Docket #0047 Date Filed: 7/31/2020

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

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

OPINION[1]

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[1] This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

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Dated: July 31, 2020
Sontchi, C.J.

INTRODUCTION[2]

This case addresses whether a subcontractor seeking to enforce its mechanic's lien can intervene in another subcontractor's lawsuit seeking to enforce its mechanic's lien when the two liens cover some of the same property.

In this adversary proceeding, Earth Pipeline (a subcontractor of Welded) seeks to enforce a mechanic's lien against Columbia Gas (the property owner) for clearing a right-of-way for the Mountaineer Xpress Pipeline Project. Columbia Gas disputes the validity of Earth Pipeline's lien. Mersino (another subcontractor of Welded) also seeks to enforce a mechanic's lien against Columbia Gas for pumping services it provided for the Mountaineer Xpress Pipeline Project. Both assert liens on the Property. By this Motion, Mersino seeks to intervene in Earth Pipeline's proceeding to protect its interest and serve judicial economy.

The Court will deny Mersino's motion for mandatory intervention under Federal Rule of Civil Procedure 24(a). Mersino's interest in the property is not threatened by the litigation because, regardless of the outcome of the Columbia Gas-Earth Pipeline dispute,

[2] Capitalized terms used but not defined herein have the meaning ascribed to them infra.

Mersino's mechanic's lien will not be extinguished. Even if the Property is foreclosed upon Mersino and Earth Pipeline will share the proceeds pro rata.

The Court will also deny Mersino's motion for permissive intervention under Federal Rule of Civil Procedure 24(b). Although the Columbia Gas-Earth Pipeline and Columbia Gas-Mersino disputes share common issues of law, unshared factual and legal issues predominate the disputes. Collateral estoppel would better serve the interests of judicial economy in this case.

JURISDICTION AND VENUE

This Court has jurisdiction over this matter, pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district, pursuant to 28 U.S.C. §§ 1408 and 1409. The Court has the power to enter an order on this matter.[3]

BACKGROUND

I. Procedural History

On October 22, 2018, Welded Construction, L.P. ("Welded") and Welded Construction Michigan, LLC, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.[4] On October 23, 2018, the cases were consolidated for procedural purposes,[5] and the case has proceeded on its course.

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[3] *See Welded Constr., L.P. v. Prime NDT Services, Inc.* (*In re Welded Constr., L.P.*), 605 B.R. 35, 37 (Bankr. D. Del. 2019) (affirming Bankruptcy Court's ability to entertain all pretrial proceedings regardless of core/non-core and Stern issues).

[4] Del. Bankr. No. 18-12378, D.I. 1; Del. Bankr. No. 18-12379, D.I. 1.

[5] Del. Bankr. No. 18-12789, D.I. 33.

On March 8, 2019, Earth Pipeline Services, Inc. ("Earth Pipeline") filed a complaint against Columbia Gas Transmission, LLC ("Columbia Gas") and Welded in state court in West Virginia, seeking to enforce a mechanic's lien against the defendants.[6] The action was removed and finally transferred on June 26, 2019 to the United States Bankruptcy Court for the District of Delaware.[7]

Earth Pipeline's Amended Complaint seeks *in rem* recovery against the real estate, and in the alternative, *in personam* recovery against Columbia Gas.[8] Columbia Gas disputes the validity of Earth Pipeline's liens, and it filed a Counterclaim against Earth Pipeline for breaches of representations and warranties, breaches of contract, and negligence.[9] Columbia Gas also filed a Motion to Dismiss[10], to which Earth Pipeline filed a Response[11] followed by Columbia Gas's Reply in Support of its Motion to Dismiss.[12] A Notice of Completion of Briefing on this issue was filed and the matter is under advisement.[13]

Meanwhile, Mersino Dewatering, Inc. ("Mersino") filed a Motion to Intervene and Brief in Support of the Motion (the "Motion").[14] Columbia Gas filed a Brief in Opposition

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[6] Adv. Pro. No. 19-50274, Amended Complaint, D.I. 23 at ¶ 22.

[7] *Id.* at ¶ 24.

[8] *See generally* Amended Complaint, D.I. 23.

[9] *See generally* First Amended Answer and Counterclaim, D.I. 10.

[10] D.I. 28.

[11] D.I. 36.

[12] D.I. 42.

[13] D.I. 46.

[14] D.I. 22.

to Mersino Dewatering's Motion to Intervene (the "Columbia Opposition Brief"),[15] and Earth Pipeline filed a Response and Opposition to Mersino Dewatering's Motion to Intervene (the "Earth Pipeline Opposition Brief").[16] Mersino filed a Reply Brief (the "Mersino Reply Brief")[17] and a Declaration of Marco Mersino in Support (the "Mersino Declaration").[18] A Notice of Completion of Briefing was filed and the Motion is ripe for decision.[19]

II. Factual Background

Columbia Gas is a Delaware limited liability company, with a principal place of business in Houston, Texas.[20] Earth Pipeline is a Wyoming corporation with a principal place of business in Washington, Pennsylvania.[21] Mersino is a Michigan corporation with a principal place of business in Davidson, Michigan.[22]

Columbia Gas is the record owner and/or has a property interest in certain land and easements commonly known as the Mountaineer Xpress Pipeline Project ("the Project"), including approximately 99,436 linear feet of a pipeline right-of-way ("the Property"), upon which Earth Pipeline asserts a lien.[23] Mersino asserts, and Columbia

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[15] D.I. 24.

[16] D.I. 26.

[17] D.I. 30.

[18] D.I. 31.

[19] D.I. 33.

[20] First Amended Answer, D.I. 10 at ¶ 2.

[21] Amended Complaint, D.I. 23 at ¶ 1.

[22] Motion at ¶ 1.

[23] First Amended Answer, D.I. 10 at ¶ 2.

Gas does not deny, that TC Energy Corporation f/k/a TransCanada Corporation acquired Columbia Pipeline Group d/b/a Columbia Gas Transmission, LLC in 2016.[24]

Columbia Gas contracted with Welded to "perform, among other things, the furnishing of materials and labor necessary for all clearing and grubbing of all timber, brush and vegetation on the Property."[25] Welded contracted with Earth Pipeline to "perform, among other things, mechanical clearing of the right-of-way, all work spaces, and all necessary roads of ingress and egress for the Project and to the Property."[26] The goods and services performed by Earth Pipeline pertained to the entire Property, as reflected in the Notice of Mechanic's Lien.[27] Earth Pipeline noticed and recorded a Notice of Mechanic's Lien against Columbia Gas on "approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas," which runs for eighteen miles across Marshall and Wetzel Counties in West Virginia.[28]

Welded also contracted with Mersino to provide temporary pumping services for a creek diversion as part of the project.[29] Mersino's responsibilities included delivery and operation of equipment, pumping services, and demobilization of the equipment upon completion.[30] Mersino noticed and recorded a Notice of Mechanic's Lien against

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[24] Motion at ¶ 2.

[25] Amended Complaint, D.I. 23 at ¶ 7.

[26] *Id*. at ¶ 8.

[27] *See* Earth Pipeline Opposition Brief, Exs. 2 & 3.

[28] *Id*.

[29] Mersino Subcontract, D.I. 22-1 at 2.

[30] *Id*. at 3.

TransCanada at 54 Seclusion Crescent, Brampton, ON ONL6R1L.[31] The property described in Mersino's Notice of Mechanic's Lien was "that certain building Mountaineer Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26083."[32] That address consists of a 3.39 acre property in Marshall County, West Virginia.[33]

Earth Pipeline and Mersino each signed a Subcontract with Welded, which, for our purposes, are identical.[34] The Subcontract contains a "no-lien" clause and Liability and Indemnity section. The Subcontract does not contain a choice-of-law clause. The "no-lien" clause provides:

> 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.[35]

One of the indemnities in the Liability and Indemnity section is for:

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[31] D.I. 22-2 at 2.

[32] *Id.*

[33] D.I. 26-2 at 2.

[34] D.I. 23-1 (Earth Pipeline); D.I. 22-1, D.I. 24, Ex. 2 (Mersino).

[35] D.I. 23-1 at 15–16 (Earth Pipeline); D.I. 24, Ex. 2 at 7–8 (Mersino).

> Claims . . . brought against Contractor . . . to the extent caused by 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.[36]

ANALYSIS

I. Mandatory Intervention under Rule 24(a)

Rule 24 of the Federal Rules of Civil Procedure, made applicable by Rule 7024 of the Federal Rules of Bankruptcy Procedure, provides for (a) mandatory intervention and (b) permissive intervention. Rule 24(a) provides, in relevant part:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.[37]

Intervention of right requires "(1) a timely application for leave to intervene, (2) a sufficient interest in the underlying litigation, (3) a threat that the interest will be impaired or affected by the disposition of the underlying action, and (4) that the existing parties to the action do not adequately represent the prospective intervenor's interests."[38]

A. Timeliness

In determining whether a motion to intervene is timely, three interrelated factors are considered: "(1) what proceedings of substance on the merits have occurred, (2) the

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[36] D.I. 23-1 at 17 (Earth Pipeline); D.I. 24, Ex. 2 at 8 (Mersino).

[37] Fed. R. Civ. P. 24(a)(2).

[38] *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005); *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995).

reason for the delay, and (3) how the delay prejudices the parties."[39] The delay is "measured from the point at which the applicant knew, or should have known, of the risk to its rights."[40]

Mersino contends that the Motion to Intervene is timely because this litigation is still at an early stage.[41] The proceeding was transferred to the bankruptcy court on July 15, 2019,[42] the Complaint, Counterclaim, and respective Answers have been filed and amended from March through May,[43] and a Motion to Dismiss was filed on June 3, 2020.[44] The Motion to Intervene was filed on May 14, 2020.[45] Because few or no proceedings of substance on the merits have occurred and the delay does not prejudice the parties, Mersino argues that the Motion is timely.

Columbia Gas argues that because Mersino filed a notice of claim in Welded's bankruptcy proceeding in February 2019, Mersino knew, or should have known, of the risk to its rights immediately when this adversary proceeding was transferred to this Court in June 2019.[46] Because Mersino "sat on its hands for roughly a year before moving to intervene" and has not provided any reason for the delay in the Motion or Mersino

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[39] *Casino Caribbean, LLC v. Money Ctrs. of Am., Inc.* (*In re Money Ctr. of Am., Inc.*), 544 B.R. 107, 114 (Bankr. D. Del. 2016) (citing *Mountain Top Condo. Ass'n*, 72 F.3d at 369) (internal quotations omitted).

[40] *Id.* at 114 n.31 (citing *Mountain Top Condo. Ass'n*, 72 F.3d at 370).

[41] Motion at 8, Mersino Reply Brief at 18.

[42] D.I. 1.

[43] D.I. 10, 14, 20, 23, 29.

[44] D.I. 28.

[45] D.I. 22.

[46] Columbia Gas Opposition Brief at 12–13 & Ex. 3 (citing *In re Welded Construction, L.P.*, Case No. 18-12378 (CSS), Claim No. 457).

Reply Brief, Columbia Gas argues that this factor should be dispositive in determining that the motion is untimely.[47]

In *Money Center*,[48] this Court held that when the intervening party waited a few months to file its motion and the adversary proceeding was still in its infancy, the motion to intervene was timely. Although Mersino's yearlong wait with no explanation is certainly puzzling, the delay alone does not seem to prejudice the parties because the litigation is still at an early stage and few if any proceedings of substance have occurred. The Court finds that Mersino's motion is timely.

B. Sufficient Interest in the Underlying Litigation

Mandatory intervention under Rule 24(a)(2) is available only to a party who "claims an interest relating to the property or transaction that is the subject of the action."[49] The party's interest must be "a legally cognizable interest" that is "significantly protectible," as opposed to "a general and indefinite" interest."[50] "[A] mere economic interest in the outcome of the litigation" because the "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," unless the intervenor has an "interest in a specific fund" and the "case affect[s] that fund."[51]

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[47] *Id.* at 13 (citing *Delaware Valley Citizens' Council for Clean Air v. Com. of Pa.*, 674 F.2d 970, 975 (3d Cir. 1982) (district court did not abuse its discretion in denying intervention when there was an unsatisfactory explanation for delay)).

[48] *In re Money Ctr. of Am., Inc.*, 544 B.R. at 114.

[49] Fed R. Civ. P. 24(a)(2).

[50] *Liberty Mut. Ins. Co.*, 419 F.3d at 220 (quoting *Mountain Top Condo. Ass'n*, 72 F.3d at 366).

[51] *Id.*

Mersino contends that its mechanic's lien covers the same property as Earth Pipeline's lien, which is the subject of this action.[52] Mersino's mechanic's lien is a significantly protectible property interest that is jeopardized by the litigation, and unless Mersino is allowed to intervene, Mersino claims that "its interest or right to payment pursuant to its interest will be foreclosed upon or extinguished."[53]

Earth Pipeline argues that Mersino's purported mechanic's lien does not cover the same property as Earth Pipeline.[54] Earth Pipeline's lien, as recorded in the Notice of Mechanic's Lien,[55] consists of "approximately 99,436 linear feet of pipeline right-of-way, temporary workspaces, access roads, laydown yards and other areas," which runs for eighteen miles across Marshall and Wetzel Counties in West Virginia.[56]

In contrast, Mersino's Notice of Mechanic's Lien provides the address of "that certain building Mountaineer Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV, 26038." Mersino's Complaint and Notice of Lis Pendens, indicate that the mechanic's lien is recorded against "real property consisting of approximately 99,500 linear feet of pipeline right-of-way and related work areas and access roads," whose "physical address" is "1591 Wheeling Avenue, Glen Dale, WV 26308."[57]

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[52] Motion at 8; Mersino Reply Brief at 6.

[53] Motion at 9–10.

[54] Earth Pipeline Opposition Brief at 7–9.

[55] Earth Pipeline Opposition Brief Exs. 2–3, D.I. 26-3 & -4.

[56] Earth Pipeline Opposition Brief at 8.

[57] D.I. 22-3 at 3, 19.

Earth Pipeline argues that because the county clerk must record notice of the lien with a "description of the property to be charged by such lien," Mersino would only be entitled to enforce a lien on the 3.39-acre 1591 Wheeling Avenue property.[58] Mersino's lien only covers the property in the Notice of Mechanic's Lien, and not Mersino's description of the property in the Complaint and Notice of Lis Pendens, which was drafted to "mirror the legal description contained in the [Earth Pipeline] complaint."[59]

In Earth Pipeline's view, the property subject to the lien parallels the scope of the parties' respective work. "Mersino was contracted to perform pumping services on a discrete, small area," whereas Earth Pipeline provided "goods and services" that "pertained to the entire right-of-way."[60] Because the 3.39-acre 1591 Wheeling Avenue property is not covered by Earth Pipeline's lien, Earth Pipeline contends that Mersino does not have an interest in the litigation.

By Earth Pipeline's logic, Mersino's mechanic's lien would simply evaporate. The lien does not encumber the Wheeling Avenue property because the services weren't performed there, but it also doesn't encumber the area where the services were actually performed because that property wasn't described in the Notice of Mechanic's Lien.

Mersino replies that the 3.39-acre 1591 Wheeling Avenue address was "the staging yard for the pipeline project," and not the location where Mersino performed its

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[58] Earth Pipeline Opposition Brief at 8 n.1 (citing W. Va. Code § 38-2-27).

[59] *Id.*

[60] *Id.* at 8.

services.[61] Instead, Mersino provided services where the Project intersected with Fish Creek, at approximately Milepost 7.1 along the pipeline, which overlaps with Earth Pipeline's lien.[62] A quick search on Google Maps indicates that the 1591 Wheeling Avenue address is quite far from Fish Creek. In the Complaint and Notice of Lis Pendens, Mersino mistakenly provided the legal description for the Wheeling Avenue property instead of the specific area where the services were performed.[63]

Although Mersino recorded the staging ground instead of the area where the services were performed, Mersino's lien should still apply to the pipeline and not evaporate. This address mix-up reflects the difficulty, recognized by the West Virginia Supreme Court of Appeals in *L.A. Pipeline*, of meeting the statutory requirement of a "definite and ascertainable description"[64] when describing work done on a pipeline.[65]

In *L.A. Pipeline*, the West Virginia Supreme Court of Appeals addressed what property description of a pipeline project satisfied the statutory requirement of "an adequate and ascertainable description of the real estate to be charged."[66] Noting that mechanic's lien statutes are remedial and liberally construed, the court held that a general

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[61] Mersino Reply Brief at 7.

[62] *Id.* at 10 (citing "Mersino Declaration," D.I. 31, ¶¶ 4–6); see also D.I. 22-3 at 8.

[63] Mersino Reply Brief at 10 n.3.

[64] W. Va. Code § 38-2-9 (notice to owner), *id.* at -8 (record in clerk's office).

[65] *L.A. Pipeline Constr., Inc. v. Glass Bagging Enters.*, No. 15-0970, 2016 W. Va. Lexis 795 at **13–18, 2016 WL 6304570 at **5–6 (W. Va. Oct. 27, 2016) (memorandum decision).

[66] W. Va. Code § 38-2-10 (materialman's mechanic's lien); *see id.* at -9 (same language for mechanic's lien).

description was sufficient for a pipeline (unlike a home, building, or bridge), even if a more precise description was available.[67]

In this case, Mersino could have provided a more precise description in the Notice of Lien of the specific area where it worked on the pipeline, like the one provided in the Reply Brief and Mersino Declaration. And the actual property described in the Notice of Mechanic's Lien was not even part of the Project. Still, the Notice of Mechanic's Lien indicates that the lien was for work done on the Property, and that general description suffices to establish a mechanic's lien on that portion of the Property.

The Court finds that Mersino has a sufficient interest in the litigation.

C. Threat that the Interest will be Impaired or Affected

In assessing whether disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest,"[68] a court looks to how "the practical consequences of the litigation" will have "any significant legal effect on the applicant's interest."[69] But "there must be a tangible threat to the applicant's legal interest," and a claim that is merely "incidentally affected" by the litigation does not suffice.[70]

Mersino argues that unless it is allowed to intervene, "its interest or right to payment pursuant to its interest will be foreclosed upon or extinguished."[71]

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[67] *L.A. Pipeline Constr., Inc.*, 2016 W. Va. Lexis 795 at **13–18, 2016 WL 6304570 at **5–6.

[68] Fed. R. Civ. P. 24(a)(2).

[69] *Liberty Mut. Ins. Co.*, 419 F.3d at 226–27 (quoting *Brody v. Sprang*, 957 F.2d 1108, 1122–23 (3d Cir. 1992)).

[70] *Id.*

[71] Motion at 9–10.

Earth Pipeline points out that regardless of the outcome of this action, Mersino's mechanic's lien will not be extinguished or divested. Under West Virginia law (and generally), two mechanics' liens held by subcontractors have equal priority.[72] If this Court grants Earth Pipeline *in personam* relief or *in rem* relief without a judicial sale, then Mersino's lien will be unimpaired. And if the encumbered property is sold in a judicial sale and the proceeds are insufficient to satisfy both claims, the two lienholders — Earth Pipeline and Mersino — will share pro-rata.[73]

Columbia Gas also contends that the pipeline is worth significantly more than the combined lien claims of Earth Pipeline and Mersino.[74] Even if both win, Columbia Gas represents that it "would pay the judgment amount before any attachment or foreclosure became final."[75] Because a foreclosure and subsequent extinguishment of Mersino's security interest is such a remote possibility, Columbia Gas argues that this action does not present a practical threat to Mersino's interest.[76]

In *Mountain Top* and *Stone & Webster*, the court granted mandatory intervention when a dispute arose among parties with a lien on specific insurance proceeds.[77] In *Lake*

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[72] W. Va. Code § 38-2-18.

[73] Matthew Bender, 3 Construction Law ¶ 9.08 (2020); *see also* W. Va. Code § 38-2-35 (court may provide a decree for money in favor of other creditors after judicial sale).

[74] Columbia Gas Opposition Brief at 14; *see id.* at n.7 (the Court should take judicial notice that the pipeline's construction costs were estimated to be roughly $3,000,000,000).

[75] Columbia Gas Opposition Brief at 14.

[76] *Id.* (citing *Islamic Soc'y of Basking Ridge v. Twp. of Bernards*, 681 F. App'x 110, 112 (3d Cir. 2017) (contingent or speculative interests do not mandate intervention of right)).

[77] *Mountain Top Condo. Ass'n*, 72 F.3d at 366; *In re Stone & Webster, Inc.*, 380 B.R. 366, 372 (Bankr. D. Del. 2008).

Investors, the Seventh Circuit addressed whether the holder of a security interest in a contract could intervene in a case that would reduce the contract to judgment.[78] The court held that because the intervenor's security interest in the contract rights "will disappear, or be converted into elusive 'proceeds,' when the contract has been performed or reduced to judgment," the party qualified for mandatory intervention.[79]

However, if the movant could "bring a separate action" to adequately protect its interest, and the result of the current action merely alters the target of such litigation rather than extinguishing the interest or distributing specific encumbered proceeds, mandatory intervention is inappropriate.[80]

Here, regardless of the outcome of this proceeding, Mersino's rights are unimpaired. If Earth Pipeline's lien is invalid or the parties settle, Mersino has free reign to pursue separate litigation against Columbia Gas. And if Earth Pipeline succeeds in this proceeding, West Virginia law ensures that proceeds of a judicial sale will either satisfy both liens or be divided pro-rata. Unlike *Lake Investors*, Mersino's path to recovery is clear, not elusive. And because both will practically be paid out by Columbia Gas, the risk to Mersino's right to payment is remote, and that interest is anyway a mere economic interest that is not sufficiently protectible to warrant intervention.

The Court finds that Mersino's interest is not threatened by this action.

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[78] *Lake Investors Dev. Grp., Inc. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1260 (7th Cir. 1983).

[79] *Id.*

[80] *See Akina v. Hawaii*, 835 F.3d 1003, 1012 (9th Cir. 2016) (denying intervention when regardless of outcome of current lawsuit, intervenors could bring a separate lawsuit to protect their interest).

D. Adequate Representation of Mersino's Interests

If "existing parties adequately represent" the intervenor's interests, then intervention is unnecessary.[81]

> The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interest of the present parties. If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate.[82]

Earth Pipeline argues that it shares Mersino's "ultimate objective," namely getting paid by either Columbia Gas or Welded for work on the project.[83] This would lead to a presumption that Mersino's interests are adequately represented, which could be rebutted by "adversity of interest, collusion, or nonfeasance on the part of" Earth Pipeline.[84] Because bad faith have alleged, Mersino is adequately represented.

Mersino merely counters that "with due respect, Earth Pipeline does not adequately represent Mersino's interest."[85] Even though Mersino's response leaves much to be desired, the caselaw supports Mersino's position.

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[81] Fed. R. Civ. P. 24(a)(2).

[82] *In re Money Ctr. of Am., Inc.*, 544 B.R. at 116 n.38 (quoting *Mountain Top Condo. Ass'n*, 72 F.3d at 368–69).

[83] Earth Pipeline Opposition Brief at 15.

[84] *Id.* (citing *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005)).

[85] Mersino Reply Brief at 17.

Adequate representation is met when "the movants and the plaintiff were seeking the same assets for the plaintiff's benefit"[86] or where the movant is part of the class represented by plaintiff.[87] However, when the movant is seeking "additional funds for the movant's benefit," a plaintiff who is also seeking funds for their own benefit does not adequately represent the movant.[88]

Here, although both Mersino and Earth Pipeline seek to recover money from Columbia Gas, that money is for different work and going to different non-class action plaintiffs. Mersino has met the "minimal" burden of showing that "representation of [its] interest may be inadequate."[89] The Court finds that Earth Pipeline does not adequately represent Mersino.

In sum, Mersino's motion was timely, Mersino has a sufficient interest in the property that is the subject of the litigation, and Earth Pipeline does not adequately represent Mersino's interest. However, Mersino's interest in the property is not threatened by the litigation, and Mersino's right to payment is too general and indefinite to be sufficiently protectible through intervention.

Therefore, the Court will deny Mersino's motion for mandatory intervention under Rule 24(a).

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[86] *See In re Money Ctr. of Am., Inc.*, 544 B.R. at 116.

[87] *See In re Cmty. Bank of N. Va.*, 418 F.3d at 314 (rejecting challenge to adequacy of class representation).

[88] *In re Money Ctr. of Am., Inc.*, 544 B.R. at 117.

[89] *In re Stone & Webster, Inc.*, 380 B.R. at 373 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, 92 S.Ct. 630 (1972); *Mountain Top Condo. Ass'n*, 72 F.3d at 368) (internal quotations omitted)).

II. Permissive Intervention

Rule 24(b) of the Federal Rules of Civil Procedure provides, in relevant part:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.[90]

Permissive intervention is appropriate when "judicial economy and consistency would be served by allowing intervention," so long as "intervention protects an interest not served by the existing [parties]."[91] The court has broad discretion in granting permissive intervention, and the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[92]

Mersino contends that even if the mandatory intervention is not met, permissive intervention is appropriate because the matters share common questions of law or fact. In the Motion, Mersino pointed to the common issues of "the scope of work performed and/or the services, labor, material, supplies, equipment, and/or machinery furnished, Welded's defaults, the rights and priority of liens, the foreclosure on property and the relationship to Welded's bankruptcy."[93] In the Mersino Reply Brief, Mersino specified that the parties share a common question of the validity of the no-lien waiver and Earth Pipeline's and Mersino's purported liens overlap on some property.[94] Mersino further highlights that Columbia Gas's arguments about the Subcontract's "no-lien" clause in the

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[90] Fed. R. Civ. P. 24(b)(1)(B).

[91] *In re Money Ctr. of Am., Inc.*, 544 B.R. at 117.

[92] *United States v. Territory of Virgin Islands*, 749 F.3d 514, 524 (3d Cir. 2014) (citing Fed. R. Civ. P. 24(b)(3)).

[93] Motion at 13.

[94] Mersino Reply Brief at 18.

Motion to Dismiss Earth Pipeline's Amended Complaint mirror those in the Columbia Gas Opposition Brief,[95] and Earth Pipeline and Mersino have substantially similar legal arguments in response.[96]

Columbia Gas replies that the common issues presented in the Motion are merely common *facts*, not common *questions* of law or fact.[97] Sharing factual background does not qualify a party for permissive intervention. Earth Pipeline adds that the unshared issues of law and fact — Earth Pipeline's additional claims against Columbia Gas, Columbia Gas's counterclaim, and the fact-intensive inquiry into each subcontractor's performance — predominate over any shared issues of law or fact.[98] Both Columbia Gas and Earth Pipeline further assert that judicial economy would not be served by allowing permissive intervention and requiring Columbia Gas "to fight a two-front war on a single battlefield,"[99] and intervention would just "overcomplicate an already complex construction dispute."[100]

Mersino's strategic goal appears to be ensuring that it receive the benefit of a judgment against Columbia Gas. Should the Court deny Mersino's intervention and rule against Columbia Gas, Mersino will likely be able to bind Columbia Gas to that judgment under offensive nonmutual collateral estoppel. Beyond the four general requirements for

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[95] D.I. 28 at 11–15.

[96] D.I. 36 at 14–18.

[97] Columbia Gas Opposition Brief at 20.

[98] Earth Pipeline Opposition Brief at 16–17.

[99] Columbia Gas Opposition Brief at 21.

[100] Earth Pipeline Opposition Brief at 16.

collateral estoppel,[101] nonmutual offensive collateral estoppel requires consideration of (1) whether the party asserting collateral estoppel could have intervened, (2) whether the defendant had incentive to litigate the first action, (3) if there are multiple, prior inconsistent judgments, and (4) if the second suit offers the defendant procedural opportunities unavailable in the first.[102]

By attempting to intervene here, Mersino was not "adopt[ing] a 'wait and see' attitude."[103] The litigation between Earth Pipeline and Columbia Gas presented Columbia Gas with a full incentive to litigate, and future suits against Columbia Gas by subcontractors have already occurred are future suits are foreseeable. There are no prior inconsistent judgments, and because both suits would be in this Court, there are no unique procedural opportunities offered in the second suit. Collateral estoppel, aimed at "promoting judicial economy by preventing needless litigation,"[104] is a better method for judicial economy than permissive intervention.

Thus, the Court will deny Mersino's motion for permissive intervention under Rule 24(b) because collateral estoppel provides a better path to judicial economy.

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[101] *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006).

> We have identified four standard requirements for the application of collateral estoppel in our case law: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action.

Id. (citing *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 209 (3d Cir. 2001) (internal quotations omitted)).

[102] *Jean Alexander Cosmetics, Inc.*, 458 F.3d at 248–49 (3d Cir. 2006) (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329–31, 99 S.Ct. 645 (1979)).

[103] *Jean Alexander Cosmetics, Inc.*, 458 F.3d at 248.

[104] *Id.* at 253.

III. Futility of Intervention

If the intervening party's legal claim fails on the merits under clearly-established law or a prior decision in the case, the motion to intervene can be dismissed as futile. In that case, the court need not consider the elements of mandatory or permissive intervention.[105]

Columbia Gas contends that Mersino's intervention is futile because the Subcontract's "no-lien" clause waived Mersino's mechanics' lien and because Mersino failed to notice and record the property owner, which is necessary to maintain a mechanic's lien under West Virginia law.[106]

A. Waiver of the Mechanics' Lien in the "No-Lien" Clause

First, Columbia Gas argues that Mersino waived its mechanic's lien. The "no-lien" clause of the Subcontract provides:

> 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. . . . *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.[107]

Columbia Gas interprets "any" lien to include liens held or created by Mersino itself. Because Mersino contractually agreed to release any mechanics' liens, that is a

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[105] *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 501 (3d Cir. 1982); *American White Cross, Inc. v. Orentzel* (*In re American White Cross, Inc.*) 269 B.R. 555, 559–60 (D. Del. 2001).

[106] Columbia Gas Opposition Brief at 12–17.

[107] *Id.* at 10 (citing D.I. 24, Ex. 2 at 7–8) (emphasis added).

written waiver of the mechanics' lien, which is countenanced by West Virginia law.[108] Columbia Gas cites cases from Illinois, Connecticut, and Florida routinely enforcing "no-lien" clauses in construction contracts.[109]

Although Columbia Gas was not a signatory to the Subcontract, it claims that it can enforce the "no-lien" clause as a third-party beneficiary. Under West Virginia law, a third-party beneficiary's ability to enforce a contract is defined in West Virginia Code § 55-8-12, which states:

> If a covenant or promise be made for the *sole benefit* of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.[110]

The Supreme Court of Appeals of West Virginia has "repeatedly applied this statute" and "consistently given force to the 'sole benefit' requirement."[111] If the provisions of the contract at issue "were intended for the benefit and protection of [one of the contracting parties], and not for the sole benefit of the plaintiff or for the sole benefit

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[108] Columbia Gas Opposition Brief at 13 (citing *First Am. Title. Ins. Co. v. Bowles Rice, LLP*, No. 1:16-cv-219, 2018 WL 3763001, at *10 (N.D. W. Va. Aug. 8, 2018) ("Undoubtedly, a contractor may waive his right to file a mechanic's lien.")

[109] Columbia Gas Opposition Brief at 13 n.3 (citing *Ridgeview Const. Co. v. Am. Nat. Bank & Tr. Co. of Chicago*, 256 Ill. App. 3d 688, 692 (1993); 3 Bruner & O'Connor Construction Law § 8:151 n.11 (citing *Pero Bldg. Co., Inc. v. Smith*, 6 Conn. App. 180 (1986)); *Greco-Davis Contracting Co. v. Stevmier, Inc.*, 162 So. 2d 285 (Fla. 2d DCA 1964); *Aetna Cas. And Sur. Co. v. U.S.*, 228 Ct. Cl. 146 (1981) (contractor could waive its lien rights in advance of construction).

[110] W. Va. Code § 55-8-12 (emphasis added).

[111] *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 403, 549 S.E.2d 266, 277 (2001); *see id*. (citing *Elmore v. State Farm Mut. Auto. Ins. Co*, 202 W. Va. 430, 438, 504 S.E.2d 893, 901 (1998) (third party barred from pursuing breach of fiduciary duty claim against tortfeasor's insurer), *and Robinson v. Cabell Huntington Hosp., Inc.*, 201 W. Va. 455, 498, 498 S.E.2d 27 (1997) (medical malpractice plaintiffs could not directly sue a physician's liability insurer in the absence of express language granting third-party benefits)).

of a class of which plaintiff is a member," then that third party cannot sue to enforce the contract.[112] "[S]tatus as a third-party beneficiary can be determined with regard to a specific provision, covenant, or promise, and not necessarily the contract as a whole."[113]

In determining whether a third party is the *sole* beneficiary of a contract, West Virginia law requires "language in the contract . . . that either expressly or impliedly declares an intent that the contract was for [the plaintiff's] *sole* benefit."[114] Otherwise, "there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration."[115] Even if "the contracting parties knew the contract would result in professional work product . . . that would ultimately be relied on," if the contract itself is clearly for the benefit of the contracting parties, then only they can enforce it.[116]

Columbia Gas does not appear to be the sole beneficiary of this provision. The only parties whose legal entitlements are addressed are the Contractor and Subcontractor; Columbia Gas ("Company") is only referred to as the property owner. Therefore, Columbia Gas likely does not meet West Virginia's strict sole benefit requirement. But Columbia Gas's ability to file a lawsuit as a third-party beneficiary does

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[112] *Eastern Steel*, 209 W. Va. at 404, 549 S.E.2d at 278 (citing *United Dispatch v. E.J. Albrecht Co.*, 135 W. Va. 34, 46, 62 S.E.2d 289, 296 (1950)).

[113] *Hatfield v. Wilson*, No. 3:12-0944, 2012 WL 2888686, at *3 (S.D. W. Va. July 13, 2012) (covenant to retain employee in a purchase agreement can be enforced by the employee for whose benefit it was made).

[114] *Eastern Steel*, 209 W. Va. at 404, 549 S.E.2d at 278.

[115] *Id.* (quoting *Ison v. Daniel Crisp Corp.*, 146 W. Va. 786, 122 S.E.2d 553 (1961)).

[116] *Id.*

not necessarily dictate whether the "no-lien" clause functions as a written waiver of the mechanic's lien. In theory, even if Columbia Gas could not enforce the contract, the document still evidences Mersino's waiver of its lien.

In the alternative, Columbia Gas points to the last sentence of the "no-lien" clause, which provides that "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."[117] Because a subcontractor's mechanic's lien arises only to ensure, and is capped by, the money owed by the general contractor,[118] this clause effectively limits the value of Mersino's lien to zero.[119]

Mersino contests the interpretation and enforceability of the "no-lien"clause. Mersino interprets "any" liens to refer "to liens filed by Mersino's subcontractors and suppliers, not Mersino."[120] Mersino points to a different clause in the contract that, in its view, allows Mersino's subcontractors and suppliers to file liens, but requires Mersino to cause the release of those liens, but only if Mersino has been paid.[121] One indemnity provided by the Subcontractor is for:

> Claims . . . brought against Contractor . . . to the extent caused by 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

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[117] Columbia Gas Opposition Brief at 15–16.

[118] *See* W. Va. Code § 38-2-2 (subcontractor "shall have a lien for his or her compensation"); *see also Kane & Keyser Hardware Co. v. Cobb*, 79 W. Va. 587, 91 S.E. 454 (1917) (lien serves to satisfy subcontractor's claim against contractor).

[119] Columbia Gas Opposition Brief at 16.

[120] Mersino Reply Brief at 11.

[121] *Id.*

> of legal counsel, but only to the extent Subcontractor has been paid by Contract all amounts due under this Agreement.[122]

Mersino further argues that the "no-lien" clause should be unenforceable under the laws of West Virginia (where the project took place), Michigan (where Mersino is incorporated), and Delaware (where Welded is incorporated). Michigan and Delaware law invalidate mechanics' lien waivers,[123] as do other states.[124] And while West Virginia favors freedom of contract, contractual provisions that effect a forfeiture of property rights are disfavored and will be strictly construed.[125]

The parties have not addressed which state law applies to this dispute. This Court has addressed a conflicts-of-law issue in a different adversary proceeding associated with the Welded bankruptcy.

> In the absence of an effective choice of law by the Parties, the Court, under Section 188 [of the Restatement (Second) of Conflict of Laws], must evaluate which state has the most significant relationship to the transaction and to the Contracting Parties by considering the following contacts: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.[126]

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[122] *Id.* n.4 (citing D.I. 24, Ex. 2 at 8).

[123] Mich. Comp. Laws Ann. § 570.1115(1); Del. Code tit. 25, § 2706(b).

[124] N.Y. Lien Law § 34; *see also* 3 Bruner & O'Connor Construction Law § 8:151 (citing *Blount Bros. Corp. v. Lafayette Place Assocs.*, 399 Mass. 632, 506 N.E.2d 499 (1987) (construing Massachusetts statute); *National Glass, Inc. v. J.C. Penney Props., Inc.*, 336 Md. 606, 650 A.2d 246 (1994) (interpreting Maryland's statute)).

[125] *Hutchinson v. Gilles*, No. 18-0644, 2020 WL 598321 at *2 (W. Va. Feb. 7, 2020) (citing *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005)).

[126] *Welded Constr., L.P. v. The Williams Companies, Inc.* (*In re Welded Constr., L.P.*), No. 18-12378, 2020 WL 3048196 at *9 (June 8, 2020).

Although an anti-waiver provision "is a signal that the law in question amounts to a fundamental public policy of the state," that does not suffice to determine which state's laws apply.[127] Here, because the Subcontract does not contain a choice-of-law provision, the Court would use these factors to assess whether Delaware or Michigan (which invalidate lien waivers) or West Virginia (which does not) has the most significant relationship. Because the Court cannot determine this question at this stage, the Court will not dismiss Mersino's intervention as futile because of the "no-lien" clause.

B. Mersino's Failure to Notice and Record against Columbia Gas

Second, Columbia Gas contends that Mersino's intervention would be futile because Mersino failed to provide notice to and record against the property owner of the Project, Columbia Gas. Section 38-2-14 of the West Virginia Code provides:

> The failure of any person claiming a lien under this article to give such notice as is required . . . , or to record 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 . . . operate as a complete discharge of such owner and of such property from all liens for claims and charges of any such . . . subcontractor . . . ."[128]

Section 38-2-9 requires that a subcontractor to both "give to the owner or his or her authorized agent . . . a notice of lien," and "cause to be recorded in the office of the clerk of the county commission of the county wherein the property is situate, a notice of the

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[127] *Id.* at *8.

[128] W. Va. Code § 38-2-14.

lien."[129] Under section 38-2-14, the lien is unenforceable if it is not noticed and recorded. Because the lien was noticed to and recorded against "Transcanada," who was not the property owner, Columbia Gas argues that Mersino did not strictly comply with the statutory requirements and has discharged its lien.[130]

Mersino replies that Columbia Gas had notice of the mechanic's lien. According to Mersino, actual notice to the property owner, even if the documentary notice was not provided, is sufficient to satisfy the statutory requirement.[131] "[D]iscovery in this case will demonstrate that [Columbia Gas], in fact, knew of Mersino's lien, and even reached out to discuss the lien on at least one occasion."[132] Additionally, Mersino contends that Columbia Gas had inquiry notice because multiple liens were filed by other subcontractors and that Columbia Gas got notice now through the motion to intervene.[133]

Mersino also argues that the notice provided satisfied section 38-2-32 of the West Virginia Code. Section 38-2-32 provides that one claiming a lien for work or labor against a corporation does not need to provide notice to the corporation, but instead just needs to record a notice of the lien within 90 days of the work's completion.[134] While the statute

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[129] W. Va. Code § 38-2-9.

[130] Columbia Gas Opposition Brief at 11 (citing *Badger Lumber Co. v. Redd*, 213 W. Va. 453, 456, 583 S.E.2d 76, 79 (2003) (the law insists on strict compliance with statutory requirements for a mechanic's lien)).

[131] Mersino Reply Brief at 15–16 (citing *Dixon v. Am. Indus. Leasing Co.*, 162 W.Va. 832, 837, 253 S.E.2d 150, 155 (1972) ("The only purpose for the requirement of notice is to afford the one served with an opportunity to protect himself should he choose to do so."); *Bailey Lumber v. Gen. Constr. Co.*, 101 W.Va. 567, 569, 133 S.E. 135, 137 (1926) ("[W]here the statute is silent as to the manner of method of giving notice, it is generally sufficient if actual notice has been received by the person affected.")).

[132] Mersino Reply Brief at 15.

[133] *Id.* at 16–17.

[134] W. Va. Code § 38-2-32.

by its terms applies only to a "workman, laborer, or other person" doing business with a corporation, as described in section 38-2-31, Mersino contends that the West Virginia Supreme Court of Appeals in *Southern Erectors* clearly applied it to a standard mechanic's lien situation, and found that notice to the property owner was unnecessary.[135]

Finally, Mersino argues that because "TransCanada, the party named on the lien, was one of the entities and/or tradenames used by [Columbia Gas] in connection with this project," requiring strict compliance would be elevating "form over function."[136] Mersino asserts, and Columbia Gas does not refute, that "TransCanada acquired Columbia Pipeline Group d/b/a Columbia Gas Transmission, LLC in 2016.[137] Mersino argues that it should not be penalized for not tracking Columbia Gas's corporate mergers "to locate its name of the moment."[138]

Mersino's arguments are unpersuasive. Mersino's cases, which permit actual notice in other contexts, are inapposite. *Bailey Lumber* holds that when a statute "prescribes no method of service, it is ordinarily sufficient to show that the party to be noticed actually received the *written* notice."[139] Unwritten actual knowledge of the underlying events does not suffice. And *Dixon* held that actual notice was for termination of a lease, not notice of a lien or service of a legal notice or summons.[140] Section 38-2-9

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[135] *Southern Erectors v. Olga Coal Co.*, 159 W. Va 385, 391–92, 223 S.E.2d 46, 52–53 (1976) (per curiam).

[136] Mersino Reply Brief at 15.

[137] Motion at ¶ 2.

[138] Mersino Reply Brief at 15.

[139] *Bailey Lumber Co.*, 101 W. Va. at 569, 133 S.E. at 137.

[140] *Dixon*, 162 W.Va. at 837, 253 S.E.2d at 155.

requires notice "by any of the methods provided by law for the service of a legal notice or summons,"[141] and under Rule 4(d) of the West Virginia Rules of Civil Procedure, defendant's actual knowledge of the action does not constitute service of process.[142]

And section 38-2-32's relaxed notice requirement does not apply here. *Southern Erectors* clearly stated in its Syllabus that section 38-2-32 applies only when "a mechanic's lien *is claimed under the provisions of [section] 38-2-31* . . . for work or labor performed under a contract with a corporate owner or his authorized agent."[143] This would not apply here, when the subcontractor's mechanic's lien is claimed under section 38-2-9. Finally, strict compliance with statutory lien requirements is required, and the function of these notice requirements is the form through which they are provided to all parties.[144] Because TransCanada was not the property owner at the time, Mersino's notice was invalid.

Even so, the caselaw on futility does not indicate that a motion to intervene should be treated as a motion to dismiss, requiring an in-depth look at the facts and law. Instead, motions are denied for futility when they relitigate issues that have already been decided

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[141] W. Va. Code § 38-2-9.

[142] *See Burkes v. Fas-Chek Food Mart Inc.*, 217 W. Va. 291, 298, 617 S.E.2d 838, 845 (2005) (defendant's actual knowledge supports a finding of "good cause" under Rule 4(k), but doesn't qualify as service).

[143] *Southern Erectors*, 159 W. Va. at 385, 223 S.E.2d at 46 (emphasis added); *see State v. McKinley*, 234 W. Va. 143, 149, 764 S.E.2d 303, 309 (2014) ("[T]he Court itself —not the reporter of decisions or the publisher — drafts the syllabus in a published opinion.")

[144] *Badger Lumber Co.*, 213 W. Va. at 456, 583 S.E.2d at 79.

in that case[145] or present a legal theory that runs counter to well-established law.[146] The disputes here — contract interpretation, waiver, and notice — do not lend themselves to disposal at the intervention stage. A motion to dismiss is the more appropriate stage to address these issues.

Therefore, the Court will not dismiss Mersino's motion to intervene as futile.

IV. Intervention under Section 38-2-34 of the West Virginia Code

Finally, Mersino and Earth Pipeline disagree about the import of section 38-2-34 of the West Virginia Code, which provides:

> [A]n action commenced by any person having a lien shall, for the purpose of preserving the same, inure 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.[147]

Mersino construes this to mean that because the purported liens of Mersino and Earth Pipeline cover some of the same property, Mersino both gets the benefit of the action and can intervene in the action.[148] Earth Pipeline takes the opposite approach, arguing that because the purported liens are not on exactly the same property, the statute actually disallows intervention.[149]

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[145] *See In re Fine Paper Antitrust Litigation*, 695 F.2d at 501 (futile to intervene "to present grounds on appeal which we have already rejected"); *In re Am. White Cross, Inc.*, 269 B.R. at 559 (motion was futile when court had previously found no merit when same arguments were advanced by another party); *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 14-1995, 2019 WL 188431, at *6 (E.D. Pa. Jan. 14, 2019) (intervention was futile when it would "relitigate the settled question" at the core of a decided case).

[146] *See Hauth v. Lobue*, No. Civ. A. 00–166–JJF, 2001 WL 1188216 at *3 (D. Del. Sept. 28, 2001) (intervention futile because "the Court can find no distinction between the facts" of clear controlling precedent "and the facts of the instant case").

[147] W. Va. Code § 38-2-34 (emphasis added).

[148] Mersino Reply Brief at 5.

[149] Earth Pipeline Opposition Brief at 17.

Motions to intervene in federal court are governed by the Federal Rules of Civil Procedure. As such, they fall squarely on the "procedural" side of *Erie*,[150] and West Virginia state law provisions regarding intervention do not apply.[151] The Court concludes that section 38-2-34 of the West Virginia Code has no bearing on this dispute.

CONCLUSION

Mersino does not meet the standard for mandatory intervention under Rule 24(a). Mersino's motion was timely because it was filed at an early stage of the litigation and does not seem to prejudice any of the parties. Mersino has an interest in the property that is the subject of the litigation because its purported lien covers part of the property that is the subject of the dispute. And Earth Pipeline does not adequately represent Mersino, despite both parties' desires to get money from Columbia Gas, because each seeks to recover money for itself. However, Mersino's interest in the property is not threatened by the litigation because regardless of the outcome, Mersino's lien is unaffected, and Mersino's right to payment is too general and indefinite to be sufficiently protectible through intervention. The Court will deny Mersino's motion for mandatory intervention under Rule 24(a).

Although the Columbia Gas-Earth Pipeline and Columbia Gas-Mersino disputes share common issues of law — the interpretation and enforceability of the Subcontract's "no-lien" clause — other factual and legal issues predominate and distinguish the

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[150] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79, 58 S.Ct. 817 (1938).

[151] *See Liberty Mut. Ins. Co.*, 419 F.3d at 229.

disputes. The doctrine of collateral estoppel better serves the interests of judicial economy in this case. The Court will deny Mersino's motion for permissive intervention under Rule 24(b).

Mersino's motion to intervene will not be denied as futile. Columbia Gas and Earth Pipeline currently dispute the interpretation and enforceability of the Subcontract's "no-lien" clause, and issues of notice are more suitable for a later stage of litigation.

Section 38-2-34 of the West Virginia Code is inapplicable in this case under *Erie* because it is a procedural statute, and the Federal Rules of Civil Procedure govern.

Based on the foregoing, the Court will deny Mersino's motion to intervene. An order will be issued.