

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

MARKWEST LIBERTY MIDSTREAM
& RESOURCES, L.L.C.,
Plaintiff/Counterclaim Defendant,

v.

CIVIL ACTION NO. 16-C-66
JUDGE H. CHARLES CARL, III

BILFINGER WESTCON, INC.,
Defendant/Counterclaim Plaintiff/
Third Party Plaintiff,

v.

MARKWEST LIBERTY BLUESTONE, LLC,
MPLX LP, MARKWEST ENERGY PARTNERS
LP, THE HARTFORD STEAM BOILER
INSPECTION & INSURANCE COMPANY OF
CONNECTICUT, TEAM INDUSTRIAL
SERVICES, INC., FURMANITE AMERICA, INC.,
O'DONNELL CONSULTING ENGINEERS, INC.,
CEMI, LLC, AND QUALITY INTEGRATED
SERVICES, INC.,
Third Party Defendants.

**ORDER DENYING QUALITY INTEGRATED SERVICES, INC.'S
MOTION TO DISMISS THIRD-PARTY COMPLAINT**

This matter came before the Court this 6th day of June, 2019, upon Third-Party Defendant Quality Integrated Services, Inc.'s *Motion to Dismiss Third-Party Complaint*. The parties have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process. Therefore, upon the full consideration of the issues, the record, and pertinent legal authorities, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This matter arises out of certain civil, structural, piping, mechanical, and electrical construction work performed by Defendant Bilfinger Westcon, Inc. (“Defendant” or “Bilfinger”) in relation to three contracts (“Contracts” or “Mobley Contracts”) for a construction project at Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.’s (“Plaintiff” or “MarkWest”) Mobley Processing Plant, an oil and natural gas processing facility located in Wetzel County, West Virginia (“Mobley Site”). *See* Am. Ctrclms., p. 6. The Mobley site originally consisted of four natural gas facilities, and Plaintiff sought to construct a fifth facility referred to as the Mobley V Processing Plant. *Id.* It is this construction project which is at the heart of the instant civil action.

2. It is undisputed that Plaintiff and Defendant entered into three separate contracts for Defendant’s work on the expansion project. *Id.* The Contracts are: the Mobley V and Flare, Residue, and PSV Piping Lump Sum Construction Contract (“Contract 1”) entered May 19, 2015 (*See* Compl., Ex. A); the Mobley Inlet Compression Lump Sum Contract (“Contract 2”) entered October 5, 2015 (*See* Compl., Ex. B); and the Mobley NE Corner Lump Sum Construction Contract (“Contract 3”) entered October 7, 2015 (*See* Compl., Ex. C).

3. This matter commenced with the filing of the Complaint on June 16, 2016, alleging Breach of Contract (Count I); Negligence/Gross Negligence (Count II); Fraud (Count III); Negligent Misrepresentation (Count IV); and Specific Performance (Count V). *See* Compl, ¶¶ 120-163. These Counts surround the civil, structural, piping, mechanical and electrical construction work for the construction of a natural gas facility involved in the transportation and processing of natural gas and natural gas liquids produced in Northern West Virginia. *Id.* at ¶¶ 2-4.

4. On December 4, 2018, this Court dismissed Plaintiff's tort claims against Defendant based on the gist of the action doctrine. Counts II, III, and IV of the Complaint against Defendant (negligence/gross negligence, fraud, and negligent misrepresentation, respectively) were dismissed with prejudice. The remaining causes of action are breach of contract and specific performance (Counts I and V, respectively).

5. Meanwhile, on July 13, 2018, Defendant Bilfinger Westcon, Inc., filed a Third-Party Complaint entitled "First Amended Counterclaims of Bilfinger Westcon Inc. and Third-Party Complaint", alleging the following causes of action against Third-Party Defendant Quality Integrated Services, Inc. (hereinafter "QIS"): "Contribution" against Third-Party Defendants The Hartford Steam Boiler Inspection & Insurance Company of Connecticut, Furnanite America, Inc., TEAM Industrial Services, Inc., CEMI, LLC, Quality Integrated Services, Inc., and O'Donnell Consulting Engineers, Inc. (Count X); and "Indemnity" against Third-Party Defendants The Hartford Steam Boiler Inspection & Insurance Company of Connecticut, Furnanite America, Inc., TEAM Industrial Services, Inc., CEMI, LLC, Quality Integrated Services, Inc., and O'Donnell Consulting Engineers, Inc. (Count XI). *See Am. Ctrclms.*, p. 40-45. Westcon alleges Third-Party Defendant QIS is an inspection and construction management company that operates across the United States with its principal place of business located in Minnesota. *Id.* at 5. According to the Amended Counterclaims, QIS's involvement in the Mobley Contracts and this civil action is alleged to have been based upon the following: "QIS...[was an] agent[] of MarkWest Midstream responsible for quality control in connection with the code repairs and inspection of the Vessels", and "[t]o the extent that there were any issues with the vessel repairs or the standards used to inspect them QIS [and others] are the parties responsible". *Id.* at 41. Further, the Amended Counterclaims allege that QIS "shared a

special relationship with Westcon in connection with the inspection, approval, and fitness for service evaluation of the Vessel repairs”. *Id.* at 42; *see also Id.* at 43.

6. On September 4, 2018, Third-Party Defendant Quality Integrated Services, Inc. filed the instant Quality Integrated Services, Inc.’s Motion to Dismiss Third-Party Complaint. *See Th. Pty. Def’s Mot.*, p. 1-2.

7. On October 26, 2018, Defendant Bilfinger Westcon Inc. filed Bilfinger Westcon, Inc.’s Omnibus Response in Opposition to the Motions to Dismiss Third-Party Complaint Filed by the Hartford Steam Boiler Inspection & Insurance Company of Connecticut, O’Donnell Consulting Engineers, Inc., and Quality Integrated Services, Inc.

8. On November 7, 2018, QIS filed its Reply to Bilfinger-Westcon, Inc.’s Omnibus Response in Opposition to the Motions to Dismiss Third-Party Complaint Filed By Hartford Steam Boiler Inspection & Insurance Company of Connecticut, O’Donnell Consulting Engineers, Inc. and Quality Integrated Services, Inc.

9. On December 21, 2018, QIS filed its Supplemental Brief in Support of its Motion to Dismiss Bilfinger Westcon, Inc.’s Third-Party Complaint, to further its position in light of the Court’s December 4, 2018 ruling dismissing the three tort counts in Plaintiff’s Complaint. *See Th. Pty. Def’s Suppl. Reply*, p. 2; *see also supra* ¶ 4.

10. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF REVIEW

11. This matter comes before the Court upon a motion to dismiss. Motions to dismiss are governed by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of

his claim which would entitle him to relief.” Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). “Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true.” *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). “We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading.” *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

12. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits. *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

13. In this matter, Third-Party Defendant QIS seeks this Court to dismiss the following Amended Counterclaims against it: “Contribution” against it and others (Count X); and “Indemnity” against it and others (Count XI). *See* Th. Pty. Def’s Mot., p. 1. The Court will take these issues up in turn.

14. QIS sets forth the following arguments for why the cause of action for Contribution should be dismissed: (1) Statute of limitations; (2) QIS owes no duty of care to Westcon; (3) Failure to state a claim because QIS provided accurate information to Plaintiff; and (4) Failure to state a claim for contribution with respect to fraud. *See* Th. Pty. Def’s Mem., p. 8-19. Further, QIS sets forth the following arguments for why the cause of action for Indemnification should be dismissed: (1) Statute of limitations; and (2) Failure to state a claim upon which relief can be granted. *Id.* at 7-16, 19.

Statute of Limitations (both Contribution (Count X) and Indemnification (Count XI))

15. First, QIS argues the Court should dismiss Westcon's contribution cause of action (Count X) and indemnification cause of action (Count XI) because they are time barred by the statute of limitations. *See* Th. Pty. Def's Mem., p. 8.

16. As an initial matter, the Court acknowledges the applicable statute of limitations for contribution, the cause of action contained in Counts X and XI of the Amended Counterclaims. Contribution and indemnification are governed by the two-year statute of limitations found in West Virginia Code § 55-2-12.

17. Further, the West Virginia Supreme Court of Appeals has repeatedly stated that the statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong and not when he or she knows of the *particular nature* of the injury. *See Harrison v. Seltzer*, 165 W.Va. 366, 371, 268 S.E.2d 312, 315 (1980); *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 712, 487 S.E.2d 901, 907 (1997); *McCoy v. Miller*, 213 W.Va. 161, 166, 578 S.E.2d 355, 360 (2003) cited by *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005).

18. QIS argues the actions at the heart of the causes of action against it are time-barred because they are alleged to have taken place in 2015 and 2016. *See* Th. Pty. Def's Mem., p. 9. Specifically, QIS alleges the following:

“[T]he events giving rise to the [sic] Westcon's Third-Party Complaint against QIS all occurred before O'Donnell provided its report to Westcon on May 20, 2016. Westcon performed the welds in July 2015 and provided the welding documentation to Markwest Liberty on April 20, 2016. It admits it had been in discussions with Markwest Liberty about the welds and the discrepancy in the applicable inspection standards for 'some time' prior to providing the O'Donnell report to Markwest Liberty on May 24, 2016....Regardless, at the latest, Westcon was on notice of any alleged issues related to the welds when Markwest Liberty served Westcon with a copy of its Complaint on June 22, 2016.”

Id.

19. Therefore, QIS argues May 20, 2018¹ would have been the latest deadline for Westcon to file a timely suit. *Id.* QIS does not dispute that the Third-Party Complaint would have been timely filed in January 2018.

20. Westcon argues that because it filed a motion to file its Amended Counterclaims and a Third-Party Complaint in January of 2018, along with the proposed Amended Counterclaims, including claims against Third-Parties, it satisfied the statute of limitations². *See* Def's Resp., p. 9. As a matter of law, the filing of the amended complaint with the Court on a motion for leave to amend "is sufficient to toll a statute of limitations regardless of other technical requirements under the rules". *Charlton v. M.P. Indus., Inc.*, 173 W. Va. 253, 256, 314 S.E.2d 416, 419 (1984).

21. Here, Westcon filed its Motion for Leave to Amend on January 4, 2018 and properly submitted the proposed Amended Counterclaims and Third-Party Complaint at that time. At that time, this civil action was still in Wetzel County Circuit Court, before Judge Cramer. Thereafter, on February 2, 2018, Judge Cramer moved the West Virginia Supreme Court of Appeals to refer the case to the West Virginia Business Court Division. Then, the West Virginia Supreme Court of Appeals granted said Motion to Refer on April 10, 2018. Subsequently, the case was assigned a presiding and resolution judge in the Business Court Division. After that, the undersigned then heard oral argument on the Motion to Amend on July 6, 2018. Westcon received the Court's order granting it permission to file its Amended Counterclaims and Third-Party Complaint on July 11, 2018 and filed the same on July 13, 2018.

¹ Alternatively, it appears, QIS argues the deadline would have been May 20, 2018, "if not earlier; or, more conservatively, June 22, 2018. *Id.*

² This includes the deadline that QIS argued. May 20, 2018, or alternatively, June 22, 2018.

22. The Court finds it is undisputed that the proposed Amended Counterclaims and Third-Party Complaint was filed in a timely manner on January 4, 2018. This proposed pleading was later entered as the Amended Counterclaims and Third-Party Complaint without change once the Motion for Leave to Amend was granted. This Court finds the unique procedural timeline of the instant civil action is of no fault to Westcon. Certainly, the Court finds no dilatoriness on the part of Westcon. The filing of the Motion to Refer by Judge Cramer, the approval and referral of this case to the Business Court Division by the Supreme Court of Appeals, and the subsequent assignment and transition to the undersigned were all outside of Westcon's control. However, importantly, it is undisputed that Westcon sought permission to amend and provided the proposed Amended Counterclaims and Third-Party Complaint well before the date QIS argues the statute of limitations expired. *See Th. Pty. Def's Mem.*, p. 9.

23. To bar Westcon's claims because it was waiting on a "judge's signature on an order to amend, would be to lend impracticality and injustice to...judicial processes and procedure." *Charlton*, 173 W. Va. at 256.

24. Further, the Court considers QIS's actual notice of the instant lawsuit. Before Westcon filed its Motion for Leave to Amend Counterclaims and File Third-Party Complaint on January 4, 2018, it had filed its Notice of Non-Party Comparative Fault Designation and served a subpoena on QIS related to the roles Westcon alleged it played relevant to this litigation. *See Def's Resp.*, p. 7, 9. Westcon proffers it filed a Notice of Non-Party Comparative Fault Designation wherein it designated the Third-Party Defendants in this case on or about December 19, 2016; however, Westcon specifies that "QIS was not listed specifically in the Non-Party Designation". *Id.* at 7. Instead, Westcon alleges "However, Manual [sic] Alvarez and CEMI, LLC were included. Alvarez was not named as a third-party defendant. Westcon believes

discovery will reveal that given the relationship between Alvarez, CEMI, LLC and QIS, and also the inclusion of Alvarez and CEMI, LLC, in the Non-Party Designation, that QIS knew of the litigation.” *Id.* At any rate, Westcon proffered it provided QIS with further notice of the litigation through subpoenas issued during April 2017. *Id.* Therefore, the Court finds that QIS, as a relevant party, was on notice of Westcon’s claims.

25. Because Westcon sought permission to amend and provided its Amended Counterclaims and Third-Party Complaint well before the date QIS avers the statute of limitations expired, and QIS, as a relevant party, had notice via subpoenas issued in April 2017, the Court finds QIS’s argument that the statute of limitations bars the action for contribution shall be rejected. Accordingly, the Court will not dismiss Westcon’s contribution cause of action (Count X) or Westcon’s indemnification cause of action (Count XI) on this basis.

Duty of Care Argument (Count X)

26. Next, QIS argues that it owes no duty of care to Westcon. *See* Th. Pty. Def’s Mem., p. 11-15. In support, QIS avers that there exists no duty of care on its part as there is no privity of contract between it and Westcon and no special relationship between it and Westcon. *Id.* at 12. Further, QIS proffers that it conveyed accurate information regarding the discrepancy in the standards used to inspect the welds; therefore, as a matter of law it owes Westcon no duty of care. *Id.* at 15.

27. First, the Court notes that the tort-based causes of action in Plaintiff’s Complaint have been dismissed. *See* Ord., 12/4/18. To the extent any issue regarding duty of care would apply to contribution or indemnity regarding the remaining contract-based causes of action in this litigation (Count 1 – Breach of Contract and Count V – Specific Performance of the Complaint), the Court finds any finding that no duty of care exists at this stage would be

premature. Further factual development is necessary as to the relationships and obligations of the parties in this matter, especially with regard to the usage, approval, and reporting of the allegedly improper and even unsafe weld inspection standards.

28. Although QIS argues no special relationship exists between the parties, the Court finds Westcon has sufficiently pled a special relationship in the Amended Counterclaims. At this stage, dismissal would be improper.

29. Further, although QIS has averred in the instant motion that it has only reported accurate information regarding the standards the vessels were inspected to, the Court cannot take this statement as true as the basis of a dismissal of claim(s). Instead, the information pled in the Third-Party Complaint must be viewed in the light most favorable to Third-Party Plaintiff. Discovery could very well reveal that only accurate information was indeed conveyed by QIS. However, the Court finds Westcon is entitled to discovery on this issue and that in this stage of the litigation, dismissal is not appropriate. Accordingly, QIS's motion is denied on this ground.

Failure to State a Claim Because QIS Provided Accurate Information (Count X)

30. Next, QIS argues that Westcon fails to state a claim for Contribution (Count X) because all QIS is alleged to have done is provide accurate information to Plaintiff. *See Th. Pty. Def's Mem.*, p. 16-17. QIS avers it did not actually inspect the welds or determine the standard to use in the inspections, rather that it reported a discrepancy in the standards to Plaintiff. *Id.* at 16.

31. Here, the remaining causes of action between Plaintiff and Defendant are breach of contract and specific performance. Although QIS did not inspect the welds or choose the standard to use in the inspections, Westcon has alleged and pled that QIS is an agent of Plaintiff, with a contractual responsibility to perform certain quality control responsibilities with regards to

the code repairs and vessel inspections at the Mobley site. *See* Def's Resp., p. 17. Dismissal at this stage would be improper. Discovery is needed to flesh out the particulars about the quality control/assurance obligations at issue in this case, as well as QIS's role in the events underlying this investigation.

32. As a matter of background, in this case, there exist claims that the welds on the vessels were examined to an API 1104 standard instead of the ASME Boiler and Pressure Vessel Safety Code. Further, it is alleged that subsequently, the inspection standard was misrepresented by the affixation of an ASME stamp to the vessels. Paragraph 2.2.2 of Contract 1, Contract 2, and Contract 3 states that Plaintiff must be satisfied with all testing described in Exhibit A, the Scope of Work. *See* Compl., Ex. A, ¶ 2.2.2; *see also* Ex. B, ¶ 2.2.2, Ex. C, ¶ 2.2.2. In Exhibit A of Contracts 1, 2, and 3, the Scope of Work is described. In Exhibit A of Contracts 2 and 3, it is specified that the pressure vessels and pressure safety valves are to be constructed in accordance with the current edition of the "ASME VIII Div. 1" industry code and standard. *See* Compl., Ex. B, Ex. A., p. 3; *see also* Ex. C, Ex. A, p. 3.

33. Westcon alleges QIS is an agent Plaintiff responsible for quality control in connection with the vessels. *See* Am. Ctrclms., p. 41; *see also* Def's Resp., p. 3. Westcon alleges when questions arose at the Mobley site regarding whether the API 1104 was the most appropriate standard to have been used on the vessel welds, that QI "asserted control over the process and insisted upon questioning the earlier standard that all parties...had approved". *See* Def's Resp., p. 4. It also alleged that at the time of the vessel welding and inspections, prior to QIS "asserting control over the process", all parties, including the authorized inspector, had approved the use of the API 1004 standard. *Id.*

34. The Court also notes it's being argued by Westcon that "Mark West used this this pressure vessel issue as a pretext to terminate the Mobley Contracts" and that reviews have shown that the vessels could have been operated for years without incident, even being inspected to the API 1104 standard instead of the ASME Boiler and Pressure Vessel Safety Code. *Id.* at 5. The Court also notes that Westcon alleges that QIS is an agent of Plaintiff. *Id.* at 17. Additionally, Westcon alleges that QIS had entered into a contract with Plaintiff regarding quality control and assurance of the vessel welds at the Mobley site, which is at the heart of this litigation. *Id.*

35. The Court finds discovery is needed as to these issues. Discovery will also flesh out what entities inspected and approved the use of the API 1104 standard, and when. Discovery will reveal if, in fact, there exists a contract between Plaintiff and QIS (Westcon alleges these parties have a contractual relationship related to quality control of the welds on the Mobley site), and what said contract directs, if anything, as to the welding inspections standard, reporting of any discrepancies in standards applied, and the approval of the authorized inspector of the standard used.

36. Discovery will also reveal more information regarding the assertion that the termination of the Mobley Contracts was pretextual, and if it was, discovery will flesh out what role, if any, QIS played as an agent for Plaintiff who identified and directed attention to a discrepancy in the welding standards. These reasons support a denial of dismissal on this ground.

37. Moreover, as noted above, discovery may very well reveal that QIS provided only accurate information to the parties. But at this stage, the allegations of the moving party (to this motion) are not to be taken as true. Rather, at this stage, it is Westcon's allegations which must

be taken in the light most favorable to its claims. The Court's review of the Amended Counterclaims reveals it has sufficiently pled that QIS is an agent of Plaintiff, with a contractual responsibility to perform certain quality control responsibilities with regards to the code repairs and vessel inspections at the Mobley site. *See Am Ctrclms.*, ¶ 223. For these reasons, dismissal would be inappropriate on this ground, and QIS's motion is denied on this ground.

Failure to State a Claim for Contribution with Respect to Fraud (Count X)

38. Next, QIS argues that Westcon fails to state a claim for contribution against it with respect to Plaintiff's fraud claims against Westcon. *See Th. Pty. Def's Mem.*, p. 17-19. Because Plaintiff's fraud claims were dismissed by this Court's Order entered December 4, 2018, the Court finds this argument must fail. Further analysis is unnecessary. QIS's motion to dismiss is denied as to this argument as it is now moot.

Failure to State an Indemnity Claim (Count XI)

39. Next, QIS argues that Westcon fails to state an indemnity claim. *See Th. Pty. Def's Mem.*, p. 19. Specifically, QIS avers that Westcon fails to state an indemnity claim because it fails to plead a "special relationship" present in the instant case. *Id.*

40. In general, "[t]he general principle of implied indemnity arises from equitable considerations. At the heart of the doctrine is the premise that the person seeking to assert implied indemnity-the indemnitee-has been required to pay damages caused by a third party-the indemnitor. In the typical case, the indemnitee is made liable to the injured party because of some positive duty created by statute or the common law, but the actual cause of the injury was the act of the indemnitor." Syl. Pt. 2, *Hill v. Joseph T. Ryerson & Son, Inc.*, W.Va., 268 S.E.2d 296 (1980).

41. “The requisite elements of an implied indemnity claim in West Virginia are a showing that: (1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share.” Syllabus Point 4, *Harvest Capital v. West Virginia Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509 (2002); see also *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 640, 609 S.E.2d 895, 901 (2004).

42. As an initial matter, on December 4, 2018, this Court dismissed Plaintiff’s tort claims against Defendant based on the gist of the action doctrine. With the dismissal of those claims, there are no remaining tort claims. As such, Westcon’s third-party claims against QIS for contribution and indemnity are moot insofar as they relate to the three now-dismissed claims asserted by Plaintiff in Counts II, III, and IV of its Complaint against Defendant (negligence/gross negligence, fraud, and negligent misrepresentation, respectively). Thus, Westcon’s indemnity claims against QIS must be dismissed to the extent Westcon seeks indemnification for the now-dismissed tort claims. The Court addresses the motion to dismiss the cause of action for indemnification for the breach of contract and specific performance, the remaining causes of action.

43. The Court finds that, taken in the light most favorable to the third-party plaintiff, Westcon has properly pled each of the elements of indemnity. Westcon has also pled a special relationship between it and QIS.

44. First, it is clear that there has been shown an injury sustained by a third party, as Plaintiff has alleged millions of dollars in damages as a result of the loss of service of the subject vessels.

45. Second, the second element contemplates that a party seeking implied indemnity may not have independently contributed to such injury. Westcon has clearly and properly pled that it is without fault with regard to the vessels. *See Am. Ctrclms.*, ¶232. It even asserts the vessels as produced were not defective. *See Def's Resp.*, p. 11. The dispute between Westcon and QIS surrounds which welding standard was appropriate to use when inspecting the welds on the vessels for fitness of service. Further discovery is needed in this matter. For instance, Westcon alleged that QIS is an agent of Plaintiff and had a contractual responsibility to it to perform certain quality control functions and assume certain quality control responsibilities in connection with the code repairs and inspection of the vessels at the Mobley site. *See Def's Resp.*, p. 17; *see also Th. Pty. Compl.*, ¶ 223. Discovery will reveal what the contract between Plaintiff and QIS stipulated to as to the weld inspections, and how it affects the instant litigation. Discovery may also reveal an indemnification clause in the contract. Westcon is also entitled to the opportunity to conduct discovery regarding QIS's involvement in the matters in dispute, including its knowledge and obligations pertaining to the standard to be applied to the inspections of the vessel welds. At this stage, this cause of action cannot be dismissed.

46. The third element, that a putative indemnitor should bear fault for causing the injury because of the relationship the indemnitor and indemnitee share, has also been satisfied. Westcon has satisfied this element through its factual allegations. It alleges a special relationship with QIS with regard to the vessels. Westcon avers QIS, through its employee and/or operator Manuel Alvarez, was an agent of Plaintiff and responsible for quality control in connection with

the code repairs and testing of the vessels. *See* Def's Resp., p. 11-12. Further, it avers QIS was responsible for "quality control and its role regarding the confusion surrounding the applicable standard had significant impact on MarkWest Midstream's decision to cease operation of the vessels, thereby incurring damages through its failure to operate". *Id.* at 13. The Court finds Westcon has sufficiently pled this element. Dismissal at this stage would be inappropriate, as more factual development is needed in this litigation to determine the rights and responsibilities of Westcon and QIS, especially with regards to the role of quality assurance and control and the application and choice of the "appropriate" standard. It is not known if QIS merely reported "accurate" information, as it proffered. It is not known if the parties are bound by any indemnification clauses. However, at this stage, Westcon has properly pled the elements for indemnification and dismissal would not be appropriate.

47. In sum, the Court finds the elements of indemnification have been properly pled, and QIS is not entitled to dismissal at this stage. The tort causes of action having previously been dismissed, the indemnification cause of action remains as to the contractual causes of action. The Court notes a tortious breach of contract could also be found by the trier of fact. For all of these reasons, the Court will not dismiss the cause of action for indemnification (Count XI).

CONCLUSION

WHEREFORE, the Court does hereby **ADJUDGE** and **ORDER** that Third-Party Defendant Quality Integrated Services, Inc.'s *Motion to Dismiss Third-Party Complaint* is **DENIED**.

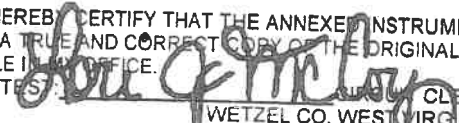
The Court notes the objections of the parties to any adverse ruling herein.

The Clerk shall transmit copies of this Order to all counsel of record.

ENTERED this 6th day of June 2019.



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

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT
IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON
FILE IN MY OFFICE.
ATTEST:  CLERK
WETZEL CO. WEST VIRGINIA
BY: _____ DEPUTY CLERK