

CAUSE NO. _____

BICO DRILLING TOOLS, INC.	§	IN THE DISTRICT COURT
	§	
V.	§	OF HARRIS COUNTY, TEXAS
	§	
VON ENERGY SERVICES, LLC AND	§	
JIM ELZNER AND JOHN SLOCUM	§	
AND QUINTEN BERTELSEN AND	§	
MIKE CANADA	§	_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DISCLOSURE

A. Discovery Control Plan

1. Plaintiff intends to conduct discovery under Level 2 of the Texas Rules of Civil Procedure.

B. Parties

2. Plaintiff, Bico Drilling Tools, Inc., is a Texas corporation that conducts business in Harris County, Texas.

3. Defendant, Von Energy Services, LLC, is a Texas limited liability corporation and may be served with process by serving its registered agent, Mark A. Padon, 1980 Post Oak Blvd., 24th floor, Houston, Texas 77056.

4. Defendant, Jim Elzner, is an individual who may be served with process at 1980 Post Oak Blvd., floor 24, Houston, Texas 77056.

5. Defendant, John Slocum, is an individual who may be served with process at 1980 Post Oak Blvd., floor 24, Houston, Texas 77056.

6. Defendant, Quinten Bertelsen, is an individual who may be served with process at 1980 Post Oak Blvd., floor 24, Houston, Texas 77056.

7. Defendant, Mike Canada, is an individual who may be served with process

at 1980 Post Oak Blvd., floor 24, Houston, Texas 77056.

C. Jurisdiction

8. The Court has jurisdiction over defendants because defendants have done business in Harris County, Houston, Texas and are amenable to service by a Texas court.

D. Venue

9. Venue is proper in Harris County, Texas.

E. Facts

10. Plaintiff provided goods to Von Energy Services, LLC on an open account. See Statement attached as Exhibit A. Defendant Von Energy Services, LLC has failed to pay the amount due on the account, thus giving rise to this lawsuit.

F. Suit on Account

11. Plaintiff provided goods to Defendant Von Energy Services, LLC on an open account. Defendant Von Energy Services, LLC accepted the goods and became bound to pay Plaintiff its designated charges, which were reasonable and customary for such services. Plaintiff attaches the account as Exhibit A and incorporates it by reference into this petition. The account accurately sets forth the description of goods, charge for said goods, and the dates of goods Plaintiff provided to Defendant Von Energy Services, LLC. The account represents the record of the series of transactions plaintiff systematically keeps in the ordinary course of business.

G. Damages

12. The balance due to Plaintiff on the account as of April 23, 2018 is

\$754,986.55 after allowing for all just and lawful offsets, payments, and credits.

H. Liability of Jim Elzner, John Slocum, Quinten Bertelsen and Mike Canada

13. Plaintiff seeks to pierce the corporate veil of defendant Von Energy Services, LLC and hold Jim Elzner, John Slocum, Quinten Bertelsen, and Mike Canada (the officers of Von Energy Services, LLC) individually liable for the contract damages sought in this case. Jim Elzner, John Slocum, Quinten Bertelsen, and Mike Canada utilized the corporate form Von Energy Services, LLC as a sham to perpetrate a fraud on plaintiff. *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986). Jim Elzner, John Slocum, Quinten Bertelsen, and Mike Canada fraudulently induced plaintiff to enter into the agreement with no intent to pay plaintiff. Plaintiff relied upon Jim Elzner, John Slocum, Quinten Bertelsen, and Mike Canada's promise to pay and provided goods to defendants which resulted in defendants' benefit. Therefore, the corporate form should be disregarded and Jim Elzner, John Slocum, Quinten Bertelsen, and Mike Canada should be held individually liable for plaintiff's causes of action against Von Energy Services, LLC

I. Attorney Fees

14. Plaintiff is entitled to recover reasonable and necessary attorney fees under Chapter 38 of the Texas Civil Practice & Remedies Code because this is a suit on account, which is listed in Section 38.001(7). Plaintiff presented its claim to Defendants. Defendants did not tender the amount owed within 30 days of the date the claim was presented.

J. Conditions Precedent

15. All conditions precedent have been performed or have occurred as required

by Rule 54 of the Texas Rules of Civil Procedure.

K. Request for Disclosure

16. Under the authority of Rule 194 of the Texas Rules of Civil Procedure, defendants are requested to disclose, within 50 days of service of this petition and request, the following information or material:

- a. The correct names of the parties to this lawsuit;
- b. The name, address, and telephone numbers of any potential parties;
- c. The legal theories and, in general, the factual bases of defendant's claims or defenses;
- d. The amount and any method of calculating economic damages;
- e. The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;
- f. For any testifying expert, the expert's name, address, and telephone number; the subject matter on which the expert will testify; the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to defendant's control, documents reflecting such information; if the expert is retained by, or otherwise subject to defendant's control, then defendant is requested to produce all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and the expert's current resume and bibliography;
- g. Any indemnity and insuring agreements under which any person may be liable to satisfy part or all of a judgment rendered in this action;
- h. Any settlement agreements;
- i. Any witness statements;
- j. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical

records and bills;

- k. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party; and
- l. The name, address, and telephone number of any person who may be designated as a responsible third party.

L. Prayer

17. For these reasons, Plaintiff asks that Defendants be cited to appear and answer and that Plaintiff have judgment against Defendants for the following:

- a. \$754,986.55 as the amount due on the account;
- b. Attorney fees;
- c. Prejudgment and post-judgment interest as allowed by law;
- d. Costs of suit; and
- e. All other relief, in law and in equity, to which Plaintiff may be entitled.

Respectfully submitted,

MONSHAUGEN & VAN HUFF, P.C.


ALBERT T. VAN HUFF
SBN: 24028183
STEPHANIE B. DONAHO
SBN: 24055213
1225 North Loop West, Suite 640
Houston, Texas 77008
Telephone: (713) 880-2992
Telecopier: (713) 880-5297
Email: al@vanhuff.com

ATTORNEYS FOR PLAINTIFF
BICO DRILLING TOOLS, INC.

Verification

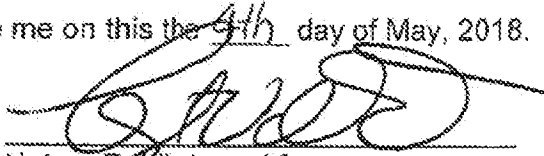
STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Samuel Claytor, who under oath stated that he is the duly authorized representative of Plaintiff on whose behalf the foregoing Original Petition is filed, that he is legally competent to make this Verification, which is based on his personal knowledge, and that the factual statements contained in the foregoing Original Petition are true and correct.

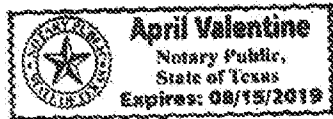


Samuel Claytor

SWORN AND SUBSCRIBED TO before me on this the 4th day of May, 2018.



Notary Public in and for
the State of Texas



CAUSE NO. _____

BICO DRILLING TOOLS, INC.

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IN THE DISTRICT COURT

V.

OF HARRIS COUNTY, TEXAS


VON ENERGY SERVICES, LLC AND
JIM ELZNER AND JOHN SLOCUM
AND QUINTEN BERTELSEN AND
MIKE CANADA

____ JUDICIAL DISTRICT

AFFIDAVIT OF SAMUEL CLAYTOR


Before me, the undersigned notary, on this day, personally appeared Samuel Claytor, a person whose identity is known to me. After I administered an oath to him, upon his oath, he said:

1. My name is Samuel Claytor. I am capable of making this affidavit. I have personal knowledge of the facts stated in this affidavit, and they are true and correct.
2. I am the President of BICO Drilling Tools, Inc.
3. The principal balance of \$754,986.55 is due from Defendants on the account, attached as Exhibit A, is just and true, is due, and allows all just and lawful offsets, payments, and credits.

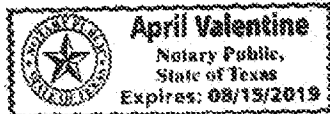


 Samuel Claytor

SWORN TO and SUBSCRIBED before me by Samuel Claytor on the 4th day of May, 2016.



 Notary Public in and for
 the State of Texas



CAUSE NO. 2018-30320

BICO DRILLING TOOLS, INC.	}	IN THE DISTRICT COURT OF
PLAINTIFF,	}	
	}	
v.	}	HARRIS COUNTY, TEXAS
	}	
VON ENERGY SERVICES, LLC AND	}	
JIM ELZNER AND JOHN SLOCUM	}	
AND QUINTEN BERTELSEN AND	}	
MIKE CANADA,	}	
DEFENDANTS.	}	190 TH JUDICIAL DISTRICT

DEFENDANTS' AMENDED ORIGINAL ANSWER

Von Energy Services, LLC (“Von Energy”), Jim Elzner (“Elzner”), John Slocum (“Slocum”), and Mike Canada (“Canada”) (collectively “Defendants”) file their Amended Answer as follows:

Defendants generally deny the allegations set forth in the Plaintiff’s Original Petition.

Defendants would show that there is a defect of parties.

Defendants deny the account which is the foundation of the Plaintiff’s action.

Defendants deny that all conditions precedent to Plaintiff’s recovery have been performed or have occurred.

Von Energy is not liable in the capacity in which it has been sued.

Accordingly, Defendants pray that Plaintiff take nothing and that upon final trial hereof, Defendants recover from Plaintiff as follows:

1. Attorneys’ fees and costs of court; and
2. Such other and further relief to which Defendant is entitled.

Respectfully submitted,

/s/ Robert J. Kruckemeyer
Robert J. Kruckemeyer; SBOT# 11735700
919 Milam, Suite 1500
Houston, Texas 77002
Ph: (713) 860-0547

Fax: (713) 222-2226

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *instrument* has been sent to all counsel of record by certified mail, return receipt requested, facsimile, and/or hand delivery, on this the 8th day of August, 2018.

/S/ Robert J. Kruckemeyer
Robert J. Kruckemeyer

VERIFICATION OF VON ENERGY LLC

STATE OF TEXAS }
 }
COUNTY OF HARRIS }

Before me, the undersigned notary public, did personally appear Jimmy Elzner, President of Von Energy, LLC, and first being duly sworn upon his oath did depose and state as follows:

“My name is Jimmy Elzner. I am over 21 years of age, have never been convicted of a felony or crime of moral turpitude and I am otherwise competent to make this verification. I am Managing Member of Von Energy, LLC and I am authorized on its behalf to make this verification. I have read the above and foregoing Defendants Amended Answer and every statement contained therein is within my personal knowledge and true and correct.

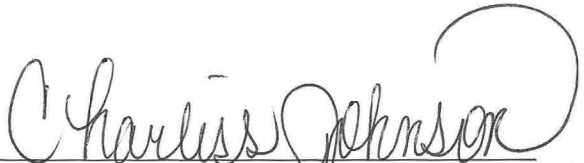
Further affiant sayeth not.”

Von Energy, LLC


By: Jimmy Elzner
Its: Managing Member

Signed this 8th day of August, 2018.




Notary Public in and for the State of Texas

CAUSE NO. 2018-30320

BICO DRILLING TOOLS, INC.	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
v.	§	
	§	OF HARRIS COUNTY, TEXAS
VON ENERGY SERVICES, LLC AND	§	
JIM ELZNER AND JOHN SLOCUM	§	
AND QUINTEN BERTELSEN AND	§	
MIKE CANADA	§	
	§	
Defendants.	§	190 th JUDICIAL DISTRICT

**DEFENDANT VON ENERGY SERVICES, LLC’S RESPONSE TO
PLAINTIFF BICO DRILLING TOOLS, INC.’s
INTERLOCUTORY MOTION FOR SUMMARY JUDGMENT**

Defendant, Von Energy Services, LLC (“VES”) responds to Bico Drilling Tools, Inc.’s (“Bico”) Interlocutory Motion for Summary Judgment (“Motion”) as follows:

I. SUMMARY OF RESPONSE

1. Summary Judgment is not proper because there are genuine issues of material fact with respect to the following issues:

- a. Whether Bico has proven its cause of action on sworn account;
- b. Whether Bico has proven its entitlement to attorneys’ fees;
- c. Whether there is a defect of parties;
- d. Whether VES is liable in the capacity in which it has been sued.

II. BACKGROUND

2. VES is a holding company. It administers insurance, payroll benefits, human resources, and performed limited accounting for VON Directional Services, LLC (“VDS”) and

VON Dynamics (“Dynamics”). VES does not, and never has, performed directional drilling services and therefore would never have had the need to contract with Bico for the acquisition of the equipment and services that make up the basis of Bico’s claim.

3. VDS is a directional drilling company. VDS provides both equipment and personnel to enable oil and gas exploration companies to achieve their maximum drilling performance. VDS did have the need to contract with Bico for the acquisition of the equipment and services that make up the basis of Bico’s claim.

4. On February 21, 2017 a Bico Application for Credit was completed that showed the name of the applicant to be VES. (Attached to the Motion as the second to last page of Exhibit B). Also, on February 21, 2017, a Bico General Terms and Conditions (“BGTC”) agreement was executed. (Attached to the Motion as the last page of Exhibit B). However, the line that was supposed to identify the customer was left blank and therefore Bico has provided no proof that VES entered into the BGTC with Bico.

5. In 2017 and 2018 VDS provided directional drilling equipment and services to various operators at various wells in New Mexico, Oklahoma and Texas. Beginning sometime after February 21, 2017 VDS began requesting and obtaining equipment and services from Bico for use at the various wells by VDS. VES never requested, used or paid for the equipment and services that VDS requested and used from Bico. Bico, however, made the invoices out to VES, not VDS, the company that was actually obtaining equipment the services from Bico.

6. Between November 22, 2017 and April 10, 2018 VDS provided equipment and services to various operators at various wells.

7. Some of the Bico invoices attached to the Motion show that Bico provided equipment and services to the following operators on the following wells:

Bico Invoice No.	Operator	Well
M36827	Elk River	West CVS TORO 32 STATE UNIT 1H
M63847	QEP	Peelar C 13BU
M63848	Olifant	Olifant University 25-18 1H
OK516149	Petro Hunt	Barnes 1-31-29XH
M63928	Diamondback	Jane M Graves B 1WB
M63990	Founders Oil & Gas	University Founders A25 #1
637802	SM Energy	Guitar North 2741 WA
637812	Kaiser Francis	South Bell Lake Unit #219H
638030	Endeavor Energy	Bankhead 4-33 Unit 2 Well #252

The VDS invoices attached to the Declaration of Jimmy Elzner, Managing Member of VDS, show that VDS, *not VES*, was the entity that was utilizing the Bico equipment and services on the following wells:

VDS Invoice No.	Operator	Well
171265	Elk River	West CVS TORO 32 STATE UNIT 1H
171279	QEP	Peelar C 13BU
171272	Olifant	Olifant University 25-18 1H
171269	Petro Hunt	Barnes 1-31-29XH
171256	Diamondback	Jane M Graves B 1WB
171281	Founders Oil & Gas	University Founders A25 #1
171300-Rebill	SM Energy	Guitar North 2741 WA
181324	Kaiser Francis	South Bell Lake Unit #219H
181353	Endeavor Energy	Bankhead 4-33 Unit 2 Well #252

For the Court's convenience, Mr. Elzner's Declaration includes the Bico invoices referenced above immediately followed by the VDS invoices referenced above. A comparison of the invoices shows that it was VDS, *not VES*, that was utilizing the equipment and services provided by Bico.

8. Only VDS, *not VES*, paid Bico for the equipment and services that VDS requested and used from Bico. Such payments included:

VDS check no. 3449 dated November 17, 2017 to Bico in the amount of \$117,869.75;

VDS check no. 3603 dated February 9, 2018 to Bico in the amount of \$105,363.88;

VDS wire transfer dated February 26, 2018 to Bico in the amount of \$15,073.69;

VDS wire transfer dated March 7, 2018 to Bico in the amount of \$100,000.00; and

VDS wire transfer dated March 23, 2018 to Bico in the amount of \$50,000.00.

Even though VDS was the entity that was actually utilizing the equipment and services that Bico was providing, and even though VDS was the entity that was paying the invoices that Bico was submitting, Bico sent the invoices to VES.

9. On or about May 4, 2018 Bico filed its Original Petition against VES and VES's principals, Jim Elzner ("Elzner"), John Slocum ("Slocum"), Quinten Bertelsen ("Bertelsen") and Mike Canada ("Canada"). Bico pleaded a sworn account cause of action against VES. Bico pleaded a piercing the corporate veil cause of action against Elzner, Slocum, Bertelsen and Canada.

10. On August 8, 2018 VES, Elzner, Slocum and Canada filed a Verified Amended Answer in which they alleged the following defenses:

A defect of parties;

Denial of the account which is the foundation of the Plaintiff's action;

Denial that all conditions precedent to Plaintiff's recovery have been performed or have occurred; and

VES is not liable in the capacity in which it has been sued.

11. On or about July 9, 2018 VDS filed a voluntary petition under Chapter 11 of Title 11 of the United States Bankruptcy Code.

12. Attached hereto as Exhibit 1 is the Declaration of Jimmy Elzner, Managing Member of Von Energy Services, LLC and Von Directional Services, LLC. In his Declaration Mr. Elzner explains the activities carried on by VES and VDS and the relationship between the entities. Attached to Mr. Elzner's Declaration are the invoices that VDS sent to the operators of the various wells showing that VDS, *not VES*, was the entity that was utilizing the equipment and services provided by Bico. Also attached to Mr. Elzner's Declaration are the cancelled checks and a print out of portions of the general ledger of VDS at Prosperity Bank that show that VDS, *not VES*, was the entity that paid Bico for the goods and services provided by Bico.

III. ARGUMENT AND AUTHORITIES

A. SUMMARY JUDGMENT STANDARD

13. In *Nixon v. Mr. Property Management Co., Inc.*, 690 S.W. 2d 546, 548-49 (Tex. 1985) the Texas Supreme Court set forth the standard a movant must meet to obtain a summary judgment. It wrote:

The standards for reviewing a motion for summary judgment are well established. As mandated by this court, they are:

1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex.1984); *Wilcox v. St. Mary's University of San Antonio*, 531 S.W.2d 589, 592-93 (Tex.1975). See also *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex.1979).

1. There are “genuine issues of material fact” regarding Bico’s claims against VES.

14. In *Transcontinental Ins. Co. v. Briggs Equipment Trust*, 321 S.W. 3d 685 (Tex. App. – Houston [14th Dist.] 2010, no pet.) the Texas Supreme Court explained that there is a genuine issue of material fact: “if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence.” *citing Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). Defendants have established that there is a genuine issue of material fact regarding Bico’s claims against VES.

a. Sworn Account

15. Bico has moved for summary judgment against VES on its sworn account claim. Since VES filed a verified denial Bico has the burden to offer proof of the sworn account. In *Solano v. Syndicated Office Sys.*, 225 S.W.3d 64, 67 (Tex. App.-El Paso 2005, no pet.) the El Paso Court of Appeals noted:

If a plaintiff’s pleading of a sworn account is defective or if the defendant files a proper sworn denial, the plaintiff must offer proof of the sworn account.

The Court went on to explain:

In a suit on sworn account, the plaintiff must prove (1) there was a sale or delivery of the goods or services, (2) the charges on the account are just, that is, the prices charged are in accordance with an agreement or, in the absence of an agreement, are usual, customary, and reasonable, and (3) the amount remains unpaid.

225 S.W.3d at 67.

16. Attached to Bico’s Motion as Exhibit A is the Affidavit of Samuel Claytor, President of Bico Drilling Tools, Inc. Mr. Claytor’s Affidavit reads, in part, as follows:

3. Plaintiff rented tools to Defendant Von Energy Services, LLC on an open account.
4. The tools rented to Defendant Von Energy Services, LLC on the account were delivered to Defendant Von Energy Services, LLC.

5. The balance due on Defendant Von Energy Services, LLC's account with Plaintiff is \$754,986.55. This balance remains unpaid.
6. A true and correct copy of Defendant Von Energy Services, LLC's account with Plaintiff is attach [sic] as Exhibit B to Plaintiff's Motion for Summary Judgment
7. The account is just and true, is due, and allows all just and lawful offsets, payments and credits.

1. The sale or delivery of the goods and services.

17. There is a genuine issue of material fact as to whether there was a sale or delivery of the goods or services by Bico to VES. Bico has attached invoices for the goods and services made out to VES but a fact issue remains as to whether VES was the entity to whom Bico actually provided the goods and services. VES has provided compelling evidence that it was VDS, *not VES*, that was provided the goods and services by Bico. This evidence includes:

- a. The Declaration of Jim Elzner, Managing Member of both VES and VDS, explaining that VES does not provide directional drilling services but is merely a holding company that provides administrative support for VDS.
- b. Invoices showing that VDS, *not VES*, was the directional drilling contractor that provided the directional drilling to the operators of the wells to which Bico provided its goods and services;
- c. VDS checks and wire transfers that show that VDS was the entity that paid Bico for the goods and services that Bico provided; and

Accordingly, there exists a genuine issue of material fact as to whether there was a sale or delivery of goods or services by Bico to VES.

2. The charges on the account are just, that is, the prices charged are in accordance with an agreement or, in the absence of an agreement, are usual, customary, and reasonable.

18. Bico has the burden to prove that the prices it charged were just. Bico has produced no agreement that shows that the prices that Bico charged to VES were in accordance with an

agreement. Since Bico has not produced an agreement that shows that the prices that Bico charged to VES were in accordance with an agreement, Bico has the burden to prove that the prices it charged to VES were usual, customary and reasonable. However, nothing in Mr. Claytor's affidavit addresses whether the prices Bico charged to VES were usual, customary and reasonable. Bico has failed to satisfy its burden. Accordingly, there exists a genuine issue of material fact as to whether the charges on the account are just.

3. The amount remains unpaid

19. Bico had the burden to prove that the amount that it seeks to recover remains unpaid by VES. Bico has not satisfied its burden to prove that the amounts sought are owed by VES as opposed to VDS. Accordingly, there is a genuine issue of material fact as to whether the amounts are owed by VES or VDS.

b. Bico has not shown that it is entitled to Attorneys' Fees

20. Bico seeks recovery of its reasonable and necessary attorneys' fees. In order to be entitled to the recovery of attorneys' fees, a plaintiff must satisfy the requirements of Tex. Civ. Prac. & Rem. Code § 38.001 *et seq.* "The plaintiff must present its claim to the defendant or the defendant's authorized agent." Tex. Civ. Prac. & Rem. Code § 38.002(2); *Gordon v. Leasman*, 365 S.W. 3d 109, 116 (Tex. App. – Houston [1st Dist.] 2011, no pet.). In seeking recovery of \$21,841.42 in attorneys' fees, Bico has attached the Affidavit of Stephanie B. Donaho to its Motion as Exhibit C. Ms. Donaho's affidavit does not include any proof that Bico presented its claim to VES or VES's authorized agent.

21. In addition, Ms. Donaho's affidavit fails to include consideration of the factors bearing upon the reasonableness and necessity of attorneys' fees in Texas as articulated in Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct and the Texas Supreme Court as

articulated in *Arthur Andersen & Co. v. Perry Equipment*, 945 S.W. 2d 812 (Tex. 1997) which are as follows: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on the results obtained or uncertainty of collection before the legal services have been rendered.

22. Further, the Declaration of Robert J. Kruckemeyer, Attorney at Law, attached hereto as Exhibit 2 raises a genuine issue of material fact as to whether the attorneys' fees sought by Bico herein are reasonable and necessary.

23. Accordingly, Bico has not met its burden of proof for the recovery of attorneys' fees.

IV. VERIFIED DENIALS

a. Defect of Parties

24. The Defendants have pleaded the verified denial of "defect of parties." In *CHCA East Houston, L.P. v. Henderson*, 99 S.W. 3d 630 (Tex. App. – Houston [14th Dist.] 2003, no pet.) the Houston Court of Appeals discussed the concept of "defect of parties." It wrote:

Alternatively, this Court and others have allowed litigants to treat misidentification as a "defect of parties." See *Enserch Corp.*, 794 S.W.2d at 6 (calling error as to true defendant among affiliated corporations a "defect in the parties"); *Wiggins v. Overstreet*, 962 S.W.2d 198, 200 (Tex. App.-Houston [14th Dist.] 1998, pet. denied) (affirming defect-of-parties objection that proper party was not individual but company bearing his name). Generally, a "defect of parties" refers to joinder problems involving necessary or indispensable parties. See, e.g., *Allison v. National*

Union Fire Ins. Co. of Pittsburgh, Pa., 703 S.W.2d 637, 638 (Tex.1986).

99 S.W. 3d at 633. Bico has a joinder problem in that it has not joined VDS as a party to the lawsuit. As shown above, VDS, not VES is the party that utilized and paid for the equipment and services that Bico provided and accordingly, VDS is the proper party to the lawsuit.

b. VES is Not Liable in the Capacity in Which it Has Been Sued

25. VES, by filing its verified denial in which it alleges that it is not liable in the capacity in which it has been sued, has raised a fact issue as to whether VES is liable to Bico. For the reasons set forth above, there is a genuine issue of material fact as to whether VES is liable in the capacity in which it has been sued and therefore, Bico is not entitled to summary judgment.

V. CONCLUSION

For the foregoing reasons VES request that the Court deny Bico's Interlocutory Motion for Summary Judgment.

Respectfully submitted,

 /S/ Robert J. Kruckemeyer

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bob@kruckemeyerlaw.com

**ATTORNEYS FOR PLAINTIFF
ATTORNEYS FOR VON ENERGY
SERVICES, LLC, JIM ELZNER, JOHN
SLOCUM AND MIKE CANADA**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *instrument* has been sent to all counsel of record by certified mail, return receipt requested, facsimile, and/or hand delivery, on this the 26th day of October, 2018.

____/S/ Robert J. Kruckemeyer_____
Robert J. Kruckemeyer

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PLAINTIFF'S NOTICE OF NON-SUIT WITHOUT PREJUDICE

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Bico Drilling Tools, Inc. hereby non-suits without prejudice its claims against defendants Von Energy Services, LLC, Jim Elzner, John Slocum and Mike Canada in the above-styled case, pursuant to Rule 162 of the Texas Rules of Civil Procedure.

The docket clerk is requested to enter this notice into the minutes of the court.

Respectfully submitted,

MONSHAUGEN & VAN HUFF, P.C.



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Certificate of Service

I hereby certify that a copy of the foregoing was served on counsel for defendant via telecopier on the 14th day of December, 2018.



ALBERT T. VAN HUFF