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CANDY L. WARNER  
CLERK OF COURT  
TYLER COUNTY, WV

**IN THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA**

**HEATHER RUCKDESCHEL,  
Administratrix of the Estate of  
THOMAS G. MILLER, JR.,**

**PLAINTIFF,**

**VS.**

**// CIVIL ACTION NO. 07-C-49M**

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

**DEFENDANTS.**

**MEMORANDUM ORDER**

Defendant, Texas Keystone, Inc. (hereinafter "Texas"), by counsel, on a prior day, filed a Motion to Dismiss the action by Plaintiff pursuant to **West Virginia Code §56-1-1a and Rule 12(b)** of the **West Virginia Rules of Civil Procedure**.

The Court denied that Motion as to Plaintiff.

Halliburton Energy Services (hereinafter "Halliburton"), which was a Co-Defendant with Texas, filed its answer to Plaintiff's Complaint on or about September 14, 2007, and also asserted a Cross Claim against Texas.

Texas, in response to the Cross Claim of Halliburton, asserted the

same reasons to dismiss as made against Plaintiff. For the same reasons the Motion to Dismiss as against Plaintiff was denied, the Motion to Dismiss the Cross Claim of Halliburton is denied, as to **W. Va. Code §56-1-1a** and **Rule 12(b)** of the **West Virginia Rules of Civil Procedure**.

Halliburton, in its Cross Claim against Texas, alleged that Texas Keystone, Inc. and Halliburton entered into a contract wherein Texas agreed to release and hold Halliburton harmless from any liability that should result from work done by Texas or any sub-contractor of Texas.

Texas filed its Motion to Dismiss the Cross-Claim of Halliburton on September 21, 2007.

Halliburton alleged in its Cross Claim that Texas contracted with Halliburton on October 18, 2005, to obtain equipment from Halliburton, to be used at Wiley Number Eight (8) Well Site, the location of the accident underlying this litigation.

The contract between Halliburton and Texas is referred to in this Order as the "Texas Keystone Work Order" or "work order".

The language in the work order relevant to the issue presently before the Court is as follows:

"Customer (Texas Keystone) agrees to **RELEASE** Halliburton Group from any and all liability for any and all damages whatsoever to property

of any kind owned by, in the possession of, or leased by Customer and those persons and entities Customer has the ability to bind by contract or which are co-interest owners or joint venturers with Customer. Customer also agrees to **DEFEND, INDEMNIFY AND HOLD Halliburton Group HARMLESS** from and against any and all liability, claims, costs, expenses, attorney fees and damages whatsoever for personal injury, illness, death, property damages and loss resulting from: loss of well control, services to control wild well, whether underground or above the surface, reservoir or underground damage, including loss of oil, gas, other mineral substances or water, surface damage arising from underground damage, damage to or loss of the well bore; subsurface trespass or any action in the nature thereof; fire; explosion; subsurface pressure; radioactivity; and pollution and contamination and its cleanup and control. (Emphasis in original).

The contract further provides: **CUSTOMER'S RELEASE, DEFENSE, INDEMNITY AND HOLD HARMLESS**, obligations will apply even if the liability and claims are caused by the sole, concurrent, active or passive negligence, fault, or strict liability of one or more members of the Halliburton Group, the unseaworthiness of any vessel or any defect in the data, products, supplies, materials or equipment furnished by any member of members of the Halliburton Group whether in design, manufacture,

maintenance or marketing thereof or from a failure to warn of such defect. 'Halliburton Group is defined as Halliburton Energy Services, Inc., its parent, subsidiary and affiliated companies, insurers and subcontractors and all its/their officers, directors, employees, consultants and agents...' (Emphasis in original)."

In addition to the Texas arguments made against Plaintiff in its Motion to Dismiss, previously denied, it also argues that *forum non convenienc*e is a separate and distinct argument as to Halliburton. The Court believes it is from this contention that Texas raises the defense of arbitration. In any event, the parties have agreed by their conduct that the defense of arbitration is raised by Texas in its Motion to Dismiss Halliburton's Cross Claim.

Texas argues that the work order doesn't constitute a binding agreement between Halliburton and Texas, but contends that this issue should be decided by arbitration under the work order.

It is the contention of Texas that the person, who signed the work order on behalf of Texas, did not have the authority to bind Texas. The argument of Texas is that as between Texas and Halliburton, the work order, which Halliburton drafted, provides that disputes concerning the work order are to be resolved before arbitrators in Houston, Texas. The

work order provides, in part, that:

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

Texas argues that under West Virginia law, an arbitration clause is intended to be an exclusive means of resolving disputes under a contract and cites **Board of Education, County of Berkeley v. Miller, 160 W. Va. 473, 236 S.E.2d 439 (W. Va. 1977)**.

Therefore, Texas contends that if the work order is enforceable, any disputes involved in this case under the order should be resolved in Houston, Texas. Additionally, even the question of whether the work order is binding on Texas, must be decided by arbitration.

The issue before this Court is whether the Motion of Texas to Dismiss the Halliburton Cross Claim on the basis that the work order construction and application to this case should be decided by arbitration should be granted or denied.

Halliburton contends in support of its theory that the work order was valid, having been signed by an agent of Texas, who had the authority to sign and bind Texas. Halliburton urges in support of the validity of the work order that its validity is based upon the law of agency in West

Virginia.

Halliburton contends that the contention of Texas that the issue of indemnity should be arbitrated is a legal impossibility.

Halliburton contends that the Motion to Dismiss of Texas to the Halliburton Cross Claim does not assert the affirmative defense of "arbitration" as required by **W.V.R.C.P., Rule 8c**. Halliburton cites **State ex rel., The Borden and Robeson Corp. v. Hill, 208 W. Va. 163, 539 S.E.2d 106 (2000)** to support this contention.

In the alternative, Halliburton urges that the arbitration contemplated by the parties is not broad enough to include the question of indemnification in a wrongful death action involving multiple parties and issues far beyond those contemplated in the work order.

Texas contends that the real issue is whether the indemnification provision in the work order is enforceable, and that issue must be determined through arbitration.

The issue in this case borders on being intractable.

The Court keeps coming back to the question of how does Halliburton disavow all the provisions in the work order with the exception

of the indemnification provision.<sup>1</sup>

On the other hand, how does Texas contend there is no enforceable contract or work order, but urge the Court that despite there being no work order, the matter should be resolved by arbitration as provided in a contract, that, in the mind of Texas, is not enforceable.

If Halliburton wants the work order to be enforceable, shouldn't it be required to accept "the bitter with the sweet"? In other words, resolved by arbitration as provided in the work order it contends is enforceable.

This Court is of the opinion that Texas did not waive its right to assert arbitration as a defense under **West Virginia Rules of Civil Procedure 8(c)**.

Both parties make good arguments concerning the waiver issue. **Rule 8c** of the **West Virginia Rules of Civil Procedure** does require that arbitration must be plead as an affirmative defense.

However, the cite to the language of **American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F. 3<sup>rd</sup> 88, 96 (4<sup>th</sup> Cir. 1996)** on page 8 of the Texas Reply convinces this Court that the better approach is not to invoke waiver upon mere delay in assertion without

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<sup>1</sup>The Court is mindful of Halliburton's contention that there is no language in the work order included in the indemnification agreement that conditions Halliburton's right to indemnification on first proceeding to arbitration.

anything more.

In this case, even if Texas did not invoke arbitration promptly, no prejudice to Halliburton has been shown for the brief delay.

Applying the facts provided in the respective briefs by the parties concerning the execution of the work order, the Court feels the work order is valid. However, perhaps more discovery would be needed on this issue for the Court to decide that issue upon summary judgment. It may be the case that even after discovery is concluded, certain issues of fact remain for jury determination before the Court could find as a matter of law that the work order constituted a binding agreement between Texas and Halliburton.

The cases need not be cited or repeated in this Order that support the proposition that generally arbitration provisions should be enforced. The general exception recognized in this state and most states, is that contracts of adhesion calling for arbitration are not favored. Adhesion is not even suggested in the instant case. It must be admitted that both parties are knowledgeable commercial litigants.

The Court, on January 4, 2008, directed Halliburton to state with particularity how it could not be afforded complete relief through arbitration as it contended during argument on this issue.

Texas contends that in response to this Inquiry by the Court, Halliburton has not provided any convincing discussion of what relief would not be available through arbitration.

On pages 4 and 5 of Halliburton's Supplemental Brief, it attempts to explain to the Court the relief it could not receive in arbitration.

The Court does not agree that Halliburton could not get complete relief in arbitration.

This Court has earlier 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. It doesn't appear to the Court that Falcon Drilling is a necessary party to an arbitration proceeding. The agent of Falcon Drilling who signed the work order is involved or will be involved in the arbitration, but only as a witness who may be called, or whose affidavit presented in an arbitration proceeding. Making Falcon a party to the arbitration will not be necessary.

Halliburton has not convinced the Court that it cannot receive complete relief from arbitration as it agreed in the work order it prepared.

The Motion by Texas Keystone, Inc. to Dismiss the Cross Claim filed by Halliburton upon the basis that the claim is subject to arbitration is GRANTED.

It is so ORDERED.

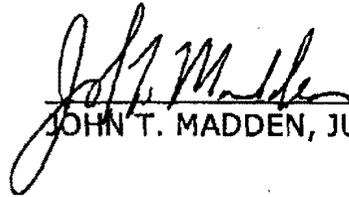
Objections and Exceptions are saved.

Regardless of what other action may be taken by Halliburton in this case, there should be no stay of the Plaintiff's case against the Defendants while the issue of arbitration is decided by our Supreme Court.

This is a Final Order as to the Cross Claim of Halliburton against Texas, and therefore may be immediately appealed.

The Clerk shall transmit a copy of this order to all counsel of record.

Dated this 29<sup>th</sup> day of October, 2008.

  
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JOHN T. MADDEN, JUDGE

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: Candy Warner, clerk

Circuit Court of Tyler County, West Virginia

By: Heather Britten, Deputy

IN THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA

FILED

HEATHER RUCKDESCHEL AND  
THOMAS G. MILLER, SR., as  
Co-Administrators of the Estate of  
THOMAS G. MILLER, JR., deceased,

2009 FEB 10 AM 10:51

CANDY L. WARNER  
CIRCUIT COURT/FAMILY COURT  
TYLER COUNTY, WV

Plaintiffs,

CIVIL ACTION NO. 07-C-49M

vs.

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

Defendants.



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**SUPPLEMENTAL ORDER**

On the 16<sup>th</sup> day of January, 2009, came the parties by counsel. Scot Summers of Offut & Nord appeared on behalf of Texas Keystone, Inc.; Plaintiffs, appeared through Mark Colantonio of the firm of Frankovitch, Anetakis, Colantonio & Simon; and Halliburton Energy Services, appeared by counsel, James N. Riley and Jeffrey D. Van Volkenburg of the law firm of McNeer, Highland, McMunn and Varner, L.C; Falcon Drilling, L.L.C., appeared telephonically by counsel Eric Barchiesi, of the law firm of Eisenberg & Torisky. The parties appeared pursuant to a hearing, noticed by Halliburton Energy Services, on its "Motion for Clarification of Order and Motion to Make Order Granting Defendant Texas Keystone's Motion to Dismiss Cross-Claim Against Halliburton Energy a Final Order for Purposes of an Immediate Appeal." A Scheduling Conference was further noticed by Plaintiffs' Counsel.

In response to Halliburton's Motion, Texas Keystone, on January 14, 2009, fax-filed "Texas Keystone, Inc.'s Response to Halliburton's Motion for Clarification of Order and Motion to Make Order Granting Defendant Texas Keystone's Motion to Dismiss Cross-Claim Against Halliburton Energy a Final Order for Purposes of an Immediate Appeal." Halliburton subsequently filed its "Reply of Halliburton to Texas Keystone's Response to Halliburton's Motion for Clarification of

Order and Motion to Make Order Granting Defendant Texas Keystone's Motion to Dismiss Cross-Claim Against Texas Keystone a Final Order for Purposes of Appeal." The aforementioned briefings were submitted in response to this Court's October 29, 2008, Memorandum Order<sup>1</sup>.

Halliburton's initial Motion for Clarification and Motion to Make Order Final For Purposes of Appeal, requested that this Court modify its October 29, 2008 Order to include certain language, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, which would clarify the Court's Order as final, for purposes of an immediate appeal. As will be discussed more fully below, this Court grants Halliburton's Motion to the extent that this Court has dismissed Halliburton's cross-claim against Texas Keystone, in its entirety. It is accordingly, ORDERED that, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court makes an express determination that, as to the previous order of this Court, there is no just reason for delay and finds for the Defendant, Texas Keystone, Inc., as to its Motion to Dismiss the Cross-Claim of Halliburton Energy Services. To the extent that the foregoing rulings of this Court with respect to the Rule 54(b) certification are adverse to any party herein, the exceptions and objections of said party are hereby noted and preserved.

Halliburton also requested that this Court clarify its previous Order with respect to the scope and breadth of its Order as applied to Halliburton's previously asserted cross-claim against Texas Keystone, Inc. In its cross-claim against Texas Keystone, Halliburton asserted claims of contribution and contractual indemnification. The Court's October 29, 2008 Memorandum Order purported to dismiss Halliburton's cross-claim, however, the entirety of the Memorandum Order concerned discussion of Halliburton's claim for indemnification. It is acknowledged by this Court

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<sup>1</sup> The Memorandum Order, is herein incorporated by reference. The Memorandum Order was entered by the Honorable John T. Madden. Judge Madden retired, effective January 1, 2009. This hearing was held before the Honorable David Hummel, Jr.

that the issue of Halliburton's contribution claim, is not specifically addressed in the October 29, 2008 Memorandum Order.

The Court heard oral arguments on behalf of Texas Keystone and Halliburton as to whether the specific claim of Halliburton for contribution against Texas Keystone should be encompassed within the Court's previous Memorandum Order, or remain pending before this Court. Texas Keystone relied on the West Virginia Supreme Court of Appeals' decisions in Charleston Area Medical Center, Inc., v. Parke Davis, 614 S.E.2d 15, 22 (2005) and Sydenstrickter v. Unipunch Products, in et al., 288 S.E.2d 511, 516 (W. Va. 1982), in support of its position that Halliburton's contribution claims against Texas Keystone were extinguished upon settlement of Plaintiffs' claims against it. Halliburton countered that the factual predicates upon which the Charleston Area Medical Center, Inc. and Sydenstrickter opinions were based could not be applied to the facts before the Court. Specifically, Halliburton argued that because it had asserted its claim for contribution against Texas Keystone, *after* suit had been filed, thereby providing notice of its claim prior to settlement with Plaintiffs, Texas Keystone could not now object to it remaining before the Court. Halliburton further argued that all parties, Texas Keystone included, were present at the settlement conference, and Texas Keystone did not voice any objection to Halliburton's settlement with the Plaintiff, and Halliburton reserved the right to pursue their claims for contribution against the remaining Defendants.

The Court, upon consideration of the entire record in this matter finds that the October 29, 2008 Memorandum Order, which dismissed Halliburton's Cross-Claim against Texas Keystone, was meant to encompass both Halliburton's claim for indemnification and contribution. It is accordingly ORDERED, that Halliburton's cross-claim for contribution against Texas Keystone is dismissed in accordance with the West Virginia Supreme Court of Appeals holding in Charleston Area Medical Center, Inc., v. Parke Davis. The exceptions and objections to the Court's holdings are noted.

Pursuant to agreement of the parties, the Court hereby modifies its October 29, 2008 Memorandum Order to the extent that trial in this matter is stayed and will not be rescheduled until such time as the appeals from this Court's holdings have been resolved by the West Virginia Supreme Court of Appeals, however, Plaintiff may continue to pursue discovery against the remaining Defendants. In addition, at the January 16, 2009 hearing Halliburton requested clarification as to its claims for indemnification and contribution against Falcon Drilling. This Court finds that such claims are still currently pending before this Honorable Court. Finally, Halliburton requested clarification concerning the time frame to perfect its appeal to the West Virginia Supreme Court of Appeals. This Court finds that the time period for Halliburton or any other party to perfect an appeal from this Court's rulings date to its October 29, 2008 Memorandum Order. This Court further finds that in the event that Halliburton's appeal to the West Virginia Supreme Court of Appeals is accepted and its claim for indemnification is reinstated before this Court, Halliburton may need to reopen its discovery to permit Halliburton to pursue discovery, pertinent to its cross-claim against Texas Keystone. The objections and exceptions of the respective parties to this Order and the October 29, 2008 Order are duly noted.

ENTER: February 6, 2009  
[Signature]  
Honorable David Hummel, Jr.

SUBMITTED BY:

[Signature]  
James A. Varner, Sr. (WV State Bar #3853)  
Debra Tedeschi Herron (WV State Bar #650)  
Jeffrey D. Van Volkenburg (WV State Bar #10227)  
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Clarksburg, WV 26302-2040  
Telephone: (304) 626-1100  
Facsimile: (304) 623-3035  
**Counsel for Halliburton Energy Services, Inc.**

Hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.  
Attest: [Signature], clerk  
Circuit Court of Tyler County, West Virginia  
By: [Signature], Deputy