Docket #0024 Date Filed: 5/28/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WELDED CONSTRUCTION, L.P., et al., Debtors.	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) (Consolidated)
COLUMBIA GAS TRANSMISSION, LLC, Counter-Claimant, v. EARTH PIPELINE SERVICES, INC., Counter-Defendant.	

Columbia Gas Transmission's Brief in Opposition to
Mersino Dewatering's Motion to Intervene

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Having sat on its alleged rights for a year, Movant Mersino Dewatering, Inc. ("Mersino") now seeks intervention to enforce an invalid and time-barred lien claim. Mersino's Motion to Intervene ("Motion") is half-hearted at best, and thoughtless at worst. Mersino's purported lien claim bears no meaningful relationship to this action, and Mersino fails to articulate any justification for its Motion under Rule 24. The Motion is fatally flawed for another important reason: it is futile. Mersino has no lien—perfected or otherwise—on which to base its claim. Mersino could not perfect its lien because Mersino filed it against the wrong entity, and makes no allegation that it timely served notice on the proper entity, Defendant and Counterclaimant Columbia Gas Transmission, LLC ("CGT"), under West Virginia law. By naming the wrong entity and listing an incorrect address on its Notice of Lien, Mersino effectively admits it failed to serve CGT. Perhaps more importantly, Mersino contractually waived its right to file a lien against CGT's property interests when it subcontracted with Defendant Debtor Welded Construction, L.P. ("Welded"). The Court should deny Mersino's desperate effort to enforce its nonexistent rights.

I. History and Background Facts

A. This proceeding concerns the clearing, grubbing, and mechanical clearing work that EPS performed on MXP, and the parties' competing claims in relation thereto.

This action concerns certain work that Plaintiff and Counterdefendant Earth Pipeline Services, Inc. ("EPS") provided under its subcontracts with Defendant Debtor Welded Construction, L.P. ("Welded") for CGT's Mountaineer Xpress Pipeline Project ("MXP"). CGT is the owner of MXP and the real property interests associated with MXP. (Dkt. 11, First Am. Answer and Countercl. at Countercl. ¶2). Welded contracted with CGT to be the general contractor on Spread 1 of MXP. (*Id.* at ¶4). In performing its work as general contractor, Welded subcontracted several scopes of work to different subcontractors, such as EPS. (*Id.* at ¶¶4-5).

EPS contends that it has a perfected lien on MXP for "all clearing and grubbing of all timber, brush, and vegetation on" MXP, and "mechanical clearing of the right-of-way, all work spaces, and all necessary roads of ingress and egress" for MXP. (Am. Compl., Dkt. 23 at ¶¶7-8). EPS filed its Notices of Mechanics' Liens against CGT on September 12, 2018 (*id.* at ¶20), and initiated this proceeding in West Virginia on March 8, 2019 (*id.* at ¶22). This proceeding was removed and later transferred to this Court on June 26, 2019. (*Id.* at 24). EPS's recently amended Complaint seeks an *in rem* recovery against MXP for its lien claim, and an alternative *in personam* recovery against CGT. (*See generally, id.*).

CGT, on the other hand, contends that EPS does not have a valid lien against MXP, for among other reasons, nearly $3 million-worth of baseless and untimely change order requests. CGT contends that EPS has slandered CGT's title by filing an improper lien, and seeks further recovery for EPS's breaches of representations and warranties, breaches of contract, and negligence. (*See generally,* First Am. Answer and Countercl., Dkt. 11). CGT claims that EPS was terminated from MXP for cause due to its poor performance and safety record, which includes a safety incident where EPS caused a heavy piece of machinery to roll over on its side, causing a stoppage of work among all trades. (*Id.* at ¶¶12-22). CGT also claims that EPS's lien contains "amounts that were not owed and could never be owed for EPS's work on the project," because, for example, "the lien contains roughly $2 million of charges tied to a change order EPS submitted to Welded for consideration well after it terminated for cause," and accordingly was waived under the terms of EPS's subcontracts. (*Id.* at ¶¶27-29).[1]

[1] The Court's scheduling order also anticipates that this proceeding will be consolidated with Welded's adversary proceeding against EPS, Adv. Pro. No. 2050612-CSS, filed on May 27, 2020. (*See* Scheduling Order, Dkt. 17 at ¶4).

B. Mersino seeks to enforce an invalid lien related to dewatering work performed on MXP.

1. Mersino allegedly performed dewatering work on MXP.

The allegations in Mersino's Motion, Brief, and Proposed Complaint are sparse and imprecise. Mersino generally alleges that it "furnished work, services, labor, materials, supplies, equipment, and/or machinery" to MXP under a subcontract with Welded. (Dkt. 22-3, Proposed Complaint at ¶¶7-10). Mersino's mechanic's lien fares marginally better by stating that Mersino performed "Dewatering/Pumping Services and/or equipment rentals on that certain building Mountaineer Xpress Pipeline Project." (Dkt 22-2 Subcontractor's Notice of Mechanic's Lien). A more complete scope of work may be divined from Mersino's Subcontract, parts of which are attached to Mersino's Motion. (Dkt. 22-1, Subcontract at pp. 1-2). Mersino's scope of work was limited to providing pumping services, supplying a bypass pumping system, providing certain support crews for pumping work, and assisting with related administrative tasks and maintenance of its pumps. (*Id.*).

2. Mersino failed to perfect any lien it may have had.

Mersino alleges that its last day of work on MXP was October 3, 2018, and that it recorded a Notice of Mechanic's Lien for $330,670 on December 11, 2018 (Dkt. 22-3, Proposed Complaint at ¶11). Unlike EPS, by purportedly recording its Notice in a single West Virginia county, Mersino only asserts a lien on part of MXP Spread 1. However, instead of addressing the Notice to CGT, the owner of MXP and the real property interests associated with MXP, the Notice of Lien is addressed to "TransCanada," at the address of "54 Seclusion Crescent, Brampton, ON ON L6R 1 L. CGT has never used that address for any purpose, nor is CGT's West Virginia registered agent for service of process located in Brampton, Ontario. Ex. 1, Declaration of A. Flores at ¶4. We are not aware of any affiliation between this address and any entity under the TC Energy (formerly

TransCanada) trade name. *See id.* at ¶¶4,7. Instead, based on an internet search, the address belongs to a residential property in Brampton, Ontario, Canada. *Id.* at ¶8.

Under W. Va. Code § 38-2-9, Mersino had "one hundred days after the completion of [its] subcontract" to "give to the ***owner*** or his or her ***authorized agent***, by any of the methods provided by law for the service of a legal notice or summons, a notice of lien . . ." (emphasis added). By Mersino's own allegations, notice to CGT was due 100 days after October 3, 2018, i.e., January 11, 2019. Perhaps realizing the flaw in its Notice of Mechanic's Lien (and that notice may not have been sent to CGT), Mersino's Proposed Complaint does not allege adequate notice and service to CGT by January 11, 2019. It does not even allege that Mersino provided notice to CGT. Instead, Mersino conclusorily alleges that it "performed all of the steps prescribed by W. Va. Code § 38-2-1 et seq. (i.e. West Virginia's Mechanic's Lien Statute) to perfect the Lien, and therefore, has a valid and enforceable mechanic's lien against the Project and/or the Property." (Dkt. 22-3, Proposed Compl. at ¶12). These conclusions of law are undercut by the name and address listed on the Notice of Lien.

3. Mersino contractually waived any lien rights it may have had.

According to Mersino's Proposed Complaint, Mersino performed its work on MXP under its subcontract with Welded ("Subcontract"). While Mersino attaches part of the Subcontract to its Motion, *see* Dkt. 22-1, it did not attach Exhibit G, the Subcontract's General Terms & Conditions (referenced on page 1 of the Subcontract). A true and correct copy of Exhibit G to Mersino's Subcontract, as provided to CGT by Welded, is attached hereto as Exhibit 2 to this Response.

Critically, Exhibit G contains a clear No-Lien Clause that waives Mersino's rights to file and recover on any liens against CGT's property:

> Subcontractor shall cause any Lien which may be filed or recorded against the Work, the Facility, the Work Site or any lands or property of Company to be released and discharged forthwith at the cost and expense of Subcontractor. If Subcontractor fails to release or obtain the release and discharge any such Lien, then Contractor may, but shall not be obliged to, discharge, release or otherwise deal with the Lien, and Subcontractor shall pay any and all costs and expenses incurred by Contractor in so releasing, discharging or otherwise dealing with the Lien, including fees and expenses of legal counsel. Any amounts so paid by Contractor may be deducted from any amounts due Subcontractor whether under the Agreement or otherwise. 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.

Ex. 2 at pp 7-8 ("No-Lien Clause").

The No-Lien Clause clearly prohibits Mersino, as the subcontractor, from maintaining a lien action against CGT's property interests, as the Company/Owner. After all, one cannot maintain an action to enforce a lien that it has contractually agreed to release. This amounts to written waiver. In light of the No-Lien Clause, Mersino has no lien—perfected or otherwise—which it can enforce in this proceeding.

II. Legal Standard

Federal Rule of Civil Procedure 24, made applicable to this proceeding by Bankruptcy Rule 7024, provides for intervention as of right, and permissive intervention. "Intervention as a matter of right presents a situation where '[t]he facts assume overwhelming importance in [the] decision.'" *United States v. Territory of Virgin Islands*, 748 F.3d 514, 519 (3d Cir. 2014) (citations omitted). Rule 24 provides, in relevant part:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). In the Third Circuit, "a litigant seeking intervention as of right under Rule 24(a)(2) must establish 1) a timely application for leave to intervene, 2) a sufficient interest

in the underlying litigation, 3) a threat that the interest will be impaired or affected by the disposition of the underlying action, and 4) that the existing parties to the action do not adequately represent the prospective intervenor's interests." *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005) (citing *Kleissler v. United States Forest Service,* 157 F.3d 964, 969 (3d Cir. 1998). "Each of these requirements must be met to intervene as of right." *Id.* (citations omitted).

On the other hand, "Rule 24(b) provides that a 'court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.'" *Virgin Islands,* 748 F.3d at 519 (quoting Fed. R. Civ. P. 24(b)(1)(B)). "In exercising its discretion, the [court] must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* (quoting Fed. R. Civ. P. 24(b)(3)).

The Court should deny a motion to intervene if intervention is futile. *See In re Am. White Cross, Inc.*, 269 B.R. 555, 559-60 (D. Del. 2001); *see also Hauth v. Lobue*, No. CIV. A. 00-166-JJF, 2001 WL 1188216, at *4 (D. Del. Sept. 28, 2001) (If the motion to intervene is "futile," it "must be denied.")(citing *In re Paper Antitrust Litigation*, 695 F.2d 494 (3d Cir. 1982)). Futility exists when "the relief sought by the proposed intervenor [is] 'unavailable as a matter of law.'" *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 14-1995, 2009 WL 188431, at *4 (E.D. Pa. Jan. 14, 2019) (quoting *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 582 (6th Cir. 1982).

III. Arguments and Authorities

Since Mersino has no lien to enforce, Mersino's Motion is futile and should be denied. Mersino waived any right to lien or enforce a lien against MXP, and failed to perfect any purported lien under West Virginia law. And even if Mersino could enforce any lien against CGT, Mersino has alleged no facts or circumstances that warrant intervention.

First and foremost, Mersino's Motion is untimely: Mersino has sat on its rights for roughly a year, as it has been on notice of this lawsuit since, at the latest, June 2019. Mersino articulates no explanation for its delay, and has none.

Second, Mersino does not have a sufficient interest in this litigation to warrant intervention as of right. This litigation and its resolution poses no—and Mersino has not identified any—tangible threats to any of Mersino's alleged interests, and there is no legitimate rank or priority dispute.

Finally, permissive intervention is inappropriate because Mersino alleges no common question of law or fact between its purported claim and this action. The EPS and Mersino subcontractual scopes of work have no overlap, and the claims and counterclaims in this action bear no resemblance to Mersino's purported lien claim. Permissive intervention would add no value to this action, and instead would "unduly dissipate[e]" "the focus of the litigation." *Kleissler*, 157, F.3d at 970. If Mersino intervenes, CGT will be forced to litigate a Frankensteinian monster, taking on two claims stitched together by the mere fact that both claimants worked on the same project. This prejudice to CGT is unwarranted.

A. Intervention is futile.

1. Mersino waived any right to file or enforce a lien against CGT.

Mersino has no viable claim against CGT because the No- Liens Clause waives Mersino's right to maintain and enforce a mechanic's lien against CGT for MXP. Because Mersino has no right to a mechanic's lien, CGT would be entitled to judgment on the pleadings on Mersino's Proposed Complaint, rendering Mersino's attempt to intervene here futile.[2]

[2] CGT's argument here is akin to a motion for judgment on the pleadings. In deciding such a motion, the Court may consider "the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based

The No-Lien Clause requires Mersino to "releas[e] and discharge[e]" "***any*** Lien" filed against CGT's property "at the cost and expense of" Mersino. "***Any*** Lien" naturally includes liens filed by Mersino itself. Thus, Mersino is contractually required to discharge its own liens at its own cost and expense. The No-Lien Clause is accordingly a lien waiver, and is enforceable as such under West Virginia law. *See First Am. Title Ins. Co. v. Bowles Rice, LLP*, No. 1:16-cv-219, 2019 WL 3763001, at *10 (N.D. W. Va. Aug. 8, 2018) ("Undoubtedly, a contractor may waive his right to file a mechanic's lien.") (citing *Bauer Enters., Inc. v. Frye*, 382 S.E.2d 71, 74 (W. Va. 1989)) (emphasis supplied). Under West Virginia law, "[a] valid written instrument which expresses the intent of the party in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *Id.* (citing *Kopf v. Lacey*, 540 S.E.2d 170, 175 (W. Va. 2000)). Indeed, No-Lien provisions are routinely enforced because parties enjoy the freedom of contract to waive any statutory mechanic's lien claims as part of the consideration for entering the agreement.[3]

Moreover, as Owner of MXP, CGT has standing as a third-party beneficiary to raise a "no liens" clause in a subcontract as a defense to a mechanic's lien claim by the subcontractor. West Virginia recognizes that a third party has standing to assert a breach of contract claim or defense when it is the intended beneficiary of a specific provision in a contract. *See* W. Va. Code § 55-8-

upon these documents." *Wolfington v. Reconstructive Orthopaedic Associates II PC*, 935 F.3d 187, 195 (3d Cir. 2019) (quoting *Mayer v. Bellchick*, 605 F.3d 223, 230 (3d Cir. 2010).

[3] *See, e.g., Ridgeview Const. Co. v. Am. Nat. Bank & Tr. Co. of Chicago*, 256 Ill. App. 3d 688, 692 (1993) ("[S]ubcontractors are held accountable for knowing, absent fraud or deception, the realities and implications of any agreements they sign with a general contractor and must learn to protect themselves from 'no-lien' contractual provisions."); 3 Bruner & O'Connor Construction Law § 8:151 n.11 (citing *Pero Bldg. Co., Inc. v. Smith*, 6 Conn. App. 180 (1986) (unambiguous "no lien" language enforced)); *Greco-Davis Contracting Co. v. Stevmier, Inc.*, 162 So. 2d 285 (Fla. 2d DCA 1964) (same); *Jankoviak v. Butcher*, 22 Ill. App. 2d 126, (2d Dist. Ill. 1959) (same); *Aetna Cas. And Sur. Co. v. U.S.*, 228 Ct. Cl. 146 (1981) (contractor could waive its lien rights in advance of construction).

12. The West Virginia Code states:

> If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

Id. A party's "status as a third-party beneficiary can be determined with regard to a specific provision, covenant, or promise, and not necessarily the contract as a whole." *Hatfield v. Wilson*, No. Civ.A. 3:12-0944, 2012 Wl 2888676, at *2-3 (S.W. W. Va. July 13, 2012). Here, the Subcontracts' No-Lien Clauses are clearly intended for the sole benefit of CGT, as the clauses contractually requires Mersino to release and discharge—and allows Welded to release and discharge— liens filed on CGT's (as opposed to anyone else's) property.[4] Even EPS recognizes this reality, as EPS alleges that

> EPS' work under the Subcontract was performed as part of Welded's work for CGT under the prime contract and, therefore, for the sole benefit of CGT, and specifically for the Property and the Project. This is evidenced by, among other things, the Subcontract's language that "[t]he 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."

(Am. Compl. at ¶11). Mersino's Subcontract contains the same language EPS cites above. (Dkt. 22-1, Subcontract at p.3).[5]

Even if Mersino did not strictly waive its lien claim, the Subcontract nonetheless prohibits Mersino from enforcing a lien. This is because, under the Subcontract, so long as a lien remains registered against CGT's property, Mersino is not entitled to payment: "No amounts are payable

[4] The West Virginia Supreme Court questions "restrictive interpretation[s]" of the third party beneficiary statute. *See Woodford v. Glenville State Coll. Hous. Corp.*, 159 W. Va. 442, 448 (1976).

[5] Mersino's Subcontract also provides that Mersino shall be liable to CGT for any breaches of the Subcontract—including breaches of the No-Lien Clause. *See* Ex. 2 at p. 8.

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." Ex. 2 at p. 8. It is black letter law that a subcontractor's recovery for a lien claim is capped by its potential recovery against the general contractor. *See, e.g., Kane & Keyser Hardware Co. v. Cobb*, 79 W. Va. 587 (1917) ("The effect of our mechanic's lien laws is to give to a party doing work or furnishing material for the construction of a building, when such party is a subcontractor, the same right to subject the building to ***the satisfaction of his claim as he has against the principal contractor . . .***" (emphasis added)). Thus, since Mersino is not entitled to payment from Welded so long as a lien exists on CGT's property, it cannot seek recovery under West Virginia's lien laws.

In sum, because Mersino's Proposed Complaint seeks to enforce a purported lien that Mersino has already waived and cannot otherwise enforce, Mersino's Motion is futile and should be denied.

2. Mersino failed to perfect its purported lien, and fails to plead facts sufficient to claim that its purported lien was perfected.

According to Mersino, it ceased to provide work on MXP on October 3, 2018. According to West Virginia Code § 38-2-9, Mersino "was required to record the notice **and** to provide notice to the owner 'by any of the methods provided by law for the service of a legal notice or summons,' within one hundred days of the cessation of work on the project." *Worldwide Mach. L.P. v, Columbia Gas Transmission, LLC,* No. 5:19-CV-208, 2019 WL 3558174, at *1 (N.D.W. Va. Aug. 5, 2019) (quoting identical language in § 38-2-11, the materialman subsection of the lien statute) (emphasis in original). The form of notice contemplated by statute requires the notice to be addressed to the Owner of the property or its authorized agent. *See* W. Va. Code § 38-2-9.

While a defective notice was apparently recorded against "TransCanada" – the former trade name for a variety of different legal entities now known as TC Energy – no notice was recorded

against CGT, the actual owner of MXP and the real property upon which MXP is situated. Indeed, no document submitted by Mersino (let alone any allegation in the Proposed Complaint) states or otherwise indicates that Mersino attempted to serve CGT with the notice "by any of the methods provided by law for the service of a legal notice or summons" within 100 days of October 3, 2018.[6] Instead, it appears that Mersino's first attempt at serving CGT was through this Motion.

The consequence of Mersino's failure to both (a) file a notice against CGT, and (b) perfect and preserve its lien against CGT is reiterated in Section 14 of the lien statute:

> The failure of any person claiming a lien under this article to give such notice as is required . . . in the manner and within the time specified in such sections, or the failure of any such claimant of any such lien to comply substantially with all of the requirements of this article for the perfecting and preservation of such lien, within the time provided therefor in this article, shall, except as provided in section twenty of this article, operate as a complete discharge of such owner and of such property from all liens for claims and charges of any such . . . subcontractor . . . for any work claimed to have been performed and for any materials, machinery or other necessary equipment claimed to have been furnished in connection with such work.

W. Va. Code. § 38-2-14.

"In full recognition of the harshness of the remedies necessary to enforce a mechanic's lien such as judicial sale and attachment, the law necessarily insists upon strict compliance with the statutory requirements for enforcement of such a lien." *Badger Lumber Co. v. Redd*, 213 W. Va. 453, 356 (2003) (citations omitted). "The basis of any lien is notice to the owner, by the contractor, or any subcontractor, that he has furnished material or labor in the construction of a building or other structure on land. It has always been held by this Court that the necessary notice required to be given the owner must be such as to fully acquaint him with all of the facts bearing on the claim. . ." *Kendall v. Martin*, 136 W. Va. 192, 197 (1951). "Discharge of a lien is required when

[6] Under West Virginia law, service on CGT could have been effected by delivering or mailing a copy of the Notice of Lien to "an officer, director, or trustee" of CGT, or its registered agent for service of process. *See* W. Va. R. Civ. P. R. 4(d)(7), (5).

a party misses the deadline for providing notice by even as little as one day." *Worldwide Mach.*, 2019 WL 358174 at *1.

Because no notice was recorded against CGT and no notice was served on CGT, Mersino's purported lien—to the extent not already waived—was discharged for failure to comply with § 38-2-9. For this additional reason, Mersino has no lien to enforce against CGT, and its Motion is futile.

B. Mandatory and Permissive Intervention Should be Denied

Even if Mersino perfected an enforceable lien, it fails to articulate any justification for intervention. Mersino's threadbare allegations resemble no standard under Rule 24.

1. Mersino's Motion is untimely.

For both mandatory and permissive intervention, Rule 24 requires a "timely" motion. Fed R. Civ. P. 24. In determining whether an intervention motion is timely, a court considers three factors: (1) the stage of the proceeding; (2) the prejudice a delay may cause to parties; and (3) the reason for the delay." *In re Cnty Bank of N. Va.*, 418 F.3d 277, 314 (3d Cir. 2005). "These three factors are necessarily bound up in one another," and are considered collectively. *Wallach v. Eaton Corp.*, 837 F.3d 356, 371 (3d Cir. 2016). Critically, "[t]he delay should be measured from the time the proposed intervenor knows or should have known of the alleged risks to his or her rights or the purported representative's shortcomings." *Benjamen ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 950 (3d Cir. 2012).

Here, the parties face undue prejudice from inevitable delays if CGT is forced to defend Mersino's unrelated lien claim within this action. This prejudice is pronounced by the fact that Mersino does not attempt to articulate a reason for its delay.

Mersino purportedly filed a notice of lien in December 2018. It filed its related notice of claim in the Welded bankruptcy on February 15, 2019, and has been on notice of events in

Welded's bankruptcy proceeding—including competing MXP lien claims—ever since. *See In re Welded Construction, L.P.*, Case No. 18-12378 (CSS), Claim No. 457, attached hereto as Ex. 3. When this matter was transferred to the Court in June 2019, Mersino had constructive, if not actual notice of this matter. Yet Mersino sat on its hands for roughly a year before moving to intervene. "The fact that [the movant] knew or should have known of the pendency of this lawsuit at an earlier time and failed to act at that time to protect [its] interests weighs heavily against the timeliness of [this] motion[]." *Delaware Valley Citizens' Council for Clean Air v. Com. of Pa.*, 674 F.2d 970, 975 (3d Cir. 1982). That Mersino does not attempt to explain its delay should be dispositive. *See id.* (district court did not abuse its discretion in denying intervention when there was an unsatisfactory explanation for delay).

2. Mersino has no interest in this litigation justifying mandatory intervention.

In order to intervene as a matter of right, "[t]he applicant must demonstrate that there is a tangible threat to a legally cognizable interest." *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005). Not even a general "economic interest in the outcome of the litigation" is sufficient "to support a motion to intervene." *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) (citations omitted). "The mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene." *Id.* (citations omitted).

Mersino's sole argument for mandatory intervention is that "Unless Mersino is allowed to intervene, the possibility exists that its interest will not be adequately protected and its interest or right to payment pursuant to its interest will be foreclosed upon or extinguished by another construction company that worked on the Project," and that such an event would impede on Mersino's purported due process rights. Dkt. 22 at pp. 12-13. But this statement is far from a

demonstration of a tangible threat to any of Mersino's interests. At most, Mersino argues that "the possibility exists" that it will be unable to recover on its purported lien because EPS will foreclose on MXP. Not only is this legally insufficient for mandatory intervention (as impediment of a right to recovery does not give a third party a right to intervene), it also defies credibility. This Court can and should take judicial notice of the fact that MXP is a state-of-the-art 170-mile long natural gas pipeline that is worth significantly more than the combined purported lien claims of both EPS and Mersino.[7] If EPS were somehow ultimately successful on its lien claim, CGT would pay the judgment amount before any attachment or foreclosure became final. A merely possible threat, with no practical consequences, is not a tangible threat. *See Islamic Society of Basking Ridge v. Twp. Of Bernards*, 681 F. App'x 110, 112 (3d Cir. 2017) (citing with approval *Ungar v. Arafat*, 634 F. 3d 46, 51-52 (1st Cir. 2011) ("An interest that is too contingent or speculative—let alone an interest that is wholly nonexistent—cannot furnish a basis for intervention as of right.")).

3. Mersino has alleged no common issue of law or fact to justify permissive intervention.

Permissive intervention is allowed on timely motion if the movant "has a claim or defense that shares with the main action a common ***question*** of law or fact." Fed. R. Civ. P. 24(b)(1)(B) (emphasis added). Even if the movant meets the requirements of Rule 24(b), the Court has broad discretion to grant or deny intervention. *See Islamic Soc'y of Basking Ridge,* 681 F. App'x at 112. Here, permissive intervention should be denied because Mersino has identified no common

[7] "A court may take judicial notice of an adjudicative fact if that fact is not subject to reasonable dispute." *Werner v. Werner*, 267 F.3d 288 (3d Cir. 2001) (citing Fed. R. Evid. 201(b)). "A judicially noticed fact must either be generally known within the jurisdiction of the trial court, or be capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* (citations omitted). It is beyond question that the value of the MXP pipeline is inordinately greater than the value of EPS and Mersino's combined lien claims. *See, e.g., Colombia Gas Transmission, LLC,* 164 FERC ¶ 61,137, Docket No. CP16-357-002 (Aug. 24, 2018) (FERC Order predating Welded's bankruptcy, noting MXP's construction costs at that time to be roughly $3,000,000,000).

question of law or fact with the primary action. Indeed, none exist.

Instead of identifying common questions of law or fact, Mersino regurgitates a laundry list of "things" that it claims to have in common with this action: "the issue of the scope of work performed and/or the services, labor, material, supplies, equipment, and/or machinery furnished, Welded's defaults, the rights and priority of liens, the foreclosure on property and the relationship to Welded's bankruptcy." (Dkt 22 at p. 10). Most "things" contained in Mersino's list are not common to this action, and nothing in the list resembles, let alone presents, a common ***question***. Mersino and EPS's "purported scope[s] of work performed, and/or the services, labor, material, supplies, equipment, and/or machinery furnished" have nothing in common. Mersino has not articulated a single reason why Welded's purported default against its Subcontract presents a common question with Welded's purported default against EPS—and indeed, the factual circumstances surrounding the EPS litigation is unique to EPS and has nothing to do with either Mersino or dewatering work. While "the relationship to Welded's bankruptcy" is a shared background fact, it presents no ***question*** of law or fact. Similarly, "the rights and priority of liens" and "the foreclosure on property" are not questions, especially in light of the value of MXP.

Even if this court could find some common question between Mersino's purported claim and this action, permissive intervention should still be denied. "In exercising its discretion, the [court] must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. Permissive intervention that adds little value to the proceedings and only serves to cause undue delay to original parties is considered to be unwarranted." *Aetna Inc. v. Insys Therapeutics, Inc.*, 330 F.R.D. 427, 434-35 (E.D. Pa. 2019) (citations omitted). Here, permissive intervention will add no value to the main proceeding. Mersino has not attempted to describe the value its alleged claim will bring to the table. Indeed, CGT expects no meaningful

overlap in discovery or testimony in defense of either purported lien claim. Instead, intervention will force CGT, and to some extent, Welded, to fight a two-front war on a single battlefield. This will unquestionably delay the administration and the litigation of the main action. *See id.* ("The discovery process, for instance, could become extensively delayed as parties closely examine the issue unrelated to this case . . .Furthermore, permitting intervention may have the resultant effect of prejudicing the original parties' rights from litigating and ultimately resolving this case"); *see also, Kleissler*, 157 F.3d at 970 (advising against intervention where "the focus of the litigation would be unduly dissipated or case management would become exceptionally complex.").

In short, because Mersino has neither articulated a common question of law or fact, nor an explanation of how this action will benefit from intervention, Mersino's request for permissive intervention should be denied.

IV. Conclusion

The Court should see Mersino's Motion for what it is: a feeble attempt to extract a payment for a non-existent lien. Mersino fails to address issues of futility apparent on the face of its Notice of Lien and its Subcontract, and Mersino's Motion is devoid of allegations that justify its untimeliness. No passing argument for intervention can be divined from the face of the Motion or the Proposed Complaint. This Court should accordingly deny Mersino's Motion for futility and put Mersino's claims to bed. In the alternative, the Court should deny Mersino's Motion for want of a statutory basis for intervention.

WHEREFORE, CGT respectfully requests the Court to deny Mersino's Motion with prejudice, and asks the Court for all other relief to which it may be justly entitled.

Date: May 28, 2020

ARCHER & GREINER, P.C.

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Attorneys for Columbia Gas Transmission, LLC

Exhibit 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WELDED CONSTRUCTION, L.P., et al., Debtors.	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) (Consolidated)
COLUMBIA GAS TRANSMISSION, LLC, Counter-Claimant, v. EARTH PIPELINE SERVICES, INC., Counter-Defendant.	

Declaration of Ann Flores

1. My name is Ann Flores. I am of sound mind, over 21 years old, and fully competent to make this declaration. I declare under penalty of perjury that the statements contained herein are true and correct to the best of my knowledge.

2. I am employed as a paralegal at TransCanada USA Services, Inc. ("TCE USA"). I have been a paralegal at TCE USA for roughly 5 years. In that role, I perform paralegal functions for Columbia Gas Transmission, LLC ("CGT").

3. As part of my job duties, I have access to and knowledge of addresses associated with TCE USA, CGT, and their registered agents.

4. I am unfamiliar with the address "54 Seclusion Crescent, Brampton, ON ON L6R 1L." Neither TCE USA nor CGT have ever used that address for any purpose. Nor have they had a registered agent located at that address.

5. CGT's principal office is located in Houston, Texas. CGT's mailing address listed with the West Virginia secretary of state is the address of CGT's principal office in Houston.

6. CGT's registered agent for the State of West Virginia is Corporation Service Company, located at 209 W. Washington Street, Charleston, West Virginia, 25302.

7. To my knowledge, no entity associated with TC Energy uses the address "54 Seclusion Crescent, Brampton, ON ON L6R 1L."

8. Based on a google search of "54 Seclusion Crescent, Brampton, ON ON L6R 1L," this address appears to be a residential property or home in Brampton, Ontario, Canada.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 26, 2020.

DocuSigned by:

6085E4D31B0B402...

Ann Flores

Exhibit 2

EXHIBIT G

GENERAL TERMS AND CONDITIONS

As it Pertains to Project	Columbia Gas Transmission MXP Spread 1	Subcontract Number	2018-01-15

Invoicing

Subcontractor shall submit a monthly signed invoice, itemized to the Contractor's satisfaction, for the portion of the work completed, less retainage (Retention). In addition to Subcontractor's signed invoice, Subcontractor must also submit an affidavit (**see Exhibit B**) asserting that Contractor is in compliance with the payment terms of this Subcontract Agreement. Within sixty (60) days after a satisfactory receipt of invoice and affidavit, payment shall be made to the Subcontractor for the Net Payable amount. The remaining 10% (Retention) will be retained by Contractor until final acceptance of the Work. Upon Contractor approval of successful completion of the work, Subcontractor may invoice for release of the retention, payable within thirty (30) days after approved invoice. The retention invoice must include a properly executed Affidavit and Release (see Exhibit B). All invoices are to be sent via email to: ap@welded.com with a copy to mcarroll@welded.com, kbranning@welded.com, telischer@welded.com, and gheimrick@welded.com

Right to Setoff

Contractor may set off against any amount payable under the Agreement any and all present and future indebtedness of Subcontractor to Contractor.

Project Schedule

Prior to starting the Work Subcontractor shall supply a detailed Project Schedule and Man Power Chart that is in compliance with the requirements of Contractor and this Agreement. The Project Schedule shall reflect all required activities with duration, and the Man Power Chart shall reflect the required manpower to accomplish the Work and shall be updated weekly. Subcontractor shall administer the Work in accordance with the Project Schedule. Subcontractor also shall notify Contractor immediately in writing at any time that Subcontractor has reason to believe that there will be a material deviation in the Project Schedule and shall specify in said notice the corrective action planned by Subcontractor.

Time is of the Essence

Subcontractor agrees that time is of the essence in the performance of its Work. Subcontractor agrees to prosecute the Work with all due diligence and to complete the Work within the time stated in the Contract Documents or the Schedule, whichever is sooner. Prior to commencement of the Work, Subcontractor shall prepare and submit a Schedule in accordance with Contractor's requirements for completion of the Work.

Subcontractor shall continuously monitor, report, forecast and control the progress of the Work in accordance with the Schedule. Subcontractor shall provide scheduling detail as the Work progresses. If such reporting or forecasting indicates a delay or potential delay, Subcontractor shall promptly take corrective action to mitigate such delay or potential delay and to get back on schedule and to avoid such delay at no cost to Contractor.

Subcontractor's reports shall be sufficiently detailed to present Contractor with an accurate status of the Work's Schedule, variances from the Schedule and reasons therefore, and planned corrective action. Reports shall be in writing and provided as established by Contractor.

Contractor's Right to Accelerate the Work at no Additional Cost to Contractor

If Subcontractor's progress impacts Contractor's linear progression of the work, or if in the reasonable belief of the Contractor, the Subcontractor will not meet the completion dates set forth in the Subcontractor's Project Schedule, the Contractor may direct the Subcontractor to accelerate the Work in a manner acceptable to the Contractor and at no additional cost to the Contractor unless the delay is the result of the acts or omissions of the Contractor. If Contractor directs the Subcontractor to accelerate the Work, Subcontractor shall promptly provide a plan, including its recommendation, for the most effective and economical acceleration of the Work. If such plan is unacceptable to the Contractor or the Subcontractor fails to provide a plan within seven (7) Days, Contractor may direct Subcontractor to follow an acceleration plan provided by Contractor.

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Termination

Termination for Convenience. In addition to any other rights that Contractor may have hereunder, or in Law, Contractor may at any time, in the exercise of its sole and arbitrary discretion, terminate the Agreement, the Work or any portion thereof by giving no less than fourteen (14) Days' notice to Subcontractor specifying the Work or portion thereof to be terminated and the effective date of the termination. Upon receipt of such notice, Subcontractor shall continue to perform all other portions of the Work not terminated, if any, in strict accordance with the Agreement. If the Agreement or any portion thereof is terminated, in accordance with this article Subcontractor agrees to waive any claims for damages, including loss of anticipated profits or any other consequential or special damages, arising out of such termination and agrees that the sole and exclusive remedy for such termination shall be only for payment of the Work performed, including demobilization. Contractor shall not be liable for any damages (consequential, special or otherwise, including loss of profits) as a result of the termination of the Work or any portion thereof.

Termination for Cause. Contractor may, in its sole discretion, immediately terminate the Agreement or any part of the Work by giving written notice to Subcontractor if any of the following occur:

1. Subcontractor becomes insolvent or seeks protection from creditors under federal or state Law, or if a bankruptcy petition is filed against Subcontractor and not dismissed with in forty-five (45) days.
2. If an order is made or a resolution is passed for the winding up or liquidation of Subcontractor
3. If a custodian, receiver, manager or other officer with similar powers is appointed in respect of Subcontractor or any of Subcontractor's property
4. If Subcontractor ceases to carry on in the ordinary course of business
5. If a creditor takes possession of any of Subcontractors' property, or if a distress, execution or any similar process is levied or enforced against such property and remains unsatisfied by Subcontractor
6. If Subcontractor fails to comply with any requirement of this Agreement
7. If Subcontractor breaches its obligations under this Agreement
8. If Subcontractor repeatedly violates any obligation or in the reasonably opinion of Contractor has failed to meet a material requirement of this Agreement
9. If the project receives an order from any Governmental Authority for breach of Law that requires an immediate suspension of the Work, including a stop work order related to safety or environmental violations.

   Upon receipt of such notice from Contractor, Subcontractor shall discontinue the Work in accordance with the notice, and shall (I) cease performance of the Work to the extent directed by Contractor in the notice; (ii) take all actions that Contractor may direct, or as may be necessary or expected under Prudent Industry Practices for the protection and preservation of the Facility and all property or other Project Supplied Materials or supplies related thereto (in whatever stage of completion), including return of the Project Supplied Materials (including unloading and stocking for proper storage) as directed by Contractor; and (iii) at Contractor's instruction, assign its rights under all Permits, subcontracts, warranties, guarantees, and other agreements or documents pertaining to the Work to Contractor or its respective designees.
10. Subcontractor shall be liable to Contractor for all additional directs costs and expenses incurred by Contractor 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 Contractor pursuant to the Agreement and at Law.
11. In addition to the termination rights set forth in herein, if Subcontractor has failed to comply with any of the terms of the Agreement, or is in material breach of any representation, declaration or warranty, including representations and warranties obligations, Contractor may, in its sole discretion, give Subcontractor notice of default. Subcontractor shall have five (5) Days immediately following receipt of the notice, or such longer time as Contractor believes to be reasonable and has specified in the notice of default or has subsequently agreed upon in writing, to remedy or to commence to remedy and

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diligently continue to remedy such default, failing which, Contractor may by further notice to Subcontractor terminate or suspend the whole or any part of the Agreement or the Work; provided that, where Contractor determines, in its reasonable discretion, that the default is not capable of being remedied or not capable of being remedied within a reasonable amount of time, Contractor may, by notice to Subcontractor, immediately terminate or suspend the whole or any part of the Agreement. Upon receipt of such notice from Contractor, Subcontractor shall discontinue the Work in accordance with the notice and shall (i) cease performance of the Work to the extent directed by Contractor in the notice; (ii) take all actions that Contractor may direct, or as may be necessary or expected under Prudent Industry Practices for the protection and preservation of the Facility and all property or other Project Supplied Materials or supplies related thereto (in whatever stage of completion), including return of the Project Supplied Materials (including unloading and stocking for proper storage) as directed by Contractor; and (iii) at Contractor's instruction, assign its rights under all Permits, subcontracts, warranties, guarantees, and other agreements or documents pertaining to the Work to Contractor or its respective designees. Subcontractor acknowledges that it will not be reimbursed for any costs arising from a suspension.

12. Where the whole or any part of the Agreement is suspended under this article, Contractor may, at any time, immediately terminate any or all of the suspended portion of the Agreement.

13. If the Agreement or any portion of the Work is terminated pursuant to this article, Contractor may complete or have others complete the Work. If the Agreement is terminated, Subcontractor is not entitled to further payment from Contractor until the Work is complete and Contractor has fully ascertained all of its costs and damages arising out of or related to the default (including, without limitation, legal, expert, design) (the "Completion Costs"). Any amount payable to Subcontractor for Work satisfactorily performed to the date of termination will be offset by the Completion Costs, the sum of any monies already paid to Subcontractor and any additional amount Contractor must pay to obtain satisfactory completion of the Work by others.

14. Contractor shall not be liable for any damages (consequential, special or otherwise, including loss of profits) as a result of the termination of the Work or any portion thereof by Contractor pursuant to any provisions of this article. The rights and remedies of Contractor provided in this article are in addition to the rights and remedies of Contractor provided by Law, or under any other provision of the Agreement.

15. If Contractor elects to terminate or suspend this Agreement or any part of the Work, and a court or other body of competent jurisdiction finds such termination or suspension was invalid, such termination or suspension shall be considered to be a termination for convenience.

Suspension of Work. Contractor may, in the exercise of its sole and arbitrary discretion, at any time or times, by notice to Subcontractor specifying the effective date of the suspension, require Subcontractor to suspend the Work or any portion thereof. Upon receiving written notice, Subcontractor shall discontinue the Suspended Work immediately, place no further purchase orders or subcontracts with respect to the Suspended Work, properly protect and secure the Work in accordance with Prudent Industry Practice, not remove any Work or equipment or tangibles forming part of the Work from the Work Site without written consent of Contractor, and promptly make reasonable efforts to obtain suspension terms satisfactory to Contractor with respect to all existing purchase orders, subcontracts, supply contracts and rental agreements related to the Suspended Work. Subcontractor shall continue to perform all other portions of the Work which have not been suspended by Contractor.

Contractor may at any time authorize resumption of the Suspended Work or any part thereof, by giving Subcontractor reasonable notice specifying the part of the Suspended Work to be resumed and the effective date of such resumption. Subcontractor shall resume the Suspended Work on the date and to the extent specified in the notice.

Subcontractor shall utilize its employees, equipment and materials in such manner, and take such other steps as may be necessary or desirable to minimize the costs associated with the Suspended Work. During the period of Suspended

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Work, Subcontractor shall secure and protect the Suspended Work and the impacted Facilities and all materials and equipment to be used or incorporated therein.

If there is Suspended Work, such event shall constitute a Change and Contractor shall reimburse Subcontractor for those direct costs, exclusive of profit, reasonably incurred by Subcontractor as a direct result of the suspension of the Work if reimbursement is provided by Company to Contractor and provided that Subcontractor takes reasonable measures to minimize all such costs. Contractor shall not be liable for any other costs or damages, including loss of profits or any other consequential or special damages, on account of the Suspended Work or any part thereof or the deletion of Suspended Work from the Agreement. Subcontractor shall promptly provide all information and records Contractor may require to verify claimed costs.

Subcontractor acknowledges that it will not be reimbursed for any costs arising from Suspended Work that causes Subcontractor to cease all or a portion of the Work for a period of time which is less than two (2) hours before the Work can recommence. It is further acknowledged by Subcontractor that it has made adequate allowance in the Price for delays of less than two (2) hours in duration.

Notwithstanding anything else in this Suspension Article, in any circumstance where the Subcontractor is entitled to a Work Schedule extension the Contractor may, in its discretion, require compression of the Work Schedule rather than an extension of time to the extent schedule compression is reasonably practicable. In such case Subcontractor will be entitled to compensation through the change order process or as otherwise agreed for the additional efforts necessary to meet the compressed Work Schedule.

Delays caused by Subcontractor

If Subcontractor is responsible for a delay in the progress of the Work, or fails to complete any portion of the Work in accordance with the Work Schedule, then Subcontractor shall, at no additional cost to Contractor; (a) work overtime, acquire and use any necessary additional labor and equipment and perform whatever other acts are required or requested by Contractor to make up the lost time and to avoid further or other delay in the performance of the Work; (b) prepare and implement a recovery plan; and (c) work diligently to mitigate all damages incurred as a result of the delay.

Subcontractor shall promptly notify Contractor in writing: (i) of any occurrence that Subcontractor has reason to believe will materially adversely affect the Project Schedule or the Work Schedule; or (ii) if the performance of the Work is not in compliance with the Project Schedule or the Work Schedule or Subcontractor's adherence to any Critical Path progress of the Work Schedule and/or the Project Schedule is behind for any reason by more than five (5) Days.

If at any time, in the reasonable opinion of Contractor, Subcontractor is not in compliance with the Project Schedule or the Work Schedule or its adherence to the Critical Path progress of the Work Schedule and/or the Project Schedule is behind for any reason by more than five (5) Days Contractor may provide notice to Subcontractor.

Where Subcontractor has provided notice in accordance with this article, Subcontractor will specify in said notice the corrective action recommended by Subcontractor in the form of a recovery plan. Where Contractor has provided notice to Subcontractor, Subcontractor shall prepare and provide to Contractor a recovery plan within five (5) Days of receipt of the notice. The recovery plan will set forth in reasonable detail the manner in which Subcontractor intends to meet the dates set forth in the Work Schedule and the Project Schedule, including the specific steps to be taken, the expected pace of recovery, and the expected recovery date, and shall require Subcontractor to take such steps as are necessary to make up the lost time and to avoid further or other delays in the performance of the Work including, if necessary, working overtime, increasing the number of working Days or hours per Day, and acquiring and using any necessary additional labor and equipment and whatever other acts are required by Contractor. If Contractor has not commented within ten (10) Days, it shall be deemed to have reviewed the plan without comment, provided that in no event shall Contractor be considered to have approved a recovery plan. Subcontractor shall, at no cost to Contractor, promptly implement and thereafter shall diligently continue to adhere to the recovery plan in order to meet the dates set forth in the Work Schedule and Project Schedule. During implementation of the recovery plan Subcontractor shall provide sufficient information to Contractor to show its compliance with the recovery plan and indicating the improvements being made to the Work Schedule and Project Schedule. It is a breach of this Agreement if

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Subcontractor, in the opinion of Contractor, is not complying with the recovery plan or fails to provide sufficient detail to show its compliance.

Subcontractor acknowledges that the Project Schedule and Work Schedule are vital to the success of the project. In addition to any other rights and remedies of Contractor hereunder, Subcontractor further acknowledges that Contractor may incur additional costs and expenses if the Project Schedule and Work Schedule are not complied with, including costs of Other Subcontractors, internal personnel, overhead and standby costs of Contractor and Other Subcontractors, and that where such costs and expenses are incurred Subcontractor is liable therefor. In addition to any other remedies Contractor may have, where Subcontractor is not in compliance with the Project Schedule and Work Schedule the reasonable and verifiable amount of such costs and expenses may be deducted from any payments due to Subcontractor and retained by Contractor on account of such costs and expenses.

Claims for costs associated with any weather-related delays and the associated productivity impacts shall not be compensated by Contractor.

Force Majeure

"Force Majeure" means any unforeseeable act or event that: (i) renders it impossible for the affected Party to perform its obligations under this Agreement; (ii) is beyond the reasonable control of the affected Party; (iii) is not due to the fault or negligence of the affected Party; and (iv) could not have been avoided by such Party through the exercise of due diligence, including the expenditure of any reasonable sum of money. Without limiting the generality of the foregoing, Force Majeure may include any of the following events: war, riot, terrorism, act of vandalism, rebellion, epidemic, Catastrophic Weather, general strike, fire, explosion, and also includes any late delivery of Project Supplied Materials where such delay is due to any event of Force Majeure. Notwithstanding the foregoing, Force Majeure shall not include: (a) late delivery of any Subcontractor supplied equipment and materials (except to the extent that such delay is due to any event of Force Majeure), (b) delays resulting from the breakdown of any Subcontractor supplied equipment and materials, (c) delays caused by inefficiencies on the part of Subcontractor, (d) Work Site specific labor disruptions, (e) the condition of the Work Site (unless caused by an event of Force Majeure), (f) late performance caused by Subcontractor's inefficiency in hiring or failure to hire (due to unavailability or otherwise) adequate labor or supervisory personnel, (g) any local, general or seasonal weather conditions or climates except Catastrophic Weather, or (h) financial issues affecting the Party claiming the Force Majeure.

If any Party cannot comply with any obligation hereunder as a result of Force Majeure, such Party shall notify the other Party in writing as promptly as possible, but in any event within twenty-four (24) hours of such event, giving the reason for the non-compliance, particulars of the Force Majeure and the obligation or condition affected. Such event of Force Majeure shall constitute a Change, and any obligation of a Party shall be temporarily suspended during the period in which such Party is unable to perform by reason of Force Majeure, but only to the extent of such inability to perform. The obligations of Subcontractor to perform as provided by the Agreement through means not affected by the Force Majeure shall continue. The Party affected by the Force Majeure shall promptly notify the other Party as soon as such event no longer prevents it from complying with its obligation, and shall thereafter resume performance of the Work.

The Party that has given a notice of Force Majeure shall mitigate the effects of such Force Majeure on the performance of its obligations. Where the Parties reasonably believe that the Force Majeure will continue for more than five (5) Days or where the Force Majeure does continue for more than five (5) Days, the Parties shall meet as soon as practicable to review the situation and its implications on the Work Schedule and to discuss the appropriate course of action in the circumstances.

No adjustment of the Work Schedule for any event of Force Majeure shall be made with respect to the first forty-eight (48) hours of direct and actual adverse impact to the milestone dates set forth in the Work Schedule arising out of such event of Force Majeure. If the performance of the Work is delayed or interrupted as a result of Force Majeure beyond forty-eight (48) hours, the Work Schedule, only as it relates to the direct and actual adverse impact to the milestone dates set forth in the Work Schedule, shall be adjusted on an equitable basis. Any Work Schedule adjustment shall include only that period of time by which the Work Schedule is directly and actually delayed by such Force Majeure.

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An event of Force Majeure shall not give rise to any increase to the Price or claim for delay and no productivity impact costs shall be due or payable by Contractor as a result of an event of Force Majeure.

Notwithstanding anything else in this Article, in any circumstance where the Subcontractor is entitled to a Work Schedule extension the Contractor may, in its discretion, require compression of the Work Schedule rather than an extension of time to the extent schedule compression is reasonably practicable. In such case Subcontractor will be entitled to compensation in accordance with the change order process or as otherwise agreed for the additional efforts necessary to meet the compressed Work Schedule.

Change Directives

Contractor may at any time by issuing a Change Directive to Subcontractor, require a change in the work, or the method, sequencing, conduct, or timing of the Work of this Agreement. See Exhibit B-1 for Contractor Change Directive. Subcontractor shall comply with any Change Directive, but shall have the right to claim an adjustment, if applicable. If Contractor issues a Change Directive and no agreement has been reached as to an adjustment, then the Subcontractor shall diligently proceed as though on a time and materials basis pursuant to Exhibit A (Labor and Equipment Rates). Subcontractor shall keep such project records of the daily cost incurred by completing such Change Directive and submit such records to the Contractor on a daily basis AND Subcontractor shall receive payment for completing the work associated with the Change Directive until the parties mutually agree to the terms of a Change Order. If Subcontractor and Contractor fail to agree on an Adjustment, then the provisions of the section titled “Disputes” may be invoked to resolve the dispute.

Change Orders shall contain full particulars of the Changes and any Adjustments and shall represent the full and final agreement as to the Change and any Adjustments.

In addition, in the event of an emergency which Contractor determines endangers life or property, Contractor may use oral orders to Subcontractor for any work required by reason of such emergency. Subcontractor shall commence and complete such emergency work as directed by Contractor. Such changes must be formalized in writing within forty-eight (48) hours of the event.

Subcontractor Requested Change

Subcontractor may, at any time, by written notice in a form consistent with Exhibit B-2 Subcontractor Requested Change to Contractor, request a Change within (2) days Business Days of the event giving rise to the Subcontractor’s request. Only a Change Order submitted on the approved form to the Contractor may be deemed adequate for consideration. Subcontractor expressly waives any right to a Change in the event such notice is not made within forty-eight (48) hours of the change event. Subcontractor is not permitted to proceed with any work which Subcontractor will seek a change request without prior written authorization from Contractor. Contractor will review and respond no later than (10) Business Days. All Subcontractor change requests must include all supporting documentation. Contractor shall notify Subcontractor of its acceptance or rejection of such request or such request shall be deemed rejected. If Contractor rejects the Change requested by Subcontractor, Subcontractor shall continue with the Work without the Change. If Subcontractor and Contractor fail to agree on an Adjustment, then the provisions of the Section titled “Disputes” may be invoked to resolve the dispute.

Claims

If Subcontractor has any claim against Contractor, excluding claims for payment relating to Change Orders, notice of each such claim shall be submitted in writing to Contractor within five days after the occurrence of the event giving rise to the claim. Resolution of properly filed claims is within Contractor’s sole discretion. If the Subcontractor disputes Contractor’s decision on Subcontractor’s properly filed claims, then Subcontractor may invoke the Dispute Resolution procedures of this Agreement following Final Completion of the specific Project.

Disputes

Applicability of Dispute Resolution Procedures. Except for matters requiring immediate injunctive or similar equitable relief or matters where the relief is prescribed by Statute, all claims, disputes or other matters in question between the Parties arising out of or relating in any way to this Agreement (hereinafter collectively referred to as a "Dispute") will be resolved pursuant to this article.

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Senior Officers to Resolve. The Parties shall make all reasonable efforts to resolve Disputes arising out of the performance of the Work by amicable negotiations and agree to provide without prejudice, frank, candid and timely disclosure of relevant facts, information, and documents to facilitate these negotiations. Any Dispute shall initially be submitted to a senior officer from each Party for resolution by mutual agreement between said senior officers. If either Party wishes a Dispute to be submitted to senior officers pursuant to this clause, such Party shall serve upon the other Party a notice in writing (a "Senior Officer's Notice") requesting that the Dispute be so referred. Such negotiation shall be on a without prejudice basis. However, should such senior officers fail to arrive at a mutually agreed resolution of the Dispute within thirty (30) Days, or such longer period as may be agreed by such senior officers, after service of the Senior Officer's Notice, the Dispute shall then be referred to mediation.

Mediation Proceedings
(A) If the Parties agree to refer a Dispute to mediation the Parties have thirty (30) Days from the Day such agreement is reached to agree on the appointment of a mediator (the "Project Mediator"). If the Parties do not agree on the appointment of a Project Mediator, then either Party may request the American Arbitration Association, or any similar body acceptable to the Parties, in the state where the Work Site is located (or such other state as the Parties may agree upon) to appoint a chartered mediator to act as Project Mediator, who, when so appointed, will be deemed acceptable to the Parties and to have been appointed by them. In the event such Project Mediator is unavailable to mediate a particular dispute, then the American Arbitration Association, or any similar body acceptable to the Parties may be asked to appoint a suitable replacement.

(B) The Parties will submit the Dispute in writing to the Project Mediator, and afford to the Project Mediator access to all records, documents and information related to the Dispute that the Project Mediator may request; provided however, no Party will be required to provide anything that would be protected by privilege, including but not limited to lawyer-client communications, work product, and litigation privilege, and any comparable privilege in any court or other adjudicatory body. The Parties shall meet with the Project Mediator at such reasonable times as the Project Mediator may require and shall, throughout the intervention of the Project Mediator, negotiate in good faith to resolve the dispute. All proceedings are agreed to be without prejudice, and the cost of the Project Mediator will be shared equally between the Parties.

(C) If the dispute cannot be resolved within forty-five (45) Days of the Project Mediator being requested to assist, or within such further period agreed to by the Parties, the Project Mediator may terminate the negotiations by giving notice to the Parties. However, the Project Mediator may declare an impasse and terminate the negotiations at any time during the mediation period.

Agreement in Full Force and Effect. Performance of the Agreement and the Work shall continue during any Dispute, provided that performance of the Work in dispute shall only continue if, and in the manner, Contractor so directs. Except as otherwise provided in this Agreement, no payments due or payable by Contractor shall be withheld on account of a Dispute other than payments which are the subject of the Dispute.

Insurance
Without limiting in any way, the scope of any obligations or liabilities assumed hereunder by Subcontractor, Subcontractor shall procure or cause to be procured and maintained at its expense, for the duration of this Subcontract, the insurance policies described in **Exhibit C - Insurance**.

The General Liability, Business Automobile Liability, Umbrella or Excess Liability and Pollution Liability Policies shall include Contractor, Company and its subsidiaries and affiliates, and the third parties as listed in **Exhibit D – Additional Insured.**

Liens
Subcontractor shall cause any Lien which may be filed or recorded against the Work, the Facility, the Work Site or any lands or property of Company to be released and discharged forthwith at the cost and expense of Subcontractor. If Subcontractor fails to release or obtain the release and discharge any such Lien, then Contractor may, but shall not be obliged to, discharge, release or otherwise deal with the Lien, and Subcontractor shall pay any and all costs and expenses incurred by Contractor in so releasing, discharging or otherwise dealing with the Lien, including fees and expenses of legal counsel. Any amounts so paid by Contractor may be deducted from any amounts due Subcontractor

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whether under the Agreement or otherwise. 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.

Subcontractors Liability and Indemnity

Subcontractor shall be liable to Contractor and Company for any and all Claims incurred by or suffered by Contractor or Company, to the property of Company, the Work or the Facilities, to the extent caused by Subcontractor's breach or non-compliance with any term or provision of this Agreement, or inaccuracy or incompleteness of any representation or warranty herein, or the fault, negligence or willful misconduct, whether active or passive, of Subcontractor or any of Subcontractor's third party vendors or Subcontractors, or their respective directors, officers, employees, agents, servants, representatives or any other person directly or indirectly acting on their behalf or under their direction or control.

Subcontractor shall defend, indemnify and hold harmless Contractor, its Affiliates, and each of their officers, directors, employees, invitees, consultants, contractors, representatives and agents and any other person directly or indirectly acting on any of the foregoing's behalf or under their direction or control (collectively, the "Contractor Indemnified Parties") from and against any and all Claims of whatever nature, including all fees and expenses of legal counsel, legal proceedings, investigations or dispute resolution costs which may be brought against Contractor Indemnified Parties or which Contractor Indemnified Parties may incur, suffer, sustain or pay to the extent caused by:

(A) any breach or non-compliance with any term or provisions of this Agreement, or inaccuracy or incompleteness of any representation or warranty, by Subcontractor;

(B) the fault, negligence, or willful misconduct, whether active or passive, of Subcontractor or any third party Subcontractor, or their respective directors, officers, employees, agents, servants, representatives or any other person directly or indirectly acting on their behalf or under their direction or control (or any acts or omissions of Contractor, Other subcontractors or their respective employees or agents while acting under the direction and control of Subcontractor or any of Subcontractor's third party vendors or Subcontractors or their respective employees or agents), related to this Agreement or the performance or non-performance of the Work hereunder;

(C) any taxes or third-party obligations, or any related contributions and penalties, imposed on Subcontractor or Contractor by any Governmental Authority or other authority, to the extent payable by and the responsibility of Subcontractor as a result of the Agreement;

(D) the failure of Subcontractor or any of Subcontractor's third-party vendors or Subcontractors to comply with the Law, including any fine, penalty, sanction imposed or assessed by any Governmental Authority relating to such failure, related to this Agreement or the performance or non-performance of the Work hereunder;

(E) any patent, trademark, copyright, industrial design, or other intellectual property infringement pertaining to any equipment, machinery, materials, compositions, processes, methods or designs, specified for use or used by Subcontractor in connection with the Work, except for those supplied or specified for use by Contractor to Subcontractor;

(F) all Liens and claims made or liability incurred by Contractor on account of the Work performed or materials supplied by any Subcontractor, including fees and expenses of legal counsel, but only to the extent Subcontractor has been paid by Contract all amounts due under this Agreement; and

(G) any of Subcontractor Prepared Documents being incorrect or inconsistent with the Agreement or the Law.

Subcontractor shall, at its sole cost and expense, if requested by Contractor, defend any Contractor Indemnified Party entitled to be indemnified under this article. Contractor shall have the right, if it so elects, to participate in any such defence and Subcontractor shall have the right to settle claims without first consulting Contractor, provided that if any settlement of any Claim would lead to liability or create any financial or other obligation on the part of any Contractor Indemnified Party, Subcontractor shall not enter into any such settlement without the consent of Contractor. If Contractor, acting reasonably, considers that the failure to settle any claim, demand, action or proceeding to which it or

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others are entitled to be indemnified by Subcontractor would be detrimental to its interests, it may so notify Subcontractor, and if, within ten (10) Days thereafter, Subcontractor fails to conclude a settlement with the claimant, then Contractor may, in its sole discretion, settle the claim, demand, action or proceeding in such amount as it considers reasonable and Subcontractor agrees to immediately pay to Contractor all or such portion of the amount so paid in settlement as Contractor, in its sole discretion, designates as Subcontractor's liability.

The obligations of Subcontractor under this article shall not be construed to negate, abridge or reduce other rights or remedies of any Contractor Indemnified Parties which would otherwise exist.

Contractor shall indemnify and hold harmless Subcontractor and its officers, directors, employees, consultants, and agents (collectively, the "Subcontractor Indemnified Parties") from and against any and all Claims which may be brought against Subcontractor Indemnified Parties or which Subcontractor Indemnified Parties may incur, suffer, sustain or pay arising out of or in connection with any Claims which arise on account of and are attributable to:

(A) a lack of or defect in title or an alleged lack of or defect in title to the Work Site;

(B) an environmental condition at the Work Site which is the responsibility of the project;

(C) Hazardous Materials supplied by Contractor in connection with this Agreement and while under Contractor's care and control;

(D) defective Project Supplied Materials; and

(e) the negligence or willful misconduct of Contractor Indemnified Parties.

If Contractor accepts the responsibility to indemnify a Subcontractor Indemnified Party, then it shall be entitled to retain and instruct legal counsel to act for and on behalf of such Subcontractor Indemnified Party and to settle, compromise and pay any claim, demand, action or proceeding without obtaining prior approval from the Subcontractor Indemnified Party in whose favor the indemnity has been provided. Subcontractor shall, and shall cause any other Subcontractor Indemnified Party to co-operate in all respects in contesting any third-party claim for which Contractor has accepted responsibility.

The obligations of Contractor under this article shall not be construed to negate, abridge or reduce any other rights or remedies of any Subcontractor Indemnified Party which would otherwise exist.

Notwithstanding anything else in the Agreement, neither Party shall be liable to the other Party for consequential, incidental or indirect damages, except (i) to the extent of amounts recoverable under a policy or policies of insurance required to be maintained pursuant to the provisions of the Agreement, whether required to be maintained by Subcontractor or Contractor, (ii) the obligation to indemnify and defend against third party Claims arising in tort for bodily injury and property damage pursuant to article 32, or (iii) as caused by the applicable Party's willful misconduct or gross negligence.

Notwithstanding anything else in this Agreement, the maximum liability of either Party under this Agreement, whether based on tort, strict liability, breach of contract or otherwise, shall be limited to the Price, except: (i) to the extent such liability arises from the Party's fraud, gross negligence or willful misconduct; (ii) amounts recoverable under a policy or policies of insurance required to be maintained by the indemnifying Party hereunder shall be in addition to the cap on liability in this section; or (iii) pursuant to the obligation to indemnify and defend against third party Claims arising in tort for bodily injury and property damage pursuant to this Article.

Warranty:

Subcontractor represents and warrants that it has the requisite competence, skill, physical resources, and number of trained, skilled, and licensed personnel (qualified by education and experience to perform its assigned tasks), required

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hereunder and that it has and shall maintain the capability, experience, registrations, licenses, permits, and government approvals required to perform the Work herein.

Subcontractor shall be duly incorporated and validly existing under the Law and it is registered and qualified to do business and perform the Work in each jurisdiction in which the Work is to be performed.

Subcontractor hereby warrants and guarantees that all Subcontractor furnished materials will be merchantable, new, unless specifically noted otherwise in the Subcontract Documents, and will be free from defects in design, workmanship, and materials; and that all Work shall be (i) performed in accordance with the industry practices within the industry prevailing at the time of the Agreement (ii) performed in compliance with all applicable federal, state or local laws, ordinances, and regulations, including all Environmental Requirements, Safety and Health Requirements, 29 CFR part 470 (the Beck Notice), and all applicable judicial decrees or voluntary remediation agreements; (iii) performed in conformance with the Subcontract Documents for the specific Project; (iv) suitable for its intended purpose as specified in the Subcontract Documents or as otherwise known by Subcontractor; (v) fit for the particular purpose intended by the Subcontract Documents; (vi) fully tested pursuant to the Subcontract Documents; and (vii) performed in a manner that does not infringe any patent, copyright, trade secret right, trademark right, or any other intellectual property or proprietary right of any third party.

In addition to Subcontractor's warranty obligations, Subcontractor agrees when applicable to the Work to be performed under this Agreement, at any time during the term of this Agreement, to repair, re-perform or replace, at Contractor's option, any Defective Work (including, without limitation, materials). All costs and expenses associated with access to or repair or replacement of Defective Work, including all transportation costs, shall be paid by Subcontractor, and Contractor may charge Subcontractor all expenses of unpacking, examining, repacking, and reshipping any rejected Defective Work. This obligation shall extend for a period of one year from the date of final payment or from the completion date for a specific Project, whichever occurs later. All warranties for any repaired or replaced Defective Work shall be extended to one year from the date of Contractor's acceptance of the repaired or replaced Defective Work or for the duration of the unused warranty period if such period is longer; however, in no event shall the Warranty Period exceed an aggregate of twenty-four (24) months. Subcontractor shall maintain equipment and replace Work damaged as a consequence of Defective Work, all without any cost to Contractor.

With respect to any materials or equipment procured by Contractor from a vendor, Contractor's liability for such materials and equipment shall be limited to "passing through" to Company the benefits of any warranty received from the applicable vendor to Company. The foregoing warranties are in lieu of all other express, implied and/or statutory warranties.

Hazardous Materials

"Hazardous Material" means any pollutant, contaminant, constituent, chemical, mixture, raw material, intermediate product, finished product or by-product, hydrocarbon or any fraction thereof, asbestos or asbestos-containing material, polychlorinated biphenyls, or industrial, solid, toxic, radioactive, infectious, disease-causing or hazardous substance, material, waste or agent, including all substances, material or wastes which are identified or regulated under any Law or the Policies and Guidelines or which may threaten life or property or adversely affect human, animal or vegetation health or the environment

Subcontractor shall examine the Project Sites involved in performing the Work and shall secure full knowledge of all reasonably ascertainable conditions under which the Work is to be executed and completed.

Subcontractor shall not perform any Work in which it uses or incorporates, in whole or in part, any Hazardous Materials in violation of any such Environmental Requirements, or in such a manner as to leave any Hazardous Materials which could be hazardous to persons or property or cause liability to Contractor. Subcontractor shall notify Contractor in writing upon receipt of any material at the Project Site requiring Material Safety Data Sheets (MSDS), and Subcontractor shall promptly provide the MSDS; furthermore, Subcontractor shall remove all unused materials and Subcontractor Waste Materials from the Project Site upon completion of the Work and properly dispose of all such Waste Materials.

Unless the release of Hazardous Materials is the subject of the Project, Subcontractor shall upon discovery of an existing or suspected release on or at the Project Site, cease Work in that area, immediately contact the Contractor's Designated Representative and notify Contractor in writing. If the release is subject to reporting pursuant to any

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Environmental Requirements, Subcontractor shall timely report the release to governmental authorities, or ensure in a timely manner Contractor's Representative is notified and reports the release to governmental authorities. Subcontractor shall continue Work at the Project Site in the areas unaffected by the release unless otherwise advised by Contractor. Upon receiving Contractor's prior written approval, Subcontractor shall remove and properly dispose of all Hazardous Materials and Waste Materials in compliance with all applicable federal, state, and local requirements governing such Hazardous Materials and removal, transportation, and disposal thereof. Upon request, Subcontractor shall provide Contractor with a copy of any licenses, permits, or manifests used in connection with the disposal of any Hazardous Materials or Waste Materials.

In the event Subcontractor transports Waste Materials to an off-site facility (or facilities) for treatment and/or disposal, Subcontractor shall ensure that such facility is in compliance with all Environmental Requirements.

Subcontractor shall handle and preserve, all Waste Materials samples, cuttings, or Hazardous Materials taken for characterization or other like reasons in a manner consistent with the level of care and skill exercised by other Subcontractors under similar circumstances at the time the samples are obtained.

Safety

The Subcontractor acknowledges Contractor's drug free workplace policy and agrees employees shall be subject to pre-employment and random testing in accordance with the Contractor's policy.

Subcontractor shall comply with all applicable local and federal safety and health requirements and laws, regulations, order, directives, codes and guidelines, including OSHA. Subcontractor shall also comply with Owner Safety and Security Requirements as attached by Exhibit, and do so without demanding further compensation from Contractor for such compliance. Site specific safety training will be required. All training will be at Subcontractors sole cost.

Subcontractor represents and warrants that it has an effective health and safety management system that ensures the Work at the Work Site will be carried out safely and in compliance with OHS Legislation and the Agreement. More specifically, Subcontractor represents and warrants that its health and safety management system includes (i) safe work procedures and policies; (ii) safety orientation courses; and (iii) any other operational controls (the "Safety Programs"), all of which meet or exceed the safety requirements of all OHS Legislation and the specifications provided by Exhibit attached as Occupational Health and Safety Specifications for Prime/General Contractors.

Subcontractor shall undertake and implement all safety measures, precautions and programs, including any special precautions which may be required due to hazardous or otherwise dangerous parts of the Work and shall provide all necessary protection to prevent damage, injury or loss to:

(a) All persons performing the Work and all other persons who may be affected by the Work;

(b) All the Work and all materials and equipment whether in storage on or off the Site, under the care, custody or control Subcontractors or agents; and

(c) Other property at the Site or adjacent areas, including trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction.

Subcontractor shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of any public authority having jurisdiction for the safety of persons or property to protect them from damage, injury, or loss. As required by law, existing conditions, and the progress of the Work, Subcontractor shall erect, maintain, and otherwise implement all such safeguards necessary for safety and protection. Such safeguards shall include, but are not limited to, posting danger signs and other warnings against hazards, promulgating safety procedures and notifying owners and users of adjacent facilities.

Contractor and Company shall have the right to stop any work at the Work site which is thought to be unsafe or not in conformity with OHS Legislation or the Site Specific Safety Plan.

Subcontractor shall exercise the utmost care when the use or storage of explosives or other Hazardous Materials or equipment is necessary for the performance of the Work. Subcontractor shall place all explosives or Hazardous

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Materials under the supervision of properly qualified personnel in accordance with all existing laws, ordinances, codes, rules, regulations, orders, and decisions of all governmental authorities having jurisdiction over the Project Site.

In any emergency affecting the safety of persons or property arising out of the Work, Subcontractor shall act immediately (i) to prevent threatened damage, injury, or loss, and (ii) contact the Contractor's Designated Representative of such emergency.

Substance Abuse Policy

a) For Projects that involve natural gas pipelines or liquefied natural gas facilities, the Department of Transportation (DOT) has instituted rules to control the use of drugs and alcohol in the Natural Gas and Hazardous Liquid Pipeline Industry as well as at Liquefied Natural Gas (LNG) facilities. All contractors that have employees who work in positions covered by the applicable regulations are required to establish an anti-drug and alcohol testing program that complies with (1) 49 CFR Parts 199 and 40 of the DOT Regulations and/or (2) applicable state requirements for natural gas pipelines or LNG facilities. The Subcontractor warrants that all of its employees performing Work for the project are in compliance with the above referenced regulations and such anti-drug and alcohol testing programs**.**

Personal Protective Equipment (PPE) shall be worn and properly utilized, at all times, by Subcontractor's employees while on the job site or while undertaking any work associated with the Project. Subcontractor shall furnish, at its own expense, any necessary material and/or training to conform to these requirements.

Owner's employees or agents may stop work or require corrective action should they determine, in their sole discretion, that Subcontractor's work procedures or equipment do not comply with applicable safety requirements. Owner's decision to stop or alter Subcontractor's unsafe work procedures or equipment shall not obligate Owner or Contractor to reimburse Subcontractor for any associated lost time or other costs. Such costs shall be the sole responsibility of the Subcontractor

Prior to commencement of construction activities, Subcontractor shall make the necessary notification(s) to the appropriate utility warning one call system(s). In areas not covered by one call systems, Subcontractor shall notify Operators of any foreign facilities encountered during construction.

Subcontractor acknowledges that it has received, read, understands, and will comply with the Minimum Requirements For Pipeline Construction In Close Proximity To High Voltage A.C. Overhead Electric Power Lines and shall comply with all requirements and standards therein.

Operator Qualification

For Projects that involve natural gas pipelines or liquefied natural gas facilities, the DOT has instituted rules establishing the requirements and responsibilities for the qualification of individuals who perform covered tasks as defined within 49 CFR, Part 192. If required by Owner or 49 CFR, Part 192 prior to October 28, 2002 and for all Projects which involve covered tasks as defined in 49 CFR, Part 192 after October 28, 2002, Subcontractor shall provide and maintain a written plan identifying its DOT Operator Qualification program that meets the requirements of 49 CFR, Part 192, Subpart N and Owner's approval. The Subcontractor shall certify that all of its employees performing Work for the project are in compliance with the above referenced regulations and any subsequent regulations issued by DOT. Subcontractor shall use only qualified employees to perform covered tasks and provide Contractor with documentation of any modifications that are made in its written plan or its employee's qualifications to perform those covered tasks (at an interval of not less than once per month).

Confidential Information

During the term of this Agreement and thereafter, except as Contractor may authorize in writing, Subcontractor shall (i) treat and cause to be treated as confidential all Confidential Information; (ii) not disclose any Confidential Information to any third party or make available any reports, recommendations, extracts, summaries, analysis or conclusions

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based on the Confidential Information; (iii) reveal the Confidential Information only to those employees of Subcontractor who require such access in order to perform the Work hereunder; (iv) grant access to Confidential Information only to employees of Subcontractor who have signed a confidentiality agreement (v) use or grant access to Confidential Information only in connection with the performance of Work pursuant to this Agreement; (vi) make copies of any tangible embodiment of Confidential Information only as necessary for the performance of such Work; (vii) remove any tangible embodiment of Confidential Information from the premises of Owner (viii) maintain the security of Confidential Information; and (ix) maintain policies and procedures and comply with all applicable laws and regulations to detect, prevent and mitigate the risk of loss, unauthorized access, use, modification, destruction or disclosure of Owner's and its Affiliates' Confidential Information.

Subcontractor may disclose only such Confidential Information as is necessary to comply with a regulatory, legal, or governmental request and only after providing immediate notification to Contractor and Owner allowing sufficient time for Owner to seek a protective or limiting order or otherwise prohibiting the disclosure of the requested Confidential Information as Owner deems necessary in its sole discretion. Subcontractor shall act in good faith to assist to seek a protective order or order limiting disclosure.

In performing the Work, at a minimum, Subcontractors shall employ industry standard data and system security measures for securing Confidential Information so as to reasonably ensure that Confidential Information is not lost or stolen, or otherwise used, modified or accessed, attempted to be accessed, or allow access to any third party without Owner's prior express written approval or by any Subcontractor employee or agent who is not authorized to access the Confidential Information. Subcontractors shall upon discovery of any breach of security or unauthorized access, immediately: (i) notify Contractor and Owner of any loss or unauthorized disclosure, possession, use or modification of the Confidential Information or any suspected attempt at such activity or breach of Subcontractors' security measures, by any person or entity; (ii) investigate and take corrective action in response thereto; and (iii) provide assurance to Owner's reasonable satisfaction that such activities or breach or potential breach shall not reoccur.

While at Owner's or its Affiliate's facilities or using Owner's or its Affiliate's equipment or accessing Owner's or its Affiliate's systems (including telephone systems, electronic mail systems, and computer systems) Subcontractors and their respective personnel shall observe and follow all applicable Owner or Affiliate policies and standards, including those policies relating to security of and access to Confidential Information as such policies and standards are modified and supplemented from time to time. Applicable policies will be made available upon request.

Upon termination of this Agreement, excluding one (1) complete set of documents for Subcontractor's records, the Subcontractor, shall either return the Confidential Information, at Owners sole discretion, to Contractor or Owner or comply with the following minimum standards regarding the proper disposal of Confidential Information: (i) implement and monitor compliance with policies and procedures that prohibit unauthorized access to, acquisition of, or use of Confidential Information during the collection, transportation and disposal of Confidential Information; (ii) paper documents containing Confidential Information shall be either redacted, burned, pulverized or shredded so that Confidential Information cannot practicably be read or reconstructed; and (iii) electronic media and other non-paper media containing Confidential Information shall be destroyed or erased so that Confidential Information cannot practicably be read or reconstructed.

If Subcontractors provision of Work involves the processing of Confidential or other information so as to place Subcontractors in a position to observe indicators of identity theft (e.g. consumer fraud alerts, notifications or warnings; suspicious documents, personal identification information, or activity; or notice from customers, law enforcement or others regarding identity theft), Subcontractors shall: (i) maintain policies and procedures to identify, detect and respond to Red Flags, substantially in accordance with Owner's program regarding such Red Flags, as updated from time to time, a current copy of which will be made available upon request, (ii) report the detection of any such Red Flags to Owner; and (iii) take appropriate measures to prevent or mitigate the risk of identity theft that may arise in the performance of such Work.

Ownership of Work Product

Any and all products of the Work performed by Subcontractor and any of its employees under this Agreement used in connection with this Agreement, including all inventions, discoveries, formulas, processes, devices, methods, compositions, compilations, outlines, notes, reports, system plans, flow charts, source codes, and other forms of

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computer software, algorithms, procedures, policies, data, documentation, and other materials or information which Subcontractor or any of its employees may conceive, invent, author, create, reduce to practice, construct, compile, develop, or improve in the course of performing the Work or otherwise delivered to Owner as part of the Work (collectively, "Work Product") shall be the sole and exclusive property of Owner from and after the time it is created. Subcontractor agrees to disclose to Contractor and Owner the existence of any Work Product of which Owner would not otherwise be aware promptly upon its creation.

Subcontractor agrees to assign and hereby does assign to Owner (together with its successors and assigns) the sole and exclusive right, title, and interest in all Work Product, including any and all related patent, copyright, trademark, trade secret, and other property or proprietary rights of any nature whatsoever. Subcontractor warrants and agrees to execute and deliver to Owner, and Subcontractor and the employees of Subcontractor to execute and deliver to Owner, any and all documents that Owner may reasonably request to convey to Owner any interest Subcontractor, or any of its employees may have in any Work Product or that are otherwise necessary to protect and perfect Owner's interest in any Work Product. Subcontractor further warrants and agrees to take, and Subcontractor agrees to cause Subcontractor's employees to take, such other actions as Owner may reasonably request to protect and perfect Owner's interest in any Work Product. Subcontractor further agrees that the sums paid to Subcontractor by Contractor in connection with Subcontractor's performance of the Work serve, in part, as full consideration for the foregoing assignment, and that said consideration is fair and reasonable, and was bargained for by Subcontractor. Subcontractor represents and warrants that it has full right, power, and authority to grant the assignment granted under this Article.

Exhibit 3

Fill in this information to identify the case:

Debtor Welded Construction, L.P.

United States Bankruptcy Court for the: _____ District of Delaware (State)

Case number 18-12378

Official Form 410
Proof of Claim

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**
   Mersino Dewatering d/b/a Global Pump
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**
   ☑ No
   ☐ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
Mersino Dewatering d/b/a Global Pump Max Newman 41000 Woodward Ave. Stoneridge West Bloomfield Hills, MI 48304, USA	Mersino Dewatering, Inc. Nick Darin 600 West Dryden Rd. Metamora, MI 48455, USA
Contact phone 248-258-2907 Contact email newman@butzel.com	Contact phone 810-658-3472 Contact email nick.darin@mersino.com

Uniform claim identifier for electronic payments in chapter 13 (if you use one):
_ _

4. **Does this claim amend one already filed?**
   ☑ No
   ☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☑ No
   ☐ Yes. Who made the earlier filing? _____

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Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ☑ No
   - ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ 457,423.50 . **Does this amount include interest or other charges?**
   - ☑ No
   - ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
   Limit disclosing information that is entitled to privacy, such as health care information.
   Services performed

9. **Is all or part of the claim secured?**
   - ☑ No
   - ☐ Yes. The claim is secured by a lien on property.

   Nature or property:
   - ☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
   - ☐ Motor vehicle
   - ☐ Other. Describe: _____

   Basis for perfection: _____
   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____
   Amount of the claim that is secured: $_____
   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ☐ Fixed
   - ☐ Variable

10. **Is this claim based on a lease?**
    - ☑ No
    - ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ☑ No
    - ☐ Yes. Identify the property: _____

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12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

	Amount entitled to priority
☑ No	
☐ Yes. *Check all that apply:*	
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
☐ Up to $2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
☐ Wages, salaries, or commissions (up to $12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$_____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 02/15/2019
MM / DD / YYYY

/s//s/ Max J. Newman
Signature

Print the name of the person who is completing and signing this claim:

Name /s/ Max J. Newman
First name Middle name Last name

Title Attorney for Mersino Dewatering

Company Butzel Long, P.C.
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (888) 830-4648 | International (310) 751-2642

Debtor:
18-12378 - Welded Construction, L.P.
District:
District of Delaware

Creditor:
Mersino Dewatering d/b/a Global Pump
Max Newman
41000 Woodward Ave.
Stoneridge West
Bloomfield Hills, MI, 48304
USA
Phone:
248-258-2907
Phone 2:
Fax:
Email:
newman@butzel.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
No
Related Claim Filed By:

Filing Party:
Authorized agent

Disbursement/Notice Parties:
Mersino Dewatering, Inc.
Nick Darin
600 West Dryden Rd.
Metamora, MI, 48455
USA
Phone:
810-658-3472
Phone 2:
Fax:
E-mail:
nick.darin@mersino.com
DISBURSEMENT ADDRESS

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
Services performed

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
457,423.50

Includes Interest or Charges:
No

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No
Amount of 503(b)(9):
No
Based on Lease:
No
Subject to Right of Setoff:
No

Nature of Secured Amount:
Value of Property:
Annual Interest Rate:
Arrearage Amount:
Basis for Perfection:
Amount Unsecured:

Submitted By:
/s/ Max J. Newman on 15-Feb-2019 3:30:34 p.m. Pacific Time
Title:
Attorney for Mersino Dewatering
Company:
Butzel Long, P.C.

VN: 86936C5B3E41601C0851D8A6F50E4F04

Mersino
A/R Aging QuickZoom
As of October 24, 2018

9:13 AM
10/24/2018

Subcontractor	Contractor	Customer	Location of Work	Date	INV# Num	Name	Terms	Due Date	Class	Aging	Open Balance	Notes
Welded Construction - MI												
30167 - Job# 2017-05 Heilmandale Road	**Mersino Dewatering, Inc dba Global Pump**	**Welded Construction**	**Williams Gas Pipeline**	**Lebanon, PA**								
				08/13/2018	60746	Welded Construction - MI:30167 -	Net 30	09/12/2018	Generators	72	95,500.00	
				08/14/2018	60790	Welded Construction - MI:30167 -	Net 30	09/13/2018	Pumps & Equipment	71	7,787.00	
				08/31/2018	61214	Welded Construction - MI:30167 -	Net 30	09/30/2018	Other	54	682.50	
Total 30167 - Job# 2017-05 Heilmandale Road											103,969.50	
30493 - Welded Pipe Line #2 Submersible	**Mersino Dewatering, Inc dba Global Pump**	**Welded Construction**	**Williams Gas Pipeline**	**Lebanon, PA**								
				08/24/2018	61017	Welded Construction - MI:30493 -	Net 30	09/23/2018	Pumps & Equipment	61	6,100.00	
				08/27/2018	61138	Welded Construction - MI:30493 -	Net 30	09/26/2018	Pumps & Equipment	58	10,266.00	
				08/27/2018	61139	Welded Construction - MI:30493 -	Net 30	09/26/2018	Pumps & Equipment	58	6,418.00	
Total 30493 - Welded Pipe Line #2 Submersible											22,784.00	
30665 - Mountaineer Express Fish Creek By	**Mersino Dewatering, Inc**	**Welded Construction**	**TransCanada**	**Marshall & Wetzel Counties, WV**								
				08/31/2018	61162	Welded Construction - MI:30665 -	Net 30	09/30/2018	Bypass Pumping	54	133,525.00	
				09/30/2018	62134	Welded Construction - MI:30665 -	Net 30	10/30/2018	Bypass Pumping	24	197,145.00	
Total 30665 - Mountaineer Express Fish Creek By											330,670.00	
Total Welded Construction - MI											#REF!	

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WELDED CONSTRUCTION, L.P., et al., Debtors.	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) (Consolidated)
COLUMBIA GAS TRANSMISSION, LLC, Counter-Claimant, v. EARTH PIPELINE SERVICES, INC., Counter-Defendant.	

CERTIFICATE OF SERVICE

I David W. Carickhoff, hereby certify that on May 28, 2020, I caused true and correct copies of the *Columbia Gas Transmission's Brief in Opposition to Mersino Dewatering's Motion to Intervene* to be served on all parties named in the attached service list in the manner indicated.

Date: May 28, 2020

ARCHER & GREINER, P.C.

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Email: ckelley@mayerbrown.com
aelkhoury@mayerbrown.com

Attorneys for Columbia Gas Transmission, LLC

SERVICE LIST

VIA REGULAR MAIL AND ELECTRONIC MAIL

Welded Construction, L.P.
c/o Young, Conaway, Stargatt & Taylor
Attn: Sean M. Beach
Robert F. Poppiti, Jr.
Allison S. Mielke
Betsy L. Feldman
Rodney Square
1000 North King Street
Wilmington, DE 19801
sbeach@ycst.com
rpoppiti@ycst.com
amielke@ycst.com
bfeldman@ycst.com

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Matthew B. McGuire
P.O. Box 2087
919 Market Street, Suite 1800
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Cree@lrclaw.com
mcguire@lrclaw.com

Earth Pipeline Services, Inc.
c/o Campbell & Levine, LLC
Attn: Mark T. Hurford
222 Delaware Avenue, Suite 1620
Wilmington, DE 19801
mhurford@camlev.com

Mersino Dewatering, Inc.
c/o Bayard, P.A.
Attn: Gregory J. Flasser
GianClaudio Finizio
600 North King Street, Suite 400
Wilmington, Delaware 19801
gflasser@bayardlaw.com
gfinizio@bayardlaw.com

Mersino Dewatering, Inc.
c/o BUTZEL LONG PC
Attn: Max J. Newman
Michael Griffie
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Bloomfield Hills, MI 48304
newman@butzel.com
griffie@butzel.com