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

DIRECTIONAL ONE SERVICES, INC. USA,
a foreign corporation authorized to do business in the State of West Virginia,

Plaintiff,

v.

Civil Action No. 18-C-14
Presiding Judge: H. Charles Carl, III
Resolution Judge: Christopher C. Wilkes

ANTERO RESOURCES CORPORATION,
a foreign corporation authorized to do business in the State of West Virginia,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court upon Plaintiff's Motion for Partial Summary Judgment. The Plaintiff, Directional One Services Inc. USA, by counsel, Sean P. McGinley, Esq., and Defendant, Antero Resources Corporation, by counsel, W. Henry Lawrence, Esq., have fully briefed the issues necessary. Oral argument on this motion was held on June 21, 2019, in Morgantown, West Virginia. Upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter was commenced with the filing of the Complaint on April 6, 2018,[1] alleging claims of Breach of Contract (Count I); Lien Foreclosure (Count II); Estoppel (Count III); Mutual Mistake/Equitable Reformation of Contract (Count IV); and Negligent Misrepresentation (Count V). *See* Compl. ¶¶ 44-79. The allegations involve a dispute between

[1] The Court notes the court file reflects that a First Amended Complaint with Jury Demand was filed April 19, 2018, but the causes of action are the same.

Plaintiff, Directional One Services Inc. USA ("Plaintiff"), a directional drilling contractor, and Defendant, Antero Resources Corporation ("Defendant"), an oil and gas well owner and operator.

2. On a prior day, Defendant hired Plaintiff to perform directional drilling services, and the parties executed a contract known as the Master Services Agreement ("MSA") on September 30, 2015.[2]

3. This civil action surrounds the parties' relationship and the MSA as it pertains to "lost in hole" equipment and tools. During the course of directional drilling, equipment may, and often does, become lodged in the well bore, and cannot be freed or recovered. In this Order, the Court shall refer to this term as "lost in hole" or "LIH."

4. On August 3, 2018, Defendant filed its Answer and Counterclaim, alleging Breach of Contract for Lost In Hole Charges (Count I); Breach of Contract for Lost In Hole Insurance Charges (Count II); Breach of Contract for Repair Charges (Count III); and Breach of Contract for Day-Rate and Standby Charges (Count IV). *See* Counterclaim, ¶¶ 40-28.

5. On May 13, 2019, Plaintiff filed the instant Plaintiff's Motion for Partial Summary Judgment, seeking summary judgment in its favor as to Count I of Plaintiff's Amended Complaint and Counts I, II, III, and IV of Defendant's Counterclaims. *See* Pl's Mot., p. 2.

6. On May 31, 2019, Defendant filed Antero Resource Corporation's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment, arguing the motion should be

[2] The parties initially executed the MSA on August 29, 2014, and later executed a new MSA on September 30, 2015. The two documents are identical in all relevant respects. Pl.'s First Am. Compl. ¶21. Because the events of which Directional One complains occurred after the 2015 MSA was executed, it is the controlling contract. The 2014 MSA is relevant only to Antero's counterclaim to recover charges Directional One improperly billed Antero between the signing of the 2014 MSA and the 2015 MSA. Any references to the "MSA" in this Order refer to the 2015 MSA.

denied because Plaintiff, not Defendant, breached the contract and because genuine issues of material fact remain as to whether or not Plaintiff double-billed Defendant for services. *See* Def's Resp., p. 1.

7. On June 21, 2019, Plaintiff filed its Reply Brief in Support of Motion for Partial Summary Judgment.

8. The Court heard oral argument on the motion at the hearing held Friday, June 21, 2019, in Morgantown, West Virginia. The Court received proposed Orders, with regard to this Motion, from counsel on July 8, 2019.

STANDARD OF REVIEW

9. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

10. Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the

evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

11. However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60.

CONCLUSIONS OF LAW

12. In this matter, Plaintiff seeks summary judgment in its favor as to certain claims: Count I of Plaintiff's Amended Complaint, Counts I, II, III, and IV of Defendant's Counterclaims. *See* Pl's Mot., p. 2.

Complaint: Breach of Contract (Count I)

13. First, Plaintiff argues it is entitled to summary judgment as to Count I of the Amended Complaint, the breach of contract cause of action.

14. Plaintiff argues that the MSA requires Defendant to be responsible for payment for lost in hole equipment and tools. *See* Pl's Mem., p. 10. Because of this, Plaintiff argues Defendant has breached the MSA. *Id.* In support of this contention, Plaintiff argues that the MSA and the Rate Sheets should be read together. *Id.* at 11. Plaintiff alleges that it provided tools and equipment to Defendant in accordance with the Rate Sheets, and therefore, Defendant is in breach of contract. *Id.* at 15.

15. Defendant, on the other hand, argues the exact opposite. Defendant argues it did not breach the contract as a matter of law. *See* Def's Resp., p. 5. Instead, Defendant argues the

MSA is clear and unambiguous in that it requires Plaintiff to bear the cost for lost in hole equipment. *Id.* at 6. For this reason, Defendant contends it did not breach the contract when it disputed invoices for such costs. *Id.* With regard to the Rate Sheets, Defendant argues these are not to be construed as part of the MSA. The Court notes these same cross-arguments are contained in Defendant's Motion for Summary Judgment and Plaintiff's Response.

16. "It is a well-recognized principle of law that, even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent." *Ashland Oil v. Donahue*, 223 S.E.2d 433, 437 (W. Va. 1976). "A fair reading of the documents discloses that they are so interrelated on their face that either, standing alone, would be meaningless without the other." *Id. See also*, *Oliver Typewriter Co. v. Huffman*, 63 S.E. 1086, 1088 (W.Va. 1909) (with "contemporaneous writings ... the intention is to be collected, not from detached parts of the instrument, but from the whole of it").

17. Even if potentially in conflict, separate provisions "will be construed together if possible.... The one will not be given control over the other if they can possibly be reconciled, it being presumed that the contract contains no provisions or clauses not intended by the parties." *Gabbert v. William Seymour Edwards Oil Co.*, 86 S.E. 671, 672 (W.Va. 1915); *McCaskey v. California State Automobile Assn.*, 118 Cal. Rptr. 3d 34, 52-53 (Cal. App. 2010) ("where two provisions conflict, the resulting repugnancy ... must be reconciled"); *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370, 374 (8th Cir. 1983) ("the preferred interpretation" is the one that gives a "harmonious interpretation" to potentially conflicting clauses).

18. To harmonize potential conflicts, courts often treat narrow provisions as "exceptions" to the more general provisions. *State ex rel. Hercules Tire & Rubber Supply Co. v. Gore*, 159 S.E.2d 801, 806 (W. Va. 1968) (specific language in a statute controls over general).

19. Under West Virginia law, courts facing breach of contract claims must determine as a matter of law whether a contract is clear and unambiguous. *SWN Prod. Co., LLC v. Long*, 240 W. Va. 1, 7, 807 S.E.2d 249, 255 (2017). Mere disagreement between the parties regarding the contract's construction does not create ambiguity; rather, ambiguity exists where reasonable minds can find language "reasonably susceptible" of two different meanings. *Id.*

20. Here, the Court finds that the plain language of §§ 1.19 and 10.1 of the MSA require Defendant to pay for "work," which includes tools and equipment "provided" to Defendant in accordance with the "published" Rate Sheets. "Provided" means: [t]o make, procure, or furnish for future use, prepare. To supply; to afford; to contribute." BLACK'S LAW DICTIONARY, 6th Ed., 1990. The Court finds that Plaintiff "provided" tools and equipment and skilled labor to Defendant, some of which tools or equipment were lost in hole and are the subject of this lawsuit.

21. Defendant had overall "supervision" of the drilling operation. Pl. Ex. 4, Black at 26:4 – 9; Pl. Ex. 6, Schopp at 35:15-21. To do this, as per industry practice, Defendant controlled the three main "drilling parameters" of drilling and had overall authority over the entire drilling operation. Pl. Ex. 8, Eddy at 22:3 to 26:19. Defendant also exercised sole authority over what to do with a lost in hole tool: whether to "fish" the tool out of the hole or whether to set a cement plug and redirect the wellbore around the stuck tool. Pl. Ex. 8, Eddy at 16:20-28:21; Pl. Ex. 6, Schopp at 34:4-8. The MSA contains no language as to "fishing" operations authorized by Defendant. In fact, the only language that provides for this procedure is

in the Rate Sheets. Ex. 1 at DIR 000382, Section 9 (providing for "fishing operations" and requiring Defendant to "either recover [the tools] without cost to [Plaintiff] or pay for any damage to or loss of such equipment").

22. With regard to lost in hole charges, the MSA states in § 10.2: "The rates to be paid to Contractor by Company for the Work shall be in lieu of any other charges for materials or supplies furnished by Contractor for use in the Work...unless otherwise specified in the scheduled rates." The terms "lost in hole" or "downhole" do not appear in the MSA. Plaintiff's lost in hole pricing is specified in the scheduled rates because each Rate Sheet breaks out the lost in hole pricing. The Rate Sheets contain a single "Operational Day Rate" for both the tools provided and the personnel to operate them. Pl. Ex. 3. Plaintiff's Rate Sheets were reviewed and approved by Defendant's operations and procurement group. Pl. Ex. 9, Harvey at 61:14-62:12. Both parties complied with the Rate Sheets for over three years, with Defendant paying all charges per the Rate Sheet without dispute or complaint. The Court finds the MSA does not contain pricing information and the terms referencing the Rate Sheets are meaningless and incomplete without the Rate Sheets.

23. The Court further finds that even though the MSA and Rate Sheets are separate writings, they must be read together. The Court has reviewed the documents and concludes that the MSA, standing on its own, would be ambiguous, incomplete, and meaningless if read without the Rate Sheets. The MSA and Rate Sheets are interrelated and should be construed together to constitute one transaction. The MSA and the Rate Sheets are part of the same transaction whereby Plaintiff supplied equipment and services to Defendant. The MSA refers specifically to Rate Sheets in multiple places, for example §§ 10.1, 10.2, and 19. *See* Pl. Ex. 5 and Pl. Ex. 15.

The Court finds, based on its review and reading of the language of the MSA itself, the parties clearly intended for the Rate Sheets and the MSA to function together.

24. As further support for its conclusion, the Court finds that the MSA is incomplete without the information contained in the Rate Sheet. The MSA contains no pricing whatsoever, and the Court concludes the terms referencing the Rate Sheets are meaningless without the Rate Sheets themselves. Similar to *Ashland* and *Oliver,*[3] the cases proffered by Plaintiff, the two documents are so interrelated that one would be meaningless without the other. In fact, the parties entered into the first Rate Sheet at an earlier date than they executed the original MSA. *See* Def's Resp., p. 3.

25. The Court further finds that neither party would have entered either of the agreements without the other. Without the Rate Sheets, the MSA is merely an "agreement to agree" on specific terms at a later date. The Court notes that both parties appear to have complied with the pricing set forth in the Rate Sheets numerous times, through many invoices, for a period of approximately three years. Finally, importantly, the language of the MSA itself contains a promise that Defendant would pay for Work "in accordance with" the "published" Rate Sheets. Ex. 5 and Ex. 15 at § 10.1.

26. The Court notes Defendant's argument, proffered at the hearing, that the Rate Sheet is akin to a pricing "menu" wherein Defendant can select different services offered by Plaintiff at its price and pay for them individually if it chooses. *See also* Def's Resp., p. 6, 7, 10. Nonetheless, this contention, even if taken as fact, does not support the finding that the MSA is clear and unambiguous without the Rate Sheets to provide the pricing detail. The Court concludes that the MSA and the Rate Sheets must be construed together. When the MSA and

[3] *See Ashland Oil v. Donahue*, 223 S.E.2d 433, 437 (W. Va. 1976) and *Oliver Typewriter Co. v. Huffman*, 63 S.E. 1086, 1088 (W. Va. 1909).

Rate Sheets are construed together, there is no genuine issue of material fact; rather, it is clear that Defendant is responsible for lost in hole tools and equipment.

27. In sum, with regard to Breach of Contract (Count I), the Court finds Defendant breached the parties' agreement and summary judgment should be **granted** in favor of Plaintiff.

Counterclaim: Counts I, II, and III

28. Next, Plaintiff argues it is entitled to summary judgment in its favor as to Defendant's first, second, and third counterclaims. *Id.* at 15. Count I asserts Plaintiff should not have invoiced for lost in hole tools, Count II asserts that Plaintiff should not have invoiced for tool repairs, and Count III asserts that Plaintiff should not have invoiced for lost in hole insurance. *Id.* The Court notes Defendant sought summary judgment in its favor as to these claims in its Motion for Summary Judgment.

29. To support its contention, Plaintiff argues that the MSA is silent as to who is responsible for lost in hole tools, the Rate Sheets set forth that the responsibility lies on Defendant, and therefore, there is no conflict between the indemnity provisions of the MSA and the Rate Sheets. *Id.*

30. However, Defendant contends that the MSA § 5 indicates that Plaintiff is responsible for lost in hole equipment charges.[4] *See* Def's Resp., p. 11, 17. Defendant further illustrates this by proffering six other MSAs with companies, none of which are Plaintiff, wherein it was negotiated in the MSA that Defendant bear the lost in hole expenses. *See* Def's Mot. for Summ. J., Ex.

[4] The Court notes Defendant proffers that Section 5 of the MSA requires Plaintiff to incorporate its risk of loss for equipment into its daily rates, as well as the costs for normal wear and tear on its equipment that subsequently requires repair, redress, or even replacement; that Section 13 of the MSA requires Plaintiff to be responsible for damage or loss to its own property, regardless of cause, and both Section 14 and Exhibit A require Plaintiff to acquire and maintain insurance to cover its loss of equipment and to incorporate that insurance cost into its rates pursuant to Section 10.4. *See* Def's Resp., p. 11.

31. The Court finds the Rate Sheets contain detailed provision and specific pricing regarding lost in hole tools, tool repairs, and lost in hole insurance. Under the terms of the MSA, the Rate Sheets may only be disregarded if they are in actual "conflict" with the MSA, in which case the latter documents prevail "to the extent of the conflict." The Court concludes that on the face of the documents, there is no conflict between the MSA and the Rate Sheets.

32. The Court concludes there is no conflict because payment in accordance with the Rate Sheets is specifically required by the balance of the MSA, which cannot be ignored wholesale in favor of the indemnity clause. Further, it is nonsensical to assert that a party can demand indemnity against its own contractual obligations. Defendant can no more claim to be indemnified against this payment obligation than against any other obligation to pay for services or material Plaintiff provided pursuant to the parties' agreement. Plaintiff, like any other rational party, never would have entered into such an agreement to ***not*** be paid for its Work.

33. In addition, the Court concludes there is no conflict just because one broad document (the MSA) is silent as to a particular issue while another document (the Rate Sheet) supplies detail and particular terms the parties omitted from the more general agreement. It is not a conflict for the MSA to contain a general indemnity in favor of Defendant (§13.3), while the Rate Sheets set forth the parties' agreement as to specific exceptions that "qualifies" this general rule. *State ex rel. Hercules*, 159 S.E.2d at 806 (specific provisions control over general). The two provisions work together to articulate a single rule that Plaintiff was responsible for its tools and equipment up to the point where they entered the wellbore (the time period Plaintiff had control over the tools and equipment), at which point Defendant assumed responsibility for them (the time period Defendant controlled the tools and equipment).

34. With regard to tool repairs, in accordance with the Rate Sheets, Plaintiff submitted to Defendant numerous invoices for inspection and repairs of damaged tools, and without exception each was reviewed, approved, and paid by Defendant. Defendant's payments for tool repair were an intentional and "important function of mitigating risk and managing the prevention of tools getting lost or stuck downhole .... By maintaining the integrity of the tool." Pl. Ex. 4, Black at 33:4-22. Therefore, the Court concludes Plaintiff properly invoiced Defendant for tool repairs.

35. With regard to insurance, Defendant argues that § 10.4 of the MSA requires: "the rates agreed to be paid to [Directional One] by [Antero] shall be inclusive of (i) insurance premiums paid by Contractor in acquiring and maintaining the insurance required by this Agreement[.]" During the initial months of drilling in Ohio, Defendant was "challenging existing conventions and drilling methods" by using air drilling. Pl. Ex. 4, Black at 86:21 – 87:3. Accordingly, Defendant exercised the option to purchase lost-in-hole insurance. Pl. Ex. 4, Black at 182:15-22; Pl. Ex. 10, Honeycutt at 66:6 – 67:2.

36. Defendant specifically requested lost-in-hole insurance from Plaintiff for each well by completing a written form. Pl. Ex. 10, Honeycutt at 65:5 – 67:5 (discussing Deposition Exhibit 48). Each such invoice then would go through several layers of review and approval by Defendant prior to payment to Plaintiff. *Id.* at 72:5 – 74:4. Defendant's personnel who requested the insurance were acting "within their decision-making authority." Pl. Ex. 31, email from Diana Hoff, Vice President of Operations for Defendant. Ms. Hoff stated that "Antero chooses whether it wants LIH insurance or not on each well (not the vendor)." *Id.*

37. Defendant accepted the benefits of Plaintiff's insurance program. When tools were lost in hole in the Seckman 2H well, Defendant paid a reduced price to replace the tools as

a result. Pl. Ex. 17, at DIR 000688, reflects that the cost of tool replacement was reduced from $694,185.00 to $406,431.50 as a result of purchasing the LIH insurance. Defendant's purchase of this insurance option not only supports Plaintiff's invoicing Defendant for the insurance, but also strongly evidences Defendant's understanding that it was required to pay for lost-in-hole tools under the parties' agreement.

38. The Court has already concluded, *supra*, that the plain and unambiguous language of the MSA and Rate Sheets, when read together, expressly require payment by Defendant of lost in hole charges. Further, the Court finds there is no conflict between the indemnity provisions of the MSA and the Rate Sheets. Defendant cannot seek indemnity against its contractual obligation to pay for work provided by Plaintiff. Also, it is not a conflict for the MSA to contain a general indemnity in favor of Defendant, while the Rate Sheets set forth the parties' agreement as to specific exceptions, such as lost in hole tools or equipment, because the two documents are construed together.

39. In sum, the Court finds there are no genuine issues of material fact. The Court concludes Defendant agreed to pay for lost in hole tools and equipment, tool repairs, and lost in hole insurance. Accordingly, Plaintiff's Motion for Partial Summary Judgment is **granted** in its favor as to Counts I, II, and III of Defendant's Counterclaims.

Counterclaim: Count IV

40. Next, Plaintiff argues it is entitled to summary judgment in its favor as to Defendant's fourth counterclaim. *Id.* at 19. Count IV involves alleged double billing for charges related to Plaintiff's standby charges and daily rates, wherein Plaintiff is to have an employee available at the Antero well site.

41. Plaintiff argues that Defendant's corporate representative's deposition testimony precludes this claim. *Id.* Plaintiff contends the corporate representative, Mr. Alvyn Schopp[5] testified that no specific facts or evidence support this claim. *Id.* Defendant, on the other hand, states that it did not admit that no evidence exists to support this counterclaim, and has contended that recent discovery has revealed such evidence. *See* Def's Resp., p. 2, 5. Defendant contends that Mr. Schopp's testimony was that he was not aware of any evidence as of the date of the deposition. *Id.* at 5. At any rate, Defendant argues such evidence "has now come to light." *Id.*

42. The Court notes that Defendant does not specifically detail what this discovery entails. Defendant hints at the evidence, stating that it was disclosed on May 10, 2019, the last day of discovery in this matter. *See* Def's Resp., p. 18. Defendant avers the discovery uncovered evidence of "improper billing." *Id.* The Court also notes that Defendant sought additional discovery on March 6, 2019, related to this cause of action, including personnel and payroll records. *Id.* This discovery request was the basis of a Motion to Compel, which the Court denied. *See* Ord., 7/12/19.

43. The Court also notes Plaintiff proffered deposition testimony from Defendant's corporate representative, Mr. Schopp, that alluded to a potential plan wherein full day charges were allegedly assessed by staying just over midnight on the previous day. *See* Pl's Reply, p. 11. Plaintiff's Reply also states that on May 10, 2019, the last day of discovery, Defendant's discovery responses to Plaintiff identified a new theory of double charges. *Id.* at 11-12.

44. At any rate, Defendant avers that it has alleged 256 instances of double-billing related to Count IV of the Counterclaim. *See* Def's Resp., p. 19. The Court concludes that Mr.

[5] The Court notes Defendant proffered Alvyn Schopp is Antero's Chief Administrative Officer and Regional Senior Vice President. *See* Def's Resp., p. 4.

Schopp's testimony that he was not aware of any evidence as of the date of the deposition cannot serve as the sole basis for summary judgment in Plaintiff's favor on this count, especially considering Defendant's assertion that evidence came forth within the discovery period allowed by this Court's Scheduling Order after that date.

45. The Court also considers the argument set forth in Plaintiff's Reply, wherein Plaintiff urges the Court that the sham affidavit rule precludes Defendant from creating an issue of material fact with regard to Counterclaim Count IV merely by providing a sham affidavit that is merely a variance from earlier deposition testimony. *See* Pl's Reply, p. 13. Plaintiff admits that Defendant has not provided an affidavit, but has instead introduced interrogatory responses and argument contained in the brief "into the summary judgment record." *Id.* at 14. Plaintiff avers this is akin to an affidavit and the Court should apply the sham affidavit rule. *Id.* Plaintiff also argues the shift was not due to new evidence, but was due to the field tickets as evidence, which were produced back in September of 2018. *Id.* at 15.

46. However, the Court does not find that interrogatory responses are the same as a sworn, verified affidavit contesting summary judgment; therefore, the sham affidavit rule will not be considered. Moreover, the Court must consider Defendant's proffer that evidence was timely produced in the course of the discovery period set forth by the Scheduling Order that supports its counterclaim regarding standby charges. Taken in the light most favorable to Defendant, the Court finds that Plaintiff has not shown that no genuine issues of material fact remain as to Counterclaim IV.

47. Accordingly, the Court finds that genuine issues of material fact exist. Accordingly, Plaintiff's Motion for Partial Summary Judgment is **denied** as to its request for summary judgment in its favor as to Count IV of Defendant's Counterclaims.

CONCLUSION

48. Accordingly, it is hereby **ADJUDGED** and **ORDERED** that Plaintiff's Motion for Partial Summary Judgment is hereby **GRANTED IN PART and DENIED IN PART** as detailed in this Order.

49. It is further **ORDERED**:

a. Judgment is granted in favor of Plaintiff as to Count I, the Breach of Contract claim, of the First Amended Complaint, for the amount stated in the Rate Sheets for the tools lost in hole in the Jameson 1H and Jack 2H wells, being the amount of $1,481,510.30, as well as prejudgment interest, currently accruing at a rate of 5.5% per annum, which is the percentage rate set by the Court, because a contractual prejudgment interest rate was not bargained for and agreed to by the parties. The prejudgment interest will accrue from March 22, 2018,[6] the date the contract terminated, through the date of the entry of this Order, along with post-judgment interest at the current legal rate.

b. Plaintiff's tort and equitable claims, Counts III, IV, and V, of the First Amended Complaint were pled in the alternative to the contract claims and they are now **MOOT** and **DISMISSED without prejudice**.

c. Judgment is granted in favor of Plaintiff as to Counts I, II, and III of Defendant's Counterclaim and those claims shall be **DISMISSED with prejudice**.

[6] Prejudgment interest is calculated from the date on which the cause of action accrued. W.Va. Code § 56-6-31; *see also Grove By & Through Grove v. Myers*, 181 W.Va. 342, 382 S.E.2d 536 (1989). The Court considers the fact that Plaintiff pled instances of lost in hole equipment and resulting invoices that were not paid in December 2017 through February 2018, as well as issues with invoices for lost in hole insurance. *See* Compl. The Court finds the instances leading to Plaintiff's breach of contract accrued on March 22, 2018, the date Plaintiff alleged the contract terminated following the notice given on February 20, 2018. *Id.* at 4.

50. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 19th day of August 2019.

JUDGE H. CHARLES CARL, III
West Virginia Business Court Division

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Clerk
Circuit Court of Tyler County, West Virginia
By: Deputy