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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) (Consolidated)

PLAINTIFF EARTH PIPELINE SERVICES, INC.'S RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANT COLUMBIA GAS TRANSMISSION'S MOTION TO DISMISS PLAINTIFF EARTH PIPELINE SERVICES, INC.'S AMENDED COMPLAINT

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Plaintiff, Earth Pipeline Services, Inc. ("Plaintiff" or "EPS"), by and through its undersigned counsel, hereby submits the following response and brief in opposition to the motions of defendant Columbia Gas Transmission, LLC ("CGT") to dismiss EPS's amended complaint.

Per Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Del. Bankr. L.R. 7012-1, EPS does not consent to the entry of final orders in this matter by the Bankruptcy Court.

PLAINTIFF EPS' RESPONSE TO DEFENDANT CGT'S MOTIONS TO DISMISS PLAINTIFF EPS' AMENDED COMPLAINT

Plaintiff EPS hereby requests that this Honorable Court deny defendant CGT's motions to dismiss EPS' amended complaint. In support thereof, EPS responds as follows:

As demonstrated in EPS' brief in opposition to CGT's motions to dismiss[1], *infra*, the claims in EPS' amended complaint are proper and adequately pled so as to state claims under West Virginia law and the rules of this Court such that any motions to dismiss the claims for failing to state a claim must be denied. With respect to Count I of EPS' amended complaint for the enforcement of its mechanics' liens against CGT's property, almost two (2) years after EPS filed its mechanics' liens against CGT's property, CGT, for the first time, attempts to argue that the Subcontract entered into between defendant, Welded Construction, L.P. ("Welded"), and EPS, and which is the subject of this dispute, contains a blanket waiver of mechanics' lien clause (the "Lien Clause") that prevents EPS from ever filing and enforcing a mechanics' lien against CGT's property. As further discussed below, the Lien Clause does not contain the clear and unequivocal language that would make it the type of blanket lien waiver clause that CGT wants it to be,

[1] CGT has filed two (2) separate motions to dismiss EPS' amended complaint with each motion purportedly based on Rule 12(b)(6) of the Federal Rules of Civil Procedure and corresponding with the two (2) adversary proceedings that have been consolidated in this matter. However, EPS' amended complaint was singularly filed in the consolidated matter and therefore there are no real factual or legal differences existing between the two adversary actions that would require two separate responses by EPS to CGT's motions. Accordingly, EPS responds to both of CGT's motions to dismiss under this singular responsive pleading and accompanying brief.

especially in light of the increasing number of jurisdictions who have made such blanket lien waiver clauses unenforceable as matter of public policy. CGT's attempt to twist the language in the Lien Clause into a complete and voluntary waiver of EPS' statutory mechanics' lien rights fails as a matter of logic and reason. Moreover, there is other language in the Subcontract that demonstrates the contemplation by the parties that mechanics' liens may be filed by EPS. As if knowing that its argument that the Lien Clause is blanket lien waiver clause is dubious, CGT then goes on to argue that, even if it is not a blanket lien waiver clause, Welded has a contractual defense to payment when a lien is filed so the Court should interpret that to mean that EPS agreed to waive its mechanics' lien rights. Not only does CGT not have standing to raise Welded's defenses to payment, even it did, the payment language does not preclude EPS from filing and enforcing its mechanics' liens against CGT's property. Finally, with respect to Counts II and III of EPS' amended complaint for quantum meruit and unjust enrichment against CGT, CGT first tries to convince the Court that these claims should somehow fail because the timing of the amendment to EPS' complaint should in some way have relevance to its contents. Unfortunately for CGT, the allowance of an amendment to EPS' complaint was discussed and agreed upon the parties, their counsel and the Court and placed into this Court's May 6, 2020 Order. CGT then argues that EPS is precluded from bringing these direct claims against CGT because EPS has also asserted the existence of the Subcontract. Such argument wholly misconstrues and misinterprets the relevant case law as there is clear precedent for the allowance of such claims. Accordingly, CGT's motions to dismiss EPS' amended complaint must be denied.

PLAINTIFF EPS' BRIEF IN OPPOSITION TO DEFENDANT CGT'S MOTIONS TO DISMISS PLAINTIFF EPS' AMENDED COMPLAINT

For the reasons set forth in the accompanying Response and Brief, Plaintiff EPS hereby respectfully requests that this Court deny the motions of defendant CGT to dismiss EPS' amended

complaint. The factual and legal bases for EPS' opposition to the motion demonstrate that the claims in EPS' amended complaint are properly and adequately pled under West Virginia law and the rules of this Court such that the claims must survive, at a minimum, any preliminary motions to dismiss for failure to state a claim.

I. NATURE AND STAGE OF PROCEEDING

This dispute arises out of labor and material clearing work performed by EPS on Station Number 0+00 to Station Number 994+36 of Spread 1 of the Mountaineer Express Pipeline Project (the "Project") in West Virginia. See Pl.'s Am. Comp. 20, D.I. 23. In order to protect its rights to payment for its completed work on the Project, on September 12, 2018, EPS filed two (2) separate Notices of Mechanics' Liens pursuant to West Virginia's Mechanics' Lien Law, W. Va. Code § 38-2-1 *et seq.*, as amended (the "Lien Law"), in Marshall County and Wetzel County, West Virginia, which were the counties where the Project was located and where EPS performed the work for which it has not yet been paid. The former being filed with the Clerk of the Marshall County Commission, at Instrument No. 1445514, Mechanic's Lien Book 11 at page 574, in the amount of $3,650,300.42, and the latter being filed with the Clerk of the Wetzel County Commission, at Instrument No. 257004, Mechanic's Lien Book 6 at page 872, in the amount of $3,650,300.42. See Pl.'s Am. Comp. 20, D.I. 23. On October 22, 2018, the general contractor on the Project, Welded, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware (the "Court"). See Pl.'s Am. Comp. 21, D.I. 23. On or about March 8, 2019, EPS filed Complaints to Foreclose the Mechanics' Liens in the Circuit Courts for Marshall County and Wetzel County, West Virginia. See Pl.'s Am. Comp. 22, D.I. 23. EPS named CGT as a defendant in its Complaints to Foreclose Mechanics' Liens as the record owner of the Project. See Pl.'s Am. Comp. 22, D.I. 23. On or about April 10,

2019, the Complaints to Foreclose the Mechanics' Liens were removed to the United States Bankruptcy Court for the Northern District of West Virginia. See Pl.'s Am. Comp. 23, D.I. 23. On June 26, 2019, the United States District Court for the Northern District of West Virginia granted CGT's motion to transfer venue of the Plaintiff's Complaints to Foreclose the Mechanics' Liens to this Court. See Pl.'s Am. Comp. 24, D.I. 23. On May 6, 2020, the Court entered a Scheduling Order that, *inter alia*, consolidated the two adversary proceedings containing Plaintiff's Complaints to Foreclose the Mechanics' Liens (Adv. Proc. Nos. 19-50274 and 19-50275) into a single consolidated proceeding included in Welded's bankruptcy proceeding. See Pl.'s Am. Comp. 25, D.I. 23. On May 15, 2020, EPS amended its complaint to include additional claims against CGT for unjust enrichment and quantum meruit. See Pl.'s Am. Comp. 25, D.I. 23. On June 3, 2020, CGT filed the instant motions to dismiss in duplicate with respect to each adversary proceeding (Adv. Proc. Nos. 19-50274 and 19-50275). See Def.'s Mot. to Dismiss, Adv. Proc. No. 19-50275, D.I. 23; Def.'s Mot. to Dismiss, Adv. Proc. No. 19-50274, D.I. 28. Due to the consolidation of the adversary proceedings by the Court, EPS responds singularly to both of CGT's motions to dismiss.

II. SUMMARY OF ARGUMENT

As set forth in EPS' Response, *supra*, Count I of EPS' amended complaint properly and adequately states a claim for the enforcement of its mechanics' liens and the Lien Clause in the Subcontract does not waive EPS' right to file and enforce its mechanics' lien. Counts II and III of EPS' amended complaint properly and adequately state additional claims directly against CGT that are both proper and allowable under West Virginia law and the assertion of a subcontract between EPS and Welded does not defeat those claims.

1. EPS' mechanics' liens and claims to enforce those mechanics' liens are allowed by statute and the Lien Clause does not contain any language that expressly and unequivocally waives EPS's rights with respect to such mechanic' liens. To the contrary, the Subcontract contemplates the filing of a lien claim by EPS and describes steps that must thereafter be undertook when lien claims are filed by EPS or EPS' subcontractors. To the extent that Welded has a defense to payment to EPS based on the filing of a lien claim, such a defense does not eliminate or waive EPS statutory mechanics' lien rights. Finally, at the motion to dismiss stage of the proceedings, the Court can't rely on the defendant's interpretation of the Lien Clause unless it is the only reasonable interpretation, which, in this case, it is not.

2. The causes of action sounding in unjust enrichment and quantum meruit should not be dismissed, based upon the well-established standards applicable to Federal Rule of Civil Procedure 12(b)(6) motions. A subcontractor on a construction project is permitted to bring claims for unjust enrichment and quantum meruit for the value of the subcontractor's work on the project when there is a dispute concerning the terms of the contract, whether the work is performed under the subcontract and whether the subcontractor was paid the full value of the work performed thereunder. While West Virginia law will not permit a subcontractor to recover both for breach of contract and unjust enrichment for the same work, the subcontractor is permitted to plead unjust enrichment or quantum meruit as an alternative theory of recovery. Accepting as true the allegations in the EPS' amended complaint, EPS asserts causes of action for unjust enrichment and quantum meruit upon which it is entitled to relief as a matter of law.

III. COUNTER STATEMENT OF FACTS

Pursuant to Del. Bankr. L.R. 7007-2(b)(i)(E), EPS incorporates by reference only those facts stated by CGT in its motions that do not conflict with or alter the facts as pled in EPS'

amended complaint or in this counter statement of facts, *infra*. All conflicting or altered facts set forth by CGT in its motions are specifically denied. Furthermore, all presumptions stated by CGT in its statement of facts are also denied. Finally, all of CGT's characterizations of the contents of the Subcontract, EPS' Notices of Mechanic's Lien, Complaints to Enforce Mechanic's Liens and amended complaint are denied as those are documents that speak for themselves. Moreover, CGT's allegations that the Subcontract contains a clear and unequivocal "No-Lien Clause" is a legal conclusion which is wholly denied.

By way of counter statement of facts, the Subcontract is a written agreement entered into between Welded and EPS. CGT is not a party to the Subcontract and had no role in its negotiation and execution. CGT's attempt to interpret the language of the Subcontract or EPS' and/or Welded's intent behind the use of language is improper, impossible and a legal conclusion that can be ignored by this Court on a motion to dismiss.

On or about June 22, 2018, very close to the completion of the Project, Welded terminated EPS from its Subcontract at the direction of CGT. EPS disputed the termination, but still demobilized pursuant to the Subcontract. Prior to such termination, EPS had furnished all of the labor and materials required by the Subcontract. CGT received the benefit as the Project owner of the work and materials contributed by EPS. The value of such labor and materials is in the amount of $7,342,519.62. CGT had knowledge of EPS's efforts and the knowledge that Earth expected to be compensated for such benefits. See generally Pl.'s Am. Comp. 2-5, D.I. 23.

IV. ARGUMENT

A. Legal Standard

CGT's motions to dismiss EPS' amended complaint are purportedly made under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failing to state a claim. Motions to dismiss

for failure to state a claim are "viewed with disfavor, and are rarely granted." Lormand v. US Unwired, Inc., 565 F.3d 228, 232 (5th Cir. 2009) (internal quotation omitted). Under Federal Rule of Civil Procedure 12(b)(6), a court may only dismiss a case for failure to state a claim where "accepting all allegations in [the] Amended Complaint as true and viewing them in the light most favorable to the Plaintiff[], the Plaintiff[] [is] not entitled to relief as a matter of law." In re Fruehauf Trailer Corp., 250 B.R. 168, 183 (Bankr. D. Del. 2000). Moreover, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). Rather, while accepting all facts alleged in the complaint as true, the court must not dismiss a complaint where "under any reasonable reading of the complaint, the plaintiff may be entitled to relief." See In re Lipitor Antitrust Litig., 868 F.3d 231, 249 (3d Cir. 2017) (quoting Bronowicz v. Allegheny Cnty., 804 F.3d 338, 344 (3d Cir. 2015) (internal citations omitted)).

While the Court may consider the facts included in the exhibits to a complaint in its analysis of a motion to dismiss for failure to state a claim, the cases cited by CGT for the proposition that, if facts in the exhibits incontrovertibly contradict the allegations in the complaint, the Court may rely on the facts in the exhibits instead of those alleged in the complaint are not factually similar to the matter before the Court. For e.g., in Bogie v. Rosenberg, 705 F.3d 603 (7th Cir. 2013), cited by CGT, the exhibit attached the complaint was a video that the Court viewed which had visual evidence that a certain room was not as private as the plaintiff had alleged in its privacy lawsuit. There, the facts in the exhibit to the complaint were in the form of video evidence which was so clearly contradictory to the allegations in the complaint that the Court could justifiably rely on those facts to grant a motion to dismiss for failure to state a claim. To the contrary here, the exhibit

at issue, the Subcontract, does not contain such clear contradictory evidence to the facts alleged in EPS' amended complaint. Moreover, the court in Bogie also noted that the plaintiff should have an opportunity to contradict the contradiction: "That is not to say that a plaintiff cannot contradict the apparent meaning or significance of a document or other exhibit." Id. at 609.

Finally, CGT's argument that the language of the Lien Clause provides a defense to EPS' claim for enforcement of its mechanics' liens is not sufficient to grant a motion a dismiss because "[t]he mere presence of a potential affirmative defense does not render the claim for relief invalid." Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 (7th Cir. 2012) (emphasis added).

Viewing all assertions of fact by EPS as true and with the understanding that the Subcontract does not incontrovertibly contradict the allegations in EPS' amended complaint, this Court must find that EPS has sufficiently alleged multiple causes of action against CGT, both *in rem* and *in personam*, because there is a reasonable possibility that EPS will be entitled to relief on the claims. Moreover, at this early stage in the litigation before additional discovery and fact-finding has occurred, there is a substantial expectation that such discovery will lead to additional facts supporting EPS's various claims against CGT. For these reasons and those that follow, CGT's motions to dismiss should be denied.

B. The Language of the Subcontract Does Not Clearly and Expressly Waive or Preclude EPS from Filing and Enforcing a Mechanics' Lien and Therefore EPS' Claim for Enforcement of its Mechanics' Liens is Proper and Adequately Pled in its Amended Complaint

As demonstrated below, Count I of EPS' amended complaint must not be dismissed for failing to state a claim as the language of the Subcontract does not clearly and expressly waive or preclude EPS from filing and enforcing a mechanics' lien.

1. The Lien Clause is Not a "No-Lien" Clause

CGT argues that the Lien Clause waives all of EPS' mechanics' lien rights against CGT's property related to the work that EPS performed on the Project. The Lien Clause is found in the General Terms and Conditions of the Subcontract and states as follows:

> **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 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.

The Lien Clause is not a blanket lien waiver clause because it does not contain express language like "waive," "waives" or "waiver" or any other preclusionary language that would indicate that EPS agrees to never file a mechanics' lien with respect to its work on the Project. To the contrary, the clause discusses the terms and conditions that occur after a mechanics' lien is filed. Amongst those terms and conditions are the responsibilities of either EPS or Welded to release or discharge the mechanics' lien after it is filed. This language is typical of the modern-day construction contracts that are drafted very carefully so as to not operate as blanket lien waivers which most states have codified as unenforceable as a matter of public policy, but rather to oblige the subcontractor to take action to discharge any mechanics' liens filed by its subcontractors. Often the clause will also include a partial lien waiver whereby the subcontractor will agree to waive its lien rights with respect to the time period covering its payments applications. These conditional waivers have been consistently upheld as enforceable. The clause in the Subcontract does not even have that type lien waiver of language.

The law in West Virginia is that "the intent to waive or abandon a lien must be shown by clear and convincing proof. The presumption is against waiver or abandonment." Campbell v. Hutchinson Lumber Co., 106 W.Va. 142, 145 S.E. 160, 165 (1928). "Provisions of a contract, effecting a forfeiture or exacting a penalty, are strictly construed against the party for whose benefit they were incorporated in the instrument." Wellington Power Corp. v. CNA Sur. Corp., 217 W. Va. 33, 614 S.E. 2d 680, 688 (2005) (citation omitted). Across many jurisdictions, waiver of a statutory right must be given no broader coverage than that which clearly results from a reasonable application of the language of the contract. G. R. Sponaugle & Sons, Inc. v. McKnight Const. Co., 304 A.2d 339, 345 (Del. Sup. Ct. 1973). A waiver of a mechanic's lien must be certain in its terms. If the terms are ambiguous, doubt is resolved against the waiver. Id. (citations omitted). The court pointed out that the subcontract where the waiver clause was found was "the creation of the contractor and not of plaintiff. Doubts as to the scope of the terms should be resolved in favor of the plaintiff and against [the owner]." Id.

CGT cites Richardson Engineering Co. v. International Business Machines Corporation, 554 F. Supp. 467 (D.Vt. 1981) in support of its argument that the Lien Clause is a "No-Lien" clause. That case involved a summary judgment motion, not a motion to dismiss, and, moreover, the contract clause at issue there was clear and unambiguous as it stated:

> Subcontractor, for itself and for all persons furnishing labor, materials or services in connection with the Work, **waives and releases all mechanic's liens or right of liens or claims, now existing or hereafter arising** for labor or materials furnished under this Subcontract, upon the Project or Project premises or upon any monies due or to become due the Contractor.

(emphasis added). The language of the Lien Clause in EPS' Subcontract has no similar "waives and releases all mechanics' liens" language and does not expressly include the Subcontractor's mechanics' liens like the clause in Richardson Engineering does.

CGT also cites Fuller Co. v. Brown Minneapolis Tank and Fabricating Co., 678 F. Supp. 506 (E.D. Pa. 1987), as supporting its claim that the Lien Clause is a "No-Lien" clause. However, CGT fails to point out the court never found the clause in Fuller to be a blanket lien waiver clause and ultimately just found that the clause meant that the subcontractor had to either post a bond or otherwise release its lien claim after filing it. This is a common use of these clauses whereby the clauses do not operate to take away the subcontractor's valuable statutory remedy of a mechanics' lien claim which are often used to "push" the parties to make payments that are owed. The fact the subcontractor may later have to bond off the lien doesn't mean the subcontractor waived its rights to the mechanics' lien claim. The Court in Fuller went out of its way to note that it wasn't saying that the clause waived all of Fuller's lien rights:

> More importantly, even if we agree that it is unclear as to whether BMT completely and fully waived its right to assert a mechanic's lien from the inception of its contractual relationship with Fuller, it is perfectly clear that BMT covenanted that if and when it did file such a lien, Fuller could require one of two things from BMT: (1) the immediate removal of the lien or (2) the furnishing of a bond against the lien satisfactory to Fuller. Fuller has, in fact, in at least one instance requested such alternative relief. (*See* Fuller's Motion For Summary Judgment, Doc. # 5, p. 4, ¶ 1.) Further, Fuller's conduct in the form of requiring BMT to furnish partial lien waivers is completely consistent with this interpretation of the contract.
>
> For the reasons stated above, we find that the Lien clause of the Fuller–BMT contract to be clear and unambiguous to the extent that it required BMT to discharge any lien that it did file or to furnish Fuller with a bond against any such mechanic's lien. We will, therefore, direct BMT to either discharge the lien in question or furnish a bond satisfactory to Fuller against said lien.

Id. at 514. Finally, CGT also cites to the unpublished opinion of First Am. Title Ins. Co. v. Bowles Rice, LLP, No. 16-219, 2019 WL 3763001, at *10 (N.D. W.Va. Aug. 8, 2018), which cites Bauer Enters., Inc. v. Frye, 382 S.E.2d 71, 74 (W. Va. 1989) for the holding that "[u]ndoubtedly, a contractor may waive his right to file a mechanic's lien[.]". However, that case is distinguishable from and not applicable to this case. Bowles Rice dealt with the commonly used and enforceable partial lien waivers that were provided in conjunction with a payment application, which is

significantly different from a prospective lien waiver or the blanket waiver of lien rights before construction even commences.

Notwithstanding that the language in the Lien Clause itself does not support the argument that it is a prospective lien waiver clause, there is also an overwhelming public policy against the use and enforcement of such blanket lien waiver clauses. Contrary to CGT's assertion that "[i]ndeed, 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", most states now disfavor blanket waiver clauses and are legislating them to be void and unenforceable because they too easily defeat a significant and important statutory right of contractors. 3 Bruner & O'Connor Construction Law § 8:151 ("The controversy surrounding "no lien" waivers has prompted the legislatures in a number of states to pass laws restricting the use of such clauses."). By way of further example, see 25 Delaware Code § 2706(b)("[a]ny contract, any agreement or understanding whereby the right to file or enforce any lien created under this chapter is waived, shall be void as against public policy and wholly unenforceable").

Moreover, if the Lien Clause is clear and unambiguous in any way, it is in its clarity that a mechanics' lien **can** be filed. The Lien Clause uses phrases like "discharge", "filed and recorded", "still registered" when talking about a mechanics' lien. Accordingly, it should be interpreted and enforced, not as CGT argues, but as written, which would be in a manner that does not preclude EPS from filing and enforcing a mechanics' lien.

2. The Subcontractors Liability and Indemnity clause in the Subcontract is further evidence that there was no intention by EPS to waive EPS' statutory right to a mechanics' lien

The Subcontract contains another clause that implies that EPS may at one point file a mechanics' lien claim thus providing further evidence that the parties did not intend to agree upon a blanket lien waiver clause. That clause states in part:

> **Subcontractors Liability and Indemnity**
>
> 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:
> …….
> (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**;….

(Emphasis Added). This language states that EPS does not have to indemnify Welded with respect to a lien claim where EPS has not been paid that money at issue. By implication, this means that EPS would have a right to make a lien claim for that amount.

3. Welded's Right, If Any, to Withhold Payment Under the Lien Clause Does Not Effect EPS' Statutory Right to a Mechanics' Lien and Claim for Enforcment of its Mechancis' Lien

In a sign that CGT isn't overly confident in its argument that the Lien Clause is a "No-Lien" Clause, CGT goes on to twist and stretch the last sentence of the Lien Clause into a convoluted argument that "[b]ecause no amounts are payable by Welded to EPS, no amounts can be payable by CGT to EPS either. And if no amounts are payable by CGT to EPS, EPS has no lien for unpaid work against CGT's property interests for this separate and independent reason." Def.'s Mot. to Dismiss, Adv. Proc. No. 19-50274, D.I. 28, at 5. These illogical leaps in

responsibility for payment, even if true, would have no bearing on EPS' statutory right to file a mechanics' lien. The last sentence of the Lien Clause states that Welded can withhold money from EPS if there is a lien registered. Again, it does not say that EPS cannot file a lien. Moreover, that is a defense of Welded's to its responsibility to pay EPS and not a defense of CGT. The Lien Clause does not say that EPS cannot collect its money from the sale of the property.

4. If the Court finds the Lien Clause language to be ambiguous, EPS has made out a reasonable interpretation of the language of the Lien Clause and therefore this Court must not grant CGT's motion to dismiss Count I

When analyzing a contract interpretation issue at the motion to dismiss stage, the Court must first determine if the language at issue is ambiguous or unambiguous. If the Court determines that the contract language is ambiguous, the Court "may not choose between two reasonable interpretations (citation omitted). Rather, the court may only dismiss a claim if the defendant's interpretation is the only reasonable one." In re Abound Solar Manufacturing, LLC, 547 B.R. 611, 622 (Bankr. D. Del. 2016).

In addition, in the recent case of State Farm Fire & Casualty Co. v. PECO Energy Company, No. 19-3288, 2020 WL 757857 (E.D. Pa. 2020), the court held that the interpretation of a clause had to be decided on summary judgment and not on a motion to dismiss and offered the following reasoning for that proposition:

> Regardless, "[i]t is not clear that the ... provisions critical here are so unambiguous that the interpretation of the [Tariff] exclusively is a matter for the Court and not for a jury.... Hence it would be improper for this court to interpret the [Tariff] finally in ruling upon a motion to dismiss made pursuant to Rule 12(b)(6)." See Operative Bricklayer's Union No. 64 of Pennsylvania Welfare Fund v. Bricklayer's Local Union No. 1 of Pennsylvania Welfare Fund, 45 F.R.D. 429, 431 (E.D. Pa. 1968); accord Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC, No. 16-1237, 2016 WL 3763024, at *7 (E.D. Pa. July 13, 2016) (collecting cases); cf. Lomma v. Ohio Nat'l Life Ass. Corp., 283 F. Supp. 3d 240, 260 (M.D. Pa. 2017) (holding that "even if the Defendants' [contract] interpretation may be the more reasonable one, this does not permit the Court to resolve this issue in Defendants' favor on their motion to dismiss"); (citation omitted); This is not to say that we are concluding as a matter of law

> that the limitation of liability in § 12.1 is inapplicable. We are not. We are concluding only that because we are unable to decide Defendant's argument on a motion to dismiss, Plaintiff's claims for breach of contract, breach of warranties, and strict liability may proceed. See Eid, 740 F.3d at 122. Our determination here is without prejudice to the parties' rights to make whatever arguments they deem appropriate in the later stages of this litigation.

Id. at *3. In the matter before the Court, the Plaintiff EPS has offered a reasonable interpretation of the Lien Clause, *viz.* that, among other reasons, the Lien Clause is not a blanket lien waiver clause because of the absence of certain language which is commonly found in other enforceable blanket lien waivers and because the language that it does contain implies that EPS did not waive its statutory right to a mechanics' lien claim. Accordingly, CGT's interpretation is not the only reasonable interpretation and therefore the Court cannot grant CGT's motion to dismiss as a matter of law.

Finally, CGT cites Northwest Construction Services, L.P. v. Seraph Apartments, L.P, No. 8-335, 2011 WL 13196507 (E.D. Tex. July 12, 2011), an unpublished opinion, for the proposition that a lien waiver clause can defeat a "mechanics lien claim on a motion to dismiss." While the unpublished opinion has no binding authority in this Court, even it did, it does not stand for the proposition for which CGT cites it. In that case, the plaintiff **admitted** that the subcontract contained a lien waiver clause but tried to argue that the defendant breached the contract so the defendant shouldn't be allowed to enforce the lien waiver clause. Moreover, the plaintiff was seeking a declaratory judgment that its lien claim was superior to other security interests. To the contrary, in the matter before this Court, EPS **denies** that the Subcontract contains any lien waiver clause and EPS is not seeking a declaratory judgment. Again, with EPS and CGT disagreeing on the effect of the language in the Lien Clause, Northwest Construction Services, L.P. has no applicability to this matter.

For the reasons set forth above, the CGT's motions to dismiss Count I of the EPS' amended complaint should be dismissed.

C. EPS states claims for unjust enrichment and quantum meruit that should not be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

EPS asserts causes of action sounding in unjust enrichment and quantum meruit in Counts II and III of the EPS' amended complaint. CGT requested that EPS furnish materials and services with respect to the construction of CGT's pipeline. EPS furnished the requested goods and services to CGT's benefit. See Pl.'s Am. Comp. ¶¶ 37-39, 52-55. CGT has not paid for the value of these goods and services, despite receiving the benefit of EPS's performance. Id. ¶¶ 40, 55. EPS seeks restitution in the amount of $3,650,300.42, as the reasonable value for the services and equipment that EPS furnished for to CGT in connection with the construction of this Defendant's pipeline. Id. ¶¶ 48-49, 57.

The elements of an unjust enrichment claim under West Virginia law are as follows:

1. A benefit is conferred upon the defendant;
2. An appreciation or knowledge by the defendant of such benefit; and
3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

CSS, Inc. v. Herrington, 306 F. Supp. 3d 857, 882 (S.D. W. Va. 2018).[2] The benefits that may be subject to an unjust enrichment action include services or interests in personal property that are rendered to the defendant. Id.

[2] West Virginia has never defined the legal distinction, if any, among claims for unjust enrichment, quantum meruit, and breach of implied contract. All three causes of action sound in equity, however. Rich v. Simoni, No. 12-12, 2014 WL 4978442, at *10 (N.D. W. Va. 2014).

Accepting as true the allegation in the EPS' amended complaint, it is readily apparent that EPS pleads cognizable causes of action sounding in unjust enrichment and quantum meruit. EPS conferred a benefit upon CGT through the provision of valuable services and materials that enables the construction of CGT's pipeline. CGT had knowledge of EPS' efforts and the knowledge that EPS expected to be compensated for such benefits. Finally, given that CGT received the benefit of these improvements, it is manifestly inequitable that it receive the value of EPS' work without compensating EPS for the goods and services that EPS rendered in order for CGT to construct its pipeline.

CGT, nevertheless, argues that the unjust enrichment and quantum meruit claims should be dismissed. CGT grounds its argument on the rationale that similar claims were dismissed in a handful of unreported decisions relating to other subcontractors retained by Welded on this project. A review of the decisions relied upon by CGT demonstrates that its contentions are meritless. The circumstances under which other subcontractors' claims for unjust enrichment or quantum meruit were dismissed do not dictate that EPS' well founded causes of action deserve a similar fate.

The first unpublished decision relied upon by CGT is HERC Services, LLC v. Columbia Gas Transmission, LLC, No. 5:19-CV-173, (N.D. W. Va. June 24, 2012). See Def.'s Mot. to Dismiss, Adv. Proc. No. 19-50274, D.I. 28, Attachment. It is notable that the District Court's dismissal was without prejudice and not because the plaintiff asserted an unviable claim but because of a defect in its complaint. The District Court summarized its ruling with respect to the unjust enrichment claim as follows:

> Under the law of unjust enrichment, if benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value.

> The flaw in plaintiff's complaint is the lack of an allegation that the defendant has not paid for the benefit that it received. Obviously, if Columbia Gas has paid its contractor in full for the benefits that it received, then it has not been unjustly enriched.

Id. at 5. The District Court gave the plaintiff in HERC Services leave to amend its complaint to make the requisite allegation.

EPS' amended complaint in the instant matter does not suffer from the deficiency that led the District Court to sustain CGT's motion in HERC Services. EPSs alleges that CGT has not paid for the goods and services that were furnished to the Defendant in connection with the construction of the pipeline. See Pl.'s Am. Comp. ¶¶ 40, 46, 54, D.I. 23. Accordingly, the decision in HERC Services does not support dismissing the unjust enrichment and quantum meruit claims in EPS' amended complaint.

The second unreported decision that CGT relies upon is Schmid Pipeline Construction, Inc. v. Columbia Gas Transmission, LLC, No. 19-257, (N.D. W. Va. 2019). See Def.'s Mot. to Dismiss, Adv. Proc. No. 19-50274, D.I. 28, Attachment. In that case, the District Court determined that the plaintiff's claims are based in contract "according to the Complaint's own allegations and exhibits." Id. at 6. The allegations in the complaint at issue in Schmid Pipeline Construction are not the allegations at issue in this lawsuit. EPS' causes of action for unjust enrichment and quantum meruit are properly founded under West Virginia law as implied-contractual claims that may be raised irrespective of the subcontract between EPS and Welded.

CGT's contention that the existence of the EPS-Welded subcontract renders it impossible for EPS to raise the unjust enrichment and quantum meruit claims is not a correct statement of West Virginia law. The District Court for the Southern District of West Virginia held, in a decision no doubt familiar to CGT, that "while no implied contract may conflict with terms of an express contract, where the express contract between the parties does not apply or subsequent conduct not

covered by the express contract may support an implied agreement, unjust enrichment may be asserted." Stand Energy Corp. v. Columbia Gas Transmission Corp., 373 F. Supp. 2d 631, 644 (S.D. W. Va. 2005). EPS' unjust enrichment and quantum meruit claims are, by CGT's own admission, founded upon work that is outside of the original scope of the subcontract. See CGT's First Amended Answer and Counterclaim, Counterclaim, ¶ 27, D.I. 11.

Courts in West Virginia have repeatedly addressed this exact issue in the context of construction projects. In U.S. ex rel. Asphalt Contractors, & Site Work, Inc. v. KAR Contracting, LLC, No. 14-27451, 2015 WL 3651279 (S.D. W. Va. 2015), the Court held that "Plaintiff may not recover for both breach of contract and quantum meruit for the same exact work. Plaintiff could, however, recover for quantum meruit instead of breach of contract in the event that there is no express contract covering the extra services and materials." U.S. ex rel. Asphalt Contractors Site Work, Inc. v. KAR Contracting, LLC, No. 14-27451, 2015 WL 3651279, at *4 (S.D. W. Va. June 11, 2015). Similarly, where the prime contractor denied that the work performed by the subcontractor was work performed under the subcontract, then the subcontractor's work is done in the absence of an agreement, "which is precisely the circumstances where quantum meruit applies." U.S. ex rel. Master Masonry, LLC v. Travelers Casualty and Surety Co., No. 16-50, 2016 WL 7156587, at *2 (N. D. W. Va. 2016).

"Under federal law, a plaintiff is permitted to plead unjust enrichment as an alternative to contract recovery when the terms of a contract or the parties to said contract are disputed." Span Construction & Engineering, Inc. v. Uwharrie Builders, LLC, No. 18-178, 2019 WL 1574233, at *2 (N.D. W. Va. 2019). There, the subcontractor asserted that it performed under a subcontract and invoiced the general contractor. The general contractor and project owner contended that full payment of all sums under the subcontract were tendered to the subcontract. The general contractor

and project owner moved to dismiss the subcontractor's unjust enrichment action, arguing that the subcontractor could not bring such a claim because there was a subcontract between the subcontractor and general contractor. The District Court declined to dismiss the unjust enrichment claim, holding:

> It appears that the terms of the contract, and whether payment has been tendered thereunder, is in dispute. Accordingly, while [subcontractor] cannot recover under both breach of contract and unjust enrichment, [the subcontractor] is permitted to plead in the alternative.

Id.

This is precisely the circumstance present in the instant matter. CGT asserts that EPS is not permitted to recover on its claim, because the work that is the subject of the claim was not within the scope of the subcontract between EPS and Welded. This is a disputed issue of fact that this Court is not capable of resolving with the record before it. In pleading its cause of action for quantum meruit, EPS alleges:

> Should the Court conclude that there was no contract for any or all of the work performed by EPS and/or that Welded is unable to pay EPS for such work, EPS would have no adequate remedy at law, and it would be inequitable and unjust to allow CGT to retain the benefit that CGT received from the work performed by EPS, which has a reasonable value of at least $3,650,300.42, without making payment for said benefit.

See Pl.'s Am. Comp. ¶ 57, D.I. 23.

West Virginia law contemplates that a subcontractor may establish claims for quantum meruit or unjust enrichment where there is a dispute between the subcontractor, the general contractor and owner with respect to whether the terms of the contract are in dispute. The heart of EPS' claims are related to the extra work that it was required to perform that is outside of the original scope of the subcontract. Accordingly, EPS is entitled to allege such quasi-contractual

claims, as a matter of law. These principles are well established under West Virginia law, including reported decisions in which CGT was a party.

Having learned nothing from the settled law in West Virginia governing unjust enrichment and quantum meruit claims associated with construction contracts, CGT wastes both EPS' and this Court's time. CGT's motions to dismiss Counts II and III of EPS' amended complaint should be dismissed.

D. EPS should be granted leave to amend its complaint to the extent that the Court determines to grant CGT's Fed. R. Civ. P. 12(b)(6) motion.

The extensive, detailed pleadings generated in this proceeding between the claims and counterclaims raised by EPS and Welded, respectively, and the claims raised by Welded in its recently consolidated adversary action recognize this case for what it is, a complex construction dispute where significant amounts are at issue. As treated at length in this response, the motion to dismiss, in a similar vein, should be recognized for what it is, CGT's desperate and ill-conceived attempt to evade its responsibility to pay the value for work that was necessary in order to construct its pipeline. CGT's motions are utterly meritless and should be dismissed. To the extent, however, that the Court determines that this is a deficiency in EPS's amended complaint, EPS requests leave to amend the complaint.

V. CONCLUSION

For all of the foregoing reasons, EPS respectfully requests that CGT's motions to dismiss EPS' amended complaint be denied.

Respectfully submitted,

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

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DATED: June 26, 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)
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) (Consolidated)

CERTIFICATE OF SERVICE

I, Stephen A. Venzie, Esq., hereby certify that on this 26th day of June 2020, I caused a true and correct copy of ***Plaintiff Earth Pipeline Services, Inc.'s Response and Brief in Opposition to Columbia Gas Transmission, Inc.'s Motions to Dismiss Plaintiff Earth Pipeline Services, Inc.'s Amended Complaint*** to be served upon the parties identified below via email and by the Court's CM/ECF System:

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DATED: June 26, 2020

Attorneys for Earth Pipeline Services, Inc.

ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

HERC SERVICES, LLC,

Plaintiff,

v,

Civil Action No. 5:19-CV-173
Judge Bailey

COLUMBIA GAS TRANSMISSION, LLC,

Defendant.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Pending before this Court are defendant's Motion to Dismiss [Doc. 8] and defendant's Motion to Transfer Venue [Doc. 13]. This Court, having jurisdiction, will address the motion to dismiss first. In that motion, the defendant asserts that the plaintiff did not properly perfect its mechanics lien on the subject property in that it did not serve notice upon the owner as required by West Virginia law.

Count One of the Complaint for Enforcement of Mechanic's Lien [Doc. 1] seeks to enforce a mechanic's lien on property owned by the defendant. According to the plaintiff, Herc ceased operations on the project on or about October 21, 2018. On October 22, 2018, the plaintiff caused to be recorded in the Office of the Clerk of Wetzel County, West Virginia, a Notice of Mechanic's Lien against Columbia's property.

According to West Virginia Code § 38-2-9, the plaintiff was required 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. In this

case, 100 days after October 21, 2018, would be January 29, 2019, yet service was not provided to the owner until February 20, 2019. This flaw is fatal to plaintiff's mechanic's lien claim.

The plaintiff argues that recordation of the notice of lien is sufficient notice to the owner, citing ***Doss v. Gulf Smokeless Coal Co.***, 102 W.Va. 470, 135 S.E. 575 (1926).

This Court finds plaintiff's arguments to be unpersuasive. The statute, § 38-2-9, requires **both** recordation and notice. In addition notice is to be by "any of the methods provided by law for the service of a legal notice or summons." If recordation were sufficient, the language concerning notice would be surplusage.

"'It is our duty "to give effect, if possible, to every clause and word of a statute."' ***United States v. Menasche***, 348 U.S. 528, 538–539 (1955) (quoting ***Montclair v. Ramsdell***, 107 U.S. 147, 152 (1883)); *see also* ***Williams v. Taylor***, 529 U.S. 362, 404, (2000) (describing this rule as a 'cardinal principle of statutory construction'); ***Market Co. v. Hoffman***, 101 U.S. 112, 115 (1879) ('As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"'). We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting. ***Babbitt v. Sweet Home Chapter, Communities for Great Ore.***, 515 U.S. 687, 698 (1995); *see also* ***Ratzlaf v. United States***, 510 U.S. 135, 140 (1994)." ***Duncan v. Walker***, 533 U.S. 167, 174 (2001).

The ***Doss*** case provides no sanctuary. ***Doss*** dealt with the predecessor of W.Va. Code § 38-2-31, which dealt with claims by laborers and workmen. In contrast to § 38-2-9, that statute did not then nor does it now require notice to the owner.

The consequence for failing to "perfect and preserve" a mechanic's lien is re-iterated in (s) 14:

> 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 West Virginia "[m]echanic's lien statutes must be strictly construed with reference to those requirements upon which the right depends and liberally construed with reference to the manner in which the right is perfected." Syl. Pt. 3, ***Badger Lumber Co. v. Redd***, 213 W. Va. 453, 583 S.E.2d 76 (2003) (quoting Syl. Pt. 1, ***Earp v. Vanderpool***, 160 W. Va. 113, 232 S.E.2d 513 (1976)).

Discharge of a lien is required when a party misses the deadline for providing notice by even as little as one day. In ***Means v. Kidd***, 136 W. Va. 514, 67 S.E.2d 740 (1951), the Court affirmed the dismissal (by demurrer) of a mechanic's lien lawsuit where a materialman miscalculated by one day the statutory deadline to give a notice of mechanic's

lien to the property owner. The deadline, then sixty days, passed on Sunday, November 2, 1949, but notice was not given until Monday, November 3, 1949. In Syllabus Point 2, the Court held, "When the notice . . . is not given to such owner until the next day after the last day of the sixty day period, and the last day of such period is a legal holiday, but not a Sunday, the failure to give such notice on or before the last day of the sixty day period renders it void and of no force or effect, terminates the right of such person to perfect and preserve such lien, and discharges the owner and the property from the lien claimed by such person." Syl. Pt. 2, ***Means***, *supra*. *See also,* ***Fisher v. Reamer***, 146 W. Va. 83, 92-93, 118 S.E.2d 76, 81 (1961) (citing ***Means***, *supra*).

In ***Amick v. C & T Development Co.***, the claimant's mechanic's lien was recorded just five days late, ninety-five days after completion of work on the project. The Court explained:

> The record of the present case shows that Michael Vandal last performed work in conjunction with the present matter on May 12, 1989, and that he did not file a notice of his lien until August 16, 1989, more than ninety days after the work was performed. Given this fact, given the language of W.Va. Code, 38–2–32, and given the holding in the ***Sturgill*** case, this Court believes that the failure of Michael Vandal to file the appropriate notice of his lien within the time provided by law resulted in a discharge of that lien and that, under the circumstances, the appellant is correct in asserting that the trial court erred . . ..

Amick v. C & T Dev. Co., 187 W. Va. 115, 119, 416 S.E.2d 73, 77 (1992).

For the above reasons, Count One of the Complaint is dismissed with prejudice.

Count Two of the Complaint seeks to recover from the defendant under the theory of unjust enrichment. Under the law of unjust enrichment, if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value.

The flaw in plaintiff's complaint is the lack of an allegation that the defendant has not paid for the benefit that it received. Obviously, if Columbia Gas has paid its contractor in full for the benefits that it received, then it has not been unjustly enriched. Accordingly, Count Two will be dismissed without prejudice and with leave to amend the complaint within twenty-eight days from the entry of this Order.

The Motion to Transfer Venue will be denied as moot.

For the reasons stated above, the defendant's Motion to Dismiss [**Doc. 8**] is **GRANTED** and defendant's Motion to Transfer Venue [**Doc. 13**] is **DENIED AS MOOT**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to counsel of record.

DATED: June 24, 2019.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FORT THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

SCHMID PIPELINE CONSTRUCTION, INC.,

Plaintiff,

v.

Civil Action No. 5:19-CV-257
Judge Bailey

COLUMBIA GAS TRANSMISSION, LLC, and **WELDED CONSTRUCTION, L.P.**,

Defendants.

ORDER DENYING SCHMID PIPELINE CONSTRUCTION, INC.'S MOTION TO REMAND AND ABSTAIN [DOC. 10], AND GRANTING COLUMBIA GAS TRANSMISSION'S MOTION FOR PARTIAL DISMISSAL [DOC. 17], AND COLUMBIA GAS TRANSMISSION'S MOTION TO TRANSFER VENUE [DOC. 20]

Pending before this Court are Schmid Pipeline Construction, Inc.'s Motion to Remand and Abstain [Doc. 10], Columbia Gas Transmission's Motion for Partial Dismissal [Doc. 17], and Columbia Gas Transmission's Motion to Transfer Venue [Doc. 20]. This Court will consider the Motions in the order in which they were filed.

Background

1. On or about August 6, 2018, Welded Construction, L.P. ("Welded"), as general contractor, entered into a certain Construction Subcontract (the "Subcontract") with Schmid Pipeline Construction, Inc. ("Schmid" or "Plaintiff") for labor, materials, equipment, and services to be provided and/or performed in connection with the construction of the Mountaineer Express Pipeline Project (the "Project").

2. Between August 10, 2018, and October 19, 2018, Schmid performed work

on the Project. Schmid last performed work on the Project on October 19, 2018.

3. On October 22, 2018, Welded and its affiliated debtors filed petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

4. On January 18, 2019, having not been paid for its work on the Project, Schmid recorded a Notice of Mechanic's Lien dated January 14, 2019, in the Office of the Clerk of the County Commission of Wetzel County, West Virginia at Mechanics Lien Book 7, at page 96, claiming a lien upon Columbia Gas' interest in the Project in the amount of $2,361,914.00.

5. On April 10, 2019, Schmid filed the Motion of Schmid Pipeline Construction, Inc. for Relief from the Automatic Stay in the Bankruptcy Case, requesting relief from the automatic stay of § 362(a) of the Bankruptcy Code, to commence an action to enforce and/or foreclose Schmid's mechanic's lien rights and remedies.

6. In its Motion for Relief from Automatic Stay, Schmid stated that it would not take any action against property of the Debtor's estate, and that Schmid sought to name Welded only as a nominal defendant in the lien action it planned to commence because, under West Virginia state law, when a subcontractor commences an action to enforce and/or foreclose a mechanic's lien, it must name the general contractor as a defendant.

7. On April 26, 2019, the Delaware Bankruptcy Court issued its Order Granting Motion of Schmid Pipeline Construction, Inc. for Relief from the Automatic Stay (the "Relief from Stay Order"), providing that:

> Schmid Pipeline is hereby granted relief from the automatic stay of 11 U.S.C. § 362(a) only to the extent required to permit Schmid Pipeline to commence

any action, and name debtor Welded Construction, L.P. (the "Debtor") as a nominal defendant, to enforce and/or foreclose Schmid Pipeline's mechanic's lien rights and remedies, including, but not limited to, commencing and pursuing to completion any necessary mechanic's lien action, with respect to the Columbia Gas Mountaineer Express Pipeline Project . . . , located in the county of Wetzel, in the State of West Virginia, provided that, once an action is filed to enforce and/or foreclose Schmid Pipeline's mechanic's lien rights and remedies ("Action"), the Action shall be stayed for 90 days immediately after the commencement of the Action. At the conclusion of such 90 day period, the automatic stay will be finally and irrevocably modified solely to the extent required to permit the parties to prosecute and defend the Action to completion.

8. On August 13, 2019, Schmid initiated an action to, inter alia, enforce and/or foreclose its Mechanic's Lien by filing a Complaint in the Circuit Court of Wetzel County, West Virginia (the "State Court") asserting solely state-law claims against Columbia Gas for (a) the enforcement and/or foreclosure of Schmid Pipeline's Mechanic's Lien pursuant to West Virginia's mechanic's lien statutes, (b) unjust enrichment and (c) quantum meruit.

9. Welded was named as a nominal defendant in the Complaint, but only as to the Mechanic's Lien claim, and no relief was sought against Welded.

10. On August 7, 2019, Columbia Gas filed a Notice of Removal [Doc. 1] with the United States Bankruptcy Court for the Northern District of West Virginia (the "Northern District of West Virginia Bankruptcy Court") asserting that the Northern District of West Virginia Bankruptcy Court had jurisdiction to decide Schmid's claims "pursuant to 28 U.S.C.

§ 1334(b), because this civil action arises in and/or is related to a pending case filed under Title 11, ***In re Welded Construction, L.P.***, Case No. 18-12378 (KG) (Bankr. D. Del.) (Jointly Administered)."

11. By Order entered September 4, 2019, this Court withdrew the reference of this proceeding to the bankruptcy court and assumed jurisdiction of the matter [Doc. 7].

Motion to Remand and Abstain

In seeking remand, Schmid argues (1) there is a question as to whether diversity jurisdiction exists; (2) that the bankruptcy court cannot exercise diversity jurisdiction; and (3) that this matter is not "related to" the action pending in bankruptcy court in Delaware.

This Court finds that none of the arguments should prevail. First, with respect to the issue of diversity jurisdiction, Schmid has pled that is it a Wisconsin corporation with its principal place of business in Wisconsin. Columbia is a limited liability company, organized and existing under the laws of the State of Delaware, having its principal place of business in Texas, and not being a citizen of Wisconsin or West Virginia. As a nominal party, the citizenship of Welded is not relevant. ***Navarro Sav. Ass'n v. Lee***, 446 U.S. 458, 461 (1980); ***Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.***, 736 F.3d 255 (4th Cir. 2015); ***Ryan Environmental, Inc. v. Hess Oil Co., Inc.***, 718 F.Supp.2d 719, 723 (N.D. W.Va. 2010) (Keeley, J.). *See* ***Brown v. Jevic***, 575 F.3d 322, 327 (3rd Cir. 2009).

The amount in controversy is clearly met. Accordingly, there is no reason to believe that this Court lacks diversity jurisdiction.

With respect to the argument that a bankruptcy court cannot exercise diversity jurisdiction, the reference has been withdrawn. There is no doubt that the district court has

jurisdiction.

This Court also finds that this matter is "related to" the Welded bankruptcy court. "The Fourth Circuit has adopted the test set forth in ***Pacor, Inc. v. Higgins***, 743 F.2d 984 (3d Cir. 1984), for determining whether a civil proceeding 'relates to' a bankruptcy case. *See* ***Owens–Illinois, Inc. v. Rapid American Corp***. (***In re Celotex Corp.***), 124 F.3d 619, 625 (4th Cir. 1997). According to that test:

> [W]hether a civil proceeding is related to bankruptcy is [determined by] **whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy**. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

Pacor, 743 F.2d at 994 (emphasis in original) (citations omitted). The Fourth Circuit has construed the ***Pacor*** test broadly, stating that the test 'does not require certain or likely alteration of the debtor's rights, liabilities, options or freedom of action, nor does it require certain or likely impact upon the handling and administration of the bankruptcy estate. The possibility of such alteration or impact is sufficient to confer jurisdiction.' ***In re Celotex Corp.***, 124 F.3d at 626; *see also* ***Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.)***, 837 F.2d 325, 330 (8th Cir. 1988) ('[E]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad

jurisdictional test articulated in ***Pacor***.')." ***Blanton v. IMN Financial Corp.***, 260 B.R. 257, 261-62 (M.D. N.C. 2001).

This Court finds that this case is related to the Welded Construction bankruptcy. A determination of the amount owed to the plaintiff in the mechanics lien proceeding could have an effect on the proof of claim filed by the plaintiff in the bankruptcy. *See* ***Siskin Steel & Supply Co., Inc. v. Highland North, LLC***, 2013 WL 23906, *7 (W.D. Pa. Jan. 2, 2013) ("Any recovery by Siskin in the mechanic's lien claim would necessarily reduce Siskin's claim against SIAG in the bankruptcy estate for contribution by the same amount, thus altering the liability of the SIAG bankruptcy estate.") and ***Longchamps Elec., Inc. v. Rothenberg (In re: Wrenn Assoc., Inc.)***, 2004 WL 1746117, *4 (D.N.H. July 26, 2004) (bankruptcy court exercised subject-matter jurisdiction over a subcontractor's action to recover under a mechanic's lien statute against a property owner, reasoning that it would "impact [the general contractor's] bankruptcy case because ... a subcontractor's mechanic's lien is only valid to the extent that monies are owed the general contractor," which was the debtor in the bankruptcy case.).

For the reasons stated above, Schmid Pipeline Construction, Inc.'s Motion to Remand and Abstain [**Doc. 10**] is **DENIED**.

Motion for Partial Dismissal

In this Motion, Columbia Gas seeks an order dismissing Counts II (unjust enrichment) and III (*quantum meruit*) of the Amended Complaint [Doc. 12]. Schmid's claims for "unjust enrichment" and "quantum meruit" - according to the Complaint's own allegations and exhibits - are based in contract. This Court has made clear that "there can

be no recovery for unjust enrichment if there is an express contract covering the same subject matter." ***Worldwide Machinery L.P. v. Columbia Gas Transmission, LLC***, Civil Action No. 5:19-cv-208, Order Dismissing Compl., Doc. No. 8 (citing ***Case v. Shepherd***, 84 S.E.2d 140, 144 (W. Va. 1954); ***Ohio Valley Health Servs. & Educ. Corp. v. Riley***, 149 F.Supp.3d 709, 720–22 (N.D. W. Va. 2015). Therefore, Counts II and III must be dismissed.

Motion to Transfer Venue

According to 28 U.S.C. § 1412, "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. The court recognizes that change of venue to the District of Delaware may prove less convenient to plaintiff than proceeding in this court, but the interest of justice weighs in favor of such a transfer. *See* ***Irwin v. Beloit Corp. (In re Harnischfeger Indus., Inc.)***, 246 B.R. 421, 435 (Bankr. N.D. Ala. 2000) ("Because the criteria under § 1412 is phrased in the disjunctive, the bankruptcy case or proceeding is transferable upon a sufficient showing of either the interest of justice or the convenience of the parties."). Factors cited by courts in determining whether transfer of venue will serve the interests of justice include: (a) the economic administration of the bankruptcy estate; (b) the presumption in favor of trying cases "related to" a bankruptcy case in the court in which the bankruptcy is pending; (c) judicial efficiency; (d) ability to receive a fair trial; (e) the state's interest in having local controversies decided within its borders; (f) enforceability of any judgment rendered; and (g) the plaintiff's original choice of forum. ***Id.*** at 435–37. Although the state's interest in deciding local controversies and

the plaintiff's original choice of forum favor retaining venue, these factors are outweighed by considerations of consistency, judicial economy, and economic administration of the bankruptcy estate. Requiring the debtor to defend or participate in an action in West Virginia would serve to diminish the bankruptcy estate.

In addition, "many courts presume that the proper venue for a proceeding related to a bankruptcy case is in the district hearing the bankruptcy case. *See* ***Sudbury, Inc. v. Dlott (In re Sudbury)***, 149 B.R. 489, 493 (Bankr. N.D. Ohio 1993) (noting the 'general presumption that all matters involving a bankruptcy should be tried in the court in which the bankruptcy is pending.'); ***Nixon Mach. Co. v. Roy Energy, Inc. (In re Nixon Machinery Co.)***, 27 B.R. 871, 873 (Bankr. E.D. Tenn. 1983) (stating that the 'general rule' is that 'the court where the bankruptcy case is pending is the proper venue for all related proceedings within the court's jurisdiction.')." ***Blanton***, supra at 267.

This last factor also supports the decision to transfer venue to the District of Delaware. There is no reason to believe that the ability to receive a fair trial or the enforceability of any judgment rendered would be affected by transferring venue. Consequently, the court finds that in the interest of justice the present action should be transferred to the District of Delaware, from which it can be referred to the bankruptcy court.

For the reasons stated above, Schmid Pipeline Construction, Inc.'s Motion to Remand and Abstain [**Doc. 10**] is **DENIED**; Columbia Gas Transmission's Motion for Partial Dismissal [**Doc. 17**] is **GRANTED**, and Columbia Gas Transmission's Motion to Transfer Venue [**Doc. 20**] is **GRANTED**. As a result, this matter is hereby **ORDERED**

TRANSFERRED to the District of Delaware.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein and to take all necessary action to execute the transfer.

DATED: October 21, 2019.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

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) (Consolidated)

ORDER

Upon consideration of *Defendant Columbia Gas Transmission, LLC's Motions to Dismiss Plaintiff Earth Pipeline Services, Inc.'s Amended Complaint* (the "Motions"), and *Plaintiff Earth Pipeline Services, Inc.'s Response and Brief in Opposition thereto,* and *Defendant Columbia Gas Transmission, LLC's Reply thereto, if any,* it is hereby **ORDERED** that the Motions are **DENIED**.

Sontchi, J.