IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

SUMMIT RESOURCES, INC.,
a West Virginia corporation,

Plaintiff,

v.

Civil Action No. 14-C-60
Judge Warren R. McGraw

WILLIAM W. KELLY, JR., Individually, LEZLEI S. KELLY, Individually, CLASSIC OIL & GAS SERVICES, INC., a foreign corporation, and CLASSIC PIPELINE, INC., a West Virginia corporation,

Defendants.

FILED
2014 DEC -1 A 11: 23
CIRCUIT CLERK OF
WYOMING COUNTY, WV

MOTION TO REFER ACTION TO THE BUSINESS COURT DIVISION

NOW COMES Defendants, William W. Kelly, Jr., Individually, Lezlei S. Kelly, Individually, Classic Oil & Gas Services, Inc., and Classic Pipeline, Inc., by and through counsel Christopher A. Brumley, Joshua C. Dotson and the law firm of Flaherty Sensabaugh Bonasso PLLC, and respectfully move this Court to refer this civil action to the Business Court Division pursuant to West Virginia Trial Court Rule 29.06(a)(2). This case involves complicated issues relating to the developing, operating, and maintaining of oil and gas wells, which is the subject of a contract between Summit Resources, Inc. and Classic Resources. Therefore, referral of the matter to the Business Court Division is proper.

A. STATEMENT OF FACTS

1. The claims set forth in Wyoming County Civil Actions 14-C-60.

On or about May 5, 2014, Plaintiff, Summit Resources, Inc. filed its Complaint against William W. Kelly, Jr., Lezlei S. Kelly, Classic Oil & Gas Services, Inc., and Classic Pipeline,

Inc. The Complaint alleges five counts: 1) Count I, Fraud- Initial Purchase of Working Interests; 2) Count II, Fraud- Subsequent Purchase of Working Interests; 3) Count III, Fraud- Drilling of the Wells; 4) Count IV, Fraud- Operation of the Wells; and 5) Civil Conspiracy. See Exhibit A.

Plaintiff, Summit Resources, Inc. alleges that it entered into an oil and gas operating agreement with Classic Resources ("Agreement"); Classic Resources was the "Operator" and responsible for the development, operation, and maintenance of the oil and gas wells subject to the Agreement. *Id.* at ¶ 10. Summit alleges that pursuant to the Agreement it owned a significant interest in multiple oil and gas wells. *Id.* at 12. The Complaint alleges that Mr. Kelly represented to Summit that it would recoup a full return on its investment in the 26 wells within three years. *Id.* at ¶ 13. Summit also alleges that Mr. Kelly represented to Summit that all 26 wells had an Estimated Ultimate Recovery (EUR) that justified Summit's financial investment in the wells. *Id.* Summit also alleges that Classic misrepresented the EUR and economic viability of the wells. *Id.* at ¶ 14. Summit alleges that only 7 of the 11 Oceana Program Wells should have been drilled; none of the eight Clear Fork Program Wells should have been drilled; and only 2 of the 7 Yukon Program Wells should have been drilled. *Id.* at 14.

The complaint alleges that after five of the Oceana Program Wells had been drilled, Mr. Kelly solicited Summit's purchase of additional interest in those wells. *Id.* at ¶ 15. According to the Complaint, Classic Resources and Summit entered into turnkey contracts for the construction of twenty-six (26) wells altogether. *Id.* at ¶ 18. Summit alleges various shortcomings related to drilling and installation of components relating to the Ocean Program Wells in violation of the Agreement between Classic Resources and Summit. *Id.* at ¶¶ 19-22. Plaintiff alleges various overcharges by Classic Resources which was to the detriment of Summit relating to the Oceana

Program Wells, the Clear Fork Program Wells, and Yukon Program Wells. *Id.* ¶¶22-42. Summit alleges that Mr. Kelly operated the 26 wells in a manner to maximize the income to himself and to fund Classic Resources' day-to-day operations to the detriment of its individual investors. *Id.* at 40. In a nutshell, Summit alleges various violations of the Agreement between Summit and Classic Resources.

2. The Parties

Parties on both sides are businesses, with the exception of Defendants William W. Kelly, Jr. and his wife, Lezlei S. Kelly. Plaintiff, Summit Resources, Inc, is a West Virginia corporation with a mailing address of 303 Middle Collision Road, Mount Lookout, West Virginia, 26678. Classic Oil & Gas Services, Inc. is a Florida corporation with a principal office address of 1782 Maywood Court, Marco Island, Florida. Classic Pipeline, Inc. is a West Virginia corporation, with a principal office address of 300 Chippen Dale Circle, Lexington, Kentucky 40517

B. ANALYSIS

1. Legal Standard

West Virginia Trial Court Rule 29.06(a)(1) provides that "[a]ny party or judge may seek a referral of Business Litigation to the Division by filing a Motion to Refer to the Business Court Division in the circuit court where the matter is pending." "Business Litigation" describes civil actions where "the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and the dispute presents commercial . . . issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the

subject matter or familiarity with some specific law or legal principles that may be applicable." *Id.* at 29.04(a)(1)-(2).[1]

2. This matter is appropriate for referral to the Business Court Division because it is a purely commercial dispute between business entities.

This case involves an alleged breach of contract and potentially complicated financial fraud issues. Specifically, the case presents questions regarding commercial contracts, contract formation, contract interpretation and the rights and duties of each party involved with regard to the payment and collection of monies to be applied toward specified wells under the contract. Therefore, this action fits the definition of "business litigation" because it involves the operation of business entities, requires the interpretation of a commercial contract, involves potentially complex financial issues and is not the type of case specifically prohibited from the Business Court Division.

The Business Court Division was created to handle cases precisely like the instant matter, thus, transfer of this case to the Business Court Division is appropriate.

3. This matter is timely filed even though the Complaint was initially filed on May 5, 2014 because the case has been stayed.

This case is timely filed pursuant to West Virginia Trial Court Rule 29.06(a)(2) because although technically, the case has been pending for over three months, practically the case has been stayed for the vast majority of this duration. During this approximate six month time, the case has been stayed for the vast majority of the time, as illustrated below and in the

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[1] West Virginia Trial Court Rule 29.04(a)(3) specifically excludes the following types of claims from the definition of Business Litigation: "[C]onsumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division." The instant matter is not one of these types of cases.

accompanying exhibits. In addition, there has been absolutely no discovery conducted in this case. The pleadings in this case essentially consist of Plaintiff's Complaint, Defendants' Removal related briefing on that issue in federal court, Defendants' Answers, and the federal court's order staying the case until October 15, 2014.

Specifically, the Complaint was filed on or about May 5, 2014. Exhibit A. The Defendants timely removed. Exhibit B. Briefing was conducted on the issue and the Court ultimately remanded the case back to circuit court with direction that the case would be stayed until October 15, 2014. Exhibit C. Discovery and other deadlines were stayed while the District Court decided the remand issue. Exhibit D. Since this date, there have been no new filings in the circuit court. Exhibit E. As such, virtually no discovery has been done in the case and there is currently no scheduling order.

CONCLUSION

For the foregoing reasons, Defendants respectfully move this Court to seek a referral of this civil action to the Business Court Division pursuant to West Virginia Trial Court Rule 29.01, *et seq.*

FILED
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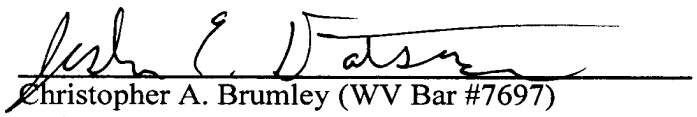
CIRCUIT CLERK OF
KANAWHA COUNTY, WV

WILLIAM W. KELLY, JR., Individually, LEZLEI S. KELLY, Individually, CLASSIC OIL & GAS SERVICES, INC., a foreign corporation, and CLASSIC PIPELINE, INC., a West Virginia corporation,

By Counsel,



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Counsel for Defendants

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

SUMMIT RESOURCES, INC.,
a West Virginia corporation,

Plaintiff,

v.

Civil Action No. 14-C-60
Judge Warren R. McGraw

WILLIAM W. KELLY, JR., Individually, LEZLEI S. KELLY,a Individually, CLASSIC OIL & GAS SERVICES, INC., a foreign corporation, and CLASSIC PIPELINE, INC., a West Virginia corporation,

Defendants.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for Defendants, do hereby certify that the foregoing ***MOTION TO REFER ACTION TO THE BUSINESS COURT DIVISION*** has been served upon counsel of record this 12th of November, 2014, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Nicholas S. Preservati, Esq.
Sarah Ghiz Korwan, Esq.
Preservati Law Offices, PLLC
P.O. Box 1431
Charleston, WV 25325
Counsel for Summit Resources, Inc.

and

Berkeley County Judicial Center
Business Court Division
Suite 2100
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Martinsburg, WV 25401

FILED
2014 DEC -1 A 11: 23
CIRCUIT CLERK OF
WYOMING COUNTY, WV

Joshua C. Dotson (WV Bar #10862)

IN THE CIRCUIT COURT OF WYOMING COUNTY
WEST VIRGINIA

SUMMIT RESOURCES, INC. a West Virginia corporation,	)	
Plaintiff,	)	
v.	)	**Civil Action No.:** 14-C-60
WILLIAM W. KELLY, JR., individually, **LEZLEI S. KELLY,** individually, **CLASSIC OIL & GAS SERVICES, INC.,** a foreign corporation, and **CLASSIC PIPELINE, INC.,** a West Virginia corporation,	)	**Honorable** _____
Defendants.	)	

FILED
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CIRCUIT CLERK OF
WYOMING COUNTY, WV

COMPLAINT

NOW COMES the Plaintiff, Summit Resources, Inc. (hereinafter, "SUMMIT"), by and through its counsel, Nicholas S. Preservati of Preservati Law Offices, and for its Complaint against the Defendants, states as follows:

THE PARTIES

1. SUMMIT is a West Virginia corporation with a principal office address of 303 Middle Collison Road, Mount Lookout, West Virginia, 26678.

2. WILLIAM W. KELLY, Jr. is an individual who resides at 300 Chippen Dale Circle, Lexington, Kentucky 40517 as well as 1782 Maywood Court, Marco Island, Florida. KELLY is the President of CLASSIC PIPELINE, INC. ("CLASSIC PIPELINE"), CLASSIC OIL & GAS SERVICES, INC. (CLASSIC SERVICES") and Classic Oil and Gas Resources, Inc. (hereinafter "CLASSIC RESOURCES").

p.3 304-682-4093 nley D. West

EXHIBIT
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3. LEZLEI S. KELLY is an individual who resides at 300 Chippen Dale Circle, Lexington, Kentucky 40517 as well as 1782 Maywood Court, Marco Island, Florida.

4. CLASSIC PIPELINE is a West Virginia corporation with a principal office address of 300 Chippen Dale Circle, Lexington, Kentucky 40517.

5. CLASSIC SERVICES is a Florida corporation with a principal office address of 1782 Maywood Court, Marco Island, Florida.

JURISDICTION AND VENUE

6. SUMMIT adopts and incorporates, by reference, all of the proceeding paragraphs as if fully set forth hereunder.

7. Jurisdiction and venue of this action is vested in the Circuit Court of Wyoming County, as SUMMIT, WILLIAM W. KELLY, JR, CLASSIC PIPELINE and CLASSIC SERVICES have conducted, and continue to conduct business in Wyoming County, the majority of WILLIAM W. KELLY, Jr.'s, CLASSIC PIPELINE's and CLASSIC SERVICES' acts and omissions underlying this Complaint occurred in Wyoming County, and the majority of gas wells at issue in this matter are located in Wyoming County.

8. This Court also has jurisdiction over WILLIAM W. KELLY, JR., LEZLEI S. KELLY, and CLASSIC SERVICES pursuant to W.Va. Code §56-3-33(a)(1), (2), (3), (4), and (6).

GENERAL STATEMENT OF FACTS

9. SUMMIT adopts and incorporates, by reference, all of the proceeding paragraphs as if fully set forth hereunder.

10. On October 1, 2006, SUMMIT entered into an oil and gas operating agreement with CLASSIC RESOURCES (hereinafter, the "Agreement"). Pursuant to the Agreement, CLASSIC

Stanley D. West 304-682-4093 p.4

RESOURCES was the "Operator" responsible for the development, operation and maintenance of the oil and gas wells subject to the Agreement.

11. SUMMIT owned a significant interest in multiple oil and gas wells subject to the Agreement. Per the Agreement, SUMMIT was liable for its proportionate share of the costs of developing, operating and maintaining the oil and gas wells subject to the Agreement.

12. The wells that SUMMIT invested in were divided into three separate programs. There were seven (7) wells drilled under the Yukon Program, eight (8) wells drilled under the Clear Fork Program, and eleven (11) wells drilled under the Oceana Program.

13. WILLIAM W. KELLY, JR. represented to SUMMIT that it would recoup a full return upon its investment in the 26 wells within three years. WILLIAM W. KELLY, JR. also represented to SUMMIT that all 26 wells had an Estimated Ultimate Recovery (EUR) that justified SUMMIT's financial investment in the wells.

14. CLASSIC misrepresented the EUR and economic viability of the wells. Of the Oceana Program Wells, seven (7) of the eleven (11) wells should not have been drilled. None of the eight (8) Clear Fork Program Wells had an EUR to justify their drilling. Only two (2) of the seven (7) Yukon Program Wells had EUR's to justify their drilling.

15. After five of the Oceana Program Wells had been drilled, WILLIAM W. KELLY, JR. solicited SUMMIT's purchase of an additional 6.92 % interest in those wells (Jewell 1, Cook 2, Bolen 1, Lamb 1 and Hatfield 1). In order to obtain SUMMIT's additional investment, WILLIAM W. KELLY, JR. represented that the wells were very economical and that SUMMIT would again recoup its entire investment in two to three years.

Stanley D. West 304-682-4093 p.5

16. WILLIAM W. KELLY, JR. obtained reserve studies that measured the EUR for the 26 Summit Wells in 2007, 2008, and 2009. WILLIAM W. KELLY, JR. did not provide these reserve reports to SUMMIT prior to soliciting SUMMIT'S investments in the respective wells.

17. In 2009 when WILLIAM W. KELLY, JR. represented to SUMMIT that it was a good investment to purchase the additional 6.92% in the Oceana Program Wells, WILLIAM W. KELLY, JR. was in possession of Reserve Reports that showed the exact opposite, namely, that at least four (4) of the five (5) wells had EUR's substantially lower than that needed to justify additional investment in the wells. WILLIAM W. KELLY, JR. withheld this information in order to get SUMMIT to further invest in the Oceana Program Wells.

18. CLASSIC RESOURCES and SUMMIT entered into turnkey contracts for the construction of the twenty-six (26) wells. CLASSIC RESOURCES agreed to provide numerous components and services as part of the fixed costs of drilling the Oceana Program Wells. The total projected cost of each Oceana Program Well was $380,060. SUMMIT agreed to the turnkey contract for the Oceana Program Wells and funded its portion of the drilling costs.

19. As part of the turnkey project, CLASSIC RESOURCES agreed to drill the Ocean Program Wells to a depth of 4,200 feet at a cost of $21.00 per foot. However, CLASSIC RESOURCES only drilled the Oceana Program Wells to an average depth of 3,900 feet. This resulted in an overpayment of approximately $6,200 per well to CLASSIC RESOURCES and a total overpayment of $68,200 by CLASSIC RESOURCES' investors.

20. CLASSIC RESOURCES also agreed to install 300 feet of surface casing per well at a cost of $4,350 per well. CLASSIC RESOURCES also agreed to cement the surface casing at a cost of $8,500 per well. In 10 of the 11 Oceana Program Wells, CLASSIC RESOURCES installed zero feet of surface casing and used no cement for the surface casing. For each of those 10 wells,

Stanley D. West 304-682-4093 p.6

CLASSIC RESOURCES received $12,850 for work it promised to perform but did not. That resulted in an overpayment to CLASSIC RESOURCES of $128,500 by CLASSIC RECOURCES' investors.

21. CLASSIC RESOURCES also agreed to install 1,200 feet of intermediate casing per well. However, it only installed an average of 969 feet of casing per well. Therefore, CLASSIC RESOURCES was paid approximately $1,756 per well for intermediate casing that it did not install. CLASSIC RESOURCES received a total overpayment of $19,316 by CLASSIC RESOURCES' investors.

22. CLASSIC RESOURCES charged its investors for installing 4,200 feet of production casing in each Oceana program well, when it only installed an average of 3,850 feet per well. As a result, CLASSIC RESOURCES received approximately $1,959 per well for production casing that it did not install. CLASSIC RESOURCES received a total overpayment of $21,549 by CLASSIC RESOURCE'S investors.

23. WILLIAM W. KELLY, JR. knew that CLASSIC RESOURCES was overcharging its investors. For example, on September 16, 2009 SUMMIT paid CLASSIC RESOURCES $96,200 to purchase an additional 6.923% working interest in the Jewell 1, Hatfield 1, Bolen 1, Lamb 1, and Cook 2. ($19,240 per well). On that same date, SUMMIT paid CLASSIC RESOURCES $33,800 for an additional 11.948% working interest in the Cook 1 well. These payments represented SUMMIT'S increased share of the projected total well cost of $380,060 per well.

24. When CLASSIC RESOURCES charged SUMMIT for its purchase of additional working interests and its increased share of the proposed well costs for the six wells on September 16, 2009, WILLIAM W. KELLY, JR. had actual knowledge that it was overcharging SUMMIT for the drilling of the wells. For example, the Jewell #1 well was completed on June 4,

2007. As of that date, WILLIAM W. KELLY, JR. knew that the well had been drilled to a total depth of 3,856' instead of 4,200'. He also knew that no 9 5/8" casing was used in the well. He also knew that only 800' of 7" casing was used in the well instead of the estimated 1,200' of casing. Finally, he knew that only 3,843' of 4 1/2" casing was used in the well instead of 4,200 feet. Despite having this knowledge, when CLASSIC RESOURCES charged SUMMIT for its newly acquired working interest and increased share of the proposed well cost, it charged SUMMIT for: 1) drilling the well to a total depth of 4,200'; 2) 300' of 9 5/8" casing; 3) 1,200' of 7" casing; and 4) 4,200' of 4 ½ " casing. CLASSIC RESOURCES charged SUMMIT for these items knowing full well that the items had not been used in the construction of the well. WILLIAM W. KELLY, JR. engaged in the same conduct for the Hatfield 1, Bolen 1, Lamb 1, and Cook 1, and Cook 2 wells.

25. The total projected cost of each Clear Fork Program Well was $412,350. SUMMIT agreed to the turnkey contract for the Clear Fork Program Wells and funded its portion of the drilling costs.

26. As part of the turnkey project, CLASSIC RESOURCES agreed to drill the Clear Fork Program Wells to a depth of 5,300 feet at a cost of $21.00 per foot. However, CLASSIC RESOURCES only drilled the Clear Fork Program Wells to an average depth of 5,191 feet. This resulted in an overpayment of approximately $2,291 per well to CLASSIC RESOURCES. The total overpayment for drilling costs was $18,328 by CLASSIC RESOURCES' investors.

27. CLASSIC RESOURCES also agreed to install 300 feet of surface casing per well at a cost of $4,350 per well. CLASSIC RESOURCES also agreed to cement the surface casing at a cost of $8,500 per well. In 4 of the 8 Clear Fork Program Wells, CLASSIC RESOURCES installed zero feet of surface casing and used no cement for the surface casing. For each of those 4 wells, CLASSIC RESOURCES received $12,850 for work it promised to perform but did not. That

Stanley D. West 304-682-4093 p.8

resulted in an overpayment to CLASSIC RESOURCES of $51,400 by CLASSIC RESOURCES' investors.

28. WILLIAM W. KELLY, JR. knew that CLASSIC RESOURCES was overcharging its investors under the Clear Fork Program. For example, on December 27, 2006 SUMMIT purchased a one-percent (1%) working interest in the eight (8) Clear Fork Program Wells. At that time, CLASSIC RESOURCES charged SUMMIT for its proportionate share of the estimated total well costs. The estimated costs included costs for drilling the wells to a depth of 5,300 feet, using 300 feet of 9 5/8" casing, 1,300 feet of 7" casing and 5,100 feet of 4 ½" casing.

29. The Short #1 well was completed on July 6, 2006, more than five months prior to SUMMIT'S investment in the well. The well was drilled to a total depth of 5,046' instead of 5,300'. Only 199' of 9 5/8" casing was used instead of 300'. Only 930' of 7" casing was used instead of 1,300'. Finally, only 4997' of 4 ½" casing was used instead of 5,100'. Despite WILLIAM W. KELLY, JR. knowing this information on July 6, 2006, when CLASSIC RESOURCES charged SUMMIT for its share of the well construction costs on December 27, 2006, it charged SUMMIT for: 1) drilling the well to a depth of 5,300; 2) using 300' of 9 5/8" casing; 3) using 1,300' of 7" casing: and 4) using 5,100' of 4 ½" casing.

30. Not only did WILLIAM W. KELLY, JR. know that CLASSIC RESOURCES was overcharging SUMMIT, WILLIAM W. KELLY, JR. tried to conceal that fact from SUMMIT. CLASSIC RESOURCES is legally obligated to file a FORM WR-35 within ninety (90) days of completing a well. As part of that form, CLASSIC RESOURCES is to identify the total depth of the well and the amount and size of the various casing used in constructing the well. Therefore, CLASSIC RESOURCES was required to file its WR-35 for the Short #1 well by the first week of October, 2006. It did not. Instead, WILLIAM W. KELLY, JR. waited to file the WR-35 until after

Stanley D. West 304-682-4093 p.9

SUMMIT had paid for its proportionate share of the inflated well costs. CLASSIC RESOURCES did not file its WR-35 with the WVDEP until March 1, 2007. WILLIAM W. KELLY, JR. engaged in a similar course of conduct for each of the Clear Fork Program Wells.

31. The total projected cost of each Yukon Program Well was $442,000. SUMMIT agreed to the turnkey contract for the Yukon Program Wells and funded its portion of the drilling costs.

32. As part of the turnkey project, CLASSIC RESOURCES agreed to drill the Yukon Program Wells to a depth of 6,300 feet at a cost of $21.00 per foot. However, CLASSIC RESOURCES only drilled the Yukon Program Wells to an average depth of 6,042 feet. This resulted in an overpayment of approximately $5,403 per well to CLASSIC RESOURCES for a total of $37,821.

33. CLASSIC RESOURCES also agreed to install 300 feet of surface casing per well at a cost of $4,350 per well. CLASSIC RESOURCES also agreed to cement the surface casing at a cost of $8,500 per well. In 5 of the 7 Yukon Program Wells, CLASSIC RESOURCES installed zero feet of surface casing and used no cement for the surface casing. For each of those 5 wells, CLASSIC RESOURCES received $12,850 for work it promised to perform but did not. That resulted in an overpayment to CLASSIC RESOURCES of $64,250 by CLASSIC RESOURCES' investors.

34. CLASSIC RESOURCES also agreed to install 1,800 feet of intermediate casing per well. However, it only installed an average of 1,451 feet of casing per well. Therefore, CLASSIC RESOURCES was paid approximately $2,625 per well for intermediate casing that it did not install. The total overpayment was $18,375 by CLASSIC RESOURCES' investors.

Stanley D. West 304-682-4093 p.10

35. CLASSIC RESOURCES charged its investors for installing 6,300 feet of production casing in each Yukon Program Well, when it only installed an average of 5,972 feet per well. As a result, CLASSIC RESOURCES received approximately $1777 per well for production casing that it did not install. The total overpayment for production casing for the Yukon Program Wells was $12,439 by CLASSIC RESOURCES' investors.

36. WILLIAM W. KELLY, JR. knew that CLASSIC RESOURCES was overcharging its investors under the Yukon Program. For example, on December 27, 2006 SUMMIT purchased a one-percent (1%) working interest in the seven (7) Yukon Program Wells. At that time, CLASSIC RESOURCES charged SUMMIT for its proportionate share of the estimated total well costs. The estimated costs included costs for drilling the wells to a depth of 6,300 feet, using 300 feet of 9 5/8" casing, 1,800 feet of 7" casing and 6,300 feet of 4 ½" casing.

37. The PCT 146 well was completed on May 30, 2006, almost seven months prior to SUMMIT'S investment in the well. The well was drilled to a total depth of 5,667' instead of 6,300'. No 9 5/8" casing was used. Only 1,309' of 7" casing was used instead of 1,800'. Finally, only 5,612' of 4 ½" casing was used instead of 6,300'. Despite knowing this information on May 30, 2006, when CLASSIC RESOURCES charged SUMMIT for its share of the well construction costs on December 27, 2006, it charged SUMMIT for: 1) drilling the well to a depth of 6,300; 2) using 300' of 9 5/8" casing; 3) using 1,800' of 7" casing: and 4) using 6,300' of 4 ½" casing.

38. Not only did WILLIAM W. KELLY, JR. know that CLASSIC RESOURCES was overcharging SUMMIT, it tried to conceal that fact from SUMMIT. CLASSIC RESOURCES was required to file its WR-35 for the PCT 146 well by the end of August, 2006. It did not. Instead, WILLIAM W. KELLY, JR. waited to file the WR-35 until after SUMMIT had paid for its proportionate share of the inflated well costs. CLASSIC RESOURCES signed its WR-35 on July

Stanley D. West 304-682-4093 p.11

20, 2007 and held it without filing it until May 5, 2009. WILLIAM W. KELLY, JR. engaged in a similar course of conduct for each of the Yukon Program Wells.

39. The total amount of footage drilling costs, casing and cement that CLASSIC RESOURCES agreed to provide, was paid to provide by its investors, and yet did not provide was $440,178.

40. WILLIAM W. KELLY, JR. operated the 26 wells in a manner to maximize the income to himself and to fund CLASSIC RESOURCES day-to-day operations to the detriment of its individual investors. WILLIAM W. KELLY, JR. routinely operated the wells at break-even or even at a loss, just so he could collect the Gathering Fees, Lease Maintenance Fees, Contract Labor Fees and COPAS Overhead Fees.

41. For example, in April of 2012, the gross revenue from the 26 SUMMIT wells was $20,909.23. Of that amount, SUMMIT's net revenue was $191.14, or nine-tenths of one-percent (0.9%) of the gross.

42. During the month of April, 2012 twelve (12) of the twenty-six (26) wells were operated at a loss. Another ten (10) of the wells generated net revenue of less than $8.00 for the entire month. Combined, these twenty-two (22) wells generated total net revenue of $18.87 for the month of April, 2012. During that same month, CLASSIC RESOURCES accrued Lease Maintenance Fees, Contract Labor Fees, and COPAS Overhead Fees of $6,018.96 from the same twenty-two wells that generated Summit $18.87 in total revenue.

43. CLASSIC RESOURCES and CLASSIC PIPELINE entered into a Gas Gathering Agreement on April 1, 2004. Under this Gas Gathering Agreement, CLASSIC PIPELINE agreed to gather the gas produced by the SUMMIT wells and transport it through its pipeline gathering network to end-users.

Stanley D. West 304-682-4093 p.12

44. CLASSIC RESOURCES filed for Chapter 7 bankruptcy on April 1, 2014. Shortly thereafter, CLASSIC RESOURCES unilaterally entered into an agreement with CLASSIC SERVICES wherein CLASSIC SERVICES took over operating the SUMMIT WELLS.

45. CLASSIC RESOURCES was contractually prohibited from changing the operator of the SUMMIT WELLS without the consent of the entities holding a majority interest in the SUMMIT WELLS. WILLIAM W. KELLY, JR. entered into the contract on behalf of CLASSIC RESOURCES and CLASSIC SERVICES so that CLASSIC SERVICES could continue to siphon assets and revenue from the SUMMIT WELLS.

46. WILLIAM W. KELLY, JR., LEZLEI S. KELLY, CLASSIC SERVICES, CLASSIC RESOURCES and CLASSIC PIPELINE devised a plan wherein WILLIAM W. KELLY, JR. would take resources and assets out of CLASSIC RESOURCES to use them to fund construction of CLASSIC PIPELINE'S pipeline network. CLASSIC PIPELINE obtained a loan from the Bank of Mingo to fund the construction of CLASSIC PIPELINE'S pipeline network. However, WILLIAM W. KELLY, JR. and CLASSIC RESOURCES deducted revenue from the SUMMIT WELLS to repay the Bank of Mingo loan on behalf of CLASSIC PIPELINE. CLASSIC PIPELINE's pipeline network was fraudulently constructed using funds that were deducted from the SUMMIT WELLS revenues.

47. WILLIAM W. KELLY, JR. LEZLEI S. KELLY, CLASSIC PIPELINE, CLASSIC SERVICES and CLASSIC RESOURCES conspired with each other to enact a plan wherein WILLIAM W. KELLY, JR. and CLASSIC RESOURCES would overcharge SUMMIT in order to increase the amount of assets and revenues that could be funneled out of CLASSIC RESOURCES to CLASSIC PIPELINE, WILLIAM W. KELLY, JR. and LEZLEI S. KELLY.

Stanley D. West 304-682-4093 p.13

48. WILLIAM W. KELLY, JR. and LEZLEI S. KELLY fraudulently funneled revenue out of CLASSIC RESOURCES and used the revenue to purchase assets in their individual names in an attempt to shield the revenues and assets from CLASSIC RESOURCES' creditors.

COUNT I
(Fraud – Initial Purchase of Working Interests)

49. SUMMIT adopts and incorporates, by reference, all of the proceeding paragraphs, as if fully set forth hereunder.

50. In the fall of 2006, WILLIAM W. KELLY, JR. solicited SUMMIT for the purposes of investing in the Yukon Program Wells, the Clear Fork Program Wells; and five wells within the Oceana Program (Jewell 1, Cook 2, Bolen 1, Lamb 1 and Hatfield 1).

51. WILLIAM W. KELLY, JR. advised SUMMIT that its investment in the Yukon wells, the Clear Fork Wells, and the five (5) Oceana wells were "as near as a sure thing as there is" and that SUMMIT would recoup its total investment in the wells within three (3) years. WILLIAM W. KELLY, JR. continuously represented that, based upon its research and production data, that these wells were a sound financial investment due to the amount of gas they would be able to produce over their respective lifetimes.

52. Based upon WILLIAM W. KELLY, JR.'s representations, SUMMIT purchased a 1% working interest in the Yukon and Clear Fork wells, and a 70% working interest in the five (5) Oceana wells.

53. WILLIAM W. KELLY, JR.'s representations to SUMMIT that the wells were sound financial investments based upon the amount of gas they would be able to produce over their respective lifetimes were material and false.

54. SUMMIT reasonably relied upon WILLIAM W. KELLY, JR.'s materially false representations and was significantly damaged as a result of its reasonable reliance.

Stanley D. West 304-682-4093 p.14

COUNT II

(Fraud – Subsequent Purchase of Working Interests)

55. SUMMIT adopts and incorporates, by reference, all of the proceeding paragraphs, as if fully set forth hereunder.

56. In 2009, WILLIAM W. KELLY, JR. solicited SUMMIT for the purposes of investing in five (5) more Oceana wells (D.R. Toler 1, Bryant 1, Jackson 1, Fox 2 and Fields 1) as well as purchasing additional working interests in the original five (5) Oceana wells (Jewell 1, Cook 2, Bolen 1, Lamb 1 and Hatfield 1).

57. WILLIAM W. KELLY, JR. advised SUMMIT that its further investment in the ten (10) Oceana wells was a sound financial investment due to the amount of gas they would be able to produce over their respective lifetimes, and again, that the financial success of SUMMIT's investment was "practically a sure thing."

58. Based upon WILLIAM W. KELLY, JR.'s material representations, SUMMIT purchased a 9% working interest in the five new Oceana wells and an additional 6.92% working interest in the original five (5) Oceana wells.

59. WILLIAM W. KELLY, JR.'s representations to SUMMIT that the wells were sound financial investments based upon the amount of gas they would be able to produce over their respective lifetimes were material and false. Based upon the information in its possession at the time it made these representations to SUMMIT, WILLIAM W. KELLY, JR. knew that the ten Oceana wells had EUR's significantly below the level necessary to justify investing in their further production.

60. SUMMIT reasonably relied upon WILLIAM W. KELLY, JR.'s materially false representations and was significantly damaged as a result of its reasonable reliance.

COUNT III

Stanley D. West 304-682-4093 p.15

(*Fraud – Drilling of Wells*)

61. SUMMIT adopts and incorporates, by reference, all of the proceeding paragraphs, as if fully set forth hereunder.

62. WILLIAM W. KELLY, JR. represented to SUMMIT that CLASSIC RESOURCES would construct each of the 26 SUMMIT wells for a fixed priced based upon numerous itemized projections.

63. Based upon WILLIAM W. KELLY, JR.'s material representations, SUMMIT pre-paid CLASSIC RESOURCES for its proportionate share of the itemized projected costs.

64. WILLIAM W. KELLY, JR.'s representations that CLASSIC RESOURCES would provide the items in the turn-key contract for a fixed price were false, as CLASSIC RESOURCES failed to provide many of the items that were pre-paid by SUMMIT.

65. SUMMIT reasonably relied upon WILLIAM W. KELLY, JR.'s materially false representations and was significantly damaged as a result of its reasonable reliance.

COUNT IV
(Fraud – Operation of the Wells)

66. SUMMIT adopts and incorporates, by reference, all of the proceeding paragraphs as if fully set forth hereunder.

67. WILLIAM W. KELLY, JR. represented that the COPAS charge deducted from the SUMMIT WELLS' revenues would be used to fund CLASSIC RESOURCES' overhead and administrative costs of operating the SUMMIT WELLS.

68. SUMMIT reasonably relied upon WILLIAM W. KELLY, JR.'s material representations and agreed to pay the COPAS fees for each of the SUMMIT WELLS.

Stanley D. West 304-682-4093 p.16

69. WILLIAM W. KELLY, JR. and CLASSIC PIPELINE fraudulently deducted the COPAS fee from the SUMMIT WELLS and used a portion of the COPAS FEE to pay CLASSIC PIPELINE'S loan payments to the Bank of Mingo.

70. SUMMIT was damaged as a result of WILLIAM W. KELLY, JR. and CLASSIC PIPELINE'S fraudulent conduct.

COUNT IV
(Civil Conspiracy)

71. WILLIAM W. KELLY, JR., LEZLEI S. KELLY, CLASSIC SERVICES and CLASSIC PIPELINE conspired with CLASSIC RESOURCES to engage in the aforementioned fraudulent conduct in order to defraud SUMMIT for the benefit of CLASSIC PIPELINE, WILLIAM W. KELLY, JR. and LEZLEI S. KELLY.

72. CLASSIC PIPELINE, WILLIAM W. KELLY, JR. and LEZLEI S. KELLY engaged in unlawful acts and lawful acts in an unlawful manner to the detriment of SUMMIT in order to effectuate its fraudulent conspiracy.

DAMAGES

WHEREFORE, SUMMIT demands judgment against WILLIAM W. KELLY, JR. and CLASSIC PIPELINE for damages and relief as follows:

a. All compensatory damages to which SUMMIT is entitled;

b. Punitive Damages;

c. Attorney's fees and costs;

d. All statutory relief to which SUMMIT is entitled;

e. All legal relief to which SUMMIT is entitled;

f. All equitable relief to which SUMMIT is entitled;

g. Pre-judgment and post-judgment interest; and

Stanley D. West 304-682-4093 p.17

h. Any and all other relief this Honorable Court deems appropriate.

SUMMIT demands a trial by jury upon all issues triable by a jury raised herein.

Plaintiff,

SUMMIT RESOURCES, INC.

By Counsel,

Nicholas S. Preservati (WV Bar #8050)
PRESERVATI LAW OFFICES PLLC
P.O. Box 1431
Charleston, WV 25325
(304) 346-1431 *office*
(304) 346-1744 *facsimile*

Stanley D. West 304-682-4093 p.18

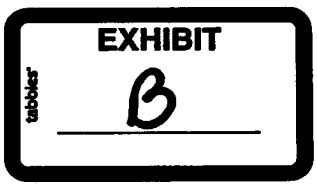
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

SUMMIT RESOURCES, INC., A West Virginia corporation,	)	
Plaintiff,	)	
v.	)	Case No.: 5:14-cv-17561 [Removed from Circuit Court of Wyoming County- Civil Action No. 14-C-60
WILLIAM W. KELLY, JR., Individually, LEZLEI S. KELLY, Individually, CLASSIC OIL & GAS SERVICES, INC., a foreign corporation, and CLASSIC PIPELINE, INC., a West Virginia corporation	)	
Defendants.	)	

DEFENDANTS' NOTICE OF REMOVAL

Defendants, William W. Kelly, Jr., Lezlei S. Kelly, Classic Oil & gas Services, Inc. and Classic Pipeline, Inc. ("Defendants", by counsel and pursuant to 28 U.S.C. §§ 1331, 1441, and 1446, hereby notifies this Court that it is removing the above-captioned action, currently pending in the Circuit Court of Wyoming County, West Virginia, to the United States District Court for the Southern District of West Virginia. As grounds for this Notice of Removal, Defendants state as follows:



Background

1. Plaintiff, Summit Resources, Inc., filed a complaint (the "Complaint") against William W. Kelly, Jr., individually, Lezlei S. Kelly, individually, Classic Oil & Gas Services, Inc., a foreign corporation, and Classic Pipeline, Inc., a West Virginia Corporation. All papers received by Defendants and filed in the State Court Action, and a copy of the Summons and Complaint, are attached hereto as **Exhibit A**.

2. Plaintiff alleges its cause of action stems from an October 1, 2006 agreement entered into between Plaintiff and "Classic Resources".[1] See Comp. ¶ 10.

3. Classic Resources is not a party to this action.

4. Plaintiff had formerly sued Classic Oil & Gas Resources, Inc. in the Circuit Court of Wyoming County, Civil Action No. 11-C-176, in which Plaintiff made essentially the same allegations. **Exhibit B**, *Plaintiff's Motion to File First Amended Complaint.*

5. The Complaint in the instant action was served on both Classic Pipeline, Inc. and Classic Oil & Gas Services, Inc. via the West Virginia Secretary of State on May 5, 2014.

6. It appears that Plaintiff also attempted to serve William W. Kelly, Jr. and Lezlei S. Kelly via the West Virginia Secretary of State. These Defendants have not been properly served and are not waiving service.

7. For the purposes of establishing the citizenship of corporate entities for the purposes of diversity jurisdiction, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where is has its principal place of business." 28 U.S.C. § 1332(c)(1).

[1] Plaintiff is undoubtedly referring to Classic Oil & Gas Resources, Inc.

8. Plaintiff alleges it is a West Virginia corporation with a principal address of 303 Middle Collison Road, Mount Lookout, West Virginia, 26678. See Comp. ¶ 1.

9. Plaintiff alleges William W. Kelly, Jr. is an individual who resides at 300 Chippen Dale Circle, Lexington, Kentucky 40517 as well as 1782 Maywood Court, Marco Island, Florida. See Comp. ¶ 2. Mr. Kelly does not reside in West Virginia.

10. Plaintiff alleges Lezlei S. Kelly is an individual who resides at 300 Chippen Dale Circle, Lexington, Kentucky 40517 as well as 1782 Maywood Court, Marco Island, Florida. See Comp. ¶ 3. Mrs. Kelly does not reside in West Virginia.

11. Plaintiff alleges Classic Oil & Gas Services, Inc. is a Florida corporation with a principal office address of 1782 Maywood Court, Marco Island, Florida.

12. The aforementioned parties in paragraphs 8-11 are diverse for the purposes of diversity jurisdiction, as alleged by Plaintiff.

13. Classic Pipeline, Inc. is a West Virginia corporation, with a principal office address of 300 Chippen Dale Circle, Lexington, Kentucky 40517. However, for removal purposes, Classic Pipeline, Inc.'s citizenship must be disregarded pursuant to the doctrine of fraudulent joinder.

Fraudulent Joinder

14. The doctrine of fraudulent joinder permits this Court to "disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction." *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999).

15. Classic Pipeline, Inc. was incorporated on **May 18, 2012** in the State of West Virginia. See **Exhibit C**, Certificate of Incorporation.

16. All of the conduct which Plaintiff alleges against Classic Pipeline, Inc. occurred before the date of incorporation. See Comp. ¶¶ 43, 46, 47, 69, 71, and 72.

17. Specifically, Plaintiff's allegations in paragraph 43 allege that "Classic Resources" and "Classic Pipeline" entered in an agreement on April 1, 2004.

18. By Plaintiff referencing an agreement in 2004, Plaintiff is referring to conduct which predates the existence of Classic Pipeline, Inc.

19. Plaintiff's claims against Classic Pipeline, Inc. must be dismissed because Plaintiff has named the wrong entity. Classic Pipeline, Inc. simply did not exist at the time referenced in Plaintiff's Complaint.

20. In this case, Plaintiff has no possibility of recovery as against the only non-diverse defendant, Classic Pipeline, Inc. Thus, fraudulent joinder as to Classic Pipeline, Inc. has been shown, its citizenship must be disregarded for removal purposes, and it must be dismissed from this matter.

21. Therefore, this Court has original jurisdiction over this action under 28 U.S.C. § 1332(a) and the action is removable to this Court by Defendants pursuant to the provisions of 28 U.S.C. § 1441(b) in that it is a civil action between citizens of different states.

Amount in Controversy

22. For removal purposes, in addition to diversity of citizenship, the matter in controversy must exceed the sum of $75,000.00, exclusive of interests and costs. 28 U.S.C. § 1332(a).

23. Title 28 U.S.C. § 1332(a) requires that the amount in controversy in diversity actions exceed $75,000.00, exclusive of interest and costs. To demonstrate

that the jurisdictional amount has likely been met, a removing party must establish only that it is more likely than not that the amount in controversy exceeds $75,000.00. *McCoy v. Erie Ins. Co.*, 147 F. Supp. 25 481, 489 (S.D.W. Va. 2001).

24. "It is settled that the test for determining the amount in controversy in a diversity proceeding is 'the pecuniary result to either party which [a] judgment would produce." *Dixon v. Edwards*, 290 F.2d 568, 569 (4th Cir. 2002).

25. In this case, there is no question that Plaintiff is alleging more than $75,000, as Plaintiff specifically alleges overpayments greater than $75,000. See e.g. Comp. ¶¶ 19-22. Additionally, Plaintiff makes no attempt to disclaim damages in excess of $75,000.

26. This Notice of Removal is timely filed with this Court within thirty (30) days of receipt of the Complaint, as required by 28 U.S.C. § 1446(b).

27. In accordance with 28 U.S.C. § 1446(d), Defendants have contemporaneously filed in the Circuit Court of Wyoming County, a Notice to State Court, which includes a copy of this Notice of Removal, and served the same on counsel for Plaintiff. See **Exhibit D**.

28. Pursuant to 28 U.S.C. § 1441, Defendants are removing this case to the Southern District of West Virginia, which is the appropriate court based on the county where the State Court Action has been filed.

WILLIAM W. KELLY, JR.
LEZLEI S. KELLY
CLASSIC OIL & GAS SERVICES, INC.
CLASSIC PIPELINE, INC.

By Counsel

/s/ Joshua C. Dotson
Christopher A. Brumley (WV Bar # 7697)
Joshua C. Dotson (WV Bar # 10862)
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

SUMMIT RESOURCES, INC., A West Virginia corporation,	)	
Plaintiff,	)	
v.	)	Case No.: _____ [Removed from Circuit Court of Wyoming County- Civil Action No. 14-C-60
WILLIAM W. KELLY, JR., Individually, LEZLEI S. KELLY, Individually, CLASSIC OIL & GAS SERVICES, INC., a foreign corporation, and CLASSIC PIPELINE, INC., a West Virginia corporation	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2014, I served a true copy of the **NOTICE OF REMOVAL** upon counsel of record and have electronically filed this with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Nicholas S. Preservati, Esq.
Sarah Ghiz Korwan, Esq.
Preservati Law Offices, PLLC
P.O. Box 1431
Charleston, WV 25325
Counsel for Plaintiff

/s Joshua C. Dotson
Christopher A. Brumley (WV Bar #7697)
Joshua C. Dotson (WV Bar #10862)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

SUMMIT RESOURCES, INC.,

Plaintiff,

v. CIVIL ACTION NO. 5:14-cv-17561

WILLIAM W. KELLY, JR., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The Court has reviewed the *Defendants' Notice of Removal* (Document 1) and attached exhibits, the *Plaintiff's Motion to Remand* (Document 9), attached exhibits, and *Memorandum in Support* thereof (Document 10), the *Defendants' Response to Plaintiff's Motion to Remand* (Document 16) and attached exhibits, as well as the *Plaintiff's Reply Memorandum in Support of Motion for Remand* (Document 17) and attached exhibits. For the reasons stated herein, the Court finds that the Plaintiff's motion to remand must be granted.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Plaintiff, a West Virginia corporation, brought suit against William W. Kelly, Jr., Lezlei S. Kelly, Classic Oil & Gas Services, Inc., and Classic Pipeline, Inc., on May 2, 2014, in the Circuit Court of Wyoming County, West Virginia. Classic Pipeline, Inc., is incorporated in West Virginia. The Defendants filed a notice of removal on June 4, 2014, asserting that Classic

Pipeline, Inc., had been fraudulently joined because it was incorporated in 2012, after the events at issue in the lawsuit. The Plaintiff filed a motion to remand on July 3, 2014.

The Plaintiff alleges that the Defendants conspired to overcharge Summit for services related to the drilling and operation of gas wells, and to then funnel money from Classic Oil and Gas Resources[1] to Classic Pipeline[2] and the Kellys. (Compl. at ¶¶ 45–47) (Document 1-1.) Defendant William Kelly is allegedly the President of Classic Pipeline, Classic Oil & Gas Services (Classic Services) and Classic Oil and Gas Resources (Classic Resources). Summit alleges that it entered into an oil and gas operating agreement with Classic Resources in 2006. Summit owned an interest in several wells, divided into three programs, and "was liable for its proportionate share of the costs of developing, operating and maintaining" the wells, while Classic Resources was the operator. (*Id.* at ¶¶ 10–12.) Mr. Kelly and Classic Resources allegedly misrepresented the profitability of the wells and induced additional investment from Summit. (*Id.* at ¶¶14–17.) Classic Resources, with the knowledge of Mr. Kelly, also allegedly performed deficient work in drilling and constructing the wells, overbilling and billing for work not completed. (*Id.* at ¶¶19–39.)

Classic Pipeline's alleged involvement stems from a Gas Gathering Agreement entered into with Classic Resources on April 1, 2004, which provided for Classic Pipeline to gather and deliver gas produced by Classic Resources. (*Id.* at ¶ 43; Gas Gathering Agreement, att'd as Ex. B to Mot. to Remand, Document 9-2.) Summit alleges that

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1 The Plaintiff alleges that Classic Oil and Gas Resources, with which Summit contracted, filed for bankruptcy on April 1, 2014, and entered into an agreement with Classic Oil and Gas Services to take over operation of the Summit wells. (Compl. at ¶ 44.)

2 A key issue in dispute is whether Classic Pipeline, Inc., and Classic Pipeline are the same entity. The Plaintiff refers to both as Classic Pipeline, while the Defendants argue that Classic Pipeline, Inc., is unrelated to Classic Pipeline. The Court has attempted to include the "Inc." when referencing the post-incorporation entity, but because the Plaintiff's allegations presume a continuation of events and conduct both before and after the date of incorporation, it is not always possible to reference Classic Pipeline, Inc., as distinct from Classic Pipeline.

> Classic Pipeline obtained a loan from the Bank of Mingo to fund the construction of Classic Pipeline's pipeline network. However, William W. Kelly, Jr., and Classic Resources deducted revenue from the Summit Wells to repay the Bank of Mingo loan on behalf of Classic Pipeline. Classic Pipeline's pipeline network was fraudulently constructed using funds that were deducted from the Summit Wells revenues.

(*Id.* at 46.) Summit further alleges that the Defendants "fraudulently deducted the COPAS fee[3] from the Summit Wells and used a portion of the COPAS fee to pay Classic Pipeline's loan payments to the Bank of Mingo." (*Id.* at ¶ 69.) Under this scheme, Mr. Kelly and Classic Resources allegedly overcharged Summit, and then funneled the assets out of Classic Resources to Classic Pipeline and Mr. and Mrs. Kelly, who proceeded to "purchase assets in their individual names" and "shield the revenues and assets from Classic Resources' creditors." (*Id.* at ¶¶ 47–48.) The complaint alleges (1) fraud, as to the initial and subsequent purchases of working interests in the wells, the drilling of the wells, and the operation of the wells, and (2) civil conspiracy.

II. STANDARD OF REVIEW

An action may be removed from state court to federal court if it is one over which the district court would have had original jurisdiction. 28 U.S.C. § 1441(a).[4] This Court has original jurisdiction of all civil actions between citizens of different states or between citizens of a state and

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3 The COPAS fee, as understood by the Plaintiff, was a charge to be deducted from Summit Wells' revenues to pay administrative and overhead costs for the operation of Summit Wells. (*See* Compl. at ¶ 67.)

4 Section 1441 states in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a).

citizens or subjects of a foreign state where the amount in controversy exceeds the sum or value of $75,000, exclusive of interests and costs. 28 U.S.C. § 1332(a)(1)-(2). Generally, every defendant must be a citizen of a state different from every plaintiff for complete diversity to exist. Diversity of citizenship must be established at the time of removal. *Higgins v. E.I. Dupont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir.1998).

Section 1446 provides the procedure by which a defendant may remove a case to a district court under Section 1441. Section 1446 requires that "[a] defendant or defendants desiring to remove any civil action from a State court shall file . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Additionally, Section 1446 requires a defendant to file a notice of removal within thirty (30) days after receipt of the initial pleading. It is a long settled principle that the party seeking to adjudicate a matter in federal court, through removal, carries the burden of alleging in its notice of removal and, if challenged, demonstrating the court's jurisdiction over the matter. *Strawn et al. v. AT &T Mobility, LLC et al.*, 530 F.3d 293, 296 (4th Cir. 2008); *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) ("The burden of establishing federal jurisdiction is placed upon the party seeking removal.") (citation omitted). Accordingly, in this case, the removing defendant has the burden to show the existence of diversity jurisdiction by a preponderance of the evidence. *See White v. Chase Bank USA, NA.*, Civil Action No. 2:08-1370, 2009 WL 2762060, at *1 (S.D. W.Va. Aug. 26, 2009) (Faber, J.) (citing *McCoy v. Erie Insurance Co.*, 147 F.Supp. 2d 481,488 (S.D. W.Va. 2001)). In deciding whether to remand, because removal by its nature infringes upon state sovereignty, this Court must

"resolve all doubts about the propriety of removal in favor of retained state jurisdiction." *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425 (4th Cir. 1999).

"The "fraudulent joinder" doctrine permits removal when a non-diverse party is (or has been) a defendant in the case . . . . This doctrine effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction." *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). The Fourth Circuit sets a high standard for defendants attempting to demonstrate fraudulent joinder: "[T]he removing party must establish either: that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court, or; that there has been outright fraud in the plaintiff's pleading of jurisdictional facts." *Id.* at 464 (quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993)) (emphasis in original; brackets removed). Courts may consider the record beyond the pleadings to "determine the basis of joinder" and "whether an attempted joinder is fraudulent." *AIDS Counseling & Testing Centers v. Grp. W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (internal quotation marks and citations omitted).

The Fourth Circuit has described the standard for fraudulent joinder as "even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Hartley*, 187 F.3d at 424. Furthermore, "all legal uncertainties are to be resolved in the plaintiff's favor in determining whether fraudulent joinder exists" and "courts should resolve all doubts about the propriety of removal in favor of retained state court jurisdiction." *Id.* at 425 (internal quotation marks removed).

The Hartley court went on to explain:

> In all events, a jurisdictional inquiry is not the appropriate stage of litigation to resolve these various uncertain questions of law and fact. Allowing joinder...is proper in this case because courts should minimize threshold litigation over jurisdiction. *See Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 464 n. 13, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980) ("Jurisdiction should be as self-regulated as breathing; ... litigation over whether the case is in the right court is essentially a waste of time and resources." (internal quotation marks omitted)). Jurisdictional rules direct judicial traffic. They function to steer litigation to the proper forum with a minimum of preliminary fuss. The best way to advance this objective is to accept the parties joined on the face of the complaint unless joinder is clearly improper. To permit extensive litigation of the merits of a case while determining jurisdiction thwarts the purpose of jurisdictional rules.

Id.

III. DISCUSSION

The Defendants removed the case despite the non-diverse West Virginia citizenship of defendant Classic Pipeline, Inc., on a theory of fraudulent joinder. They assert that Classic Pipeline, Inc., was incorporated on May 18, 2012, and, therefore, did not exist during the time frame of the alleged conspiracy. The Plaintiff moved for remand, arguing that Classic Pipeline has, in fact, existed since 2004. As evidence, the Plaintiff attached an excerpt from a deposition of Mr. Kelly in which he responded to an inquiry as to when Classic Pipeline started, with "we started out in, created it in '04, 2004." (Kelly Depo. at 24:18, Document 9-1.) In addition, the Plaintiff attached the Gas Gathering Agreement between Classic Oil & Gas Resources, Inc., and Classic Pipeline, entered into on April 1, 2004. Citing the Gas Gathering Agreement, the Plaintiff argues that "[o]ne of the actual agreements in dispute in this case was signed by Defendant William Kelly on behalf of Defendant Classic Pipeline on April 1, 2004." (Mem. in Supp. of Mot. to Remand, at 4.) Accordingly, the Plaintiff asserts that it has "more than a glimmer of hope of prevailing against Classic Pipeline," ending the jurisdictional inquiry. (*Id.*)

The Defendants respond that Classic Pipeline, Inc., came into existence when it was incorporated in May of 2012. (Def.s' Resp. at 2.) They assert that, pursuant to West Virginia Code § 31D-2-203,[5] "the Articles of Incorporation are proof of when Classic Pipeline, Inc. came into existence" and that consideration of the Plaintiff's evidence that it existed prior to that date "would be in direct contravention" to that statute. (*Id.* at 3.) The Defendants draw a distinction between "Classic Pipeline, Inc.," the corporation formed in 2012, and "Classic Pipeline," which they claim was simply a nomenclature used by Classic Oil & Gas Resources to track the gas in newly developed areas. (*Id.* at 4–6.) They further argue that the 2004 Gas Gathering Agreement was "only a mechanism used for internal purposes in order to track fees associated with the particular gathering system referenced in the document." (*Id.* at 5.) In support, they attach a Declaration by Mr. Kelly stating that "Classic Pipeline" was a nomenclature used by Classic Resources for internal tracking purposes, and that it did not become "Classic Pipeline, Inc." (William Kelly Declaration, at ¶¶ 8–9.)

The Plaintiff replies that Classic Pipeline may have changed its corporate status when it incorporated, but that Classic Pipeline and Classic Pipeline, Inc., are clearly the same entity. (Pl.'s Reply at 1.) It again cites the Gas Gathering Agreement and Mr. Kelly's deposition testimony, emphasizing that the agreement "sets forth two separate entities in a contract with a purchase price among other guidelines." (*Id.* at 3) (further arguing that "you don't enter into a

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5 W. Va. Code § 31-D-2-203 provides:

> (a) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.
>
> (b) The secretary of state's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

contract with yourself" in response to the Defendants' argument that the pre-2012 Classic Pipeline was not an entity separate from Classic Resources.) The Plaintiff further cites Fourth Circuit cases involving similar factual scenarios with unincorporated sole proprietorships later becoming incorporated.

The Defendants' only basis for alleging fraudulent joinder rests on the date of incorporation of Classic Pipeline, Inc. Thus, the Court need only consider whether the Plaintiff has plausibly alleged facts under which Classic Pipeline, Inc., could be liable for events prior to its incorporation.

The parties dispute whether the "Classic Pipeline" that entered into the Gas Gathering Agreement in 2004 is the same entity as the "Classic Pipeline, Inc." named as a Defendant. The Court finds that the Plaintiff has presented sufficient evidence to support a finding that Classic Pipeline was a predecessor to Classic Pipeline, Inc., making Classic Pipeline, Inc., liable for its actions. The Gas Gathering Agreement appears to be between separate entities: it includes terms setting forth the responsibilities of each party, terms for payment, indemnification clauses, terms regarding the transfer of possession of the gas, and the accompanying responsibility for the gas, between the Producer (Classic Resources) and the Gatherer (Classic Pipeline), and more. Mr. Kelly's Declaration states that Classic Pipeline and Classic Pipeline, Inc., are not the same company. Yet, in a July 2013 deposition taken for a previous case, he engaged in the following exchange:

> Q: And just to make sure that I'm clear as we go through this, there's the Resource, then there's the consulting company. What other companies do you currently own or have an interest in right now?
>
> A: Classic Pipeline.

> Q: And what's the full legal name of that?
>
> A: Classic Pipeline, Inc.
>
> Q: And is it also a Kentucky corp.?
>
> A: Yes.
> ...
>
> Q: Now, when was that company started?
>
> A: We started out in, created it in '04, 2004.
>
> Q: Why did you guys start that one?
>
> A: We were in a situation where we were developing some new areas and in order to develop the fields, we had to build a gathering system to tie into the main transmission line....

(William Kelly Depo., at 24:4–24:23.)

The Defendants assert that the date of incorporation should be dispositive. The West Virginia statute they reference, W. Va. Code § 31D-2-203, simply provides that "*the corporate existence* begins when the articles of incorporation are filed." W. Va. Code § 31D-2-203(a) (emphasis added). There is no dispute as to the date of incorporation. Classic Pipeline's *corporate* existence began in 2012 when it was incorporated. However, it may have existed in another form prior to its incorporation. The Plaintiffs have presented allegations and supporting evidence that, if proven true, could result in a determination that Classic Pipeline, Inc., was a continuation of Classic Pipeline and adopted its contracts. A court so finding could also conclude that Classic Pipeline entered into the alleged conspiracy with Class Resources, Classic Services, and the Kellys, and that Classic Pipeline, Inc., continued to engage in, and enjoy the benefits of, that conspiracy after incorporation.

Corporations can be liable for pre-incorporation events under certain circumstances. For example, successor liability provides for a successor corporation to

> be liable for the debts and obligations of a predecessor corporation if there was an express or implied assumption of liability, if the transaction was fraudulent, or if some element of the transaction was not made in good faith. Successor liability will also attach in a consolidation or merger.... Finally, such liability will also result where the successor corporation is a mere continuation or reincarnation of its predecessor.

Carter Enterprises, Inc. v. Ashland Specialty Co., 257 B.R. 797, 802 (S.D.W. Va. 2001) (Chambers, J.) (citing Syl. Pt. 3, *Davis v. Celotex Corp.*, 420 S.E.2d 557, 558 (1992)); *see also Kaiser Found. Health Plan of Mid-Atl. States v. Clary & Moore, P.C.*, 123 F.3d 201, 204 (4th Cir. 1997). In *Carter*, a sole proprietor entered into contracts for tangible goods. *Id.* at 799. It later incorporated, and the corporation continued to make some payments on debts incurred by the sole proprietor. *Id.* The court found that the corporation had assumed the liability, and that it was a mere continuation of the sole proprietorship. *Id.* at 803–05. Here, as well, the Plaintiffs have produced evidence that Classic Pipeline, Inc., was a continuation of Classic Pipeline, that William Kelly controlled both, and that Classic Pipeline, Inc., assumed the responsibilities detailed in the Gas Gathering Agreement between Classic Resources and Classic Pipeline. [6]

This Court is not in a position to resolve uncertain questions of fact or law on a jurisdictional inquiry. The burden is on the Defendants to demonstrate that "there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court." *Mayes v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999) (emphasis in original). Because

6 Given Mr. Kelly's alleged involvement in each defendant company, it is possible that corporate veil piercing, or reverse veil piercing, could provide another avenue for recovery if Classic Pipeline, Inc., is found not to have direct liability. For a discussion of veil-piercing, *see Carter*, 257 B.R. at 801 (citing syl. pt. 9, *Dieter Eng'g Serv., Inc. v. Parkland Dev., Inc.*, 483 S.E.2d 48 (1996)).

there are circumstances under which a corporation can be liable for pre-incorporation events, and there is no evidence that the Plaintiff has committed fraud in its allegations against Classic Pipeline, Inc., the Defendants cannot meet that burden. Therefore, this Court cannot dismiss Classic Pipeline, Inc., as fraudulently joined. Accordingly, this Court lacks jurisdiction and this matter must be remanded to the Circuit Court of Wyoming County, West Virginia.

CONCLUSION

Following thorough review and careful consideration, the Court **FINDS** that it lacks subject matter jurisdiction in the above-styled matter. Wherefore, the Court **ORDERS** that the *Plaintiffs' Motion to Remand* (Document 9) be **GRANTED**, and that this case be **REMANDED** to the Circuit Court of Wyoming County, West Virginia, for further proceedings.

The Court observes that the Plaintiff has requested an award of costs and fees associated with the removal of this action. (*See* Pl.'s Mot. at 1) (Document 9.) Should the Plaintiff continue to seek such an award, the Court **ORDERS** that it submit its calculation of applicable costs **no later than October 15, 2014,** and that the order remanding this matter be stayed pending resolution of the motion for costs and fees.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to the Clerk of the Circuit Court of Wyoming County, West Virginia, to counsel of record and to any unrepresented party in this action. ENTER: September 17, 2014

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

SUMMIT RESOURCES, INC.,

Plaintiff,

v. CIVIL ACTION NO. 5:14-cv-17561

WILLIAM W. KELLY, JR., et al.,

Defendants.

ORDER

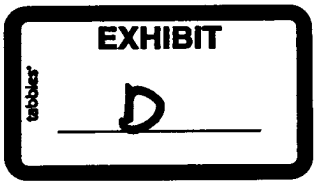
The Court has reviewed the parties' *Joint Motion to Stay Deadlines in Case Until Court Rules on Plaintiff's Motion to Remand* (Document 13). Therein, the parties request a stay of the deadlines contained in the Court's *Order and Notice* (Document 4), pending the outcome of the Plaintiff's *Motion to Remand* (Document 9.)

For good cause shown, the Court hereby **ORDERS** that the *Joint Motion to Stay Deadlines in Case Until Court Rules on Plaintiff's Motion to Remand* (Document 13) be **GRANTED** and that the deadlines in the *Order and Notice* be **STAYED.**

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and to any unrepresented party.

ENTER: July 3, 2014

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA



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Civil
Case Information
Twenty-Seventh Judicial Circuit of Wyoming County

14-C-60
Judge: WARREN MCGRAW
SUMMIT RESOURCES, INC. VS. WILLIAM KELLY, JR. ET AL

Plaintiff(s) - (If Name is blue then point to name for additional information)

SUMMIT RESOURCES INC

Plaintiff Attorney(s)

N/A

Defendant(s) - (If Name is blue then point to name for additonal information)

CLASSIC OIL, ET AL. KELLY, WILLIAM JR

Defendant Attorney(s)

N/A

Case Information:

Date Filed: 05/02/2014
Case Type: MISCELLANEOUS CIVIL

Events:

LINE	DATE	ACTION / RESULT	
1	05/02/2014	CASE FILED CIVIL CASE INFO SHEET/COMPLAINT; SUMMONS ISSUED	View Document
2		AND GIVEN TO PLAINTIFF FOR SERVICE.	
3	05/12/2014	RESPONSE FILED BY STANLEY WEST.	View Document
4	05/23/2014	RETURN OF SVC BY SOS ON 5/5/14 ON: LEZLEI KELLY; CLASSIC PIPE-	View Document
5		LINE, INC.; CLASSIC OIL & GAS SERVICES; & WILLIAM KELLY JR.	
6	05/28/2014	2ND SUMMONS ISSUED AND RETURNED TO ATTY FOR SERVICE ON L KELLY	View Document
7		AND W KELLY JR THRU SS	
8	06/12/2014	NOTICE OF FILING NOTICE OF REMOVAL.	View Document
9	06/13/2014	RETURN OF SVC OF SUMMONS ON CLASSIC OIL & GAS BY SOS ON 5/5/14.	View Document
10	06/13/2014	RETURN OF SVC OF SUMMONS ON LEZLEI KELLY BY SOS ON 5/5/14.	View Document
11	07/17/2014	RETURN OF SVC OF 2ND SUMMONS/COMP ON W. KELLY BY SOS ON 6/25/14.	
12	07/17/2014	RETURN OF SVC OF 2ND SUMMONS/COMP ON L KELLY BYSOS ON 6/25/14.	
13	10/14/2014	ORDER - FROM US DISTRICT COURT - REMANDING CASE TO WYO CO. CC.	

EXHIBIT tabbies E

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2014 DEC -1 A 11:23
CIRCUIT CLERK OF
WYOMING COUNTY, WV