IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **WELDED CONSTRUCTION, L.P.,** **DEBTOR,**	 **Chapter 11** **Case No. 18-12378 (CSS)** **(Jointly Administered)**
EARTH PIPELINE SERVICES, INC., **Plaintiff,** **v.** **COLUMBIA GAS TRANSMISSION, LLC,** **Defendant,**	 **Adv. Pro. No. 19-50274 (CSS)** **Adv. Pro. No. 19-50275 (CSS)**
COLUMBIA GAS TRANSMISSION, LLC, **Counter-Claimant,** **v.** **EARTH PIPELINE SERVICES, INC.,** **Counter-Defendant.**	 **Adv. Pro. No. 19-50274 (CSS)** **Adv. Pro. No. 19-50275 (CSS)**

FIRST AMENDED ANSWER AND COUNTERCLAIM

Pursuant to Federal Rule of Civil Procedure 15(a)(2), made applicable to this action through Federal Rule of Bankruptcy Procedure 7015, Columbia Gas Transmission, LLC ("CGT") has obtained Earth Pipeline Services, Inc. (EPS)'s consent to hereby file this First Amended Answer and Counterclaim. Accordingly, CGT hereby files this First Amended Answer and Counterclaim, and in support thereof, shows the Court the following:

FIRST AMENDED ANSWER

1. Admit.

2. CGT admits that it is a limited liability company, duly organized and existing in good standing under the laws of the State of Delaware, and having a place of business at 700 Louisiana Street, Suite 700, Houston, TX 77002. CGT further admits having a registered agent in West Virginia as Corporation Service Company, 209 W. Washington Street, Charleston, Kanawha County, West Virginia 25302. CGT further admits that it is the record owner and/or has a real property interest in certain land and easements commonly known as the Mountaineer Xpress Pipeline ("MXP"), including that certain, approximately 99,436 linear feet of a pipeline right-of-way, with related fixtures, facilities, and real property in Marshall and Wetzel Counties, West Virginia. The remaining allegations of this paragraph state legal conclusions to which no response is required, and, together with any other facts alleged and not otherwise admitted herein, to the extent a response is required, they are denied.

3. Admit.

4. Deny.

5. Deny.

6. Admitted on information and belief.

7. CGT admits that EPS filed a notice of mechanic's lien on or around September 12, 2018. That notice speaks for itself and is the best evidence of its contents. CGT denies any other allegation inconsistent with the content of that notice, and denies the accuracy of the contents of the notice (including the claimed lien).

8. CGT admits that EPS served a notice of filing of the mechanic's lien attached as Exhibit 1 to the Complaint, and a copy of the mechanic's lien, upon CGT's registered agent on or about

September 25, 2018. These documents speak for themselves and are the best evidence of their contents. CGT denies any allegation inconsistent with the contents of these documents.

9. Deny.

10. Deny.

CGT denies each and every allegation not specifically admitted herein, included any stated in the Complaint's WHEREFORE clause. CGT denies that EPS is entitled to enforce its Mechanic's Lien against CGT's title and interest in the Liened Property, and denies that EPS is entitled to recovery.

DEFENSES

1. The Complaint fails to state a cause of action or claim against CGT upon which relief can be granted.

2. Under the law of West Virginia, the general contractor of a Construction Project is a necessary party to any lien lawsuit. Since the General Contractor, Welded Construction, L.P. ("Welded"), is not named as a defendant in this lawsuit, there is no jurisdiction for EPS's lawsuit.

3. EPS's claim has been waived and/or released in whole or in part, whether by action, in writing, or by contract.

4. EPS's claim is barred, in whole or in part, by estoppel, accord and satisfaction, fraud, failure of consideration, laches, payment, unclean hands, res judicata, and statute of limitations, to the extent that discovery reflects the application of these defenses is warranted.

5. Certain amounts of damages alleged by EPS have not been and may never be incurred by EPS, and therefore EPS has failed to state a justiciable and/or ripe claim for controversy or resolution.

6. CGT reserves any and all defenses available under Rule 7008 and Rule 7012 of the Federal Rules of Bankruptcy Procedure, and Rule 8 and Rule 12 of the Federal Rules of Civil Procedure.

7. EPS's recovery is barred in whole or in part by the doctrines of comparative fault, contributory negligence, and/or assumption of risk.

8. EPS's recovery is barred in whole or in part by the fact that EPS is the cause of its own damages.

9. EPS's recovery is barred or may otherwise be reduced in whole or in part by the right and defense of offset and/or recoupment. As explained in the First Amended Counterclaim below, CGT has incurred damages, including property damage, as a result of EPS's construction activities on MXP. CGT has also incurred offset-able and/or recoupable damages as a result of the slander to its title, including but not limited to the legal fees incurred in defending these claims in order to clear title.

10. The recovery which EPS seeks is not permissible by law, either in whole or in part, as EPS is not appropriately licensed or otherwise legally entitled to recover on its lien action.

11. CGT reserves the right to assert such additional defenses as discovery may prove are warranted.

WHEREFORE, CGT requests that this Court dismiss EPS's Complaint on the merits and with prejudice, and that CPG be awarded costs, including attorneys' fees, in defense thereof.

FIRST AMENDED COUNTERCLAIM

Counter-claimant Columbia Gas Transmission, LLC hereby states the following First Amended Counterclaim against Counter-defendant Earth Pipeline Services, Inc.:

PARTIES

1. CGT is a limited liability company, duly organized under the laws of the State of Delaware, with members in Delaware and Texas.

2. CGT is the record owner and/or has a real property interest in the real property and fixtures that constitute MXP.

3. Counterdefendant EPS is incorporated under the laws of Pennsylvania, with a principal place of business in Pennsylvania.

FACTS

4. EPS performed certain work and furnished some (but not all contractually required) materials for the construction of MXP pursuant to two subcontracts with CGT's general contractor for Spread 1 of MXP, Welded Construction, L.P., dated March 8, 2018 and March 20, 2018 (together, the "Subcontracts").

5. The Subcontracts were performed for the sole benefit of CGT, and specifically for Spread 1 of MXP. For example, the Welded Subcontracts each state that "The Work is a portion of the goods and services to be provided by [Welded] to Columbia Gas Transmission, LLC (OWNER) for Spread 1 of the Mountaineer Express Pipeline Project in Marshall and Wetzel Counties in West Virginia." The Subcontracts similarly note that EPS's work product "shall be the sole and exclusive property of Owner [CGT]." CGT even has direct rights and remedies against EPS under the Subcontracts, such as the right to stop EPS if its Work fails to meet safety requirements, among others.

6. Under the Welded Subcontracts, Welded "may set off against any amount payable under [the Subcontracts] any and all present and future indebtedness of Subcontractor to Contractor." As an express third party beneficiary to the Welded Subcontracts, CGT has the same express set-off rights. CGT has the same or similar set-off and/or recoupment rights, as the case may be, in common law and in in equity.

7. Under the Subcontracts, time is of the essence. EPS was required to perform in accordance with agreed-upon schedules. EPS was also required to perform in accordance with necessary safety protocols and procedures.

8. The Subcontracts contain provisions allowing Welded to terminate the Subcontracts for cause. When terminated for cause, EPS "shall be liable to [Welded] for all additional direct costs and expenses incurred by [Welded] in completing the Work that would not have been incurred but for the termination hereunder (including any additional direct costs to complete or to have a third party complete the Work), in addition to all other rights and remedies of [Welded] pursuant to the [Subcontracts] and at law."

9. The Subcontracts also contain provisions effectively waiving EPS's rights to payment while its liens are on CGT's property. For example, the Subcontracts state "No amounts are payable by Contractor to Subcontractor so long as a lien remains registered against the Work, the Facilities, the Work Site or any lands or property of Contractor, arising out of the Work."

10. The Subcontracts expressly state that "[EPS] shall be liable to Contractor [Welded] and Company [CGT] for any and all Claims incurred by or suffered by [Welded] or [CGT], to the property of [CGT], the Work or the Facilities, to the extent caused by [EPS]'s breach or non-compliance with any term or provision of the [Subcontracts], or inaccuracy or incompleteness of any representation or warranty herein, or the fault, negligence or willful misconduct, whether

active or passive, of [EPS] . . . or [its] respective directors, officers, employees, agents, servants, representatives or any other person directly or indirectly acting on their behalf or under their direction or control."

A. EPS was terminated from MXP for cause due to its poor performance and safety record and that caused losses to CGT.

11. In its Subcontracts, EPS represented and warranted that "it has the requisite competence, skill, physical resources, and number of trained, skilled, and licensed personnel. . ." to perform the work required of it under the Subcontracts, including work on the mountainous terrain of West Virginia where MXP was being constructed. EPS also agreed in its Subcontracts to comply with CGT's steep-slope requirements for working on MXP. As CGT later found out, these representations regarding the adequacy of EPS's experience and its ability to follow steep-slope requirements were false.

12. EPS caused substantial costly delays on the project due to its inefficient and poor work on Spread 1 of MXP. On information and belief, this inefficient and poor work was caused by EPS's lack of familiarity with MXP's terrain. Evidence of EPS's poor construction practices was regularly tracked, and, for example, on April 16, 2018, Welded notified EPS that "[t]he mechanical clearing is not going fast enough and the schedule you sent last week will delay our project."

13. EPS's inability to handle the unfamiliar terrain also caused serious safety concerns for the entire MXP project. EPS had a poor safety record while working on MXP.

14. On or around June 13, 2018, on Spread 1 of MXP at the estimated location of Station #922+00 – Hill 90, EPS caused a heavy piece of machinery known as a Komatsu 240 Robotec, to roll over on its side because it was, among other things, insufficiently secured.

15. This roll-over event was caused by the EPS employee operating the Komatsu 240 Robotec, Logan Hammel.

16. In this particular incident, Mr. Hammel was directed by his foreman not to assist with work on Hill 90. He did not follow his foreman's instructions. Upon finishing work on Hill 90, Mr. Hammel attempted to travel down the hill without being properly secured in accordance with CGT's steep slope plan. Misjudging the conditions on the hill, Mr. Hammel negligently collided with a large rock with the Komatsu 240 Roboetc, causing the equipment to slip downhill on wet soil and eventually roll on its right side.

17. The tipped over Komatsu 240 Robotec was photographed as shown herein:





18. Mr. Hammel damaged the Komatsu 240 Robotec that he was operating. Mr. Hammel also inflicted damage onto the MXP Spread 1 right-of-way that needed subsequent correction.

19. According to the Steep Slope Plan implemented on MXP Spread 1, the equipment operated by Mr. Hammel should have been connected to a winch tractor equipped with proper rigging components when working on hills as steep as Hill 90. By failing to comply with CGT's Steep Slope Plan—a Plan EPS was aware of and agreed to comply by—EPS failed to properly secure its equipment, enabling Mr. Hammel to endanger himself, CGT, Welded, and others on MXP Spread 1.

20. The root cause reported for the incident on June 13, 2018, is EPS's poor training and poor oversight of its personnel (among EPS's other issues).

21. The June 13, 2018 incident caused a safety stand-down on MXP Spread 1 on June 14, 2018. This stand-down caused damages to CGT, including compensation for idle time and delay damages—not just to Welded, but for all other impaired subcontractors.

22. CGT held a safety meeting with EPS on June 15, 2018. After this safety meeting, EPS was stood-down from working on MXP Spread 1 until, as Welded ultimately decided, EPS was

terminated from the project. Incredulously, EPS now seeks to recover (among other improper charges) idle time invoices for this stand-down time as part of its lien claim.

23. On June 20, 2018, as a result of the June 13 incident and EPS's inability to guarantee its compliance with CGT's safety protocols, EPS was de-scoped from its remaining work on MXP Spread 1 and its Welded Subcontract was terminated for cause.

24. As a result of EPS's termination, Welded was required to substitute additional subcontractors to perform EPS's scope of work. The substitution of additional subcontractors by Welded caused damages to CGT, including delay damages and other cost increases associated with MXP.

B. EPS filed an improper lien against CGT's property.

25. Subsequent to its termination, EPS wrongfully filed a lien for $3,650,300.42 against CGT's property for the alleged unpaid contract prices and the value of its work performed under the Subcontracts.

26. The lien was wrongfully filed because it contains amounts that were not owed and could never be owed for EPS's work on the project.

27. For example, the lien contains roughly $2 million of charges tied to a change order EPS submitted to Welded for consideration well after it was terminated for cause. The change order included additional amounts which EPS contends it should be paid instead of contract amounts, due to working on the steep slopes of MXP Spread 1.

28. EPS could never be entitled to this change order. EPS had represented and warranted it had requisite competence and skill to perform work on these slopes, and it had received a copy of CGT's steep slope plan months in advance of submitting its change order. This change order, submitted months after EPS began working on these slopes, was not timely, and therefore was

waived under the terms of the Subcontracts. Even if the change order was not waived, EPS was not otherwise entitled to the change order.

29. The lien contains hundreds of thousands of dollars of charges for idle stand-by time caused by EPS's safety incident on June 13, 2018. These charges are similarly false, as EPS is not entitled to them. It did not incur these costs to perform the Work, but instead incurred them as a result of its failure to comply with mandatory safety and construction requirements.

30. The lien contains certain double-counted invoiced amounts. These charges are false, as EPS is not entitled to them.

31. The lien also does not take into account any offset from cover costs incurred by Welded and/or CGT after Welded replaced EPS. For example, Welded was forced to incur its own labor costs when EPS could not finish certain jobs on its own, as contractually required. Similarly, Welded was forced to enlist additional subcontractors at a premium (due to urgency of Welded's need and the schedule delays already caused by EPS) to correct and perform the rest of EPS's scope of work after EPS was terminated for cause. These cover costs offset EPS's claims for compensation against Welded. And if EPS cannot recover the full amount of its invoices against Welded because of these offsets, it cannot recover the full amount of its invoices against CGT under a lien cause of action.

FIRST CAUSE OF ACTION – SLANDER OF TITLE

32. CGT incorporates paragraphs 1-30 of this First Amended Counterclaim as if fully stated herein.

33. EPS filed a Notice of Mechanic's Lien with the Clerk of the Marshall County Commission, asserting a mechanic's lien against MXP Spread 1.

34. The Notice of Mechanic's Lien falsely claims that EPS is owed $3,650,300.42 for the unpaid contract price and the value of its work.

35. EPS's false statement created an unfounded cloud derogatory to CGT's title to MXP Spread 1.

36. Upon information and belief, EPS's false statement was made with malice.

37. CGT has incurred special damages as a result of diminished value in the eyes of third parties due to EPS's false statement, including but not limited to attorneys' fees.

38. By encumbering CGT's property with an invalid lien, in whole or in part, EPS committed a slander of title.

39. CGT is entitled to recover its special, direct and consequential damages, and pre- and post-judgment interest, and costs.

SECOND CAUSE OF ACTION – BREACH OF REPRESENTATION AND WARRANTY

40. CGT incorporates paragraphs 1-30 of this First Amended Counterclaim as if fully stated herein.

41. CGT is a third-party beneficiary, and is in fact the sole beneficiary of the Subcontracts.

42. In the Subcontracts, EPS represented and warranted that "it has the requisite competence, skill, physical resources, and number of trained, skilled, and licensed personnel. . ." to perform the work required of it under the Subcontracts.

43. EPS breached said representations and warranties because it did not have the requisite competence, skill, physical resources, and/or number of trained, skilled, and licensed personnel to perform the work required of it under the Subcontracts.

44. As a result of EPS's breaches, CGT incurred damages, including but not limited to damages for delay, and physical property damage to its right-of-way on MXP Spread 1.

45. CGT is entitled to recover its direct and consequential damages, attorneys' fees, and pre- and post-judgment interest.

THIRD CAUSE OF ACTION – BREACH OF CONTRACT

46. CGT incorporates paragraphs 1-30 of this First Amended Counterclaim as if fully stated herein.

47. CGT is a third-party beneficiary, and is in fact the sole beneficiary of the Subcontracts.

48. Time is of the essence under the Subcontracts, but EPS failed to timely perform its Work under the Subcontracts, causing delays to the completion of MXP Spread 1 and economic harm to CGT.

49. The Subcontracts required EPS to perform its Work in accordance with CGT's safety protocols. EPS failed to perform its work in accordance with these protocols, causing economic and property damage to CGT.

50. CGT is entitled to recover its direct and consequential damages, attorneys' fees, and pre- and post-judgment interest.

FOURTH CAUSE OF ACTION – NEGLIGENCE

51. CGT incorporates paragraphs 1-30 of this First Amended Counterclaim as if fully stated herein.

52. In addition to a contractual recovery, CGT is entitled to recover in tort against EPS due to EPS's special relationship with CGT. EPS was CGT's Subcontractor. As a Subcontractor on MXP, EPS had knowledge or specific reason to know of the potential consequences of its dangerous behavior, it knew that CGT would be injured by its dangerous behavior, and it knew the damages that CGT would likely suffer as a result of its dangerous behavior.

53. EPS owed a duty of care to CGT in performing its Work on CGT's real property.

54. EPS breached its duty of care to CGT by performing construction work with negligence, wanton negligence, or recklessness.

55. EPS's breach was the proximate cause of damages to CGT, including but not limited to property damage to CGT's right-of-way, and other direct and indirect damages.

56. CGT is entitled to recover its direct and consequential damages, attorneys' fees, and pre- and post-judgment interest. To the extent EPS's defective Work is found to be wantonly negligent or reckless, CGT is also entitled to recover punitive damages.

PRAYER

57. CGT requests that the Court enter a take-nothing judgment in CGT's favor and dismiss with prejudice EPS's Complaint to Foreclose Mechanics' Lien.

58. CGT requests that the Court award CGT all other relief, legal and equitable, to which it is justly entitled.

59. CGT also requests that the Court enter judgment in favor of CGT and against EPS on all of CGT's causes of action, and award CGT is actual, direct, consequential, special, and punitive damages, costs and attorneys' fees, pre- and post-judgment interest, and all other costs and expenses allowed by law, and all other relief, legal and equitable, to which CGT is justly entitled.

Date: March 3, 2020

ARCHER & GREINER, P.C.

By: */s/ David W. Carickhoff*

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CERTIFICATE OF SERVICE

I David W. Carickhoff, hereby certify that on March 3, 2020, I caused true and correct copies of the *First Amended Answer and Counterclaim* to be served on all parties named in the attached service list in the manner indicated.

Date: March 3, 2020

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