

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA

**MARKWEST LIBERTY MIDSTREAM  
& RESOURCES, L.L.C.,**

**Plaintiff,**

v.

**Civil Action No.: 16-C-66  
Hon. Jeffrey Cramer**

**BILFINGER WESTCON, INC.,**

**Defendant.**

**FIRST AMENDED PARTIAL ANSWER AND AFFIRMATIVE DEFENSES  
AND COUNTERCLAIMS OF BILFINGER WESTCON INC.**

Bilfinger Westcon Inc. ("Westcon"), by counsel, hereby re-files in the Circuit Court of Wetzel County, West Virginia its First Amended Partial Answer and Affirmative Defenses to the Complaint filed by MarkWest Liberty Midstream & Resources, L.L.C. ("MarkWest") and Counterclaims of Bilfinger Westcon Inc.<sup>1</sup> Unless otherwise stated, Westcon answers based on its current knowledge. Westcon states that all of the allegations contained in the complaint, including headers and the prayer for relief, unless specifically admitted, are denied. In making this answer Westcon does not admit the authenticity, veracity, completeness, or admissibility of any document referenced by Plaintiff and reserves its rights to contest that authenticity, veracity, completeness, and/or admissibility of all such documents at an appropriate time. Westcon files its partial answer to the complaint as follows:

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<sup>1</sup> This pleading was initially filed in the United States District Court, Northern District of West Virginia on August 19, 2016. This case was remanded to the Circuit Court of Wetzel County, West Virginia on November 4, 2016. While the documents filed in the federal court remained filed in relation to this case now pending before this Court, to clarify timing for responsive filings as well as the record, Westcon is refiling this pleading, as well its Partial Motion to Dismiss. This pleading, as well as the Partial Motion to Dismiss, have been revised to reflect the fact of the remand as well as related applicable West Virginia law.

Responding to the opening unnumbered paragraph, Westcon admits that the complaint purports to bring an action by Plaintiff, but denies liability and further denies that Plaintiff is entitled to the relief it seeks.

1. Westcon lacks information sufficient to form an opinion or belief regarding all aspects of MarkWest's business referenced in paragraph numbered 1, but generally admits that MarkWest is involved in the processing of natural gas.

2. Regarding paragraph numbered 2, Westcon admits that MarkWest owns and operates a facility located in Wetzel County, West Virginia, herein referred to as the "Mobley Site." Westcon is generally aware that the Mobley Site consisted of four gas related facilities at the time Westcon and MarkWest entered into construction contracts related to the Mobley Site. Westcon lacks information sufficient to form an opinion or belief regarding the remaining allegations in this paragraph, and therefore denies the same.

3. Regarding paragraph numbered 3, it is admitted that the Mobley Site is located in mountainous terrain in rural Wetzel County and that MarkWest sought to expand its operations with a facility that it referred to as Mobley No. V. Westcon lacks information sufficient to form an opinion or belief regarding the remaining allegations in this paragraph, and therefore denies the same.

4. Regarding paragraph numbered 4, it is admitted that MarkWest and Westcon entered into three construction agreements relating to four projects at the Mobley Site. The types of work to be performed are identified in these agreements and Westcon refers to such documents, which speak for themselves, for the content thereof.

5. Regarding paragraph numbered 5, the documents referenced by Plaintiff, the contracts relevant to this dispute, speak for themselves and Westcon refers to such documents for the content thereof.

6. Westcon denies the allegations in paragraph numbered 6.

7. Regarding paragraph numbered 7, Westcon denies that at the time MarkWest terminated Westcon from the Mobley Site, that Westcon's work was not properly proceeding in relation to the timeframe agreed between the parties. Westcon denies that the welding work was incomplete or defective, except that it is acknowledged that there was a discrepancy concerning the standard by which two welds on two pressure vessels were examined and that these welds were the subject of warranty repair. Regarding the testing of the welds the subject of the warranty work, it is admitted only that testing records reference a standard other than the ASME Boiler and Pressure Code. Westcon denies that the Mobley Site was in danger of any catastrophic or other failure. To the extent this paragraph states legal conclusions, no response is required. To the extent a response is required, such conclusions are denied.

8. Regarding paragraph numbered 8, Westcon denies that the Mobley Site was in danger of imminent or catastrophic failure and further denies that lives were at risk. Westcon lacks information sufficient to know what steps MarkWest took subsequent to its termination of Westcon's work. It is denied that drastic steps were necessary to remedy any of the warranty issues. All other allegations in this paragraph are denied.

9. Westcon denies the allegations in paragraph numbered 9.

10. Regarding paragraph numbered 10, Westcon admits that Plaintiff has filed a complaint alleging damages and asserting various theories of liability. Westcon denies that MarkWest is entitled to the damages it seeks and further denies the theories of liability

referenced by Plaintiff in this paragraph. To the extent this paragraph states allegations, they are denied.

11. Upon information and belief, it is admitted that MarkWest is a Delaware limited liability company with its principal place of business located in Denver County, Colorado. The remainder of this paragraph related to MarkWest's allegation of citizenship states a legal conclusion to which no response is required. To the extent any response is required, Defendant denies the same.

12. Westcon admits the allegations in paragraph numbered 12.

13. Regarding paragraph numbered 13, the statement therein is a legal conclusion to which no response is required. To the extent a response is required, Westcon admits that the United States District Court for the Northern District of West Virginia has remanded this case to the Circuit Court of Wetzel County, West Virginia.

14. Regarding paragraph numbered 14, it is admitted that the Mobley Site is located in Wetzel County, West Virginia. The remainder of this paragraph states legal conclusions to which no response is required. To the extent a response is required, Westcon admits that the United States District Court for the Northern District of West Virginia has remanded this case to the Circuit Court of Wetzel County, West Virginia.

15. Regarding paragraph numbered 15, Westcon states that the contracts speak for themselves and refers to those documents for the content thereof.

16. Regarding paragraph numbered 16, it is admitted that MarkWest and Westcon entered into three construction agreements. With respect to the remainder of the allegations in this paragraph, Westcon states that the contracts speak for themselves and refers to those documents for the content thereof.

17. Regarding paragraph numbered 17, it is admitted that a contract entitled “Mobley V and Flare, Residue, and PSV Piping Lump Sum” (herein referred to as the “Mobley V Contract”), bears an effective date of May 19, 2015. Regarding all other statements in this paragraph, Westcon states that the contract speaks for itself and refers to that document for the content thereof.

18. Regarding paragraph numbered 18, Westcon states that the identified contract speaks for itself and refers to that document for the content thereof.

19. Regarding paragraph numbered 19, Westcon states that the identified contract speaks for itself and refers to that document for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the relevant contract by Westcon, they are denied.

20. Regarding paragraph numbered 20, Westcon denies that MarkWest suffered damages associated with the completion of the work referenced in the relevant contract within the timeframe agreed upon by the parties. Regarding the portion of the paragraph that references language from the Mobley V Contract, Westcon states that the identified contract speaks for itself and refers to that document for the content thereof. Westcon affirmatively notes that to the extent this paragraph omits from its quotation of the contract relevant limitations set forth therein, that this paragraph is misleading and does not accurately reflect the agreement between the parties and is therefore denied.

21. Regarding paragraph numbered 21, it is admitted that a contract entitled “Construction Contract Mobley Inlet Compression Lump Sum” (herein referred to as the “Inlet Compression Contract”), bears an effective date of October 5, 2015. Regarding all other

statements in this paragraph, Westcon states that the contract speaks for itself and refers to that document for the content thereof.

22. Regarding paragraph numbered 22, Westcon states that the referenced contract speaks for itself and refers to that document for the content thereof.

23. Regarding paragraph numbered 23, Westcon states that the identified contract speaks for itself and refers to that document for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the relevant contract by Westcon, they are denied.

24. Regarding paragraph numbered 24, Westcon states that the identified contract speaks for itself and refers to that document for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the relevant contract by Westcon, they are denied.

25. Regarding paragraph numbered 25, Westcon states that the identified contract speaks for itself and refers to that document for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the relevant contract by Westcon, they are denied. Westcon affirmatively notes that to the extent this paragraph references certain contractual remedies like per day payments, that it omits key limitations, is therefore misleading and does not accurately reflect the agreement between the parties and is therefore denied.

26. Regarding paragraph numbered 26, it is admitted that a contract entitled “Construction Contract Mobley NE Corner Lump Sum” (herein referred to as the “NE Corner Contract”), bears an effective date of October 7, 2015. Regarding all other statements in this

paragraph, Westcon states that the contract speaks for itself and refers to that document for the content thereof.

27. Regarding paragraph numbered 27, Westcon states that the referenced contract speaks for itself and refers to that document for the content thereof.

28. Regarding paragraph numbered 28, Westcon states that the identified contract speaks for itself and refers to that document for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the relevant contract by Westcon, they are denied.

29. Regarding paragraph numbered 29, Westcon states that the identified contract speaks for itself and refers to that document for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the relevant contract by Westcon, they are denied. Westcon affirmatively notes that to the extent this paragraph references certain contractual remedies like per day payments, that it omits key limitations, is therefore misleading and does not accurately reflect the agreement between the parties and is therefore denied.

30. Regarding paragraph numbered 30, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

31. Regarding paragraph numbered 31, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

32. Regarding paragraph numbered 32, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

33. Regarding paragraph numbered 33, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

34. Regarding paragraph numbered 34, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

35. Regarding paragraph numbered 35, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

36. Regarding paragraph numbered 36, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

37. Regarding paragraph numbered 37, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the

extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

38. Regarding paragraph numbered 38, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

39. Regarding paragraph numbered 39, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

40. Regarding paragraph numbered 40, Westcon states that the identified contracts speak for themselves and refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply any breach of the identified contracts by Westcon, they are denied.

41. Westcon denies the allegations in paragraph numbered 41.

42. Westcon denies the allegations in paragraph numbered 42.

43. Westcon denies the allegations in paragraph numbered 43.

44. Westcon denies the allegations in paragraph numbered 44.

45. Westcon denies the allegations in paragraph numbered 45.

46. Westcon denies the allegations in paragraph numbered 46.

47. Westcon denies the allegations in paragraph numbered 47.

48. Westcon denies the allegations in paragraph numbered 48.

49. Regarding paragraph numbered 49, it is admitted only that MarkWest requested the removal of a Westcon employee, A. C. Miller. All other allegations in this paragraph are denied.

50. Regarding paragraph numbered 50, it is admitted that a meeting and site “walk around” took place on October 21, 2015, attended by Andrew Cottle and a MarkWest representative. It is admitted that at the start of this interaction, reference was made by the MarkWest representative to the removal of A.C. Miller. The allegation regarding A.C. Miller is denied, however, in that by the end of this interaction, MarkWest had withdrawn this request. It is affirmatively denied that there were “documented safety, quality and schedule issues on the Project.”

51. Westcon denies the allegations in paragraph numbered 51. It is affirmatively stated that by the end of the October 21, 2015 meeting referenced in the response to paragraph numbered 50, MarkWest was not seeking the removal of A.C. Miller.

52. Regarding paragraph numbered 52, it is admitted that a meeting took place on or about October 29, 2015 and that it was attended by Mark Peterson, President and CEO of Westcon, Andrew Cottle and MarkWest representatives. The remaining allegations in this paragraph are denied.

53. Regarding paragraph numbered 53, it is denied that Westcon failed to respond to any issues reasonably raised by MarkWest in the meeting referenced in response to the allegations in paragraph numbered 52. It is affirmatively stated that during the course of the meeting several projects were discussed, including but not limited to the Mobley Site, and that there were discussions about possible additional work that would result in additional Westcon

resources in the Eastern Region. It is affirmatively denied, however, that there was a lack of resources at the Mobley Site.

54. Westcon denies the allegations in paragraph numbered 54.

55. Regarding the allegations in paragraph numbered 55, it is admitted that a crane accident occurred on November 13, 2015 at the Mobley Site. All other allegations in this paragraph are denied.

56. Regarding the allegations in paragraph numbered 56, Westcon admits that a crane accident occurred on November 13, 2015, resulting in property damage. It is further admitted that a crane was operating in close proximity to a building located on the Mobley Site. All other allegations in this paragraph are denied.

57. Regarding paragraph numbered 57, it is admitted that following a crane accident on November 13, 2015, three individuals sought medical treatment. Westcon lacks information sufficient to form an opinion or belief regarding the remaining allegations in this paragraph and therefore denies the same.

58. Regarding paragraph 58, it is admitted that following the crane accident MarkWest told Westcon that Westcon would not be allowed to use Westcon crane operators for cranes in use at the Mobley site and that third party crane operators had to be utilized going forward. It is denied that MarkWest was “forced” to make this decision.

59. Regarding paragraph numbered 59, Westcon admits only that after the crane incident on November 13, 2015, MarkWest asked for the removal of A.C. Miller, a project manager at the Mobley Site, from the Mobley Site and that Westcon adhered to this request. It is denied that A. C. Miller was the “Contractor Representative.”

60. Regarding paragraph 60, it is denied that MarkWest instructed Westcon that Westcon's personnel could not drive or otherwise use fork trucks of the type referenced in this paragraph. It is denied that the fork truck was "improperly utilized" for lifting. It is admitted, however, that during a lift a load on the fork truck came into contact with a valve atop a pipe.

61. Regarding paragraph 61, it is admitted only that an accident occurred involving a fork truck, wherein a load on the fork truck came into contact with a valve atop a pipe. It is admitted that following the contact, the line in question was shut down for a brief period of time. Westcon lacks information sufficient to form an opinion or belief as to whether this caused a substantial loss of plant throughput or a serious gas leak, and therefore denies the same.

62. Regarding paragraph numbered 62, Westcon admits, upon information and belief, that MarkWest does business with other entities, presumably in relation to the Marcellus Shale gas fields.

63. Westcon lacks information sufficient to form an opinion or belief regarding the allegations in paragraph numbered 63 and therefore denies the same.

64. Westcon lacks information sufficient to form an opinion or belief regarding the allegations in paragraph numbered 64 and therefore denies the same.

65. Regarding paragraph numbered 65, Westcon denies that it breached its obligations under the relevant contracts and denies that it was unprepared, disorganized or unable to do the work. Westcon admits that the projects the subject of the relevant contracts experienced delay, but affirmatively states that the source of such delay were issues associated with MarkWest and the Mobley Site.

66. Regarding paragraph 66, it is admitted that MarkWest and Westcon agreed to extend certain deadlines in relation to the NE Corner Contract and further that the scope of work was not complete on the initially selected date. It is denied that the incomplete scope of work was related to any fault, breach or omission of or by Westcon.

67. Regarding paragraph 67, it is admitted that MarkWest and Westcon agreed to extend certain deadlines in relation to the Mobley V Contract and further that the work was not complete on the initially selected date. It is denied, however, that the incomplete work was related to any fault, breach or omission of or by Westcon.

68. Westcon denies the allegations in paragraph numbered 68.

69. Westcon denies the allegations in paragraph numbered 69.

70. Regarding paragraph numbered 70, it is admitted that Westcon performed welding work pursuant to the Mobley V Contract on the two referenced pressure vessels in July of 2015.

71. Regarding paragraph numbered 71, Westcon states that during the course of the project, numerous documents were provided to MarkWest pertaining to the welds at issue and describing their state, how they were tested, and issues pertaining to their service. Such documents speak for themselves and Westcon refers to those documents for their content. Westcon further states that such documents represented Westcon's understanding in relation to the welds or changes requested by MarkWest personnel, its employees or agents. To the extent the allegations in paragraph 71 are inconsistent with the above, they are denied.

72. Regarding paragraph numbered 72, Westcon states that during the course of the project, numerous documents were provided to MarkWest regarding the inspection and testing of the welds at issue. Such documents speak for themselves and Westcon refers to those

documents for their content. Westcon further admits that some of these documents reference API 1104 and some reference ASME Boiler Code Section VIII.

73. Regarding paragraph numbered 73, Westcon states that during the course of the project, numerous documents were provided to MarkWest that could be construed as relevant to a fitness for service evaluation. Such documents speak for themselves and Westcon refers to those documents for their content.

74. Regarding paragraph numbered 74, Westcon admits only that MarkWest requested information regarding the welding performed on the pressure vessels identified as T-501 and T-531.

75. Westcon denies the allegations in paragraph numbered 75.

76. Regarding paragraph numbered 76, Westcon admits only that stamps were affixed to the T-501 and T-531 vessels. It is denied that these stamps were affixed in March of 2016. It is further denied that these stamps were affixed, “instead” of responding to requests for information from MarkWest.

77. Regarding paragraph numbered 77, Westcon admits only that stamps were affixed to the T-501 and T-531 pressure vessels. The remainder of the statements in this paragraph state legal conclusions to which no response is required. To the extent any response is required, they are denied.

78. Westcon denies the allegations in paragraph numbered 78.

79. Regarding paragraph numbered 79, Westcon admits only that the welding in relation to the two identified pressure vessels were initially tested, in whole or in part, to the API 1104 standard and that these vessels were subject to warranty repair. All other allegations in this paragraph are denied.

80. Westcon denies the allegations in paragraph numbered 80.

81. Westcon denies the allegations in paragraph numbered 81.

82. Regarding paragraph numbered 82, Westcon admits only that on or about April 20, 2016, documentation regarding welds on the T-501 and T-531 pressure vessels were provided to MarkWest. Westcon affirmatively denies that this information had been requested by MarkWest for “months.” All other allegations in this paragraph are denied.

83. Westcon lacks information sufficient to form an opinion or belief regarding the statements contained in paragraph numbered 83 and therefore denies the same.

84. Regarding paragraph numbered 84, Westcon admits only that after providing information to MarkWest regarding the welds on the T-501 and T-531 pressure vessels, an employee or agent of MarkWest made inquiry regarding the reference to the use of the API 1104 standard contained in this information.

85. Regarding paragraph numbered 85, Westcon admits only that a meeting took place on or about May 6, 2016, between Westcon employees and agents or employees of MarkWest. It is affirmatively stated that at this time MarkWest was made aware that additional review of the welds on the T-501 and T-531 pressure vessels was underway. The remaining allegations of this paragraph are denied.

86. Regarding paragraph numbered 86, it is affirmatively stated that on or about May 6, 2016, MarkWest was informed through its employees or agents that an additional review of the welds at issue was going to be undertaken.

87. Regarding paragraph numbered 87, it is admitted only that on May 19, 2016, Kevin Fox met with Manual Alvarez, an employee or agent of MarkWest, reviewed the documentation with him regarding the T-501 and T-531 pressure vessels, and conveyed to

Alvarez information that had been prepared in accordance with Alvarez's direction. All other allegations in this paragraph are denied.

88. Regarding paragraph numbered 88, it is admitted that Alvarez signed the transmittal for the information received from Kevin Fox. It is denied that this was a "brief" review of the documentation. Westcon lacks information sufficient to form an opinion or belief regarding the remainder of the allegations in this paragraph and therefore denies the same.

89. Westcon denies the allegation in paragraph numbered 89.

90. Regarding paragraph numbered 90, it is admitted that Westcon informed MarkWest that it was having the welds on the T-501 and T-531 pressure vessels examined and kept MarkWest apprised of this activity during various parts of the month of May, 2016. It is denied that this information was relayed to MarkWest in response to turning over the pressure vessel documentation regarding the T-501 and T-531 pressure vessels on May 19, 2016.

91. Regarding paragraph numbered 91, it is admitted only that on May 20, 2016, O'Donnell Consulting Engineers (herein "O'Donnell") sent correspondence to Westcon. To the extent this paragraph references language from that document, it speaks for itself and Westcon refers to that document for the content thereof.

92. Regarding paragraph numbered 92, Westcon states that the referenced document speaks for itself and refers to that document for the content thereof.

93. Regarding paragraph numbered 93, Westcon states that the referenced document speaks for itself and refers to that document for the content thereof.

94. Regarding paragraph numbered 94, Westcon states that the referenced document speaks for itself and refers to that document for the content thereof.

95. Regarding paragraph numbered 95, Westcon admits that the document from O'Donnell was received by it on Friday, May 20, 2016, that Westcon sought to communicate with MarkWest regarding this document the following Monday, May 23, 2016, and emailed the document to MarkWest on Tuesday May 24, 2016. Westcon affirmatively denies that the welds on the pressure vessels were dangerously defective and that the vessels could not be legally operated. All other allegations in this paragraph are denied.

96. Westcon denies the allegations in paragraph numbered 96.

97. Regarding paragraph numbered 97, it is admitted only that Westcon emailed the O'Donnell document to MarkWest on May 24, 2016.

98. Regarding paragraph numbered 98, Westcon admits only that warranty work remained to be performed on the welds on the T-501 and T-531 pressure vessels and that the welds on these two pressure vessels had been tested, in whole or in part, under the API 1104 standard. To the extent the remaining allegations state legal conclusions, no response is required. To the extent any response is required, they are denied.

99. Regarding paragraph numbered 99, Westcon states that it admits only that repair work falling under its warranty obligations was necessary in relation to the welds on the T-501 and T-531 pressure vessels. The remaining statements assert legal conclusions to which no response is required. To the extent any response is required, they are denied.

100. Westcon denies the allegations in paragraph numbered 100.

101. Westcon denies the allegations in paragraph numbered 101.

102. Regarding paragraph numbered 102, Westcon denies that the project was in danger of imminent and catastrophic failure and further denies that lives were at risk. Westcon denies that it acted in a reckless or wanton manner. Westcon admits that its work at the

Mobley Site was terminated, but affirmatively states that such termination was without cause. Westcon lacks information sufficient to form an opinion or belief as to the exact nature of the steps MarkWest took in relation to addressing issues pertaining to the welds on the two relevant pressure vessels and therefore denies such allegations.

103. Westcon denies the allegations in paragraph numbered 103.

104. Regarding paragraph numbered 104, Westcon affirmatively states that it substantially complied with its scope of work, and that remaining work would have been performed in accord with the understandings between MarkWest and Westcon, had MarkWest not terminated Westcon from the Mobley Site. Westcon affirmatively denies that it failed to prosecute its work with promptness or diligence and further denies the other allegations in this paragraph.

105. Regarding paragraph numbered 105, Westcon affirmatively states that it substantially complied with its scope of work. Westcon affirmatively denies that it was “not even close” to achieving project completion.

106. Regarding paragraph numbered 106, Westcon states that at the time it was terminated from the Mobley Site there remained approximately \$240,000 in relation to the initial lump sum contract value to Westcon, or less, associated with the Mobley V Contract. To the extent the allegations in this paragraph are inconsistent with the above, they are denied.

107. Regarding paragraph numbered 107, Westcon affirmatively states that it substantially complied with its scope of work, and that remaining work would have been performed in accord with the understandings between MarkWest and Westcon. Westcon affirmatively denies that it was appropriately terminated for cause in relation to this or any

contract on site. Westcon denies that there would be “substantial cost” associated with the completion of the balance of the referenced scope of work.

108. Westcon denies the allegations in paragraph numbered 108.

109. Westcon denies the allegations in paragraph numbered 109.

110. Regarding paragraph numbered 110, it is admitted only that approximately two weeks before Westcon was terminated from the Mobley Site, MarkWest sent Westcon a punch list. Westcon affirmatively states that at the time of the termination from the Mobley Site, that approximately 60% of the items on this list were complete. Westcon denies that the punch list related to “contract deficiencies,” but was instead the typical type of punch list for a project of the applicable size and scope. All allegations inconsistent with the above are denied.

111. Regarding paragraph numbered 111, Westcon admits that it addressed the punch list provided by MarkWest and that it was working towards its completion in a timely and appropriate manner. To the extent this paragraph references a “pattern and practice,” Westcon affirmatively denies any negative inference therefrom.

112. Regarding paragraph numbered 112, Westcon denies the allegations regarding “defective work” and affirmatively states that it was completing the punch list items in the normal course.

113. Westcon denies the allegations in paragraph numbered 113.

114. Regarding paragraph numbered 114, it is admitted that by letters dated May 26, 2016 and May 27, 2016 that MarkWest communicated to Westcon that it was terminating the contracts on various grounds. Westcon denies those grounds and further affirmatively denies breach, illegal and intentional misconduct, gross negligence, or any other tortious conduct.

115. Regarding paragraph numbered 115, the statements in this paragraph reference communications sent from MarkWest to Westcon and such documents speak for themselves and Westcon refers to those documents for the content thereof. Westcon affirmatively denies that it owes MarkWest the damages MarkWest claims, denies all allegations of breach and tortious conduct and denies that it is liable for the damages listed therein.

116. Regarding paragraph numbered 116, the statements in this paragraph reference communications and contracts and such documents speak for themselves and Westcon refers to those documents for the content thereof. To the extent the statements in this paragraph could be construed to imply the breach of any duty under any relevant contract, they are denied.

117. Regarding paragraph numbered 117, Westcon denies that it owes MarkWest for the damages alleged in this paragraph and further denies any tortious or other misconduct or breach as stated or implied in this paragraph. Westcon admits only that it has offered to perform warranty work to repair the welds related to the relevant pressure vessels and further states this is the only appropriate relief under the relevant contract.

118. Regarding paragraph numbered 118, Westcon admits that it sent a letter by date of May 31, 2016 to MarkWest. In further response to the allegations in this paragraph, Westcon states that the document speaks for itself, and refers to that document for the content thereof.

119. Westcon denies the allegations in paragraph numbered 119 and further affirmatively denies that it has committed any tortious act.

**COUNT I**  
**(Allegations related to Claim of**  
**Breach Of Contract)**

120. Westcon restates and incorporates by reference the foregoing paragraphs as if fully set forth herein.

121. Regarding paragraph numbered 121, it is admitted that MarkWest and Westcon signed three construction contracts related to the Mobley Site. Further in response to the allegations, Westcon states that the agreements speak for themselves and refers to those documents and the content thereof.

122. Westcon denies the allegations in paragraph numbered 122.

123. Westcon denies the allegations in paragraph numbered 123.

124. Westcon denies the allegations in paragraph numbered 124.

125. Westcon denies the allegations in paragraph numbered 125.

Regarding the “WHEREFORE” clause, Westcon denies that judgment in MarkWest’s favor is appropriate and denies that damages are owed to MarkWest.

WHEREFORE, Westcon requests the Court to enter judgment in its favor and against MarkWest, that it dismiss MarkWest’s claims with prejudice, and that it grant Westcon such other appropriate relief as the Court deems necessary.

**COUNT II**  
**(Allegations Relating To Claim**  
**Of Negligence/Gross Negligence)**

126. – 132. For Westcon’s response to Count II of Plaintiff’s Complaint, including paragraphs numbered 126, 127, 128, 129, 130, 131, 132, and the unnumbered “WHEREFORE” clause, see Westcon’s previously filed Partial Motion to Dismiss. Pursuant to

the filing of this motion, Westcon has no obligation to respond and further affirmatively denies that MarkWest is entitled to any relief in relation to this claim.

**COUNT III**  
**(Allegations Related To Claim of Fraud)**

133. – 141. For Westcon’s response to Count III of Plaintiff’s Complaint, including paragraphs numbered 133, 134, 135, 136, 137, 138, 139, 140, 141, and the unnumbered “WHEREFORE” clause, see Westcon’s previously filed Partial Motion to Dismiss. Pursuant to the filing of this motion, Westcon has no obligation to respond and further affirmatively denies that MarkWest is entitled to any relief in relation to this claim.

**COUNT IV**  
**(Allegations Related To Claim of Negligent Misrepresentation)**

142. – 151. For Westcon’s response to Count IV of Plaintiff’s Complaint, including paragraphs numbered 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, and the unnumbered “WHEREFORE” clause, see Westcon’s previously filed Partial Motion to Dismiss. Pursuant to the filing of this motion, Westcon has no obligation to respond and further affirmatively denies that MarkWest is entitled to any relief in relation to this claim.

**COUNT V**  
**(Allegations Related to the Specific Performance Claim)**

152. Westcon restates and incorporates by reference the foregoing paragraphs of the answer as if fully set forth herein.

153. Regarding paragraph 153, Westcon admits that it signed three construction contracts with MarkWest. Further in response to this paragraph, Westcon states that the construction agreements speak for themselves and refers to those documents for the content thereof.

154. Regarding paragraph 154, the statements therein set forth legal conclusions to which no response is required.

155. Westcon denies the allegations in paragraph numbered 155.

156. Westcon denies the allegations in paragraph numbered 156.

157. Westcon denies the allegations in paragraph numbered 157.

158. Regarding paragraph numbered 158, Westcon states that the contracts at issue speak for themselves and refers to those documents for the content thereof.

159. Regarding paragraph numbered 159, Westcon states that the letters that are the subject of these statements speak for themselves and refers to those documents for the content thereof.

160. Regarding paragraph 160, to the extent this paragraph states a legal conclusion, no response is required. Westcon affirmatively denies that it has failed to provide to MarkWest any materials which Westcon may be deemed contractually obligated to provide.

161. Regarding paragraph 161, Westcon states that it references an entity not a party to this litigation and therefore no response is required. To the extent this paragraph was intended to reference Westcon, Westcon denies the allegation.

162. Westcon denies the allegations in paragraph numbered 162.

163. Regarding paragraph numbered 163, to the extent its allegations state legal conclusions, no response is required. Westcon affirmatively states, however, that no “project materials” that it is otherwise obligated to provide to MarkWest have been withheld. Westcon further denies any remaining allegations in paragraph 163.

164. Westcon denies the allegations in paragraph numbered 164.

Regarding the “WHEREFORE” clause, Westcon affirmatively denies that any damages alleged are owed or relief alleged justified.

WHEREFORE, Westcon prays that this lawsuit be dismissed and that Westcon be awarded its costs and reasonable attorney fees and such other relief as may seem just and equitable.

#### **FIRST DEFENSE**

The complaint fails to state a claim against Westcon upon which relief may be granted.

#### **SECOND DEFENSE**

Plaintiff’s claims are barred, in whole or in part, because Plaintiff has failed to allege and has not suffered any cognizable injury.

#### **THIRD DEFENSE**

Plaintiff’s claims are barred, in whole or in part, because Plaintiff has failed to allege and has not suffered injury in fact.

#### **FOURTH DEFENSE**

Plaintiff’s claims are barred, in whole or in part, by the doctrines of estoppel, waiver, failure to mitigate, ratification and/or unclean hands.

#### **FIFTH DEFENSE**

Plaintiff’s claims are barred, in whole or in part, for failure to join indispensable parties.

#### **SIXTH DEFENSE**

Plaintiff’s claims are barred, in whole or in part, because Westcon is not liable for the acts of any other third party and because the injuries alleged by Plaintiff, to the extent any

exist, were caused, in whole or in part, by the conduct of third parties for whom Westcon was not responsible.

#### **SEVENTH DEFENSE**

Plaintiff's claims are barred to the extent that claimed injuries and/or damages were not legally and proximately caused by any acts or omissions of Westcon.

#### **EIGHTH DEFENSE**

The types of damages sought by Plaintiff are unreasonable based upon any alleged breach of the contracts at issue, are affirmatively prohibited by the terms of said contracts and thereby would constitute an unenforceable penalty and are therefore against public policy.

#### **NINTH DEFENSE**

MarkWest breached the construction contracts at issue, wrongfully seeking to terminate the contracts pursuant to cause, and these acts and other acts and omissions on the part of MarkWest, precluded Westcon from completing the work.

#### **TENTH DEFENSE**

The damages sought in the Complaint are limited or barred, in whole or in part, by the applicable "no damage for delay" clause, under which "Late Completion Payments" for "unexcused Schedule Delay" are the sole monetary remedy as a form of liquidated damages, both in regard to amounts assessed *per diem*, and total amounts assessed in the aggregate for all alleged Schedule Delays.

#### **ELEVENTH DEFENSE**

The damages sought in the Complaint are limited or barred, in whole or in part, by express contractual waivers, as a form of excused Schedule Delay, and/or enforceable written

or oral modification(s), amendment(s). Westcon further asserts the doctrine of accord and satisfaction.

**TWELFTH DEFENSE**

The damages sought in the Complaint are limited or barred, in whole or in part, by the applicable contractual exclusion(s) of consequential damages.

**THIRTEENTH DEFENSE**

Plaintiff's failure to make required payments under the applicable contract(s) constitutes a material breach, which discharges Westcon's duty of return performance and limits or bars, in whole or in part, Plaintiff's claims for breach of contract damages.

**FOURTEENTH DEFENSE**

Plaintiff's claims are barred in part by the economic loss doctrine and/or gist of the action doctrine.

**FIFTEENTH DEFENSE**

To the extent that Plaintiff has failed to mitigate its alleged damages, Plaintiff cannot recover such damages in this action.

**SIXTEENTH DEFENSE**

The damages sought in the Complaint are unforeseeable to Westcon and/or speculative and not reasonably certain to be incurred.

**SEVENTEENTH DEFENSE**

Plaintiff or its employees, agents, and/or contractors performed an independent investigation. Consequently, pursuant to the independent investigation doctrine, Plaintiff is deemed to have relied upon its own investigation and not upon the representations of Westcon.

### **EIGHTEENTH DEFENSE**

MarkWest's claims for punitive damages are barred by the express terms of the contracts entered into with Westcon. Further, such punitive damage claims violate Westcon's right to procedural due process and constitute "excessive fines." MarkWest's claims are unconstitutional and are therefore barred by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article 3, Section 5 of the West Virginia Constitution.

### **NINETEENTH DEFENSE**

MarkWest warranted that its plans and specifications for construction at the Mobley Site were adequate for Westcon to fulfill its contractual obligations. To the extent the alleged damages asserted in the Complaint were caused by breach of said warranty, Westcon invokes the defense of the implied warranty of adequate plans and specifications.

### **RESERVATION OF RIGHTS TO ASSERT ADDITIONAL DEFENSES**

Westcon has not knowingly or intentionally waived any applicable defenses, and it reserves the right to assert and rely upon other applicable defenses that may become available by statute, rule, regulation or other source of law, or as becomes apparent during discovery in this matter. Westcon reserves the right to amend and/or seek to amend and/or assert its answer and/or affirmative defenses.

### **JURY DEMAND**

Pursuant to the Seventh Amendment and the West Virginia Rules of Civil Procedure, Westcon demands a trial by jury of all issues that are triable.

## **COUNTERCLAIMS OF BILFINGER WESTCON INC.**

Bilfinger Westcon Inc. (“Westcon”), by counsel, hereby files its counterclaims against Plaintiff and Counter-Defendant MarkWest Liberty Midstream & Resources, L.L.C. (“MarkWest”).

### **PARTIES**

1. Westcon is a North Dakota corporation with its principal office located at 7401 Yukon Drive, Bismarck, ND, 58503.

2. 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.

### **JURISDICTION AND VENUE**

3. Jurisdiction is appropriate in this case based upon the remand of this action to this Court by the United States District Court, Northern District of West Virginia, and its opinion, dated November 4, 2016 and, by virtue of the application of that opinion, W. Va. Code § 51-2-2.

4. Similarly, venue is appropriate in the Circuit Court of Wetzel County, West Virginia based upon the recent Remand Order and because the events giving rise to this cause of action occurred in part in Wetzel County, West Virginia.

### **FACTS**

5. By contract with an effective date of May 19, 2015, entitled “Construction Contract Mobley V and Flare, Residue, and PSV Piping Lump Sum” (herein the “Mobley V and Flare Contract,”) Westcon entered into a construction contract with MarkWest for work to be performed at a location owned and operated by MarkWest and referred to as the Mobley Processing Plant in Wetzel County, West Virginia (herein the “Mobley Site”). A copy of this

agreement is attached as Exhibit 3 to Exhibit A to this filing and is incorporated herein by reference.

6. By contract with an effective date of October 5, 2015, entitled “Construction Contract Mobley Inlet Compression Lump Sum” (herein the “Inlet Compression Contract”), Westcon entered into a construction contract with MarkWest for work to be performed at the Mobley Site. A copy of this agreement is attached as Exhibit 4 to Exhibit A to this filing and is incorporated herein by reference.

7. By contract with an effective date of October 7, 2015, entitled “Construction Contract Mobley NE Corner Lump Sum” (herein the “NE Corner Contract”), Westcon entered into a construction contract with MarkWest for work to be performed at the Mobley Site. A copy of this agreement is attached as Exhibit 5 to Exhibit A to this filing and is incorporated herein by reference. The three above referenced contracts, the Mobley V and Flare Contract, the Inlet Compression Contract and the NE Corner Contract, are at times referred to herein collectively as the “Mobley Contracts.”

8. During the course of performing the Mobley V and Flare Contract, MarkWest requested additional work outside the scope of the contract and affirmatively represented that any required documentation, including the signing of change orders and the issuance of Purchase Order Modifications, in relation to such additional scope of work would be forthcoming.

9. The additional work requested for the Mobley V and Flare Contract materially altered Westcon’s scope of work at great additional expense.

10. In reliance upon the representations and assurances of MarkWest, its employees and agents, Westcon expended substantial amounts of money and entered into

commitments and transactions that resulted in substantial obligations and expenses associated with Westcon's performance of this additional scope of work.

11. During the course of performing the Inlet Compression Contract, MarkWest requested additional work outside the scope of the contract and affirmatively represented that any required documentation, including the signing of change orders and the issuance of Purchase Order Modifications, in relation to such additional scope of work would be forthcoming.

12. The additional work requested for the Inlet Compression Contract materially altered Westcon's scope of work at great additional expense.

13. In reliance upon the representations and assurances of MarkWest, its employees and agents, Westcon expended substantial amounts of money and entered into commitments and transactions that resulted in substantial obligations and expenses associated with Westcon's performance of this additional scope of work.

14. During the course of performing the NE Corner Contract, MarkWest requested additional work outside the scope of the contract and affirmatively represented that any required documentation, including the signing of change orders and the issuance of Purchase Order Modifications, in relation to such additional scope of work would be forthcoming.

15. The additional work requested for the NE Corner Contract materially altered Westcon's scope of work at great additional expense.

16. In reliance upon the representations and assurances of MarkWest, its employees and agents, Westcon expended substantial amounts of money and entered into

commitments and transactions that resulted in substantial obligations and expenses associated with Westcon's performance of this additional scope of work.

17. Throughout the course of the work associated with the Mobley Contracts, conditions on site, including but not limited to materially different subsurface and/or physical conditions, and other acts and omissions of MarkWest, its employees and agents, delayed work resulting in additional expenses, costs and other damages to Westcon. Such circumstances, acts and omissions of MarkWest violated and otherwise breached the Mobley Contracts, including, but not limited to, entitling Westcon to an adjustment in the lump sum fixed prices and other such compensation as is necessary to reimburse Westcon for direct, unavoidable, and reasonable costs.

18. In late May of 2016, Westcon sent correspondence dated May 26, 2016 and May 27, 2016 purporting to terminate the Mobley V and Flare Contract, the Inlet Compression Contract and the NE Corner Contract for cause. Such actions were wrongful, not in accordance with the agreements of the parties and caused Westcon damage.

19. The Mobley Contracts each include a paragraph 23.3, a termination for convenience clause, which provided that MarkWest could terminate the contracts at any time by giving a ten (10) day written notice to Westcon. In the event of such termination, MarkWest was obligated to pay Westcon for all work satisfactorily completed through the date of such termination, all reasonable termination and demobilization expenses, including, but not limited to, unavoidable cancellation fees, committed costs, and penalties of third parties, and a pro rata share of any fixed portions of Westcon's compensation based upon the percentage of completion of the scope of work as of the termination date.

20. Despite the obligations set forth in the Mobley Contracts and pursuant to paragraphs 23.3, MarkWest failed to satisfy the terms of these provisions, materially breached the same and has caused Westcon damages.

21. In addition, the Mobley Contracts gave Westcon the right to perform warranty work pursuant to the contractor's warranty set forth in paragraphs 10.0. With respect to welds on two Pressure Vessels, identified above as the De-Ethanizer and the De-Methanizer, Westcon timely offered to perform such warranty work at its own cost and expense, but such offer was denied. Instead, MarkWest wrongfully terminated Westcon from the site, denying it the opportunity to complete its warranty work. Therefore, MarkWest's claim for costs to fix the two Pressure Vessels is barred.

**COUNT I**  
**(Breach of Contract)**

22. Westcon re-alleges and incorporates by reference the allegations in paragraphs 1 through 21.

23. MarkWest materially breached its express and implied obligations in the Mobley Contracts by taking actions and positions that were in contravention of its contractual commitments and that were intended to and/or had the effect of interfering with, hindering or prohibiting Westcon from performing under the Mobley Contracts, thus defeating the intentions and reasonable expectations of Westcon as a party to the Mobley Contracts and defeating Westcon's ability to perform the work in a timely and cost efficient manner.

24. In addition, MarkWest materially breached the Mobley Contracts by failing to issue necessary change orders, despite requesting material changes and additional work beyond the scopes of work set forth in the Mobley Contracts and assuring that change

orders and/or Purchase Order Modifications would be issued while demanding that such work be performed in an expeditious fashion and ahead of that documentation.

25. MarkWest failed to comply with the terms of the Mobley Contracts by directing Westcon to perform additional work without following the terms of the Mobley Contracts and changing and/or materially altering the work while it was being performed without complying with the Mobley Contracts and then breaching the Mobley Contracts by failing to compensate Westcon for the work it performed at MarkWest's direction.

26. MarkWest agreed to pay Westcon for work performed by Westcon as provided for by the Mobley Contracts.

27. Westcon substantially complied with the Mobley Contracts and performed work at the site satisfactorily for MarkWest. MarkWest breached the Mobley Contracts by refusing to pay Westcon for work it performed and materials it purchased.

28. MarkWest had knowledge of and accepted partial or complete performance of additional work by Westcon upon the manifest understanding that the additional work would be duly compensated, constituting contractual amendments, alterations, modifications and/or separate agreements which MarkWest is required to honor, due to MarkWest's material alterations of the Mobley Contracts, due to MarkWest's prevention or hindrance of Westcon's performance, and/or pursuant to the doctrines of waiver and estoppel.

29. With respect to the Mobley V and Flare Contract, Westcon's damages have been partially quantified in relation to invoices pursuant to work performed and project completion in the amount of **\$5,734,569.90**. MarkWest has breached the Mobley V and Flare Contract by refusing to timely pay this sum, which is due and owing.

30. With respect to the Inlet Compression Contract, Westcon's damages have been partially quantified in relation to invoices pursuant to work performed and project completion in the amount of **\$837,038.92**. MarkWest has breached the Inlet Compression Contract by refusing to timely pay this sum, which is due and owing.

31. With respect to the NE Corner Contract, Westcon's damages have been partially quantified in relation to invoices pursuant to work performed and project completion in the amount of **\$692,146.31**. MarkWest has breached the NE Corner Contract by refusing to timely pay this sum, which is due and owing. Unpaid invoices related to the Mobley Contracts equal **\$7,263,755.13**.

32. As a proximate result of acts, omissions, and breaches by MarkWest, Westcon has suffered substantial damages, including, but not limited to, damages for unpaid invoices, uncompensated work satisfactorily completed through the date of termination, all reasonable termination and demobilization expenses, including, but not limited to, unavoidable cancellation fees, committed costs, and penalties of third parties, and a pro rata share of any fixed portions of Westcon's compensation based upon the percentage of completion of the scope of work as of the termination date, delay damages, and other damages, including damages to be quantified.

**COUNT II**  
**(Quantum Meruit/Unjust Enrichment)**

33. Westcon re-alleges and incorporates by reference the allegations in paragraphs 1 through 32, above.

34. The above-described work was materially different or additional to the original subject matter and scope of work in the Mobley Contracts.

35. Westcon performed the above-described services under such circumstances that it reasonably expected to be paid for such services by MarkWest.

36. MarkWest was unjustly enriched by the work Westcon performed at MarkWest's directions, and unjustly enriched by retaining the materials Westcon supplied to MarkWest, for which MarkWest has refused to pay causing damage to Westcon. The benefits MarkWest received and retained from Westcon's work and materials were such that it would be inequitable and unconscionable to permit MarkWest to receive those benefits and avoid payment therefor.

37. As a proximate result of MarkWest's refusal to pay for services and materials provided by Westcon, Westcon is entitled to recover damages under theories of *quantum meruit* and/or unjust enrichment, including the reasonable value of the work it performed for MarkWest and materials it purchased.

**COUNT III**  
**(Mechanics' Lien Enforcement)**

38. Westcon re-alleges and incorporates by reference the allegations in paragraphs 1 through 37, set forth above.

39. MarkWest has breached the Mobley Contracts by failing to pay Westcon the sum of **\$7,263,755.13**, plus interest, still due and owing, related to Westcon's performance of its obligations. This sum includes the contract prices as well as additional sums pursuant to change orders and related amounts.

40. Westcon provided labor and materials, in the amounts referenced above, as part of the construction work performed by it at the Mobley Site.

41. Within 100 days of ceasing to provide labor and materials, Westcon caused to be recorded with the Office of the Clerk of the County Commission of Wetzel County,

West Virginia, A Notice of Mechanics' Lien in the amount of **\$7,263,755.13**, claiming a lien on the interest in and upon the real estate, buildings structures and improvements situate on the described property, as more fully identified in the Notice of Mechanics' Lien and related exhibits, attached hereto as Exhibit A, and incorporated herein by reference. Said Mechanics' Lien was recorded on August 16, 2016, in said Clerk's Office as Instrument No. 207463, in Lien Book 6, at Page 1, and served via the West Virginia Secretary of State on August 17, 2016.

42. Westcon has fully complied with all of the applicable provisions of §38-2-1 et seq. of the West Virginia Code, as amended, for perfecting and enforcing its lien against MarkWest.

43. Westcon claims lien priority from the date any work was first commenced by it at the Mobley Site.

44. Westcon has brought its lien enforcement action within six months of the recording of its Notice of Mechanics' Lien. The debts set forth therein have been due and payable and remain due and payable and MarkWest has been and remains in breach as of the filing of this counter-claim.

45. Pursuant to W. Va. Code § 38-2-1 et seq., Westcon is entitled to have its lien against the property owned by MarkWest, and upon which the Mobley Site is constructed, and the structures and improvements Westcon has made thereto, enforced and preserved, and Westcon is entitled to a decree of sale of said property after the Court ascertains the amount and priority of the liens against the property, and Westcon is also entitled to *in personam* judgment in its favor and against MarkWest in the amount of the statutory lien, plus statutory interest and costs and such other damages as appropriate.

**COUNT IV**  
**(Declaratory Judgment)**

46. Westcon re-alleges and incorporates by reference the allegations in paragraphs 1 through 45, set forth above.

47. For the reasons stated and facts set forth above, an actual controversy exists between the parties hereto.

48. Westcon requests a declaration of its rights with respect to the above matters through an Order declaring the following:

- a. MarkWest owes Westcon the following amounts as damages in this action: **\$7,263,755.13** plus statutory interests and costs for the work Westcon agreed to and did satisfactorily perform and for materials it supplied at MarkWest's direction;
- b. MarkWest owes Westcon such additional damages related to delay and other material breaches of the contract, yet to be quantified;
- c. MarkWest's refusal to pay Westcon is not in good faith and otherwise did not comply with the terms of the agreements between the parties;
- d. MarkWest has an obligation to pay all sums due and owing for the work performed by Westcon;
- e. MarkWest materially altered or changed the subject matter and scope of original work under the Mobley Contracts and owes Westcon damages to compensate for additional work performed under the new scope of work;
- f. MarkWest materially breached the contract by hindering or prohibiting performance, and/or breach of its obligation to compensate Westcon for materially different subsurface and/or physical conditions;
- g. MarkWest is required to honor its contractual amendments, alterations, modifications and/or separate agreements with Westcon, due to MarkWest's material alterations of the Mobley Contracts, due to MarkWest's prevention or hindrance of Westcon's performance, and/or pursuant to the doctrines of waiver and estoppel;

- h. MarkWest materially breached the Mobley Contracts by failing to issue necessary change orders, under which MarkWest is obligated to pay damages constituting compensation for additional work performed by Westcon;
- i. Westcon satisfactorily and substantially performed its work and obligations owed to MarkWest and with respect to the referenced warranty work and Westcon's prompt offer to satisfy, repair and attend to such warranty work;
- j. Westcon at all times acted in accord with the instructions of MarkWest, its employees or agents;
- k. MarkWest was not damaged by any alleged breach of the Mobley Contracts by Westcon;
- l. Westcon should be granted such other and further relief as the court deems just and proper.

**PRAYER FOR RELIEF**

WHEREFORE, Defendant and Counterclaimant Westcon respectfully requests the following relief:

1. That this Court enforce the Mechanics' Lien against MarkWest's property and enter a decree selling the property in satisfaction of the lien and in accordance with Count III of this Counterclaim and/or in the alternative;
2. That a judgment be entered in favor of Westcon and against MarkWest in the amount of **\$7,263,755.13** in relation to the Mobley Contracts and for such additional actual and identified damages suffered as a result of MarkWest's breach of contract, including an award in *quantum meruit* and unjust enrichment as appropriate;
3. That the Court award Westcon prejudgment and post-judgment interest, costs, attorney's fees, and such other and further general and specific relief as this Court deems just and proper.

**JURY DEMAND**

Pursuant to the Seventh Amendment and the West Virginia Rules of Civil Procedure, Westcon demands a trial by jury of all issues that are triable. Dated this 7<sup>th</sup> day of November, 2016.

**BILFINGER WESTCON INC.**

**By Counsel**

*John R. Callcott by Philip T. Hulett 11/07/2016*  
Eric J. Hulett, Esq. (WV Bar #6332)  
Steptoe & Johnson PLLC  
1250 Edwin Miller Blvd., Suite 300  
Martinsburg, WV 25404  
Phone: (304) 262-3519  
Fax: (304) 262-3541  
[eric.hulett@steptoe-johnson.com](mailto:eric.hulett@steptoe-johnson.com)

John R. Callcott, Esq. (WV Bar #9206)  
Steptoe & Johnson PLLC  
1085 Van Voorhis Road, Suite 400  
Morgantown West Virginia 26505  
Phone: (304) 598-8151  
Fax: (304) 598-8116  
[john.callcott@steptoe-johnson.com](mailto:john.callcott@steptoe-johnson.com)

Devon J. Stewart, Esq. (WV Bar #11712)  
Steptoe & Johnson PLLC  
Chase Tower, Seventeenth Floor  
P.O. Box 1588  
Charleston WV 25326-1588  
(304) 556-8245  
[devon.stewart@steptoe-johnson.com](mailto:devon.stewart@steptoe-johnson.com)

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA

MARKWEST LIBERTY MIDSTREAM  
& RESOURCES, L.L.C.,

Plaintiff,

v.

Civil Action No.: 16-C-66  
Hon. Jeffrey Cramer

BILFINGER WESTCON, INC.,

Defendant.

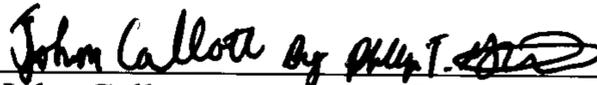
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on November 7, 2016, the foregoing "*First Amended Partial Answer and Affirmative Defenses and Counterclaims of Bilfinger Westcon Inc.*" was served via First Class US Mail on counsel for MarkWest as follows:

Thomas Ryan, Esq.  
Travis L. Brannon, Esq.  
K&L Gates LLP  
K&L Gates Center  
210 Sixth Avenue  
Pittsburgh, Pennsylvania 15222  
Telephone: (412) 355-6500  
Facsimile: (412) 355-6501  
**Email:** [Thomas.ryan@klgates.com](mailto:Thomas.ryan@klgates.com)  
[Travis.brannon@klgates.com](mailto:Travis.brannon@klgates.com)

William Crichton VI, Esq.  
Crichton & Crichton  
325 9th Street  
Parkersburg, West Virginia 26101  
Telephone: (304) 485-5003  
**Email:** [Will@crichtonlawfirm.com](mailto:Will@crichtonlawfirm.com)

*Counsel for MarkWest Liberty Midstream & Resources, L.L.C.*

 11/07/2016  
John Callcott, Esq. (WV Bar #9206)  
Steptoe & Johnson PLLC  
1085 Van Voorhis Road, Suite 400  
Morgantown West Virginia 26505  
Phone: (304) 598-8151  
Fax: (304) 598-8116  
[john.callcott@steptoe-johnson.com](mailto:john.callcott@steptoe-johnson.com)