

NO. 34865

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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HEATHER RUCKDESCHEL, Administratrix of the  
Estate of Thomas G. Miller, Jr., Plaintiff Below,  
Appellee

v.

Civil Action No. 07-C-49M  
Judge John T. Madden

FALCON DRILLING, COMPANY, L.L.C., TEXAS KEYSTONE,  
INC., and HALLIBURTON ENERGY SERVICES, INC.,  
DEFENDANTS BELOW

HALLIBURTON ENERGY SERVICES, INC., APPELLANT

Appellee.

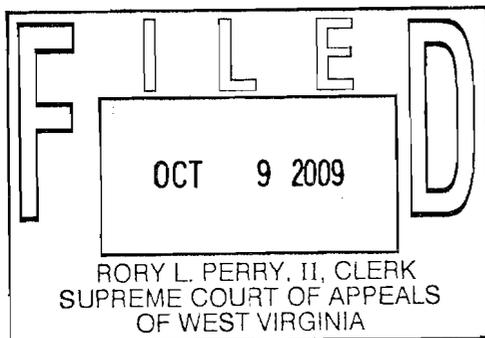
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FROM THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA  
THE HONORABLE JOHN T. MADDEN

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**REPLY ON BEHALF OF APPELLANT, HALLIBURTON ENERGY SERVICES, INC.,  
TO RESPONSE BRIEF SUBMITTED BY TEXAS KEYSTONE, INC.**

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**KIND OF PROCEEDING AND NATURE OF RULING BELOW**

For purposes of this Reply Brief, Halliburton incorporates the information contained in this section of its Appellate Brief.<sup>1</sup>

**STATEMENT OF RELEVANT FACTS**

For purposes of this Reply Brief, Halliburton incorporates the information contained in this section of its Appellate Brief.

**POINTS AND AUTHORITIES**

**I. The Work Order At Issue Constituted a Binding Contract And Any Request that A Matter Be Arbitrated, Pursuant to A Provision of the Work Order, Explicitly Acknowledges This Fact**

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<sup>1</sup> For purposes of this Brief and Halliburton’s Response to Falcon’s Brief, Halliburton has changed the caption of the case to reflect the case caption contained in this Court’s Order setting the briefing schedule. Halliburton notes for purposes of the record that Halliburton is the sole appellant and Texas Keystone is the sole appellee.

<u>Board of Educ. v. Zando Martin &amp; Milstead,</u> 182 W. Va. 597, 390 S.E.2d 796 (1990) .....	12
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**STANDARD OF REVIEW**

For purposes of this Reply Brief, Halliburton incorporates the information contained in this section of its Appellate Brief.

## LEGAL ARGUMENT

Halliburton incorporates all arguments contained in its Appellate Brief for purposes of this Reply.

### **I. The Work Order At Issue Constituted a Binding Contract And Any Request that A Matter Be Arbitrated, Pursuant to A Provision of the Work Order, Explicitly Acknowledges This Fact**

Texas Keystone's Response to Halliburton's Appellate Brief, continues its previous argument that the work order at issue does not constitute a binding contract, with the exception of the arbitration provision. This argument asks the Court to ratify a legal impossibility. Texas Keystone has yet to cite any authority providing that an arbitration provision in a work order can be enforced, at the same time the document containing the arbitration clause is not a binding contract. The *October 29, 2008 Memorandum Order*, subject of this appeal found: "This Court has herein opined that from the brief amount of discussion submitted by the parties surrounding the execution of the work order, that both parties were bound." See, *Memorandum Order*. The Circuit Court correspondingly compelled arbitration, pursuant to the terms in the work order. Texas Keystone has chosen not to file a formal cross-appeal on the issue of the enforceability of the Circuit Court's ruling, which found that a contract existed between the parties. The Circuit Court found that the *Memorandum Order*, constituted a Rule 54(b) Final Order for purposes of Appeal. Counsel for Texas Keystone did not object when this issue was brought before the Court, and in fact, agreed to entry of the Order as a Rule 54(b) Order. See, *Transcript of January 16, 2009 Hearing*, at pg. 7, lines 23-28; pg. 8; pg. 9, lines 1-13, attached to *Response to Falcon's Submission and Motion to Strike as Exhibit A*.

Texas Keystone cannot now argue that the subject Order did not constitute a Rule 54(b) Order. Pursuant to the Court's holding after the January 16, 2009 hearing, if Texas Keystone wished

to challenge the validity of the contract, they were required to file a cross assignment of error, pursuant to Rule 10(f).<sup>2</sup> They have failed to do so, and as such, this issue is waived. Additionally, Texas Keystone continues to argue for the enforcement of the arbitration provision contained in the contract, but attempts to argue that the contract is not valid. Texas Keystone's argument is not supported by logic, nor rules of contract interpretation. If Texas Keystone wants arbitration pursuant to the contract, the contract must be binding. Correspondingly, if Texas Keystone argues that the terms of the arbitration clause must be applied to both parties, do not the terms of the express indemnification clause in favor of Halliburton need to be applied as well? Texas Keystone finds no ambiguity or issue with the terms of the arbitration clause, but it has insisted that express indemnification must be arbitrated, without proposing an argument as to why?

Texas Keystone has presented an affidavit of Robert Kozel, President and Chief Executive Officer of Texas Keystone and a limited portion of the transcript from the deposition of Larry D. Winckler, in support of the position that only the arbitration provision of the work order should be imposed upon Texas Keystone. Texas Keystone has failed to inform the Court that Robert Kozel, in addition to his role with Texas Keystone is also listed as a "Member" of Falcon Drilling, L.L.C.

As Texas Keystone plainly acknowledges on page 13 of its Response, "Based upon its motion to dismiss and referral to arbitration, Texas Keystone has consistently objected to any and all discovery solely related to the issue of whether the work order created a binding contract between Halliburton and Texas Keystone." This included the depositions of Paul Gellis, the individual that

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<sup>2</sup> Texas Keystone has continually asserted that enforcement of the contract is an issue that should be decided through arbitration. *See, Texas Keystone's Response Brief*, at pg. 12.

signed the subject contract.<sup>3</sup> Texas Keystone is thus asking this Court to find that no contract existed, after preventing discovery on the issue of whether a contract existed, while at the same being forced to acknowledge that the Circuit Court of Tyler County found that the parties were “bound” by the work order.

Under Section 2 of Texas Keystone’s Response Brief, Texas Keystone cites to various West Virginia Supreme Court of Appeals’ decisions discussing the enforceability of arbitration provisions. Texas Keystone states on page 17 of its brief:

In rendering its decision to compel arbitration in the matter, *the circuit court followed the dictates of West Virginia law*. This Court has made a clear statement concerning the enforcement of arbitration provisions.

Therefore in West Virginia only if it appears from *the four corners of a written contract* or from the *obvious nature of the contracting parties*, or from the *obvious nature of the activity covered by the contract*, that the arbitration provision is so inconsistent with *the other terms of the contract* or so oppressive under the circumstances that it could not have been bargained for, should a court refuse to enforce the arbitration provision.

Board of Education of the County of Berkeley v. W. Hartley Miller, Inc., 236 S.E.2d 439, 447 (W. Va. 1977) (emphasis added). Texas Keystone further cites with approval to the following holding:

The end result of the rule which we announce today is that all arbitration provisions in *all contracts which indicate* that the parties intended to arbitrate  
...

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<sup>3</sup> Mr. Gellis, an employee of Falcon, was directed to not answer questions propounded by counsel for Halliburton, by Falcon’s counsel.

Id. (emphasis added) As court decisions contemplating the enforcement of arbitration provisions indicate, when arbitration is contemplated, and specifically, when arbitration is requested by a party such as Texas Keystone, there must be a basis for the arbitration request. The basis of the arbitration request is the contract in which the arbitration clause is found. In addition, in the section of *Texas Keystone's Response Brief* addressing the scope of the arbitration clause, Texas Keystone argues that Texas Keystone's failure to provide indemnification to Halliburton should be properly addressed through a "breach of contract" action. See, *Texas Keystone Response Brief*, at pg. 21. Halliburton is puzzled how Texas Keystone can assert that there is no contract, at the same arguing to the Court that Halliburton's remedy is a breach of contract action. A breach of contract action naturally arises from a previously ratified contract.

**II. Texas Keystone's Arguments That The Scope of Arbitration Was Not Improperly Expanded Beyond Its Intended Scope Fails To Address The Involvement of Additional Parties In the Dispute**

The arbitration provision at issue provides:

G. DISPUTE RESOLUTION - Customer and Halliburton agree that any dispute that may arise out of performance of this contract shall be resolved by a binding arbitration panel of three arbitrators under the rules of the American Arbitration Association. The arbitration will take place in Houston, TX.

Texas Keystone attempts to portray the issue of the scope of the arbitration provision above in a "simple, straightforward" manner. See, *Texas Keystone Response Brief*. This Court has recently received a brief submitted by Falcon Drilling, L.L.C. (hereafter, "Falcon") related to the ongoing litigation in this manner. Falcon and Texas Keystone are closely held companies, with overlapping ownership and officers. Falcon's brief has brought to the forefront the issues associated with referring this matter to arbitration. If Texas Keystone's Motion to Dismiss Halliburton's cross-claim

is upheld, Halliburton is faced with the specter of litigating in Texas and the Circuit Court of Tyler County, against two, closely related parties. Falcon is not subject to the arbitration provision in the work order at issue. In this instance, arbitration becomes a tool of the litigation machinery, which runs the risk of eliminating substantive rights as more fully explained below.

Discovery on the issue of Halliburton's cross-claims was in its infancy at the time the lower court dismissed Halliburton's cross-claim against Texas Keystone. Texas Keystone, at page 13 of its *Response Brief*, acknowledged that it prohibited Halliburton from engaging in discovery on "the issue of whether the work order created a binding contract between Halliburton and Texas Keystone." See, *Texas Keystone's Response Brief*, at pg. 13.<sup>4</sup> Thus, because of the interrelated nature of the parties, the question emerges as to how Halliburton is to conduct discovery and explore the relationship between the entities to determine where and at what percentage fault lies, when the litigation is essentially bifurcated in two separate forums. It is easy to imagine a scenario whereby Falcon objects to discovery questions and inquires related to Texas Keystone in the Circuit Court proceeding and Texas Keystone does likewise in arbitration. As Rule 1 of the West Virginia Rules of Civil Procedure states: "They [Rules of Civil Procedure] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." W. Va. R. Civ. P. 1. (Parenthetical information added)

Courts across this county have been uniform in upholding the principle that when a matter is referred to arbitration, parties are not to do so at the expense of the rights provided to them in a

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<sup>4</sup> Texas Keystone has provided the Court with affidavits and deposition testimony, which it says supports its contention that the case should be referred to arbitration, at the same time acknowledging that it prohibited Halliburton from discovery related to whether their existed a contract.

court of law. “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial forum. State ex rel Dunlap v. Berger, 211 W. Va. 549, 556, 567 S.E.2d 265, 272 (2002), *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652, 114 L.Ed. 26, 37 (1991) (discussing pre-suit agreement to arbitrate pursuant to the Federal Arbitration Act). Even if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of the that claim. Otherwise, arbitration of the claim conflicts with the statute’s purpose of both providing relief and generally deterring unlawful conduct through the enforcement of its provisions.” Dunlap, at 556, *citing Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6<sup>th</sup> Cir. 2000). *See also, Dunlap*, at 556, *citing Parrett v. City of Connersville, Inc.*, 737 F.2d 690, 697 (7<sup>th</sup> Cir. 1984) (holding that arbitration offended due process where arbitrator could not award full common law damages nor prevent harm to Plaintiff before it occurred).

The Court in Dunlap went on to summarize the holdings of other jurisdictions addressing potential problems with the Federal Arbitration Act: “This reasoning extends not only to protect a party’s right to seek and obtain all of the remedies that are afforded by law under specific statutory schemes, but also to protect a party’s right to fully and effectively vindicate rights that are secured by common law for the benefit of citizens generally – such as the right to be free from fraud and oppression generally. Dunlap, at 556.

Halliburton acknowledges that the Dunlap decision was rendered in the context of this Court’s consideration of a contract of adhesion. Such is not the case with the contract between Halliburton and Texas Keystone. However, the substantive issues concerning arbitration and its

potential to eliminate substantive rights must be considered. The referral of this matter to arbitration, with the potential to limit discovery and place burdensome difficulties on the prosecution of Halliburton's cross-claim against two closely related parties, warrants that this matter be remanded to the Circuit Court of Tyler County for resolution of Halliburton's claim for contractual indemnification.

In support of its position that the arbitration provision in the contract should supercede the indemnification provision, Texas Keystone asserts on page 18 of its brief that the work order at issue ". . . was presented to an employee of Falcon Drilling on the day of the accident in question, presumably under the threat that no work would be performed by Halliburton unless the work order was signed." *Texas Keystone Response Brief*, at pg. 18. Texas Keystone omits the deposition testimony of Paul Gellis, the "tool pusher" in charge of the drilling operations at the Texas Keystone well site. Prior to the point when counsel for Falcon prohibited Mr. Gellis from answering questions related to the authority he was provided by Texas Keystone related to the work order, the following exchange transpired:

Q: Okay. With respect to Halliburton and their role on this particular well site, who contacted them to ask them to come on site?

A. That would be myself.

Q. Okay. And who do you contact at Halliburton to make that call or that inquiry?

A. I would call the dispatcher.

*Deposition Transcript of Paul Gellis*, pg. 182, lines 7-13.

Finally, at footnote 5 of *Texas Keystone's Response Brief*, Texas Keystone argues that after requesting that this matter to be arbitrated, the burden is now on Halliburton to initiate arbitration

proceedings. It was Texas Keystone that argued that this matter should be brought before a panel of arbitrators. If this Court upholds the Circuit Court's rulings with respect to ordering this matter be sent to arbitration, Halliburton has no reservation about initiating the arbitration proceedings. However, a motion to dismiss terminates the proceedings before the Circuit Court of Tyler County. As Halliburton clarified in its Appeal Brief, this matter may need to be referred back to the circuit court. The appropriate method for invoking the right to arbitration is not a Motion to Dismiss the proceeding, but rather to move the court that the matter be referred to arbitration, with a corresponding stay in proceedings. Texas Keystone's analogy, contained in footnote 5 of its Response Brief, demonstrates that Texas Keystone is using arbitration in an attempt to extricate itself from the indemnity provisions in the contract.

**III. Texas Keystone's Arguments that Halliburton's Right to Contribution Have Been Extinguished Are Unavailing**

**A.) Texas Keystone incorrectly interprets the Sydenstricker opinion**

In the instant matter, the lower court dismissed Halliburton's contribution claim because the Court found that Halliburton had relinquished its right to pursue contribution as a result of its settlement of Plaintiffs' claims. Additionally, Texas Keystone now asserts that because of its settlement with Plaintiffs, another avenue for the elimination of Halliburton's cross-claim for contribution is present. This is simply not true.

With respect to Texas Keystone's claim that Sydenstricker, et al. v. Unipunch Products, et al., 169 W. Va. 440, 288 S.E.2d 511 (1982) forecloses Halliburton's right to seek contribution from it, a thorough review of the Sydenstricker decision unequivocally negates this position. While

discussing the potential for recovery for a contribution claim, while also considering the effect of the workers' compensation statute, the Court stated,

*[o]ur right to contribution before judgement is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured Plaintiff. However, it is clear that the amount of recovery in a third-party action based on contribution is controlled by the amount recovered by the plaintiff in the main action.*

Id., at 452 (emphasis added). Taking into account that Sydenstricker involved a separate third party suit, it is clear that the opinion announced a strong policy favoring a party's ability to recover on a theory of contribution from another responsible tortfeasor.

As previously stated in Halliburton's Appellate Brief, if the lower court's ruling is upheld, future defendants will be forced to seriously reconsider early settlement in litigation in that they would be foreclosed from asserting a right to contribution against other defendants who remain in the litigation. In this instance, the strong policy favoring resolution of disputes through settlement is upended in favor of aggressive defensive litigation. These are results that this Court cannot and should not support by upholding the Tyler County Circuit Court's dismissal of Halliburton's claim for contribution.

From a policy perspective, the position asserted by Falcon would promote a chilling effect on settlements between Plaintiff and putative tortfeasor in a situation where there is more than one potentially liable tortfeasor. It has long been held that "the law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation." Syl. Pt. 1, *in part*, Sanders v. Roselawn Memorial Guardians, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968).

**B.) The West Virginia Court Appeals Decision in Zando Is Not Applicable To Halliburton's Claims for Contribution Against Texas Keystone**

Texas Keystone, as well as Falcon, attempts to place reliance on the West Virginia Supreme Court opinion of Board of Educ. v. Zando Martin & Milstead, 182 W. Va. 597, 390 S.E.2d 796 (1990), for its argument that a settling defendant cannot remain in the case to seek recovery from a non-settling defendant. This is not true. The Court in Zando held that "... one who settles with the plaintiff prior to verdict is discharged from any liability for contribution." Id., 182 W. Va. at 604, 390 S.E.2d at 803. The Zando opinion does not foreclose a party's right to pursue contribution after settlement. Halliburton asserted its cross-claims in its Answer to Plaintiff's Amended Complaint and reserved the right to continue pursuit of those claims after settlement with Plaintiffs. Halliburton's cross-claim for contribution against Falcon is properly before the Circuit Court.

The cases Texas Keystone has relied upon to support its position that Halliburton's cross-claim for contribution is extinguished, notably Charleston Area Medical Center, 217 W. Va. 15, 614 S.E.2d 15 (2005), and Lombard Can. Ltd. v. Johnson, 217 W. Va. 437, 618 S.E.2d 466 (2005), provide that "[a] defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure." Lombard, *supra*, at 441.

Lombard and CAMC do not stand for the proposition that the right to contribution and allocation of fault are extinguished by a plaintiff's settlement with a joint tortfeasor. The contribution claim is essentially a bifurcated matter, where a party seeking contribution may litigate its claims in lieu of initiating an entirely separate civil action to proceed on the same course.

**C.) Holdings From Other Jurisdictions Support Halliburton's Right to Recover Contribution from Texas Keystone**

In M. Pierre Equipment Co., Inc., v. Griffith Consumers Co., 831 A.2d 1036, 2003 D.C. App. LEXIS 559 (2003), the District of Columbia Court of Appeals, found that a settling tortfeasor maintains the ability to assert a claim for contribution against a non-settling tortfeasor. The court held that a settling tortfeasor "has the burden of establishing common liability and the reasonableness of the settlement. Id., at \*\*2. The factual backdrop of the court's ruling involved an apparent pre-suit settlement, whereby the settling tortfeasor was assigned the rights of the damaged party. Id., at \*\*3. The settling tortfeasor proceeded to file suit against the non-settling tortfeasor and recovered a jury award in the amount of \$600,000.00, based on the evaluation that this amount "would have been a reasonable settlement with the Galstons for their damages." Id., at \*\*4. See also, Automobile Underwriters Corp. v. Harrelson, 409 N.W.2d 688 (Iowa 1987); Transport Ins. Co. v. Chrysler Corp., 71 F.3d 720, 722 (8<sup>th</sup> Cir. 1995); Travelers Ins. Co. v. United States, 283 F.Supp. 14, 31 (S.D. Texas 1968).

A final note related to the defenses to Halliburton's claims for contribution concerns Falcon's reference to the Uniform Contribution Among Joint Tortfeasors Act ("UCATA") in its unauthorized filing. Falcon cited to the UCATA for the proposition that it supports Falcon's position that a settling tortfeasor is not entitled to contribution from a non-settling tortfeasors. See, Falcon's Submission, at pg. 15, Uniform Contribution Among Joint Tortfeasors Act, 12 U.L.A. 202 (2008) § 1(d). West Virginia has not adopted the UCATA and the § 2 of the UCATA eliminates the notion of comparative negligence in a contribution action: "In determining the pro rata shares of tortfeasors in the entire liability . . . their relative degree of fault shall not be considered." See, also M. Pierre

at \*\* 6, 2003 D.C. App. LEXIS 559 (2003). Falcon, and implicitly Texas Keystone, attempt to invoke authority from the Restatement of Torts: *Contribution Among Joint Tortfeasors*, § 886(A)(2) in apparent support for its position on contribution in the instant action. However, Comment (d) to the Restatement of the Law (Second) Torts, § 886A actually provides:

Unreasonable Settlements. In particular, when a tortfeasor without suffering a judgment against him has voluntarily made a settlement with the plaintiff and a payment that exceeds any amount that would be reasonable under the circumstances, he should not be permitted to inflict liability for contribution regarding the excess upon another tortfeasor who has not entered into the same settlement. The reasonableness of the settlement is always open to inquiry in the suit for contribution, and the tortfeasor making it has the burden of establishing the reasonableness of the payment he has made.

Comment (g) to § 886A states: "If one from whom contribution is sought is not in fact liable to the injured person, he is not liable for contribution." Collectively, these passages support the position that Halliburton should be permitted to seek contribution from Falcon and Texas Keystone, irrespective of the status of any settlement with Plaintiffs. All parties were before the Court and were aware of Halliburton's cross-claim. For this Court to hold that Halliburton's cross-claim was automatically eliminated at the moment Texas Keystone decided to settle with Plaintiffs, would be to inject a degree of uncertainty into the litigation process, which may force defendants in multi-party suits, to avoid settlement if substantive rights can be eliminated through the actions of a party over which they have no control.

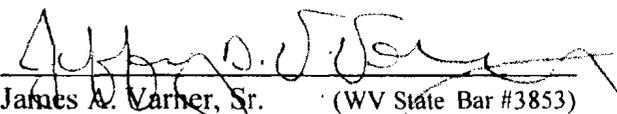
### CONCLUSION

WHEREFORE, based upon the foregoing and for all the reasons set forth above and in Halliburton's previously filed brief, the Appellant herein, Halliburton Energy Services, Inc., requests this Honorable Court enter an Order granting the relief requested in its Appeal. The Appellant

specifically requests this Honorable Court enter an Order reversing the Circuit Court's October 29, 2008 Memorandum Order and Supplemental Order, which collectively dismissed Halliburton's cross-claim against Texas Keystone. Halliburton has produced ample evidence to overcome the light standard on a motion to dismiss. Appellant Halliburton further requests that this Court find that Halliburton is entitled to express indemnification pursuant to the contract between Texas Keystone and Halliburton and that this Court find that Appellant is not required to arbitrate the issue of its indemnification claim against Texas Keystone. Halliburton also requests that this Court find that Texas Keystone waived its right to assert the affirmative defense of arbitration for the reasons stated in Halliburton's appellate brief. Finally, it is requested that this Honorable Court reverse the circuit court's ruling which dismissed Halliburton's cross-claim for common law contribution, as the same was not supported in fact or law and remand this proceeding to the Circuit Court of Tyler County, West Virginia for further proceedings.

Respectfully submitted this the 9th day of October, 2009.

**Appellant, HALLIBURTON ENERGY SERVICES, INC., By Counsel:**



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**CERTIFICATE OF SERVICE**

This is to certify that on the 9th day of October, 2009, I served the foregoing "***Reply on Behalf of Appellant, Halliburton Energy Services, Inc., to Response Brief Submitted by Texas Keystone, Inc.***" upon all counsel of record by depositing true copies in the United States Mail, postage prepaid, in envelopes addressed as follows:

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