Docket #0026 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, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS)

PLAINTIFF EARTH PIPELINE SERVICES, INC.'S RESPONSE AND OPPOSITION TO MERSINO DEWATERING'S MOTION TO INTERVENE AND BRIEF IN SUPPORT

COHEN, SEGLIAS, PALLAS, GREENHALL
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PLAINTIFF'S RESPONSE AND OPPOSITION TO MERSINO DEWATERING'S MOTION TO INTERVENE

For the reasons set forth in the accompanying Brief, Plaintiff Earth Pipeline Services, Inc. ("EPS"), hereby respectfully requests that this Court deny the Motion of Mersino Dewatering, Inc. d/b/a Global Pump ("Mersino") to Intervene in the instant consolidated adversary proceedings (the "Motion") against nominal defendant Welded Construction, L.P. and Columbia Gas Transmission, LLC. The factual and legal grounds for this opposition are set forth in the accompanying, the entirety of which is incorporated herein by reference.

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PLAINTIFF'S RESPONSE AND OPPOSITION TO MERSINO DEWATERING'S MOTION TO INTERVENE

Plaintiff, Earth Pipeline Services, Inc. ("EPS"), by and through its undersigned counsel, hereby submits the following in response and opposition to the Motion of Mersino Dewatering, Inc. d/b/a Global Pump ("Mersino") to Intervene in the instant consolidated adversary proceedings (the "Motion"). For its response, EPS avers as follows:

1. Denied. EPS is without sufficient knowledge to form a belief as to the truth of this averment, and, therefore, it is denied.

2. Denied. EPS is without sufficient knowledge to form a belief as to the truth of this averment, and, therefore, it is denied. By way of further response, upon information and belief, Columbia Gas Transmission, LLC ("CGT") is a limited liability company organized and existing under the laws of the State of Delaware with a place of business located at 700 Louisiana Street, Suite 700, Houston, TX 77002, and its DE registered agent located at Corporation Service Company, 251 Little Falls Drive, Wilmington, New Castle County, DE 19808. It is further specifically denied that

the Mountaineer Express Pipeline Project (the "Project") is located at 1591 Wheeling Avenue, Glen Dale, WV 26038. By way of further response the real property which the Project occupies is situated from Mile Post 0.00 to Mile Post 18.83 in both Marshall and Wetzel Counties, West Virginia and includes approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas located from Station Number 0+00 to Station Number 994+36 existing on such real property (the "Property").

3. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

4. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

Facts:

5. Admitted, upon information and belief.

6. Denied. Mersino characterizes the contents of a subcontract with Welded Construction, L.P. ("Welded"), which is a document that speaks for itself, and Mersino's characterization is denied. By way of further denial, the allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

7. Denied. EPS is without sufficient knowledge to form a belief as to the truth of this averment, and, therefore, it is denied.

8. Denied. Mersino characterizes the contents of its Notice of Mechanic's Lien ("Mersino Lien"), which is a document that speaks for itself, and Mersino's characterization is denied. By way of further denial, the allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

9. Admitted in part, denied in part. It is admitted that EPS filed a complaint to foreclose its mechanic's lien upon the Project in the Circuit Court of Wetzel County, West Virginia and that

CGT removed it to the District Court for the Northern District of West Virginia, Wheeling Division as a matter related to the pending bankruptcy of Welded, which was then subsequently transferred to this Court where Welded's bankruptcy is pending. It is specifically denied, however, that the instant action is solely related to EPS's mechanic's lien filed in Wetzel County. Rather, EPS also filed a Complaint in the Circuit Court of Marshall County, West Virginia, Civil Action No. 19-C-28, naming CGT as defendant, and which was later removed, transferred, and consolidated with the matter initiated in Wetzel County against CGT, and which is currently the subject matter of the instant adversary proceedings.

10. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

11. Denied. Mersino characterizes the contents of EPS's Complaints to Foreclose Mechanic's Liens and Amended Complaint to Foreclose Mechanic's Liens, which are documents that speak for themselves, and Mersino's characterization is denied. By way of further denial, the allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

12. Denied. As set forth above, Mersino does not have a mechanic's lien against the same project and/or property as EPS. By way of further denial, Mersino characterizes the contents of its own and EPS's Complaints for Foreclosure of Mechanic's Liens, which are documents that speak for themselves, and Mersino's characterization is denied. By way of further denial, the allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

13. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

14. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

15. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

16. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

17. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

18. Denied. Mersino characterizes the contents of its Complaint for Enforcement of Mechanic's Lien, which is a document that speaks for itself, and Mersino's characterizations are therefore denied.

19. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

Respectfully submitted,

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PLAINTIFF'S BRIEF IN OPPOSITION TO MERSINO DEWATERING, INC'S MOTION TO INTERVENE

Plaintiff, Earth Pipeline Services, Inc. ("EPS"), by and through its undersigned counsel, hereby submits the following brief in response and opposition to the Motion of Mersino Dewatering, Inc. d/b/a Global Pump ("Mersino") to Intervene in the instant adversary proceedings (the "Motion").

I. INTRODUCTION AND FACTUAL SUMMARY

Mersino has filed the instant Motion for work it alleges that it completed as a subcontractor for Welded Construction, L.P. ("Welded"), the debtor and a nominal defendant in the consolidated adversary proceedings between EPS and Columbia Gas Transmission, LLC ("CGT"), on a section of property related to the Mountaineer Express Pipeline Project in West Virginia (the "Project"). See Intervenor Mersino's Mot. to Intervene & Br. Supp. 7, D.I. 22. In its Motion, Mersino claims that its work for Welded should allow it to intervene in the instant proceeding. See Mersino Br. 7-8. Mersino claims that it has a mechanic's lien "on the same Project or Property as Earth Pipeline." See Mersino Br. 8. However, its mechanic's lien is only against "that certain building Mountaineer

Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26038 in the County of Marshall" as provided in its own Notice of Mechanic's Lien. See Mersino Br., Ex. 2 "Mechanic's Lien." Investigation into the address listed on Mersino's lien shows that it consists of a 3.39 acre property located wholly within Marshall County in West Virginia. See Sheriff of Marshall County Real Property Ticket, No. 2019-0000018055, attached hereto as **Exhibit 1.**

EPS, on the other hand, has filed separate lien claims in both Marshall and Wetzel Counties respectively for its work on the Project, which have been consolidated in this Adversary Proceeding. See Pl.'s Am. Comp. 2-5, D.I. 23. On its own liens, EPS lists that its work consisted of mechanical clearing and grubbing "of approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas, from Station Number 0+00 to Station Number 994+36 for Spread 1 of the Mountaineer Express Pipeline Project, owned by [CGT] and situate[d] from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia…" (the "Property"). True and correct copies of EPS's Notices of Mechanic's Liens are attached hereto as **Exhibit 2** and **3** respectively. Moreover, EPS's claims are not limited to its lien claims against CGT. In its Amended Complaint, EPS brings additional causes of action for unjust enrichment and *quantum meruit*. CGT brought a counterclaim against EPS, alleging distinct and specific claims unique to the relationship between itself and EPS, even though EPS maintains such allegations are unmeritorious.

The Motion to Intervene must be denied because the respective mechanic's liens of EPS and Mersino attach to different properties. As such, Mersino lacks a substantial interest in the subject matter of EPS's lawsuit. In addition, there are no common questions of law or fact, nor is there any preclusive effect on Mersino's claim under West Virginia law that would warrant Mersino's presence in the instant action.

II. ARGUMENT

A. Mersino Has Failed To Meet Its Burden For Mandatory Intervention

Mersino has not met its burden under Federal Rule of Civil Procedure 24(a) for mandatory intervention, made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure Rule 7024. The Third Circuit has made clear that a non-party may intervene only where: 1) the application to intervene is timely; 2) the intervenor has a sufficient interest in the litigation; 3) the interest may be affected or impaired by the disposition of the action; and 4) the interest is not adequately represented by an existing party. See Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995). The intervenor must meet all four factors. See id. Mersino fails to meet the burden to establish intervention as a matter of right under Rule 24(a).

1. Mersino has insufficient interest in the current litigation.

To establish a sufficient interest for intervention, Mersino must demonstrate an interest relating to the property or transaction which is the subject of the action. See Liberty Mut. Ins. Co v. Treesdale, 419 F.3d 216, 220 (3d Cir. 2005). Mersino lacks sufficient interest in the instant dispute to require mandatory intervention. Its mechanic's lien claim affects substantially different property than EPS's. In addition, the proposed intervenor lacks any involvement in the additional claims asserted by both EPS and CGT.

Mersino claims it has a sufficient interest in the litigation due to its lien on the same property as EPS and that it has a significant interest in getting paid for its work on the Project. See Mersino Br. 4 at ¶¶ 12-13. The record revealed through the proposed intervenor's motion shows otherwise. Mersino's lien claim only attached to the property as described in its Notice of Mechanic's Lien "that certain building Mountaineer Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26038 in the County of Marshall," an address that shows an area of a little more than three acres, and which

does not facially appear to be the same as the property to which EPS' lien has attached. See **Ex. 1** (showing land parcel for work completed as identified by Mersino).

The description of the property that is subject to EPS's lien, by contrast, is "approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas, from Station Number 0+00 to Station Number 994+36 for Spread 1 of the Mountaineer Express Pipeline Project, owned by [CGT] and situate[d] from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia." See **Ex. 2** and **3**; see also Pl.'s Am. Compl. ¶ 20 (describing EPS's mechanic's liens).[1]

The property that is subject to Mersino's putative action to enforce its mechanics lien is not the same property that is subject to the instant action. Mersino's, consists of a 3.39 acre property solely located within Marshall County and, EPS's claims pertain to a 99,436 foot right-of-way which runs for eighteen miles across both Marshall County and Wetzel County. Since Mersino does not have a lien interest in the same property as EPS, it does not have any interest in the subject matter of this litigation sufficient to mandate joinder under Rule 24(a).

That Mersino's mechanic's lien attaches to a different property than the EPS mechanic's liens is borne out from the vast differences in the scope of work performed by these subcontractors. Mersino was contracted to perform pumping services on a discrete, small area of the Project. See Mersino Br., Ex. 1 "Subcontract," 1 § A. By contrast, the goods and services that EPS furnished pertained to the entire right-of-way, "clearing and grubbing all timber, brush and vegetation of approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads,

[1] It appears that Mersino has modified the description of the property that is subject to its lien in its proposed complaint to mirror the legal description contained in the EPS complaint. See Mersino Br., Ex. 3 "Proposed Complaint," ¶ 2. The only lien that Mersino would be entitled to enforce, however, is the lien created by virtue of the Notice of Mechanics Lien that Mersino recorded in office of the Clerk of the County Commission for Marshall County, West Virginia. See W. Va. Code, § 38-2-27 (noting clerk will record notice of lien to show, among other things, "description of the property to be charged by such lien."); see also Mersino Br., Ex. 3 "Proposed Complaint," ¶ 11.

laydown yards, and other areas … from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia." See **Ex. 2** and **3** (describing mechanic's liens).

Further, Mersino contends that it has an interest in or right to payment that must be protected by intervention in this lawsuit. See Mersino Br. 9. This argument is unavailing. A "mere economic interest in the outcome of litigation" is not sufficient interest for purposes of a motion to intervene. The 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. See Liberty Mut. Ins. Co., 419 F.3d at 220-21 (quoting Mountain Top, 72 F.3d at 366) (internal citations and quotation marks omitted). Unlike EPS, which has also asserted a valid and timely claim against CGT sounding in *quantum meruit*, Mersino has not asserted a claim that would attach to the general assets of CGT. Simply put, Mersino's economic interest is protected, if at all, by the value of the property interest on which its lien attaches. That property interest is not at issue in this action.

2. Mersino's interests that form the subject of its motion to intervene are not impaired as a result of this lawsuit.

In the event that Mersino was able to demonstrate an interest in the property at issue in this lawsuit that supports intervention under Rule 24(a), nevertheless, it is not entitled to intervene as a matter of right because that interest is not impaired by this lawsuit.

> Once an applicant for intervention has established that he or she possesses a sufficient legal interest in the underlying dispute, the applicant must also show that this claim is in jeopardy in the lawsuit. Under this element of the test, the proposed intervenors must demonstrate that their legal interests may be affected or impaired, as a practical matter by the disposition of the action. In making this determination, we are required to assess the practical consequences of the litigation, and may consider any significant legal effect on the applicant's interest.
>
> It is not sufficient that the claim be incidentally affected; rather, there must be a tangible threat to the applicant's legal interest. Yet, *this factor may be satisfied if, for example, a determination of the action in the applicants' absence will have a significant stare decisis effect on their claims,* or if the applicants' rights may be affected by a proposed remedy.

Liberty Mut. Ins. Co., 419 F.3d at 226-227 (quoting Brody v. Sprang, 957 F.2d 1108, 1122-23 (3d Cir. 1992)) (emphasis original).

Mersino contends that if it is not permitted to intervene, "the possibility exists that its interest will be foreclosed upon or extinguished by another construction company that worked on the Project." See Mersino Br. 9. It also suggests that if intervention is not permitted, Mersino will be deprived of due process rights and the ability to adequately protect its interests. See id. at 10. However, under West Virginia law, Mersino's lien will not be "extinguished" or divested even if EPS is successful. All perfected mechanic's liens and materialmen's liens attach at the time of the initial construction. See Carolina Lumber Co. v. Cunningham, 192 S.E.2d 722, 727 (W. Va. 1972). Under West Virginia law, where a lien is established in favor of any relevant creditors to a piece of property, a court shall order a sale of the property and provide a decree in favor of other creditors as shall be enforced as decrees for money. See W. Va. Code, § 38-2-35. Therefore, if EPS's lien claim is successful against CGT, Mersino's lien claim will not be extinguished, but, to the contrary, will be closer to providing exactly the relief sought in its Motion: "to enforce or protect Mersino's rights or, frankly, to see that Mersino gets paid for the work it has done and/or the services, labor, materials, supplies, equipment, and/or machinery that it furnished to the Project and/or for the improvements to the Property." See Mersino Br. 10.

3. Even if Mersino's interests were identical to EPS's, EPS will adequately protect Mersino's interests as they would both have the same objective.

Even assuming *arguendo* that Mersino could be found sufficiently interested in the instant proceeding for mandatory joinder, its interests are still adequately protected by EPS and it will not be deprived of any due process rights as its lien claim will not be extinguished if EPS is successful, thus failing the third and fourth factors of the Rule 24(a) mandatory joinder test. In order to fully meet the fourth prong of the Rule 24(a) test for mandatory joinder, that the intervenor not have a

party adequately representing its interests in the litigation, the intervenor must also show that a current party cannot adequately represent its interests. See Westra Constr. Inc. v. U.S. Fid. & Guar. Co., 546 F. Supp. 2d 194, 202 (M.D. Pa. 2008) (citing In re Cmty. Bank of N. Va., 418 F.3d 277, 314 (3d Cir. 2005)). However, "[w]hen a party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." Westra, 546 F. Supp. 2d at 202 (quoting In re Cmty. Bank, 418 F.3d at 315) (internal quotation marks omitted) (emphasis added). In order to overcome this presumption, the intervenor "must ordinarily demonstrate adversity of interest, collusion or nonfeasance on the party of the party to the suit." Id. Here, Mersino's objective is to get paid by either Welded or CGT for its work on the Project. EPS shares that ultimate objective, while also bringing its own additional claims for payment against CGT. Thus, EPS shares Mersino's ultimate objective. Mersino has also failed to show that EPS is colluding with CGT or is engaged in nonfeasance of its suit.

For these reasons, Mersino has failed to show that it either is a sufficiently interested party, that its interests will be affected or impaired by the instant litigation to which it is a nonparty, or that its alleged interests are not adequately protected by EPS. Therefore, its reliance on Rule 24(a)'s mandatory intervention is unavailing.

B. Mersino Should Not Be Granted A Permissive Joinder Because There is No Common Question of Law or Fact

Mersino should not be granted a permissive joinder under Rule 24(b) because it shares no common question of law or fact with the allegations and claims in the instant proceeding. Mersino claims that it should be granted permissive intervention because it shares common issues of law or fact such as "the issue of the scope of the work performed and/or the services, labor, materials, 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." See Mersino Br. 10.

Under Federal Rule of Civil Procedure 24(b)(1)(B), a court has the discretion to permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact. However, in exercising this discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. See Fed. R. Civ. P. 24(b)(3). Courts have specifically underscored this interest in efficiency and judicial economy through the aggregating of claims which have no need to be heard in separate proceedings due to their common questions of law or fact. See U.S. ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins., 239 F.R.D. 404, 415 (W.D. Pa. 2006) (surveying various federal courts' approaches to favoring consolidating those claims which would have been brought separately but can be considered together due to common factual or legal history). The aim of permissive joinder is generally to streamline or simplify a proceeding in order to avoid later collateral litigation. See id. at 415-16. Here, the addition of Mersino's lien claim would not streamline proceedings of common factual history, but would rather overcomplicate an already extremely complex construction dispute that centers upon competing claims between EPS and CGT with respect to the work that EPS performed on the project.

Additionally, the only factual similarity between Mersino's lien claim and the instant proceeding is that both Mersino and EPS were subcontractors for Welded. While both brought *in rem* claims against CGT as lien claimants, the entire determination of the value of each lien claim will go to performance of the work under each individual subcontract. Determinations of contract performance contain highly individual questions of law and fact. Moreover, Mersino's claim of common questions of law and fact ignores the two other *in personam* claims brought by EPS in its Amended Complaint against CGT. EPS's unjust enrichment and *quantum meruit* claims are personal and consider only the relationship between itself and CGT in the performance of EPS's subcontract. Even more tellingly, CGT has issued a counterclaim against EPS containing various *in personam* counts, further differentiating the issues at play in the instant proceeding from any claims asserted by

Mersino. See generally CGT Am. Answer and Countercl., D.I. 10. For these reasons, this Court should decline to use its discretion to grant Mersino a permissive joinder because it would needlessly complicate, unduly delay, and prejudice EPS's right to relief against CGT while not furthering the goals of judicial economy and efficiency.

C. The West Virginia Lien Statute Disallows Mersino's Intervention

Finally, the West Virginia Lien Statute precludes intervention by Mersino in the instant proceeding because its lien does not affect the same property as EPS's liens. Section 38-2-34(a) of the West Virginia Code provides that "an action commenced by any person having lien shall, for the purpose of preserving the same, insure to the benefit of all other persons having a lien under this article on the same property, and persons may intervene in the action for the purpose of enforcing their liens." Mersino uses this statute to claim that intervention is proper under the lien system's statutory scheme. The disparity in descriptions of the liens in Mersino's and EPS's Notices of Lien Claim show that their respective liens are not on the same property. For this reason, Mersino does not have any rights under West Virginia law to intervene in this matter.

III. CONCLUSION

For all of the foregoing reasons, Earth Pipeline Services respectfully requests that Mersino's Motion to Intervene be denied.

Respectfully submitted,

COHEN, SEGLIAS, PALLAS, GREENHALL & FURMAN, P.C.

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DATED: May 28, 2020

Attorneys for Earth Pipeline Services, Inc.

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CERTIFICATE OF SERVICE

I, Sally J. Daugherty, hereby certify that on this 28th day of May 2020, I caused a true and correct copy of ***Plaintiff Earth Pipeline Services, Inc.'s Response in Opposition to Mersino Dewatering, Inc.'s Motion to Intervene and Brief in Support*** to be served upon the parties identified below via email and by the Court's CM/ECF System:

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Attorneys for Earth Pipeline Services, Inc.

DATED: May 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, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS)

PLAINTIFF'S BRIEF IN OPPOSITION TO MERSINO DEWATERING, INC'S MOTION TO INTERVENE

Plaintiff, Earth Pipeline Services, Inc. ("EPS"), by and through its undersigned counsel, hereby submits the following brief in response and opposition to the Motion of Mersino Dewatering, Inc. d/b/a Global Pump ("Mersino") to Intervene in the instant adversary proceedings (the "Motion").

I. INTRODUCTION AND FACTUAL SUMMARY

Mersino has filed the instant Motion for work it alleges that it completed as a subcontractor for Welded Construction, L.P. ("Welded"), the debtor and a nominal defendant in the consolidated adversary proceedings between EPS and Columbia Gas Transmission, LLC ("CGT"), on a section of property related to the Mountaineer Express Pipeline Project in West Virginia (the "Project"). See Intervenor Mersino's Mot. to Intervene & Br. Supp. 7, D.I. 22. In its Motion, Mersino claims that its work for Welded should allow it to intervene in the instant proceeding. See Mersino's Br.

7-8. Mersino claims that it has a mechanic's lien "on the same Project or Property as Earth Pipeline." See Mersino's Br. 8. However, its mechanic's lien is only against "that certain building Mountaineer Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26038 in the County of Marshall" as provided in its own Notice of Mechanic's Lien. See Mersino's Notice of Mechanic's Lien, attached hereto as **Exhibit 1**. Investigation into the address listed on Mersino's lien shows that it consists of a 3.39 acre property located wholly within Marshall County in West Virginia. See Sheriff of Marshall County Real Property Ticket, No. 2019-0000018055, attached hereto as **Exhibit 2.**

EPS, on the other hand, has filed separate lien claims in both Marshall and Wetzel Counties respectively for its work on the Project, which have been consolidated in this Adversary Proceeding. See Pl.'s Am. Comp. 2-5, D.I. 23. On its own liens, EPS lists that its work consisted of mechanical clearing and grubbing "of approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas, from Station Number 0+00 to Station Number 994+36 for Spread 1 of the Mountaineer Express Pipeline Project, owned by [CGT] and situate[d] from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia…" (the "Property"). True and correct copies of EPS's Notices of Mechanic's Liens are attached hereto as **Exhibit 3** and **4** respectively. Moreover, EPS's claims are not limited to its lien claims against CGT. In its Amended Complaint, EPS brings additional causes of action for unjust enrichment and *quantum meruit*. CGT brought a counterclaim against EPS, alleging distinct and specific claims unique to the relationship between itself and EPS, even though EPS maintains such allegations are unmeritorious.

The Motion to Intervene must be denied because the respective mechanic's liens of EPS and Mersino attach to different properties. As such, Mersino lacks a substantial interest in the

subject matter of EPS's lawsuit. In addition, there are no common questions of law or fact, nor is there any preclusive effect on Mersino's claim under West Virginia law that would warrant Mersino's presence in the instant action.

II. ARGUMENT

A. Mersino Has Failed To Meet Its Burden For Mandatory Intervention

Mersino has not met its burden under Federal Rule of Civil Procedure 24(a) for mandatory intervention, made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure Rule 7024. The Third Circuit has made clear that a non-party may intervene only where: 1) the application to intervene is timely; 2) the intervenor has a sufficient interest in the litigation; 3) the interest may be affected or impaired by the disposition of the action; and 4) the interest is not adequately represented by an existing party. See Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995). The intervenor must meet all four factors. See id. Mersino fails to meet the burden to establish intervention as a matter of right under Rule 24(a).

1. Mersino has insufficient interest in the current litigation.

To establish a sufficient interest for intervention, Mersino must demonstrate an interest relating to the property or transaction which is the subject of the action. See Liberty Mut. Ins. Co v. Treesdale, 419 F.3d 216, 220 (3d Cir. 2005). Mersino lacks sufficient interest in the instant dispute to require mandatory intervention. Its mechanic's lien claim affects substantially different property than EPS's. In addition, the proposed intervenor lacks any involvement in the additional claims asserted by both EPS and CGT.

Mersino claims it has a sufficient interest in the litigation due to its lien on the same property as EPS and that it has a significant interest in getting paid for its work on the Project. See Mersino's Br. 4 at ¶¶ 12-13. The record revealed through the proposed intervenor's motion shows otherwise. Mersino's lien claim only attached to the property as described in its Notice of Mechanic's Lien "that certain building Mountaineer Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26038 in the County of Marshall," an address that shows an area of a little more than three acres, and which does not facially appear to be the same as the property to which EPS' lien has attached. See **Ex. 2** (showing land parcel for work completed as identified by Mersino).

The description of the property that is subject to EPS's lien, by contrast, is "approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas, from Station Number 0+00 to Station Number 994+36 for Spread 1 of the Mountaineer Express Pipeline Project, owned by [CGT] and situate[d] from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia." See **Ex. 3** and **4**; see also Pl.'s Am. Compl. ¶ 20 (describing EPS's mechanic's liens).[1]

The property that is subject to Mersino's putative action to enforce its mechanics lien is not the same property that is subject to the instant action. Mersino's, consists of a 3.39 acre property solely located within Marshall County and, EPS's claims pertain to a 99,436 foot right-of-way which runs for eighteen miles across both Marshall County and Wetzel County. Since Mersino does not have a lien interest in the same property as EPS, it does not have any interest in the subject matter of this litigation sufficient to mandate joinder under Rule 24(a).

[1] It appears that Mersino has modified the description of the property that is subject to its lien in its proposed complaint to mirror the legal description contained in the EPS complaint. See Mersino Br., Ex. 3 "Proposed Complaint," ¶ 2. The only lien that Mersino would be entitled to enforce, however, is the lien created by virtue of the Notice of Mechanics Lien that Mersino recorded in office of the Clerk of the County Commission for Marshall County, West Virginia. See W. Va. Code, § 38-2-27 (noting clerk will record notice of lien to show, among other things, "description of the property to be charged by such lien."); see also Mersino Br., Ex. 3 "Proposed Complaint," ¶ 11.

That Mersino's mechanic's lien attaches to a different property than the EPS mechanic's liens is borne out from the vast differences in the scope of work performed by these subcontractors. Mersino was contracted to perform pumping services on a discrete, small area of the Project. See Mersino Br., Ex. 1 "Subcontract," 1 § A. By contrast, the goods and services that EPS furnished pertained to the entire right-of-way, "clearing and grubbing all timber, brush and vegetation of approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards, and other areas … from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia." See **Ex. 3** and **4** (describing mechanic's liens).

Further, Mersino contends that it has an interest in or right to payment that must be protected by intervention in this lawsuit. See Mersino Br. 9. This argument is unavailing. A "mere economic interest in the outcome of litigation" is not sufficient interest for purposes of a motion to intervene. The 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. See Liberty Mut. Ins. Co., 419 F.3d at 220-21 (quoting Mountain Top, 72 F.3d at 366) (internal citations and quotation marks omitted). Unlike EPS, which has also asserted a valid and timely claim against CGT sounding in *quantum meruit*, Mersino has not asserted a claim that would attach to the general assets of CGT. Simply put, Mersino's economic interest is protected, if at all, by the value of the property interest on which its lien attaches. That property interest is not at issue in this action.

2. Mersino's interests that form the subject of its motion to intervene are not impaired as a result of this lawsuit.

In the event that Mersino was able to demonstrate an interest in the property at issue in this lawsuit that supports intervention under Rule 24(a), nevertheless, it is not entitled to intervene as a matter of right because that interest is not impaired by this lawsuit.

> Once an applicant for intervention has established that he or she possesses a sufficient legal interest in the underlying dispute, the applicant must also show that this claim is in jeopardy in the lawsuit. Under this element of the test, the proposed intervenors must demonstrate that their legal interests may be affected or impaired, as a practical matter by the disposition of the action. In making this determination, we are required to assess the practical consequences of the litigation, and may consider any significant legal effect on the applicant's interest.
>
> It is not sufficient that the claim be incidentally affected; rather, there must be a tangible threat to the applicant's legal interest. Yet, *this factor may be satisfied if, for example, a determination of the action in the applicants' absence will have a significant stare decisis effect on their claims,* or if the applicants' rights may be affected by a proposed remedy.

Liberty Mut. Ins. Co., 419 F.3d at 226-227 (quoting Brody v. Sprang, 957 F.2d 1108, 1122-23 (3d Cir. 1992)) (emphasis original).

Mersino contends that if it is not permitted to intervene, "the possibility exists that its interest will be foreclosed upon or extinguished by another construction company that worked on the Project." See Mersino Br. 9. It also suggests that if intervention is not permitted, Mersino will be deprived of due process rights and the ability to adequately protect its interests. See id. at 10. However, under West Virginia law. Mersino's lien will not be "extinguished" or divested even if EPS is successful. All perfected mechanic's liens and materialmen's liens attach at the time the initial construction. See Carolina Lumber Co. v. Cunningham, 192 S.E.2d 722, 727 (W. Va. 1972). Under West Virginia law, where a lien is established in favor of any relevant creditors to a piece of property, a court shall order a sale of the property and provide a decree in favor of other creditors as shall be enforced as decrees for money. See W. Va. Code, § 38-2-35. Therefore, if EPS's lien claim is successful against CGT, Mersino's lien claim will not be extinguished, but, to the contrary, will be closer to providing exactly the relief sought in its Motion: "to enforce or protect Mersino's rights or, frankly, to see that Mersino gets paid for the work it has done and/or the services, labor, materials, supplies, equipment, and/or machinery that it furnished to the Project and/or for the improvements to the Property." See Mersino Br. 10.

For these reasons, Mersino has failed to show that it either is a sufficiently interested party, that its interests will be affected or impaired by the instant litigation to which it is a nonparty, or that its alleged interests are not adequately protected by EPS. Therefore, its reliance on Rule 24(a)'s mandatory intervention is unavailing.

B. Mersino Should Not Be Granted A Permissive Joinder Because There is No Common Question of Law or Fact

Mersino should not be granted a permissive joinder under Rule 24(b) because it shares no common question of law or fact with the allegations and claims in the instant proceeding. Mersino claims that it should be granted permissive intervention because it shares common issues of law or fact such as "the issue of the scope of the work performed and/or the services, labor, materials, 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." See Mersino Br. 10. Under Federal Rule of Civil Procedure 24(b)(1)(B), a court has the discretion to permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact. However, in exercising this discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. See Fed. R. Civ. P. 24(b)(3). Courts have specifically underscored this interest in efficiency and judicial economy through the aggregating of claims which have no need to be heard in separate proceedings due to their common questions of law or fact. See U.S. ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins., 239 F.R.D. 404, 415 (W.D. Pa. 2006) (surveying various federal courts' approaches to favoring consolidating those claims which would have been brought separately but can be considered together due to common factual or legal history). The aim of permissive joinder is generally to streamline or simplify a proceeding in order to avoid later

collateral litigation. See id. at 415-16. Here, the addition of Mersino's lien claim would not streamline proceedings of common factual history, but would rather overcomplicate an already extremely complex construction dispute that centers upon competing claims between EPS and CGT with respect to the work that EPS performed on the project.

Additionally, the only factual similarity between Mersino's lien claim and the instant proceeding is that both Mersino and EPS were subcontractors for Welded. While both brought *in rem* claims against CGT as lien claimants, the entire determination of the value of each lien claim will go to performance of the work under each individual subcontract. Determinations of contract performance contain highly individual questions of law and fact. Moreover, Mersino's claim of common questions of law and fact ignores the two other *in personam* claims brought by EPS in its Amended Complaint against CGT. EPS's unjust enrichment and *quantum meruit* claims are personal and consider only the relationship between itself and CGT in the performance of EPS's subcontract. Even more tellingly, CGT has issued a counterclaim against EPS containing various *in personam* counts, further differentiating the issues at play in the instant proceeding from any claims asserted by Mersino. See generally CGT Am. Answer and Countercl., D.I. 10. For these reasons, this Court should decline to use its discretion to grant Mersino a permissive joinder because it would needlessly complicate, unduly delay, and prejudice EPS's right to relief against CGT while not furthering the goals of judicial economy and efficiency.

C. The West Virginia Lien Statute Disallows Mersino's Intervention

Finally, the West Virginia Lien Statute precludes intervention by Mersino in the instant proceeding because its lien does not affect the same property as EPS's liens. Section 38-2-34(a) of the West Virginia Code provides that "an action commenced by any person having lien shall, for the purpose of preserving the same, insure to the benefit of all other persons having a lien under

this article on the same property, and persons may intervene in the action for the purpose of enforcing their liens." Mersino uses this statute to claim that intervention is proper under the lien system's statutory scheme. The disparity in descriptions of the liens in Mersino's and EPS's Notices of Lien Claim show that their respective liens are not on the same property. For this reason, Mersino does not have any rights under West Virginia law to intervene in this matter.

III. CONCLUSION

For all of the foregoing reasons, Earth Pipeline Services respectfully requests that Mersino's Motion to Intervene be denied.

Respectfully submitted,

COHEN, SEGLIAS, PALLAS, GREENHALL & FURMAN, P.C.

/s/ Sally J. Daugherty
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500 Delaware Avenue, Suite 730
Wilmington, DE 19801
(302) 425-5089

DATED: May 28, 2020

Attorneys for Earth Pipeline Services, Inc.

Exhibit 1

Sheriff of Marshall County

Marshall County Real Property

Tax Year: 2019 Account Number: 00017290
Ticket #: 0000018055 Taxpayer I.D.:
District: 06 - GLEN DALE CORP.

Property Owner	Property Description
REILLEYS INC A CORP 1400 DUCK LN GLEN DALE, WV 26038 Lending Institution:	3.39 A BETWEEN B&O RR CO Map/Parcel: 9 / 0002 0000 0600 Lot Size: Acreage: Book: 0004 Page: 0065

Tax Class: 4
Homestead Exemption: None
Back Tax: None
Exoneration: None
Prior Delinquents: None
Special Disposition: None

ASSESSMENT:

Assessment	GROSS	NET	TAX (1/2 Year)
Land	1380	1380	
Building	0	0	
Total	1380	1380	17.48

AMOUNTS DUE: First Half: none due Second Half: none due Total Due: none due

PAYMENTS RECEIVED:

	First Half	Second Half
Net	17.48	17.48
Discount	.44	.44
Interest	.00	.00
Total	17.04	17.04
Date	08/23/2019	08/23/2019

Please Remit Payment (if any) to: Sheriff of Marshall County
P.O. Box 648
Moundsville, WV 26041
Or call (304) 843-1400 with questions.

Exhibit 2

EMILY LANE
525 WILLIAM PENN PLACE
SUITE 3005
PITTSBURGH PA 15219

BOOK 0011 PAGE 0574

Prepared by, recorded at the request of,
and returned to:
Brian A. Lawton, Esquire
Cohen Seglias Pallas Greenhall & Furman, PC
525 William Penn Place, Suite 3005
Pittsburgh, PA 15219

NOTICE OF MECHANIC'S LIEN

TO: Columbia Gas Transmission, LLC, owner or reputed owner as its interests may appear.

You will please take notice that the undersigned, Earth Pipeline Services, Inc., with a place of business located at 135 Technology Drive, Suite 400, Canonsburg, PA 15317, was and is subcontractor with Welded Construction, L.P., who was and is general contractor for the furnishing of materials and doing of the work and labor necessary for the clearing and grubbing all timber, brush and vegetation of approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas, from Station Number 0+00 to Station Number 994+36 for Spread 1 of the Mountaineer Express Pipeline Project, owned by you and situate from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia and that the contract price and value of said work and material is $7,342,519.62. You are further notified that the undersigned has been paid only $3,692,219.20 thereof and that it claims and will claim a lien, in the amount of $3,650,300.42, upon your interest in the said tract of land and upon the buildings, structures and improvements thereon to secure the payment of said sum.

Given under my hand this 10TH day of September, 2018.

Claimant,

EARTH PIPELINE SERVICES, INC.

By:_____
Joshua Roberts, President

BOOK 0041 PAGE 0575

COMMONWEALTH OF
PENNSYLVANIA)
) SS:
COUNTY OF WASHINGTON)

Joshua Roberts, being first duly sworn, upon his oath says that the statements contained in the foregoing notice of mechanic's lien are true, as he verily believes.

Taken, subscribed and sworn to before me this 10 day of September, 2018.

Lauren Hrvatin
Notary Public

My commission expires: 4/27/22

COMMONWEALTH OF PENNSYLVANIA - NOTARY SEAL
Lauren Hrvatin, Notary Public
Washington County
My Commission Expires 04/27/2022
Commission Number 1331000

Marshall County
Jan Pest, Clerk
Instrument 1445514
09/12/2018 @ 10:50:32 AM
MECHANICS LIEN
Book 11 @ Page 574
Pages Recorded 2
Recording Cost $ 11.00

5075038.1 53781-0010
9/9/2018
Marshall County

STATE OF WEST VIRGINIA, MARSHALL COUNTY, SCT.:

I, JAN PEST, Clerk of the County Commission of said County, do hereby certify that the annexed writing, bearing date on the 10th day of September, 2018, was presented for and by me, admitted to record in my office upon the above certificate as to the parties therein named this 12th day of September, 2018 at 10:50 o'clock A. M.

TESTE: Jan Pest Clerk

Exhibit 3

Wetzel County
Carol S Haught, Clerk
Instrument 257004
09/12/2018 @ 11:47:25 AM
MECHANICS LIEN
Book 6 @ Page 872
Pages Recorded 2
Recording Cost $ 11.00

Prepared by, recorded at the request of,
and returned to:
Brian A. Lawton, Esquire
Cohen Seglias Pallas Greenhall & Furman, PC
525 William Penn Place, Suite 3005
Pittsburgh, PA 15219

NOTICE OF MECHANIC'S LIEN

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You will please take notice that the undersigned, Earth Pipeline Services, Inc., with a place of business located at 135 Technology Drive, Suite 400, Canonsburg, PA 15317, was and is subcontractor with Welded Construction, L.P., who was and is general contractor for the furnishing of materials and doing of the work and labor necessary for the clearing and grubbing all timber, brush and vegetation of approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas, from Station Number 0+00 to Station Number 994+36 for Spread 1 of the Mountaineer Express Pipeline Project, owned by you and situate from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia and that the contract price and value of said work and material is $7,342,519.62. You are further notified that the undersigned has been paid only $3,692,219.20 thereof and that it claims and will claim a lien, in the amount of $3,650,300.42, upon your interest in the said tract of land and upon the buildings, structures and improvements thereon to secure the payment of said sum.

Given under my hand this 10th day of September, 2018.

Claimant,

EARTH PIPELINE SERVICES, INC.

By:_____
Joshua Roberts, President

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF WASHINGTON)

Joshua Roberts, being first duly sworn, upon his oath says that the statements contained in the foregoing notice of mechanic's lien are true, as he verily believes.

Taken, subscribed and sworn to before me this 10 day of September, 2018.

Lauren Hrvatin
Notary Public

My commission expires: 4/27/22

COMMONWEALTH OF PENNSYLVANIA - NOTARY SEAL
Lauren Hrvatin, Notary Public
Washington County
My Commission Expires 04/27/2022
Commission Number 1331000

5051316.2 53781-0010
9/9/2018
Wetzel County

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, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS)

CERTIFICATE OF SERVICE

I, Sally J. Daugherty, hereby certify that on this 28th day of May, 2020, I caused a true and correct copy of ***Response and Opposition to Mersino DeWatering's Motion to Intervene and Brief in Support Thereof*** to be served upon the parties identified below via email and by the Court's CM/ECF System:

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DATED: May 28, 2020

Attorneys for Earth Pipeline Services

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, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS)

ORDER DENYING MERSINO DEWATERING'S MOTION TO INTERVENE

Upon consideration of *Earth Pipeline Services, Inc.'s Response and Opposition to Mersino Dewatering's Motion to Intervene and Brief in Support* (the "Motion"), seeking to intervene into it is hereby **ORDERED** that the Motion is **DENIED**.

Sontchi, J.

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, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS)

PLAINTIFF EARTH PIPELINE SERVICES, INC.'S RESPONSE AND OPPOSITION TO MERSINO DEWATERING'S MOTION TO INTERVENE AND BRIEF IN SUPPORT

COHEN, SEGLIAS, PALLAS, GREENHALL
& FURMAN, P.C.

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Attorneys for Earth Pipeline Services, Inc.

DATED: May 28, 2020

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IN THE UNITED STATES BANKRUPTCY COURT
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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, WELDED CONSTRUCTION, L.P., Defendants.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS)

PLAINTIFF'S RESPONSE AND OPPOSITION TO MERSINO DEWATERING'S MOTION TO INTERVENE

For the reasons set forth in the accompanying Brief, Plaintiff Earth Pipeline Services, Inc. ("EPS"), hereby respectfully requests that this Court deny the Motion of Mersino Dewatering, Inc. d/b/a Global Pump ("Mersino") to Intervene in the instant consolidated adversary proceedings (the "Motion") against nominal defendant Welded Construction, L.P. and Columbia Gas Transmission, LLC. The factual and legal grounds for this opposition are set forth in the accompanying, the entirety of which is incorporated herein by reference.

COHEN, SEGLIAS, PALLAS, GREENHALL
& FURMAN, P.C.

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DATED: May 28, 2020

Attorneys for Earth Pipeline Services, Inc.

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)
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PLAINTIFF'S RESPONSE AND OPPOSITION TO MERSINO DEWATERING'S MOTION TO INTERVENE

Plaintiff, Earth Pipeline Services, Inc. ("EPS"), by and through its undersigned counsel, hereby submits the following in response and opposition to the Motion of Mersino Dewatering, Inc. d/b/a Global Pump ("Mersino") to Intervene in the instant consolidated adversary proceedings (the "Motion"). For its response, EPS avers as follows:

1. Denied. EPS is without sufficient knowledge to form a belief as to the truth of this averment, and, therefore, it is denied.

2. Denied. EPS is without sufficient knowledge to form a belief as to the truth of this averment, and, therefore, it is denied. By way of further response, upon information and belief, Columbia Gas Transmission, LLC ("CGT") is a limited liability company organized and existing under the laws of the State of Delaware with a place of business located at 700 Louisiana Street, Suite 700, Houston, TX 77002, and its DE registered agent located at Corporation Service Company, 251 Little Falls Drive, Wilmington, New Castle County, DE 19808. It is further specifically denied that

the Mountaineer Express Pipeline Project (the "Project") is located at 1591 Wheeling Avenue, Glen Dale, WV 26038. By way of further response the real property which the Project occupies is situated from Mile Post 0.00 to Mile Post 18.83 in both Marshall and Wetzel Counties, West Virginia and includes approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas located from Station Number 0+00 to Station Number 994+36 existing on such real property (the "Property").

3. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

4. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

Facts:

5. Admitted, upon information and belief.

6. Denied. Mersino characterizes the contents of a subcontract with Welded Construction, L.P. ("Welded"), which is a document that speaks for itself, and Mersino's characterization is denied. By way of further denial, the allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

7. Denied. EPS is without sufficient knowledge to form a belief as to the truth of this averment, and, therefore, it is denied.

8. Denied. Mersino characterizes the contents of its Notice of Mechanic's Lien ("Mersino Lien"), which is a document that speaks for itself, and Mersino's characterization is denied. By way of further denial, the allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

9. Admitted in part, denied in part. It is admitted that EPS filed a complaint to foreclose its mechanic's lien upon the Project in the Circuit Court of Wetzel County, West Virginia and that

CGT removed it to the District Court for the Northern District of West Virginia, Wheeling Division as a matter related to the pending bankruptcy of Welded, which was then subsequently transferred to this Court where Welded's bankruptcy is pending. It is specifically denied, however, that the instant action is solely related to EPS's mechanic's lien filed in Wetzel County. Rather, EPS also filed a Complaint in the Circuit Court of Marshall County, West Virginia, Civil Action No. 19-C-28, naming CGT as defendant, and which was later removed, transferred, and consolidated with the matter initiated in Wetzel County against CGT, and which is currently the subject matter of the instant adversary proceedings.

10. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

11. Denied. Mersino characterizes the contents of EPS's Complaints to Foreclose Mechanic's Liens and Amended Complaint to Foreclose Mechanic's Liens, which are documents that speak for themselves, and Mersino's characterization is denied. By way of further denial, the allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

12. Denied. As set forth above, Mersino does not have a mechanic's lien against the same project and/or property as EPS. By way of further denial, Mersino characterizes the contents of its own and EPS's Complaints for Foreclosure of Mechanic's Liens, which are documents that speak for themselves, and Mersino's characterization is denied. By way of further denial, the allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

13. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

14. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

15. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

16. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

17. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

18. Denied. Mersino characterizes the contents of its Complaint for Enforcement of Mechanic's Lien, which is a document that speaks for itself, and Mersino's characterizations are therefore denied.

19. Denied. The allegations of this paragraph consist of legal conclusions which require no response, and therefore, are denied.

Respectfully submitted,

COHEN, SEGLIAS, PALLAS, GREENHALL
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DATED: May 28, 2020

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PLAINTIFF'S BRIEF IN OPPOSITION TO MERSINO DEWATERING, INC'S MOTION TO INTERVENE

Plaintiff, Earth Pipeline Services, Inc. ("EPS"), by and through its undersigned counsel, hereby submits the following brief in response and opposition to the Motion of Mersino Dewatering, Inc. d/b/a Global Pump ("Mersino") to Intervene in the instant adversary proceedings (the "Motion").

I. INTRODUCTION AND FACTUAL SUMMARY

Mersino has filed the instant Motion for work it alleges that it completed as a subcontractor for Welded Construction, L.P. ("Welded"), the debtor and a nominal defendant in the consolidated adversary proceedings between EPS and Columbia Gas Transmission, LLC ("CGT"), on a section of property related to the Mountaineer Express Pipeline Project in West Virginia (the "Project"). See Intervenor Mersino's Mot. to Intervene & Br. Supp. 7, D.I. 22. In its Motion, Mersino claims that its work for Welded should allow it to intervene in the instant proceeding. See Mersino Br. 7-8. Mersino claims that it has a mechanic's lien "on the same Project or Property as Earth Pipeline." See Mersino Br. 8. However, its mechanic's lien is only against "that certain building Mountaineer

Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26038 in the County of Marshall" as provided in its own Notice of Mechanic's Lien. See Mersino Br., Ex. 2 "Mechanic's Lien." Investigation into the address listed on Mersino's lien shows that it consists of a 3.39 acre property located wholly within Marshall County in West Virginia. See Sheriff of Marshall County Real Property Ticket, No. 2019-0000018055, attached hereto as **Exhibit 1.**

EPS, on the other hand, has filed separate lien claims in both Marshall and Wetzel Counties respectively for its work on the Project, which have been consolidated in this Adversary Proceeding. See Pl.'s Am. Comp. 2-5, D.I. 23. On its own liens, EPS lists that its work consisted of mechanical clearing and grubbing "of approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas, from Station Number 0+00 to Station Number 994+36 for Spread 1 of the Mountaineer Express Pipeline Project, owned by [CGT] and situate[d] from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia…" (the "Property"). True and correct copies of EPS's Notices of Mechanic's Liens are attached hereto as **Exhibit 2** and **3** respectively. Moreover, EPS's claims are not limited to its lien claims against CGT. In its Amended Complaint, EPS brings additional causes of action for unjust enrichment and *quantum meruit*. CGT brought a counterclaim against EPS, alleging distinct and specific claims unique to the relationship between itself and EPS, even though EPS maintains such allegations are unmeritorious.

The Motion to Intervene must be denied because the respective mechanic's liens of EPS and Mersino attach to different properties. As such, Mersino lacks a substantial interest in the subject matter of EPS's lawsuit. In addition, there are no common questions of law or fact, nor is there any preclusive effect on Mersino's claim under West Virginia law that would warrant Mersino's presence in the instant action.

II. ARGUMENT

A. Mersino Has Failed To Meet Its Burden For Mandatory Intervention

Mersino has not met its burden under Federal Rule of Civil Procedure 24(a) for mandatory intervention, made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure Rule 7024. The Third Circuit has made clear that a non-party may intervene only where: 1) the application to intervene is timely; 2) the intervenor has a sufficient interest in the litigation; 3) the interest may be affected or impaired by the disposition of the action; and 4) the interest is not adequately represented by an existing party. See Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995). The intervenor must meet all four factors. See id. Mersino fails to meet the burden to establish intervention as a matter of right under Rule 24(a).

1. Mersino has insufficient interest in the current litigation.

To establish a sufficient interest for intervention, Mersino must demonstrate an interest relating to the property or transaction which is the subject of the action. See Liberty Mut. Ins. Co v. Treesdale, 419 F.3d 216, 220 (3d Cir. 2005). Mersino lacks sufficient interest in the instant dispute to require mandatory intervention. Its mechanic's lien claim affects substantially different property than EPS's. In addition, the proposed intervenor lacks any involvement in the additional claims asserted by both EPS and CGT.

Mersino claims it has a sufficient interest in the litigation due to its lien on the same property as EPS and that it has a significant interest in getting paid for its work on the Project. See Mersino Br. 4 at ¶¶ 12-13. The record revealed through the proposed intervenor's motion shows otherwise. Mersino's lien claim only attached to the property as described in its Notice of Mechanic's Lien "that certain building Mountaineer Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26038 in the County of Marshall," an address that shows an area of a little more than three acres, and which

does not facially appear to be the same as the property to which EPS' lien has attached. See **Ex. 1** (showing land parcel for work completed as identified by Mersino).

The description of the property that is subject to EPS's lien, by contrast, is "approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas, from Station Number 0+00 to Station Number 994+36 for Spread 1 of the Mountaineer Express Pipeline Project, owned by [CGT] and situate[d] from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia." See **Ex. 2** and **3**; see also Pl.'s Am. Compl. ¶ 20 (describing EPS's mechanic's liens).[1]

The property that is subject to Mersino's putative action to enforce its mechanics lien is not the same property that is subject to the instant action. Mersino's, consists of a 3.39 acre property solely located within Marshall County and, EPS's claims pertain to a 99,436 foot right-of-way which runs for eighteen miles across both Marshall County and Wetzel County. Since Mersino does not have a lien interest in the same property as EPS, it does not have any interest in the subject matter of this litigation sufficient to mandate joinder under Rule 24(a).

That Mersino's mechanic's lien attaches to a different property than the EPS mechanic's liens is borne out from the vast differences in the scope of work performed by these subcontractors. Mersino was contracted to perform pumping services on a discrete, small area of the Project. See Mersino Br., Ex. 1 "Subcontract," 1 § A. By contrast, the goods and services that EPS furnished pertained to the entire right-of-way, "clearing and grubbing all timber, brush and vegetation of approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads,

[1] It appears that Mersino has modified the description of the property that is subject to its lien in its proposed complaint to mirror the legal description contained in the EPS complaint. See Mersino Br., Ex. 3 "Proposed Complaint," ¶ 2. The only lien that Mersino would be entitled to enforce, however, is the lien created by virtue of the Notice of Mechanics Lien that Mersino recorded in office of the Clerk of the County Commission for Marshall County, West Virginia. See W. Va. Code, § 38-2-27 (noting clerk will record notice of lien to show, among other things, "description of the property to be charged by such lien."); see also Mersino Br., Ex. 3 "Proposed Complaint," ¶ 11.

laydown yards, and other areas … from Mile Post 0.00 to Mile Post 18.83 in Marshall and Wetzel Counties, West Virginia." See **Ex. 2** and **3** (describing mechanic's liens).

Further, Mersino contends that it has an interest in or right to payment that must be protected by intervention in this lawsuit. See Mersino Br. 9. This argument is unavailing. A "mere economic interest in the outcome of litigation" is not sufficient interest for purposes of a motion to intervene. The 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. See Liberty Mut. Ins. Co., 419 F.3d at 220-21 (quoting Mountain Top, 72 F.3d at 366) (internal citations and quotation marks omitted). Unlike EPS, which has also asserted a valid and timely claim against CGT sounding in *quantum meruit*, Mersino has not asserted a claim that would attach to the general assets of CGT. Simply put, Mersino's economic interest is protected, if at all, by the value of the property interest on which its lien attaches. That property interest is not at issue in this action.

2. Mersino's interests that form the subject of its motion to intervene are not impaired as a result of this lawsuit.

In the event that Mersino was able to demonstrate an interest in the property at issue in this lawsuit that supports intervention under Rule 24(a), nevertheless, it is not entitled to intervene as a matter of right because that interest is not impaired by this lawsuit.

> Once an applicant for intervention has established that he or she possesses a sufficient legal interest in the underlying dispute, the applicant must also show that this claim is in jeopardy in the lawsuit. Under this element of the test, the proposed intervenors must demonstrate that their legal interests may be affected or impaired, as a practical matter by the disposition of the action. In making this determination, we are required to assess the practical consequences of the litigation, and may consider any significant legal effect on the applicant's interest.
>
> It is not sufficient that the claim be incidentally affected; rather, there must be a tangible threat to the applicant's legal interest. Yet, *this factor may be satisfied if, for example, a determination of the action in the applicants' absence will have a significant stare decisis effect on their claims,* or if the applicants' rights may be affected by a proposed remedy.

Liberty Mut. Ins. Co., 419 F.3d at 226-227 (quoting Brody v. Sprang, 957 F.2d 1108, 1122-23 (3d Cir. 1992)) (emphasis original).

Mersino contends that if it is not permitted to intervene, "the possibility exists that its interest will be foreclosed upon or extinguished by another construction company that worked on the Project." See Mersino Br. 9. It also suggests that if intervention is not permitted, Mersino will be deprived of due process rights and the ability to adequately protect its interests. See id. at 10. However, under West Virginia law, Mersino's lien will not be "extinguished" or divested even if EPS is successful. All perfected mechanic's liens and materialmen's liens attach at the time of the initial construction. See Carolina Lumber Co. v. Cunningham, 192 S.E.2d 722, 727 (W. Va. 1972). Under West Virginia law, where a lien is established in favor of any relevant creditors to a piece of property, a court shall order a sale of the property and provide a decree in favor of other creditors as shall be enforced as decrees for money. See W. Va. Code, § 38-2-35. Therefore, if EPS's lien claim is successful against CGT, Mersino's lien claim will not be extinguished, but, to the contrary, will be closer to providing exactly the relief sought in its Motion: "to enforce or protect Mersino's rights or, frankly, to see that Mersino gets paid for the work it has done and/or the services, labor, materials, supplies, equipment, and/or machinery that it furnished to the Project and/or for the improvements to the Property." See Mersino Br. 10.

3. Even if Mersino's interests were identical to EPS's, EPS will adequately protect Mersino's interests as they would both have the same objective.

Even assuming *arguendo* that Mersino could be found sufficiently interested in the instant proceeding for mandatory joinder, its interests are still adequately protected by EPS and it will not be deprived of any due process rights as its lien claim will not be extinguished if EPS is successful, thus failing the third and fourth factors of the Rule 24(a) mandatory joinder test. In order to fully meet the fourth prong of the Rule 24(a) test for mandatory joinder, that the intervenor not have a

party adequately representing its interests in the litigation, the intervenor must also show that a current party cannot adequately represent its interests. See Westra Constr. Inc. v. U.S. Fid. & Guar. Co., 546 F. Supp. 2d 194, 202 (M.D. Pa. 2008) (citing In re Cmty. Bank of N. Va., 418 F.3d 277, 314 (3d Cir. 2005)). However, "[w]hen a party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." Westra, 546 F. Supp. 2d at 202 (quoting In re Cmty. Bank, 418 F.3d at 315) (internal quotation marks omitted) (emphasis added). In order to overcome this presumption, the intervenor "must ordinarily demonstrate adversity of interest, collusion or nonfeasance on the party of the party to the suit." Id. Here, Mersino's objective is to get paid by either Welded or CGT for its work on the Project. EPS shares that ultimate objective, while also bringing its own additional claims for payment against CGT. Thus, EPS shares Mersino's ultimate objective. Mersino has also failed to show that EPS is colluding with CGT or is engaged in nonfeasance of its suit.

For these reasons, Mersino has failed to show that it either is a sufficiently interested party, that its interests will be affected or impaired by the instant litigation to which it is a nonparty, or that its alleged interests are not adequately protected by EPS. Therefore, its reliance on Rule 24(a)'s mandatory intervention is unavailing.

B. Mersino Should Not Be Granted A Permissive Joinder Because There is No Common Question of Law or Fact

Mersino should not be granted a permissive joinder under Rule 24(b) because it shares no common question of law or fact with the allegations and claims in the instant proceeding. Mersino claims that it should be granted permissive intervention because it shares common issues of law or fact such as "the issue of the scope of the work performed and/or the services, labor, materials, 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." See Mersino Br. 10.

Under Federal Rule of Civil Procedure 24(b)(1)(B), a court has the discretion to permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact. However, in exercising this discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. See Fed. R. Civ. P. 24(b)(3). Courts have specifically underscored this interest in efficiency and judicial economy through the aggregating of claims which have no need to be heard in separate proceedings due to their common questions of law or fact. See U.S. ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins., 239 F.R.D. 404, 415 (W.D. Pa. 2006) (surveying various federal courts' approaches to favoring consolidating those claims which would have been brought separately but can be considered together due to common factual or legal history). The aim of permissive joinder is generally to streamline or simplify a proceeding in order to avoid later collateral litigation. See id. at 415-16. Here, the addition of Mersino's lien claim would not streamline proceedings of common factual history, but would rather overcomplicate an already extremely complex construction dispute that centers upon competing claims between EPS and CGT with respect to the work that EPS performed on the project.

Additionally, the only factual similarity between Mersino's lien claim and the instant proceeding is that both Mersino and EPS were subcontractors for Welded. While both brought *in rem* claims against CGT as lien claimants, the entire determination of the value of each lien claim will go to performance of the work under each individual subcontract. Determinations of contract performance contain highly individual questions of law and fact. Moreover, Mersino's claim of common questions of law and fact ignores the two other *in personam* claims brought by EPS in its Amended Complaint against CGT. EPS's unjust enrichment and *quantum meruit* claims are personal and consider only the relationship between itself and CGT in the performance of EPS's subcontract. Even more tellingly, CGT has issued a counterclaim against EPS containing various *in personam* counts, further differentiating the issues at play in the instant proceeding from any claims asserted by

Mersino. See generally CGT Am. Answer and Countercl., D.I. 10. For these reasons, this Court should decline to use its discretion to grant Mersino a permissive joinder because it would needlessly complicate, unduly delay, and prejudice EPS's right to relief against CGT while not furthering the goals of judicial economy and efficiency.

C. The West Virginia Lien Statute Disallows Mersino's Intervention

Finally, the West Virginia Lien Statute precludes intervention by Mersino in the instant proceeding because its lien does not affect the same property as EPS's liens. Section 38-2-34(a) of the West Virginia Code provides that "an action commenced by any person having lien shall, for the purpose of preserving the same, insure to the benefit of all other persons having a lien under this article on the same property, and persons may intervene in the action for the purpose of enforcing their liens." Mersino uses this statute to claim that intervention is proper under the lien system's statutory scheme. The disparity in descriptions of the liens in Mersino's and EPS's Notices of Lien Claim show that their respective liens are not on the same property. For this reason, Mersino does not have any rights under West Virginia law to intervene in this matter.

III. CONCLUSION

For all of the foregoing reasons, Earth Pipeline Services respectfully requests that Mersino's Motion to Intervene be denied.

Respectfully submitted,

COHEN, SEGLIAS, PALLAS, GREENHALL & FURMAN, P.C.

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DATED: May 28, 2020

Attorneys for Earth Pipeline Services, Inc.

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CERTIFICATE OF SERVICE

I, Sally J. Daugherty, hereby certify that on this 28th day of May 2020, I caused a true and correct copy of ***Plaintiff Earth Pipeline Services, Inc.'s Response in Opposition to Mersino Dewatering, Inc.'s Motion to Intervene and Brief in Support*** to be served upon the parties identified below via email and by the Court's CM/ECF System:

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