

B.

We begin by recognizing that from the start the parties manifested their intention to reduce any agreement into a final purchase and sale agreement. Daugherty Petroleum's . . . letter proposing a purchase price made the negotiation of such an agreement a condition to its bid. Likewise, Cabot Oil's purported acceptance of Daugherty Petroleum's proposed purchase price reflected an understanding that the parties needed to negotiate a [PSA]. Barr's response to Cabot Oil's follow-up e-mail and letter again emphasized that Daugherty Petroleum conditioned its offer on the execution of a mutually agreeable [PSA]. Most emblematic of the parties' mutual understanding that they would negotiate a formal contract, however, is the [draft PSA] that Cabot Oil composed and sent to Daugherty Petroleum. Hence, because the parties manifested their mutual intention to memorialize any agreement in a formal written contract, we begin with the presumption that their correspondence did not create a binding agreement in the absence of such a formal contract.

Using the factors recognized by the Supreme Court of West Virginia, we next conclude that Cabot Oil has not offered strong evidence to overcome this presumption. Even accepting as true Cabot Oil's suggestion that these types of lease contracts are not unusual, we find that the other five factors reinforce that an executed [PSA] was necessary to form a binding contract. We address these five factors in turn.

First, as the district court noted and Cabot Oil acknowledged at oral argument, representatives from both parties indicated in depositions that formal [PSAs] are customary for these types of lease transactions. Second, a formal contract appears to have been necessary to fully express the parties' agreement. Although

the parties' correspondence contained a number of essential terms of an agreement, such as a proposed price term, general information about the leases, and so forth, it left many terms for the parties to negotiate later. Third, the numerous details that the parties still needed to negotiate after their initial correspondence are evidenced by the [draft PSA], which spans twelve pages in length and includes a multitude of terms that either conflicted with or were additional to Daugherty Petroleum's letter. Fourth, the amount involved in the transaction—over \$2,600,000—is large. Finally, the parties' correspondence not only reveals that a final [PSA] was contemplated as a conclusion to their negotiations, but, as reflected in Daugherty Petroleum's initial proposal, it was a condition to the bid. Because these factors militate in Daugherty Petroleum's favor, Cabot Oil has failed to rebut the presumption that a formal [PSA] was necessary to form a binding contract.

We therefore agree with the district court that the undisputed facts indicate that the parties merely engaged in preliminary negotiations and there was no mutual assent. From the start, the parties' correspondence reflected that the execution of a mutually agreeable [PSA] was necessary to consummate their negotiations and would not merely be a convenient memorial of a preexisting agreement. And, furthermore, such a [PSA] was a condition precedent to the formation of a binding agreement. In the absence of an executed [PSA], we agree with the district court that under West Virginia law no binding contract exists between the parties. As a result, Daugherty Petroleum's decision to abandon the negotiations and not to purchase the leases does not constitute a breach of contract.

For these reasons, we **affirm** the district court's grant of summary judgment.

Cabot Oil & Gas Corporation v. Daugherty Petroleum, Inc. 479 Fed. Appx. 524 (4th Cir. 2012)

Cabot Oil issued a solicitation for bids to purchase several oil and gas leases it owned in West Virginia. The solicitation letter invited recipients to submit a "preliminary bid or proposal" and stated that "those submitting such proposals, if any, will be notified for further discussion and negotiation." Daugherty Petroleum received the solicitation and responded with a letter that it called alternatively a "bid" and an "offer." Daugherty Petroleum proposed a purchase price and indicated its ability to close on the deal within 75 days of Cabot Oil's acceptance. The Daugherty Petroleum letter emphasized, however, that it was "contingent and conditioned" on the negotiation of various terms, including form of payment, due diligence issues, and a requirement that Cabot Oil take the leases off the market for 60 days to allow the due diligence process to be completed. The parties referred to the latter as the "exclusivity period." Finally, Daugherty Petroleum indicated that, during the due diligence process, the parties would "negotiate the terms and conditions of an asset purchase agreement."

Eventually, after some delay when the parties communicated informally and Cabot Oil executives contemplated the bid, Cabot Oil sent Daugherty Petroleum a letter in which it agreed to the purchase price and the proposed form of payment. Cabot Oil indicated that it preferred to move directly into hammering out a purchase and sale agreement ("PSA"), during which Daugherty Petroleum could perform whatever due diligence it deemed necessary. To that end, Cabot Oil indicated that it would begin drafting the PSA immediately. Cabot Oil's letter omitted any reference to the exclusivity period.

Around six weeks later, after numerous failed attempts to communicate with Daugherty Petroleum and hearing nothing, Cabot Oil sent a letter indicating that it had accepted Daugherty Petroleum's offer to purchase the leases and threatening to pursue legal. Daugherty Petroleum responded that their bid was conditioned on the negotiation of a PSA and the completion of due diligence. Shortly thereafter, Cabot Oil sent Daugherty Petroleum a twelve-page draft PSA. The terms differed in certain respects from Daugherty Petroleum's letter, including terms governing form and timing of payment. It also included additional terms not previously contemplated in their communications.

Daugherty Petroleum never responded to the PSA despite Cabot Oil's numerous attempts to make contact.

Cabot Oil sued Daugherty Petroleum in West Virginia for breach of contract, seeking more than \$2 million in damages. Both companies moved for summary judgment. The district court granted Daugherty Petroleum's motion and denied Cabot Oil's motion, finding that the correspondence between the parties did not create a binding contract. Cabot Oil appealed.

Per Curiam:

A.

The fundamental elements of a binding, enforceable contract are competent parties, legal subject-matter, valuable consideration, and mutual assent. Mutuality of assent, in turn, generally requires an offer by one party and acceptance by the other. Offer and acceptance may be manifested through word, act, or conduct that evinces the intention of the parties to contract. . . .

Parties may form binding contracts through correspondence. Yet courts must be careful not to construe correspondence as constituting a binding agreement if the parties intended for it to serve merely as preliminary negotiations. If the correspondence reflects that the parties intended to reduce an agreement to a formal written contract, a presumption arises under West Virginia law that the correspondence does not constitute a binding contract, but instead only preliminary negotiations. Strong evidence is necessary to rebut this presumption.

In considering whether a party has rebutted this presumption, the overarching goal is to discern whether the parties intended for a final written document to be merely a "convenient memorial" of their agreement or the "consummation of the negotiation."

The Supreme Court of West Virginia has recognized six factors to guide courts in making this determination: (1) "whether the contract is of that class . . . usually found to be in writing"; (2) "whether it is of such nature as to need a formal writing for its full expression"; (3) "whether it has few or many details"; (4) "whether the amount involved is large or small"; (5) "whether it is a common or unusual contract"; and (6) "whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations." *Blair v. Dickinson*, 133 W. Va. 38, 54 S.E.2d 828, 844 (W. Va. 1949) (quoting *Elkhorn-Hazard Coal Co. v. Ky. River Coal Corp.*, 20 F.2d 67, 70 (6th Cir. 1927)) (internal quotation marks omitted).

Moreover, "[i]f a written draft is proposed, suggested or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract." *Id.* (quoting *Elkhorn-Hazard*, 20 F.2d at 70) (internal quotation marks omitted). And if "the parties to an agreement make its reduction to writing and signing a condition precedent to its completion, it will not be a contract until this is done, although all of the terms of the contract have been agreed upon." *Id.* at 843 (quoting *Brown v. W. Md. Ry. Co.*, 114 S.E. 457, 457 (W. Va. 1922)) (internal quotation marks omitted).