

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA

MARKWEST LIBERTY MIDSTREAM )  
 & RESOURCES, L.L.C. )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BILFINGER WESTCON INC. )  
 )  
 Defendant. )

2018 JUN 15 PM 3:17  
 SHARON L. CRAMER  
 CLERK  
 WETZEL COUNTY

Case No. 16-C-660  
 Judge Cramer

COMPLAINT

MarkWest Liberty Midstream & Resources, L.L.C. ("MarkWest"), by and through its attorneys, K&L Gates LLP and Crichton & Crichton, files this Complaint against the Defendant, Bilfinger Westcon, Inc. ("Westcon") and states as follows:

OVERVIEW

1. MarkWest is engaged in the gathering, processing, fractionation, storage, and transportation of natural gas.
2. MarkWest owns and operates the Mobley Processing Plant in Wetzel County, West Virginia (the "Mobley Site"). The Mobley Site originally consisted of four natural gas facilities that served as a critical infrastructure component in the transportation and processing of natural gas and natural gas liquids produced throughout northern West Virginia.
3. Although the Mobley Site is located in the mountainous terrain of rural Wetzel County, MarkWest sought to expand its operations and increase plant capacity with a fifth facility creating even more jobs locally, i.e., the Mobley V Processing Plant (the "Project").
4. In order to do so, MarkWest hired Westcon to perform civil, structural, piping, mechanical and electrical construction work for the Project pursuant to three different lump sum construction contracts.

5. In each contract, Westcon promised MarkWest that it would timely complete all of its work in a first-class, workman-like manner for a lump sum price.

6. To MarkWest's disappointment, Westcon utterly failed to deliver on its promises at every turn.

7. In fact, Westcon has admitted to MarkWest that: (i) it has not completed the welding in its work scope and other work; (ii) the welding it did do was defective; (iii) it failed to properly test and inspect, and/or had erroneously tested and inspected certain welds on pressure vessels; (iv) it misrepresented welds as properly certified without considering the applicable ASME Boiler and Pressure Vessel Safety Code; and (v) the Project was in danger of catastrophic failure from Westcon's actions and omissions.

8. As soon as MarkWest learned that the Project was in danger of imminent and catastrophic failure and lives were at risk, MarkWest took immediate and drastic steps to remedy Westcon's reckless and wanton behavior, including immediately shutting down its operations associated with the Project.

9. MarkWest was left with no choice but to terminate Westcon and each of its Mobley contracts.

10. MarkWest now seeks to recover the substantial damages it has already incurred and anticipates it will incur to remedy and/or replace Westcon's late, incomplete and defective work. Through this lawsuit, MarkWest seeks recovery of: (i) the significant compensatory damages it has incurred as a result of Westcon's contractual breaches, including its late, defective and incomplete work; (ii) damages from the delays on the Project, including amounts owed pursuant to an agreed-upon liquidated damages provision; (iii) damages resulting from

Westcon's wanton disregard for MarkWest's operational safety; and (iv) punitive damages as the result of Westcon's gross negligence and malicious, willful and fraudulent conduct.

### PARTIES

11. MarkWest is a Delaware limited liability company with its principal place of business located at 1515 Arapahoe Street, Tower 1, Suite 1600, Denver, CO 80202. MarkWest is a citizen of West Virginia.

12. Westcon is a North Dakota corporation with its principal place of business located in 7401 Yukon Drive, Bismark, ND 58503.

### JURISDICTION AND VENUE

13. Pursuant to W.Va. Code § 51-2-2, this Court has jurisdiction over this matter.

14. Venue is appropriate in the Circuit Court of Wetzel County, West Virginia because the events giving rise to this cause of action occurred in Wetzel County, West Virginia, and the Mobley V Plant is located in Wetzel County, West Virginia.

15. MarkWest and Westcon also contractually agreed that the venue of any action filed under the Contracts shall be proper in this court. Ex. A at § 27.0; Ex. B at § 27.0; Ex. C at § 27.0.

### FACTUAL BACKGROUND

#### **I. Westcon and MarkWest Entered into Three Construction Contracts In Which Westcon Agreed to Timely Complete Construction Work at the Project for a Lump Sum.**

16. In order to construct the Project, MarkWest entered three different lump sum construction contracts with Westcon, in which Westcon agreed to perform certain civil, structural, piping, mechanical and electrical construction work for the Project.

#### **A. The Mobley V and Flare, Residue, and PSV Piping Lump Sum Contract**

17. On May 19, 2015, MarkWest and Westcon entered into the Mobley V and Flare,

Residue, and PSV Piping Lump Sum Construction Contract (“Plant Contract;” attached hereto as Exhibit A) in which Westcon agreed to perform all the flare, residue and PSV piping work and all the mechanical and electrical construction work for the Project for the lump sum price of \$17,091,880. *See Ex. A* at §§ 1.0 & 3.1.

18. In the Plant Contract, Westcon also agreed that time was of “great importance” for the performance of its work. *See id.* at § 2.1.

19. Accordingly, in the Plant Contract, Westcon guaranteed it would achieve Mechanical Completion by no later than October 15, 2015 and it would achieve Project Completion by no later than November 30, 2015. *Id.* at § 2.1.

20. Because MarkWest would experience significant damages that were not readily quantifiable if Westcon did not timely achieve Mechanical Completion, the parties agreed that for each day Westcon may be late in achieving Mechanical Completion, Westcon would pay MarkWest \$12,500 per day:

Subject to the other terms of this Contract, if Contractor fails to achieve Mechanical Completion by the Required Completion Date, and if such failure continues for more than ten (10) calendar days following such Required Completion Date, Contractor shall pay to Company, as part of the consideration for awarding this Contract, an amount equal to \$12,500 per day for each calendar day that passes following the 10th day after the Required Completion Date and until Project Completion is achieved (the “Late Completion Payments”)....

*Id.* at § 2.6.

**B. The Mobley Inlet Compression Lump Sum Contract**

21. On October 5, 2015, MarkWest and Westcon entered into the Mobley Inlet Compression Lump Sum Construction Contract (“Inlet Compression Contract;” attached hereto as Exhibit B) where Westcon agreed to perform the complete construction of two new inlet compressions units (i.e., Unit 1 and Unit 2) including all associated equipment and structures as

well as the demolition of an existing unit for the Project for the lump sum price of \$3,645,345. *See* Ex. B at §§ 1.0 & 3.1.

22. In the Inlet Compression Contract, Westcon agreed that time was of “great importance” for the performance of its work. *See id.* at § 2.1.

23. Accordingly, in the Inlet Compression Contract, Westcon guaranteed it would achieve Mechanical Completion of Unit 1 by no later than January 31, 2016 and achieve Mechanical Completion of Unit 2 by no later than March 31, 2016. *Id.* at § 2.1.

24. Westcon also guaranteed it would achieve Project Completion by no later than April 30, 2016. *Id.* at § 2.1.

25. In the Inlet Compression Contract, the parties agreed that for each day Westcon may be late in achieving Mechanical Completion, Westcon would pay MarkWest \$7,500 per day. *Id.* at § 2.6

**C. The Mobley NE Corner Lump Sum Contract**

26. On October 7, 2015, MarkWest and Westcon entered into the Mobley NE Corner Lump Sum Construction Contract (“NE Corner Contract;” attached hereto as Exhibit C) where Westcon agreed to perform the complete civil, mechanical and electrical construction of the piping and associated equipment and structures for the Northeast Corner for the Project for the lump sum price of \$2,365,875. *See* Ex. C at §§ 1.0 & 3.1.

27. In the NE Corner Contract, Westcon agreed that time was of “great importance” for the performance of its work. *See id.* at § 2.1.

28. Accordingly, in the NE Corner Contract, Westcon guaranteed it would achieve Mechanical Completion by no later than December 14, 2015 and achieve Project Completion by no later than December 21, 2016. *Id.* at § 2.1.

29. In the NE Corner Contract, the parties agreed that for each day Westcon may be late in achieving Mechanical Completion, Westcon would pay MarkWest \$7,500 per day. *Id.* at § 2.6.

**II. Westcon Agreed to Provide all Workmanship Necessary to Complete the Project and Exercise Due Care in Completing the Project.**

30. In the Plant Contract, the Inlet Compression Contract and the NE Corner Contract (collectively, the “Contracts”), Westcon agreed to provide all “workmanship, labor, materials and equipment necessary to complete the Scope of Work as set forth” in the Contracts. Ex. A at § 1.0, Ex. B at § 1.0; Ex. C at § 1.0.

31. The Contracts made clear that safety was paramount to MarkWest, by among other things, requiring Westcon to “use due care throughout the performance of the Scope of Work.” Ex. A at § 21.1; Ex. B at § 21.1; Ex. C at § 21.1.

32. Further, Westcon was required to “employ, or cause to be employed, on or in connection with the performance of the Scope of Work only persons who are fit and skilled for the Work assigned” and “at all times enforce or cause to be enforced, strict discipline and good order among the workmen employed for any Work.” Ex. A at § 21.2; Ex. B at § 21.2; Ex. C at § 21.2.

33. Also, Westcon was required to cause its “employees and all subcontractors to abide by all safety and security rules and policies in force on the Property.” Ex. A at § 21.3; Ex. B at § 21.3; Ex. C at § 21.3.

34. The Contracts also required Westcon to “have a competent representative at the Property at all times who shall have absolute authority to act, in all respects, on behalf of and for Contractor (herein called “Contractor’s Representative”).” Ex. A at § 16.2; Ex. B at § 16.2; Ex. C at § 16.2.

35. Westcon was required to “replace said representative, without additional charge, if

so demanded by [MarkWest].” *Id.*

36. Each of the Contracts included an Exhibit C entitled “Contractor’s Safety & Health Provisions” that imposed safety requirements on Westcon and provided as follows:

It its [MarkWest’s] firm belief that accident prevention by [Westcon] working on [MarkWest] Property will not only reduce the potential for injury-producing accidents to [Westcon] and [MarkWest] employees but will result in fewer unexpected costs, greater efficiency, and project completion on time and within specifications.

[Westcon] is expected to conduct the work in a safe and healthful manner in compliance with [MarkWest’s] safety rules as well as federal, state, and local safety and health regulations, laws, and ordinances. Failure to adhere to the guidelines detailed on the following pages, as well as good business practices, may result in the termination of the Contract. The safety and health of all employees working on [MarkWest] Property is a prime concern of MarkWest management and must receive appropriate attention from [Westcon].

Ex. A at C-1; Ex. B at C-1; Ex. C at C-1.

37. Exhibit C required Westcon to “take prompt and appropriate action to correct unsafe conditions and/or work practices.” Ex. A at C-2; Ex. B at C-2; Ex. C at C-2.

38. Westcon’s compliance with both “the letter and the implied intent of [Exhibit C] to provide a safe and healthful work place for [Westcon’s] employees” was a “condition of the Contract.” Ex. A at C-3; Ex. B at C-3; Ex. C at C-3.

39. Further, one of the specific rules contained in Exhibit C was that “[i]llegal or illicit drugs will not be permitted or used on **Company** Property. Persons under the influence of, or whose work is impaired as a result of, the use of alcohol or drugs will be suspended from working on **Company** Property.” Ex. A at C-3; Ex. B at C-3; Ex. C at C-3.

40. Additionally, Exhibit C required that any “[e]quipment defects affecting safety shall be corrected before the equipment is used.” Ex. A at C-3; Ex. B at C-3; Ex. C at C-3.

**III. Westcon Ignores its Contractual Obligations, Fails to Complete its Scope of Work, Fails to Exercise Due Care and Disregards Life and Safety Concerns On the Project.**

41. Almost immediately after commencing work, Westcon began breaching its contractual obligations on the Project.

42. Westcon was unprepared, disorganized and failed to supply enough properly skilled workers to carry out its scope of work under the Contracts.

43. Westcon failed to exercise due care during the performance of its work on the Project.

44. While performing its work, Westcon had numerous documented near misses during the course of the Project.

45. Westcon failed to enforce strict discipline and safety rules and policies.

46. Westcon employed numerous employees that could not pass or refused to take drug tests during the course of the Project, including its QA/QC director.

47. Westcon's Project Manager and Contractor Representative, A.C. Miller, was involved in the use and/or distribution of illegal drugs from the Westcon construction trailer located outside the Project gate.

48. MarkWest attended numerous meetings with Westcon where it repeatedly notified Westcon's management of MarkWest's concerns with the documented safety, quality and schedule issues on the Project.

49. MarkWest also repeatedly requested Westcon remove and replace the Contractor Representative Miller due to the documented staffing, safety, quality and schedule issues on the Project.

50. For instance, on October 21, 2015, MarkWest attended a meeting with Westcon's Regional Director where MarkWest requested Westcon remove and replace Miller due to the documented safety, quality and schedule issues on the Project.

51. Westcon refused this directive and did not remove and replace Miller.

52. On October 29, 2015, MarkWest met with Westcon's CEO/President and Regional Director to discuss the documented staffing, safety, quality and schedule issues on the Project.

53. Rather than respond to these issues, Westcon's CEO/President requested MarkWest give Westcon more business so that Westcon could have resources in place to support the Northeast region.

54. Westcon continued to disregard MarkWest's staffing, safety, quality and schedule concerns and fail to remove and replace Miller.

55. Then, on November 13, 2015, Westcon recklessly ignored computer warnings that a crane was overloaded.

56. Westcon's lack of corrective measures caused the loaded crane to flip over within a few feet of the Mobley III and IV compressor building, crushing other equipment, and causing property damage.

57. As a result of this incident, three people were hospitalized and the Mobley III and IV plants were shut down for three days.

58. MarkWest was forced to formally bar Westcon from operating cranes and impose a policy requiring Westcon to only use certain specified equipment operators.

59. Only after this crane incident did Westcon finally remove and replace the Contractor Representative and Project Manger Miller.

60. However, a month after the crane incident, Westcon again disregarded MarkWest's specific instructions and directions and improperly utilized a mobile fork lift for lifting.

61. This led to a serious incident where equipment struck a valve on an operating gas line, causing more property damage and resulting in an emergency shutdown of the Mobley Inlet Compression project for nearly 24 hours, substantial loss of plant throughput and a serious gas leak.

**IV. Westcon Substantially Delays the Project, Causing MarkWest to Lose Significant Revenue.**

62. MarkWest does significant business with certain customers in the Marcellus Shale gas fields.

63. MarkWest needed Westcon's work and the Project completed on-time so that it could meet its contractual obligation to supply customers with Ethane, Propane, Isobutene Normal Butane and Natural Gasoline derived from the fractionation process at the Mobley Site.

64. Additionally, MarkWest earns compression and processing fees from customers as soon as the Project is commissioned and put on-line.

65. However, because Westcon was unable to complete its scope of work due to its numerous breaches of its contractual obligations and general unpreparedness, disorganization and inability to manage its work on the Project, the Project experienced substantial delay.

66. For instance, although MarkWest and Westcon agreed to extend the deadline for Westcon to complete its scope of work on the NE Comer Contract to January 16, 2016, Westcon completely failed to meet this deadline.

67. Similarly, although MarkWest and Westcon agreed to extend the Plant Contract's Mechanical Completion deadline to January 31, 2016, Westcon completely failed to meet this deadline

68. As a result, MarkWest has lost revenue and significant profits that it would have derived from its customers.

V. **Westcon Falsely Represents to MarkWest that its Welding Was Safe and Fit for Service.**

69. Throughout its work on the Project, Westcon misrepresented to MarkWest that the welding it was performing on the Project was complete, safe and fit for service and that it was properly testing and inspecting the welds on the Project.

70. In July 2015, Westcon performed welding on De-Ethanizer and De-Methanizer pressure vessels that was specified in the Plant Contract scope of work.

71. Westcon represented to MarkWest that this welding was complete, safe and not defective.

72. Westcon also represented to MarkWest that it had tested and inspected the welds on the De-Ethanizer and De-Methanizer pressure vessels pursuant to the applicable ASME Boiler and Pressure Vessel Safety Code as specified.

73. Westcon represented to MarkWest that the De-Ethanizer and De-Methanizer pressure vessels were complete and fit for service.

74. Nonetheless, MarkWest began requesting documentation and information from Westcon regarding the welding it was performing on the Project such as weld x-rays, welding procedures and weld reports.

75. Despite repeated requests, Westcon did not provide MarkWest with the welding documentation and information it was requesting.

76. Instead, in or around March 2016, Westcon affixed an ASME R Stamp certification to the De-Ethanizer and De-Methanizer vessels

77. This ASME R Stamp certified that the welds on the De-Ethanizer and De-Methanizer vessels were complete, had been properly tested and inspected and the vessels were fit for service.

78. MarkWest relied upon Westcon's affixation of the ASME R Stamp to the vessels and its representations regarding the welding it was performing to start-up the Project and bring the Mobley V plant online on or around April 8, 2016.

79. However, contrary to Westcon's representations to MarkWest, it is now known that Westcon rendered defective welding on the Project and Westcon failed to properly test and inspect welds on the De-Ethanizer and De-Methanizer vessels in accordance with the applicable ASME Boiler and Pressure Vessel Safety Code.

80. As a result, Westcon's representations and the ASME R Stamp affixed to the De-Ethanizer and De-Methanizer vessels were fraudulent.

81. If MarkWest had known Westcon's representations regarding its welds were not true and the safety of the Project was in question, it would not have started up the Project and exposed workers at the Mobley Site to such a dangerous situation.

**VI. Westcon Places Numerous Lives in Danger by Intentionally Concealing its Dangerously Defective Welds.**

82. On or around April 20, 2016, after months of requesting, Westcon finally provided MarkWest with some of the documentation and information regarding the welding Westcon performed on the Project such as weld x-rays, welding procedures, and weld reports.

83. MarkWest immediately began to review this documentation and noticed a potential discrepancy in the welding documentation which appeared to indicate that Westcon's welds on the De-Ethanizer and De-Methanizer vessels had been examined to the API 1104 standard instead of the applicable ASME Boiler and Pressure Vessel Safety Code.

84. MarkWest notified Westcon of this discrepancy.

85. At a May 6, 2016 meeting, Westcon's employees Matt Bureau and David Capers represented to MarkWest employees Tyler Adams and Manny Alvarez that "everything would be taken care of" and that there was no need to shut down the plant due to the discrepancy.

86. On May 9, 2016, David Capers notified MarkWest that it was sending all of the welding documents and information to an engineer in Pittsburgh to resolve any issues.

87. On May 19, 2016, at the end of the day, Westcon's regional quality control manager, Kevin Fox, provided documents to MarkWest's Manny Alvarez and represented they were the corrected documentation for the De-Ethanizer and De-Methanizer vessels, i.e., "tower turnover documentation."

88. Alvarez signed a transmittal for the documents and based upon a brief review noticed the documentation still included information (i.e., x-ray reader sheets) indicating that Westcon's welds on the De-Ethanizer and De-Methanizer vessels had been examined to the API 1104 standard instead of the applicable ASME Boiler and Pressure Vessel Safety Code.

89. Once again, MarkWest notified Westcon of this discrepancy.

90. Once again, Westcon represented to MarkWest employees Tyler Adams and Manny Alvarez that an answer would be coming soon from an engineer in Pittsburgh, Pennsylvania.

91. Unknown to MarkWest, the very next day on May 20, 2016, the Pittsburgh engineering firm, O'Donnell Consulting Engineers, Inc. ("O'Donnell"), issued a written report ("O'Donnell Report, attached hereto as Exhibit D) to Westcon which concluded the "vessels cannot be legally operated." See Ex. D.

92. O'Donnell found the welds on the De-Methanizer vessel contained a "severe lack

of weld penetration” that does not meet “the applicable safety code” and “does not pass ‘Fitness-for-Service’ criteria.” Ex. D.

93. As a result, O’Donnell concluded the De-Methanizer vessel “should not be re-pressurized after a shutdown, and should be repaired ASAP.” Ex. D.

94. With respect to the De-Ethanizer vessel, O’Donnell found “[t]he weld defects don’t meet the ASME Code or Fitness for Service requirements. There are numerous defects which can act as crack starters. Consequently, the carbon vessel needs to be repaired ASAP.” Ex. D.

95. Even after Westcon received the O’Donnell Report, Weston did not immediately notify MarkWest that the welds were dangerously defective and the vessels could not legally be operated.

96. Instead, Westcon continued to allow MarkWest to operate Mobley V for several more days, knowingly placing the safety and lives of MarkWest and Westcon’s employees, contractors and other workers at serious risk.

97. On May 24, 2016, days after receiving the O’Donnell Report, Westcon sent MarkWest an email and also emailed MarkWest a copy of the O’Donnell Report.

98. Westcon admitted that it had: (i) not completed the welding in its work scope; (ii) provided defective welding on the Project; (iii) failed to properly test and inspect, and/or had erroneously tested and inspected certain welds on the De-Ethanizer and De-Methanizer vessels; and (iv) certified welds without applying the applicable ASME Boiler and Pressure Vessel Safety Code.

99. Such conduct violated the Contract, basic engineering standards, common industry practices and the law.

100. Such conduct also demonstrated a general disregard for life and safety concerns - threatening a catastrophic failure at the Project and jeopardizing the safety and lives of MarkWest and Westcon's employees, contractors and other workers at the Mobley Site.

101. No competent contractor would act in such an unsafe and duplicitous manner.

102. Once MarkWest learned that the Project was in danger of imminent and catastrophic failure and lives were at risk, MarkWest took immediate and drastic steps to remedy Westcon's reckless and wanton behavior, including immediately shutting down its operations associated with the Project.

**VII. MarkWest is Forced to Terminate Westcon.**

103. At or around the time of the O'Donnell report, Westcon falsely represented to MarkWest that it has completed 99% of the scope of work on the Plant Contract

104. Westcon, however, had failed to complete its scope of work and failed to prosecute its work with promptness or diligence despite repeated notices from MarkWest to do promptly do so.

105. Westcon still had not completed the Plant Contract scope of work and Westcon was not even close to achieving Project Completion on the Plant Contract.

106. In fact, there is hundreds of thousands in dollars of work to complete on the Plant Contract.

107. Similarly, Westcon still had not completed the NE Corner Contract and Inlet Compression scopes of work. There is a substantial cost associated with the balance of these scopes of work that will need to be completed.

108. Nor had Westcon provided MarkWest with all the records required by the Contracts, including but not limited to, pressure testing records.

109. Yet, Westcon had demonstrated it is in no hurry to finish its scope of work on the Project.

110. Indeed, on May 10, 2016, MarkWest sent to Westcon a consolidated punch list containing over a thousand punch list items and other numerous contract deficiencies related to the Contracts (including certain welding defects known by MarkWest at that time).

111. After receiving the letter, Westcon merely continued with its prior pattern and practice.

112. It did not correct all its defective work or complete all the uncompleted items identified in the letter.

113. As such, once MarkWest learned about Westcon's general disregard for life and safety concerns and that Westcon had misrepresented that the welding it was performing on the Project was complete, safe and fit for service, MarkWest was left with no choice but to terminate the Contracts for multiple reasons.

114. On May 26, 2016 and May 27, 2016, MarkWest provided Westcon with written notice via three termination letters (the "Termination Letters") that it was terminating the Contracts for cause for material breach and on account of Westcon's illegal and intentional misconduct, gross negligence and otherwise tortious conduct.

115. Among other things, the Termination Letters set forth MarkWest's intent pursuant to Section 23.2.3 of the Contracts to hold Westcon fully responsible for all costs to repair Westcon's defective and deficient work and all damages suffered by MarkWest as a result of Westcon's gross negligence and willful and wanton conduct, such as, all costs incurred to third parties as a result of the shutdown of the Project, lost profits, penalties and other damages related to the inability of the Project to fulfill its contractual obligation to MarkWest customers.

116. The Termination Letters demanded Westcon deliver to MarkWest all information furnished by MarkWest for the Project, all data developed by Westcon under the Contracts, including all x-rays and documentation related to every weld performed on the Project, by June 1, 2016 as required by Sections 23.2.1 and 23.2.2 of the Contracts.

117. Westcon has refused to compensate MarkWest for the damages caused by its breaches, gross negligence and willful and wanton misconduct and/or otherwise comply with the instructions in the Termination Letters. Westcon has also not provided the documentation required by the Contracts.

118. In fact, on May 31, 2016, Westcon sent MarkWest a letter, which, among other things, once again admitted Westcon's welds on the De-Ethanizer and De-Methanizer vessels had initially been examined to the API 1104 standard instead of the applicable ASME Boiler and Pressure Vessel Safety Code, yet remarkably blamed MarkWest.

119. Accordingly, MarkWest has no choice but to file this lawsuit to recover the damages it has incurred and will incur due to the Westcon's breaches, gross negligence and willful and wanton misconduct.

### COUNT I

#### **(Breach of Contract)**

120. MarkWest restates and incorporates by reference all of the foregoing paragraphs of this Complaint as if fully set forth herein.

121. MarkWest and Westcon entered into three valid construction contracts, pursuant to which MarkWest agreed to pay Westcon a lump sum as consideration for Westcon providing the timely and complete construction of certain piping, mechanical, electrical and civil construction work for the Project.

122. MarkWest has performed all material obligations under the Contracts.

123. Westcon has materially breached its obligations under the Contracts by, *inter alia*, failing to progress the Project in a timely manner, failing to prosecute the Work with sufficient promptness and diligence; failing to complete its scope of work under the Contracts; violating basic engineering standards, common industry practices and applicable laws and/or regulations; failing to supply adequate staffing of properly skilled workers; failing to exercise due care during the performance of the work on the Project; failing to enforce strict discipline and safety rules and policies; and failing to follow the directives and instructions of MarkWest.

124. As a result of Westcon's material breaches, MarkWest was forced to terminate Westcon for default.

125. As a direct and proximate cause of Westcon's breaches, MarkWest has suffered significant damages and is entitled to all such damages under the Contracts, including compensatory damages, costs of completing the Project, costs of repairing defective work, liquidated damages and all special and consequential damages, including but not limited to lost profits.

**WHEREFORE**, MarkWest requests the Court to enter judgment in its favor and against Westcon for all damages allowed by law, plus interest, costs, and expenses, and such other relief as this Court deems appropriate.

## COUNT II

### **(Negligence/Gross Negligence)**

126. MarkWest restates and incorporates by reference all of the foregoing paragraphs of this Complaint as if fully set forth herein.

127. MarkWest and Westcon are in privity of contract.

128. A special relationship exists between MarkWest and Westcon because Westcon knew that any failure to properly complete all its work timely, with due care and consistent with generally accepted construction practices and standards of its industry and all applicable federal, state and local laws and ordinances would significantly harm MarkWest.

129. Westcon owed MarkWest a duty to properly complete all work timely, with due care and consistent with generally accepted construction practices and standards of its industry and all applicable federal, state and local laws and ordinances.

130. At all times relevant herein Westcon negligently performed such duties with resulting breaches thereof.

131. The acts and omissions of Westcon constitute gross negligence, as that term is defined by law. Viewed objectively from the standpoint of Westcon at the time of the occurrences, the acts and omissions of Westcon involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and Westcon had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious, reckless and/or outrageous indifference to the rights, health, safety and welfare of others.

132. As a direct and proximate result of the gross negligence and legal malice of Westcon, MarkWest suffered significant damages to its business and property, and is entitled to all such damages and punitive damages.

**WHEREFORE**, MarkWest requests the Court to enter judgment in its favor and against Westcon for all damages allowed by law, plus interest, punitive damages, attorneys' fees, costs, and expenses, and such other relief as this Court deems appropriate.

**COUNT III****(Fraud)**

133. MarkWest restates and incorporates by reference all of the foregoing paragraphs of this Complaint as if fully set forth herein.

134. Westcon represented to MarkWest, among other things, that the welding it was performing on the Project was complete, safe and fit for service, that it was properly testing and inspecting the welds on the Project, and that Westcon's welds were in compliance with applicable laws.

135. Westcon's representations were material to the transaction at hand and were false and/or misleading.

136. Westcon made these representations with knowledge of their falsity and/or with utter disregard and recklessness as to whether they were true or false.

137. Westcon made these representations with the intent of misleading MarkWest into relying upon them.

138. MarkWest justifiably relied upon Westcon's representations.

139. Westcon's actions were wanton, reckless, malicious, of oppressive character and/or made with conscious, reckless and/or outrageous indifference to the rights, health, safety and welfare of others.

140. Westcon intentionally, willfully, recklessly and maliciously made false statements to MarkWest.

141. Westcon's misrepresentations and MarkWest's justifiable reliance proximately caused MarkWest to suffer significant harm and damage to its business and property, and MarkWest is entitled to all such damages and punitive damages.

**WHEREFORE**, MarkWest requests the Court to enter judgment in its favor and against Westcon for all damages allowed by law, plus interest, punitive damages, attorneys' fees, costs, and expenses, and such other relief as this Court deems appropriate.

**COUNT IV**

**(Negligent Misrepresentation)**

142. MarkWest restates and incorporates by reference all of the foregoing paragraphs of this Complaint as if fully set forth herein.

143. Westcon, during the course of its business and during the course of a transaction in which it had a pecuniary interest, supplied MarkWest with false information.

144. Westcon failed to exercise reasonable care or competence in obtaining or communicating the information.

145. The false information Westcon supplied to MarkWest was for the purpose of guiding MarkWest in its business transactions.

146. MarkWest justifiably relied upon Westcon's false information.

147. MarkWest and Westcon are in privity of contract.

148. Alternatively, a special relationship exists between MarkWest and Westcon

149. Westcon owed MarkWest a duty to provide information.

150. Westcon knew MarkWest would rely upon the information it supplied to MarkWest.

151. As a result of Westcon supplying MarkWest with false information, MarkWest has suffered significant harm to its business and property, and MarkWest is entitled to all such damages.

**WHEREFORE**, MarkWest requests the Court to enter judgment in its favor and against Westcon for all damages allowed by law, plus interest, costs, and expenses, and such other relief as this Court deems appropriate.

**COUNT V**

**(Specific Performance)**

152. MarkWest restates and incorporates by reference all of the foregoing paragraphs of this Complaint as if fully set forth herein.

153. MarkWest and Westcon entered into three valid construction contracts, pursuant to which MarkWest agreed to pay Westcon a lump sum as consideration for Westcon providing the timely and complete construction of certain piping, mechanical, electrical and civil construction work for the Project.

154. The terms of the Contracts are clear, unambiguous and certain.

155. MarkWest has performed all material obligations under the Contracts.

156. Westcon has materially breached its obligations under the Contracts.

157. On May 26, 2016 and May 27, 2016, MarkWest rightfully terminated Westcon and the Contracts for cause for material breach and on account of Westcon's illegal and intentional misconduct, gross negligence and otherwise tortious conduct.

158. Section 23.2.2 of the Contracts obligates Westcon to deliver to MarkWest "all information furnished by [MarkWest] in connection with the Scope of Work, together with all data developed by [Westcon] under the Contract[s]."

159. MarkWest's termination letters to Westcon dated May 26, 2016 and May 27, 2016 formally demanded the return of all material described in Section 23.2.2 of the Contracts, including

but not limited to all x-rays and documentation related to every weld performed on the Project (the "Project Materials".)

160. Westcon, therefore, had a contractual obligation to provide to MarkWest all Project Materials after MarkWest terminated Westcon.

161. Despite the terms of the Contracts and MarkWest's explicit demand for the return of all Project Materials, Exeter has not yet returned all Project Materials that rightfully belong to MarkWest.

162. Westcon's refusal constitutes a breach of the Contracts.

163. The Project Materials are unique, identifiable, unable to be replicated without significant time and expense, and their loss will cause significant delay to the Project.

164. As a result, MarkWest has no adequate remedy at law.

WHEREFORE, MarkWest requests the Court to enter judgment in its favor and against Westcon compelling Westcon to specifically perform under the Contracts by providing MarkWest with all Project Materials, granting MarkWest all damages allowed by law, plus interest, costs, and expenses, and such other relief as this Court deems appropriate.

**DEMAND FOR JURY TRIAL**

MarkWest hereby demands a trial by jury on all claims and issues.

Dated: June 13, 2016

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