

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

FILED
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Clerk of the Circuit Court
Wetzel County, West Virginia

**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 GRANTING DEFENDANT'S MOTION FOR PARTIAL DISMISSAL

This matter came before the Court this 4th day of December 2018, upon Defendant Bilfinger Westcon, Inc's Motion for Partial Dismissal. 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. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter arises out of certain civil, structural, piping, mechanical, and electrical construction work performed by Defendant Bilfinger Westcon, Inc. (hereinafter "Defendant" or "Bilfinger") in relation to three contracts (hereinafter "Contracts" or "Mobley Contracts") for a construction project at Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.'s (hereinafter "Plaintiff" or "MarkWest") Mobley Processing Plant, an oil and natural gas processing facility located in Wetzel County, West Virginia (hereinafter "Mobley Site"). *See* Def's Mem., p. 1-2; *see also* Pl's Resp., p. 1. 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.* at 2. 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. *See* Pl's Resp., p. 1; *see also* Def's Mem., p. 2-5. The Contracts are explained as follows:

3. First, on May 19, 2015, Plaintiff and Defendant entered into the Mobley V and Flare, Residue, and PSV Piping Lump Sum Construction Contract (hereinafter "Contract 1"). *See* Def's Mot., Ex. 1, Compl., Ex. A. Contract 1 governs the parties' rights and responsibilities with respect to construction activities within Defendant's scope of work on the Mobley V Processing Plant. *See* Def's Mem., p. 2. Contract 1 includes a liquidated damages provision for delay, wherein the parties agreed that Defendant would be assessed \$12,500.00 in the form of a late completion payment per day of "unexcused schedule delay." *See* Def's Mot., Ex. 1, ¶¶ 2.6-2.7; *see also* *Id.* This penalty is capped at \$250,000.00. *Id.* at ¶ 2.6. Contract 1 also includes a provision which is an exclusion for "Consequential Damages," "including but not limited to, loss of use, loss of profits, loss of revenue, loss of facility or loss of reputation, regardless if such

damages arise from contract, warranty, tort, strict liability, or any other legal theory whatsoever,” subject to confidentiality and gross tort exceptions. *Id.* at ¶ 29.0; *see also Id.* Contract 1 addresses the risk of equipment damage, directing that Defendant’s sole obligation for damage to Plaintiff’s equipment occurring at the work site is limited to “repair or replace of the same...” and that for “claims covered by Plaintiff’s All-Risk Insurance Policy, [Defendant’s] limit of liability shall be [Plaintiff’s] All-Risk insurance deductible of fifty thousand dollars and zero per cent (\$50,000.00)” and that Plaintiff further waived subrogation rights “regardless of cause.” *Id.* at ¶ 13.1; *see also* Def’s Reply, p. 5-6. Finally, Contract 1 includes an “aggregate cap on contractor’s liability, which fixes the “Contractor’s aggregate cap on all liability arising under this Contract” at “one hundred per cent [*sic*] (100%) of the Lump Sum Fixed Price, regardless if the liability arises from contract, warranty, tort, strict liability, or any other legal theory whatsoever.” *Id.* at ¶ 30.0; *see also* Def’s Mem., p. 2.

4. Second, on October 5, 2015, Plaintiff and Defendant entered into the Mobley Inlet Compression Lump Sum Contract (hereinafter “Contract 2”). *See* Def’s Mot., Ex. 2, Compl, Ex. B. Contract 2 governs the parties’ rights and responsibilities with respect to activities within Defendant’s scope of work, including the construction of two new inlet compression units. *See* Def’s Mem., p. 4. Contract 2 includes a liquidated damages provision for delay, wherein the parties agreed that Defendant would be assessed \$7,500.00 in the form of a late completion payment per day of “unexcused schedule delay.” *See* Def’s Mot., Ex. 2, ¶¶ 2.6-2.7; *see also Id.* at 5. This penalty is capped at \$200,000.00. *Id.* at ¶ 2.6. Further, in a clause virtually identical to that in Contract 1, Contract 2 excludes consequential damages, and fixes Defendant’s maximum liability at “one hundred per cent [*sic*] (100%) of the Lump Sum Fixed Price, regardless if the liability arises from contract, warranty, tort, strict liability, or any other legal

theory whatsoever.” *Id.* at ¶ 30.0; *see also Id.* Also like Contract 1, Contract 2 also addresses the risk of equipment damage, directing that Defendant’s sole obligation for damage to Plaintiff’s equipment occurring at the work site is limited to “repair or replace of the same...” and that for “claims covered by Plaintiff’s All-Risk Insurance Policy, [Defendant’s] limit of liability shall be [Plaintiff’s] All-Risk insurance deductible of fifty thousand dollars and zero cents (\$50,000.00)” and that Plaintiff further waived subrogation rights “regardless of cause.” *Id.* at ¶ 13.1; *see also* Def’s Reply, p. 5-6.

5. Finally, third, on October 7, 2015, Plaintiff and Defendant entered into the Mobley NE Corner Lump Sum Construction Contract (hereinafter “Contract 3”). *See* Def’s Mot., Ex. 3, Compl., Ex. C. Contract 3 includes a liquidated damages provision for delay identical to that in Contract 2, wherein the parties agreed that Defendant would be assessed \$7,500.00 in the form of a late completion payment per day of “unexcused schedule delay.” *See* Def’s Mot., Ex. 3, ¶¶ 2.6-2.7. This penalty is capped at \$200,000.00. *Id.* at ¶ 2.6. Like Contract 1 and Contract 2, Contract 3 contains the same exclusion of consequential damages, limit on property damage, and aggregate liability capped at one hundred percent of the contract price. *Id.* at ¶¶ 13.1, 29.0-30.0; *see also* Def’s Mot., p. 5.

6. This matter was 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.

7. On November 7, 2016, Defendant filed the instant Motion for Partial Dismissal, seeking dismissal of Counts II, III, and IV with prejudice, based upon the gist of the action doctrine. See Def's Mot., p. 1.

8. On December 16, 2016, Plaintiff filed its Response in Opposition to Defendant's Motion for Partial Dismissal.

9. On December 30, 2016, Defendant filed its Reply in Support of Defendant's Motion for Partial Dismissal.

10. On February 7, 2018, the Wetzel County Circuit Judge entered a Judicial Motion to Refer Case to the Business Court Division.

11. On June 9, 2018, the instant civil action was transferred to the Business Court Division, by Business Court Transfer Memorandum.

12. On June 28, 2018, Plaintiff filed its Supplemental Memorandum in Opposition to Defendant's Motion for Partial Dismissal.

13. On July 6, 2018, Defendant filed its Reply in Further Support of Bilfinger Westcon Inc.'s Partial Motion to Dismiss.

14. On August 7, 2018, Plaintiff filed its Sur Reply in Opposition to Defendant's Reply in Further Support of Its Partial Motion to Dismiss.

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

STANDARD OF REVIEW

16. This matter comes before the Court upon a partial 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).

17. 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

18. In this matter, Defendant argues Counts II, III, and IV of Plaintiff’s Complaint should be dismissed because these tort causes of action are “improper attempts to recast claims as tort claims to overcome the bargained-for limitations on recovery of damages set forth in the parties; contracts.” See Def’s Mot., p. 2. Specifically, Defendant argues dismissal of these Counts is proper pursuant to the West Virginia gist of the action doctrine, that this action is purely an action for breach of contract, where there has been no harm to person or property and there is no recognized special relationship between Plaintiff and Defendant upon which tort claims may be founded. *Id.* The Court will take these issues up in turn.

19. Defendant argues Counts II, III, and IV of Plaintiff’s Complaint should be dismissed because these tort causes of action are already appropriately cast as claims for breach of contract in the Complaint. See Def’s Reply, 7/6/18, p. 2; see also Def’s Mot., p 2. In seeking to prevent the recasting of a contract claim as a tort claim, courts apply the “gist of the action”

doctrine. Under this doctrine, recovery in tort will be barred when any of the following factors are demonstrated:

(1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP, 231 W. Va. 577, W. Va. 586, 746 S.E.2d 568, 577 (2013) (internal citations omitted). Succinctly stated, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract. *Id. citing Goldstein v. Elk Lighting, Inc.*, No. 3:12-CV-168, 2013 WL 790765 at *3 (M.D.Pa.2013).

20. "Contract law has been traditionally concerned with the fulfillment of reasonable economic expectations. Tort law, on the other hand, is concerned with the safety of products and the corresponding quantum of care required of a manufacturer." *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 83, 297 S.E.2d 854, 858 (1982) (quoting *Northern Power and Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 328 (Alaska 1981)). Under the gist of the action doctrine, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract. *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 814 S.E.2d 205 (2018).

21. Here, the Court finds the liability for the alleged actions described and alleged in the Complaint clearly arises from the parties' contracts. The alleged fraud, negligence/gross negligence, and negligent misrepresentation arise solely from the contractual relationship between the Plaintiff and the Defendant (i.e., three Mobley Contracts). Further, Plaintiff's sole

basis for its claims is private, contractual, construction agreements, negotiated and agreed to by two sophisticated parties. The Court notes that neither Plaintiff nor Defendant, private companies in the construction and oil and gas field, had held themselves out to the community as a purveyor of public services. *See Gaddy*, 746 S.E.2d at 577 (quoting *Goldstein v. Elk Lighting, Inc.*, No. 3:12-cv-168, 2013 WL 790765, at *4 (M.D.Pa.2013) (finding that tort claims were not barred because the parties' obligations were governed by social policies rather than the terms of the contract)).

Fraud (Count III) and Negligent Misrepresentation (Count IV)

22. First, Plaintiff's fraud and negligent misrepresentation claims are grounded in allegations that Defendant examined the welds on the vessels to an API 1104 standard instead of the ASME Boiler and Pressure Vessel Safety Code, and made material misrepresentations related to the inspection standard by affixing an ASME stamp to the vessels. *See Compl.*, p. 12; *see also Def's Mot.*, p. 12. 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 Def's Mot.*, Ex. 1, ¶ 2.2.2; *see also Ex. 2*, ¶ 2.2.2, *Ex. 3*, ¶ 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 standard¹. *See Def's Mot.*, Ex. 2, Ex. A., p. 3; *see also Ex. 3*, Ex. A., p. 3. Therefore, it is clear that the misrepresentations alleged in the Complaint all relate to inspections and are thus directly tied to the duties and obligations assumed in the Mobley Contracts. *Gaddy*, 746 S.E.2d at 586. In other words, the claims do not

¹ The Scope of Work (Exhibit A) to Contract 1 states that "[t]he Scope of Work shall include all workmanship, labor, materials and equipment necessary to or reasonably inferred by the attached RFQ Documents...". *See Def's Mot.*, Ex. 1, Ex. A., p. 1. However, there are no attached RFQ documents to Exhibit A of Exhibit 1 to the Motion.

arise independently of the existence of a contract. See *Lockhart v. Airco Heating & Cooling*, 211 W. Va. 609, 614, 567 S.E.2d 619 (2002). Rather, Defendant's alleged liability for these claims "stems from" the Mobley Contracts and Plaintiff's fraud and negligent misrepresentation claims thus are barred by the gist of the action doctrine. See *Corder v. Antero Res. Corp.*, 322 F. Supp. 3d 710, 723 (N.D.W. Va. 2018).

23. Moreover, the fraud and negligent misrepresentation claims are only actionable if Defendant has also breached the terms of the three Mobley Contracts. All liability must stem from that breach, and the fraud and negligent misrepresentation claims only duplicate the same breaches of relevant contractual provisions. See *Tinsley v. OneWest Bank, FSB*, 4 F. Supp. 3d 805 (S.D.W. Va. 2014)(Plaintiff's fraud claims against Defendant fulfilled the "gist of the action" doctrine, warranting dismissal, where all three fraud claims were dependent upon the success of Plaintiff's breach of contract claim, that is, if Defendant prevailed upon the contract claim, then none of the representations of which Plaintiff complained were "false").

24. In sum, the Court concludes Plaintiff's "Fraud" (Count III) and "Negligent Misrepresentation" (Count IV) claims thus must be dismissed, and Defendant's Motion for Partial Dismissal should be granted as to these claims.

Negligence/Gross Negligence (Count II)

25. Second, likewise, Plaintiff's negligence/gross negligence cause of action is grounded in allegations that Defendant "negligently performed" all its work by failing to complete it timely. See Compl., p. 19. It is evident that the alleged negligent conduct alleged in the Complaint relates to schedule delays and is thus directly tied to the duties and obligations assumed in the Mobley Contracts, and do not arise independently of the existence of a contract.

See *Gaddy*, 746 S.E.2d at 586; see also *Lockhart v. Airco Heating & Cooling*, 211 W. Va. 609, 614, 567 S.E.2d 619 (2002).

26. The parties specifically and expressly agreed to terms regarding late completion, including late completion payments, in all three of the Mobley Contracts. See Def's Mot. to Dismiss, Ex 1, ¶ 2.6; see also Ex. 2, ¶ 2.6, Ex. 3, ¶ 2.6.

27. The relevant portion in Contract 1 states as follows:

2.6 Late Completion Payments. Subject to the other terms of this Contract, if Contractor fails to achieve Mechanical Completion by the Required Completion Date, and if such failure continues for more than ten (10) calendar days following such Required Completion Date, Contractor shall pay to Company, as part of the consideration for awarding this Contract, an amount equal to \$12,500 per day for each calendar day that passes following the 10th day after the Required Completion Date and until Project Completion is achieved (the "Late Completion Payments"), but in no event will the total Late Completion Payments be more than \$250,000. Contractor shall pay the Late Completion Payments, if any, required hereunder monthly in arrears on the tenth (10th) day of each month.

2.7 Payment Reasonable. Company and Contractor hereby acknowledge and agree that the terms, conditions and amounts for Late Completion Payments are reasonable, considering the reduction in value and the actual costs that the Company will incur in the event of Contractor's failure to meet the Required Completion Date. The parties further acknowledge that the actual losses that Company may incur as a result of Contractor's failure to meet the Required Completion Date are difficult if not impossible to discern and the amounts of the payments are a form of liquidated damages and the parties expressly acknowledge that the payments are not penalties or forfeitures. Late Completion Payments shall be the sole monetary remedy for unexcused Schedule Delay.

Id. at ¶ 2.6-2.7.

28. Further, the Court's review of Contract 2 and Contract 3 reveals that Contract 2's and Contract 3's Late Completion Payments clauses are substantially similar to Contract 1's,

except that the parties agreed to an amount of \$7,500.00 per day, instead of \$12,500.00 per day, and agreed to limit the cap to \$200,000.00, instead of \$250,000.00. *See* Def's Mot., Ex. 2, ¶ 2.6, Ex. 3, ¶ 2.6. Importantly, in all three Mobley Contracts, the parties agreed that late completion payments are the "sole monetary remedy" for any unexcused schedule delay. *See* Def's Mot., Exs. 1, 2, 3, ¶ 2.7. The Court notes the three Mobley Contracts contemplated specifics, such as when the late completion payments were due and the maximum amount of late completion payments. *Id.* at ¶ 2.6.

29. Plaintiff further alleges in this Count that "acts and omissions of Westcon constitute gross negligence." *See* Compl., p. 19. Specifically, Plaintiff alleges "the acts and omissions of Westcon involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and Westcon had actual, subjective awareness of the risk involves, but nevertheless proceeded with conscious, reckless and/or outrageous indifference to the rights, health, safety and welfare of others." *Id.* Pursuant to this cause of action, Plaintiff seeks punitive damages. *Id.* at 3.

30. The Court finds the Mobley Contracts (Contracts 1, 3, and 3) were comprehensive. A review of the contracts reveals the contracts themselves covered employment, safety, and risk of equipment damage. *See* Compl., p. 6. In fact, Plaintiff cites these provisions in its own Complaint. *Id.* In paragraph 13.1 of all three Mobley Contracts, the parties agreed Defendant's obligation to any equipment damage at the worksite is limited to "repair or replace the same...". *See* Def's Mot., Exs. 1, 2, 3, ¶ 13.1. Further, the parties agreed in all three contracts that for "claims covered by [Plaintiff's] All-Risk Property Insurance policy, [Defendant's] limit of liability shall be [Plaintiff's] All-Risk Property insurance deductible of

fifty thousand dollars and zero cents (\$50,000.00).” *Id.* Plaintiff further waived subrogation rights “regardless of cause.” *Id.*

31. Plaintiff references equipment damage from a crane flipping over “within a few feet of the Mobley III and IV compressor building, crushing some equipment and damaging the property.” *See* Pl’s Resp., p. 1-2. Further, Plaintiff avers three people were sent to the hospital. *Id.* at 2. The Court notes that contractually, these events were resolved by a change order reflecting the schedule delay, as contemplated by the Contract. *See* Compl., p. 10. Schedule delays addressed in the change order adjusting the schedule. *Id.* Further, Defendant avers the individuals involved in the “crane tip” were not employees of Plaintiff and are not parties to this litigation. *See* Def’s Reply, p. 6.

32. In sum, the Court concludes Defendant’s alleged liability for the claims of Negligence/Gross Negligence alleged in Count II of the Complaint, stem from the Mobley Contracts and thus are barred by the gist of the action doctrine. *See Corder v. Antero Res. Corp.*, 322 F. Supp. 3d 710, 723 (N.D.W. Va. 2018). Therefore, Defendant’s Motion for Partial Dismissal must be granted as to this Count.

CONCLUSION

In conclusion, based upon the above set forth Findings of Fact and Conclusions of Law, the Court finds that the Plaintiff’s claims for “Negligence/Gross Negligence” (Count II); “Fraud” (Count III); and “Negligent Misrepresentation” (Count IV), must be dismissed with prejudice, and therefore, Defendant’s motion shall be granted.

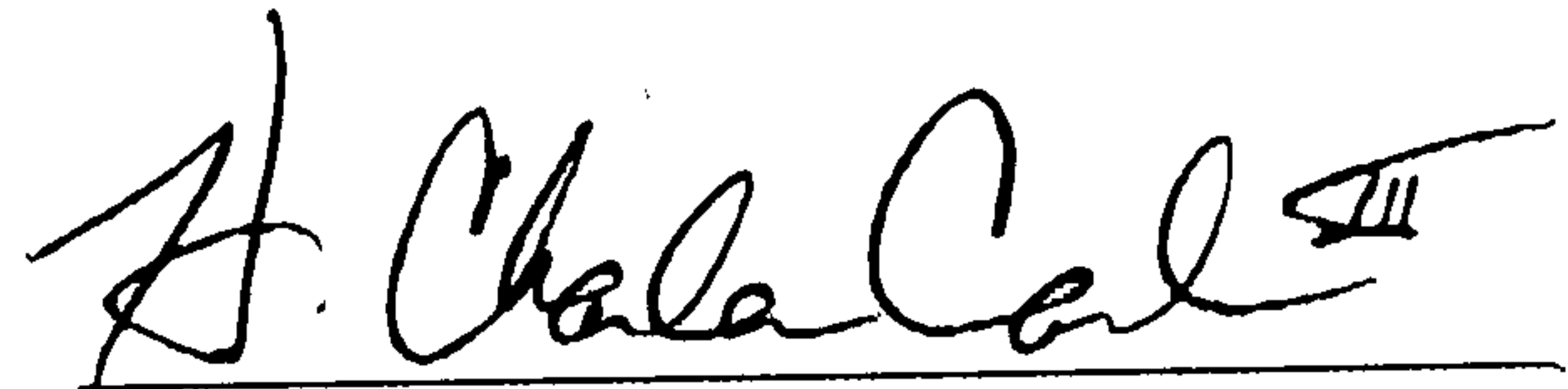
WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendant Bilfinger Westcon, Inc.’s Motion for Partial Dismissal is hereby **GRANTED**. It is further **ORDERED**

and **ADJUDGED** that Counts II, III, and IV of Plaintiff's Complaint are **DISMISSED WITH PREJUDICE**.

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

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record.

ENTERED this 4th day of December 2018.



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