IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WELDED CONSTRUCTION, L.P., et al., Debtors.	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
EARTH PIPELINE SERVICES, INC., Plaintiff, v. COLUMBIA GAS TRANSMISSION, LLC, Defendant.	Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19-50275 (CSS) (Consolidated)
COLUMBIA GAS TRANSMISSION, LLC, Counter-Claimant, v. EARTH PIPELINE SERVICES, INC., Counter-Defendant.	
WELDED CONSTRUCTION, LP, Plaintiff, v. EARTH PIPELINE SERVICES, INC. Defendant.	Adv. Pro. No. 20-50612 (CSS) (Consolidated)

Columbia Gas Transmission's Reply in Support of its
Motion to Dismiss Earth Pipeline Services, Inc.'s Second Amended Complaint

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The question before the Court is whether EPS's Subcontracts with Welded govern the same subject-matter as EPS's allegedly quasicontractual claims against CGT. The answer to that question is a resounding ***yes***. This conclusion is drawn from the plain and ordinary terms of the Subcontracts, which are unambiguous and indisputably valid. This is corroborated by EPS's admissions in its live Answer to Welded's Complaint—not alternative factual allegations or "prior" pleadings. This is evidenced by EPS's live Proof of Claim, in which EPS swore "under penalty of perjury" that the work for which it seeks a quasicontractual recovery from CGT is part of the "contracted services" EPS "provided" to Welded. And this is conceded in EPS's Response (Dkt. 61), in which EPS admits that

> The change order provisions found in the terms and conditions of the subcontracts between Welded and EPS are typical of the modern-day construction contracts and ***they provide a procedure for the ordering, documenting and approval or disapproval of changes to the original scope of work of the subcontracts.***

Dkt. 61 p. 12 (emphasis added).

In short, either EPS was entitled to additional payment from Welded under the Subcontracts for what it claims was work it performed on Spread 1 of MXP, or it was not. That issue is, by EPS's own admissions, encompassed and governed by the terms of the Subcontracts—and EPS has a breach of contract remedy against Welded for any alleged payment to which it is ultimately entitled. No quasicontractual claims may lie against CGT for that same work.

In its verbose[1] Response, EPS attempts to escape this conclusion by raising irrelevant and incorrect arguments. EPS incorrectly argues:

1. EPS's admissions in its "previous" pleadings cannot be held against it;

[1] In violation of this Court's Local Rule 7007-2(a)(iv), EPS's Response was 39-pages long (nine pages over the page limit). Del. Bankr. L.R. 7007-2(a)(iv). Presumably in order to keep its Response shorter, EPS also changed the size of its block quotes to size 11 font, another violation of this Court's rules. *See* Del. Bankr. L.R. 7007-2(a)(ii). While CGT will leave the Court to enforce its rules how it feels appropriate, CGT addresses each of EPS's arguments herein.

2. EPS may plead quasicontractual claims because of the alternative pleading rule; and

3. The change order provisions of the Subcontracts cannot defeat EPS's claims because Welded disputes that EPS is entitled to those change orders, the change order process failed, and no change order was granted for the work at issue.

All of these arguments fail:

1. The ***Answer*** and ***Proof of Claim*** upon which CGT relies are live, parallel pleadings in these consolidated cases, and not "previous" complaints for relief that have already been amended, or alternative allegations made within EPS's live complaint. Although in a ***complaint***, EPS may allege independent facts that would support alternative claims, the Court should not disregard the admissions in EPS's Answer and Proof of Claim as "alternative" factual allegations—especially because (1) they were not, in fact, made in the alternative, and (2) the statements in the Proof of Claim were made under oath.

2. The alternative pleading rule has no bearing on whether the Subcontracts govern EPS's purportedly quasicontractual work on MXP Spread 1 because EPS does not contest the validity of the Subcontracts. EPS's allegedly quasicontractual work is governed by the plain and ordinary terms of the Subcontracts—and other courts addressing this specific issue have regularly dismissed quasicontractual claims concerning work that is the subject of disputed change orders governed by contractual change order provisions.

3. The fact that Welded disputes its contractual liability under the Subcontracts is a matter for which EPS has an explicit contractual remedy. That EPS was denied change orders by Welded under its Subcontracts does not make its work extra-contractual.

Accordingly, for the reasons set forth in CGT's Motion and this Reply, CGT asks this Court to dismiss EPS's Second Amended Complaint with prejudice.

A. The Court Should Not Consider EPS's Flawed Procedural Arguments

EPS's Response relies on several misunderstandings of civil and bankruptcy procedure:

First, the Court should disregard any new or conflicting averments of fact contained in EPS's Response. "[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Commonwealth of Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) (citation omitted). And the allegations of CGT and Welded in their own pleadings do not matter, as their pleadings are not at issue. *See* Dkt. 51 p. 21 ("Courts do not look at a defendant's answer to a complaint for alleged facts under a motion to dismiss standard . . .").

Second, the Court should disregard EPS's citations to, and reliance on, the West Virginia Rules of Civil Procedure. EPS filed its Second Amended Complaint in this Court; by virtue of the *Erie* doctrine, West Virginia procedural rules on the sufficiency of pleadings have no impact on EPS's pleading burdens. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Third, EPS has waived its right to object to final orders because EPS consented to this Court's jurisdiction by both (1) filing its Proof of Claim that is the subject of these consolidated proceedings (*see Travelers Int'l AG v. Robinson*, 982 F.2d 96, 100 (3d Cir. 1992)) and (2) filing several pleadings without contesting this Court's authority to enter final orders as required by Del. Bankr. L.R. 7008-1 (*see*, *e.g.*, Dkt. 23, Amended Complaint). Fed. R. Bankr. P. 7008 requires the ***complaint*** to contain a statement regarding consent to entry of final orders by the bankruptcy court, and Del. Bankr. L.R. 7008-1 provides that the pleader waives its right to contest the bankruptcy court's authority to enter final orders if such a statement is not included (unless otherwise ordered by the Court). Any reservation of rights in the notice of appearance filed by EPS is irrelevant.

B. The Court may take Judicial Notice of EPS's Live Pleadings.

In arguing that the Court should not take judicial notice of its Proof of Claim and its Answer to Welded's Complaint[2], EPS claims that these are "previous pleadings" that should not be used against it. Dkt. 61 p. 21. This is revisionist history at best: EPS's Proof of Claim and Answer are ***live pleadings*** that are currently asserted in these consolidated cases, and neither contain any alternative admissions (assuming a party could even make an admission in the alternative). For the reasons set forth in CGT's Motion, the Court should take judicial notice of these admissions.

The out-of-circuit and state law cases cited by EPS for the opposite conclusion are inapposite. *Stuart Moldaw Trust*, a decision decided by the Southern District of New York based on a prior version of Federal Rule of Civil Procedure 8(e), discussed alternative allegations made in the ***same pleading***, as opposed to parallel live pleadings. *2004 Stuart Moldaw Tr. v. XE L.I.F.E., LLC*, 642 F. Supp. 2d 226, 240 (S.D.N.Y. 2009), *aff'd*, 374 F. App'x 78 (2d Cir. 2010). Its statements of law were, essentially, recitations of the alternative pleading rule (which CGT discusses at length, *infra*). *See id.* And even *Stuart Moldaw Trust* countenances that "[a] pleader may assert contradictory statements of fact only when in doubt about the facts in question." *Id.* (citation omitted). There is no doubt as to the existence of the Subcontracts here. *Henry* stands for the same principles as *Stuart Moldaw Trust* and can be disregarded for the same reasons. *See Henry v. Daytop Vill., Inc.,* 42 F.3d 89, 94 (2d Cir. 1994). Neither of these cases deal with ***Answers*** or statements made in lien filings and proofs of claim ***under oath***.

Lee and *Khoja*[3]—two Ninth Circuit cases— and *Pillars*[4]—a Second Circuit case—are

[2] Complaint and Objection to Proof of Claim Number 592 Filed by Earth Pipeline Services, Inc., *Welded Construction L.P. v. Earth Pipeline Services, Inc.*, No. 20-50612-CSS (Bankr. D. Del. May 27, 2020), Dkt. 1.
[3] *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018).
[4] *In re Motors Liquidation Co.*, 957 F.3d 357 (2d Cir. 2020).

similarly inapplicable in light of the clear case law in this Circuit: "An answer is a judicial admission, and as such binds the party who makes it, establishes the truth of the admitted fact for the purposes of the instant proceedings, and may 'estop' the party making a contrary argument at trial and on appeal." *Weaver v. Conrail, Inc,* No. CIV.A 09-5592, 2010 WL 2773382, at *8 (E.D. Pa. July 13, 2010) (citing *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 n. 20 (3d Cir. 2006) and *Parilla v. IAP Worldwide Serv., VI, Inc.*, 368 F.3d 269, 275 (3d Cir. 2004)). Statements made in Proofs of Claim are also judicial admissions for the purposes of adversary proceedings relating to the subject matter of those Proofs of Claim. *See* cases cited at Mot. pp. 16-17.

While EPS summarily argues—without support or reasoning—that "the allegations on which CGT seeks to have this Court take judicial notice are allegations pled in the alternative, and are not unequivocal, deliberate, clear or unambiguous," this statement is a patently false characterization. Dkt. 61 p. 24. CGT seeks judicial notice of EPS's ***Answer*** (which contains no alternative admissions) and its ***Proof of Claim*** and ***Mechanic's Lien*** (both of which are verified under oath). If statements of fact made under penalty of perjury are not "unequivocal," nothing is. In short, EPS cannot contest that its purportedly quasicontractual claims relate to work which is subject to and governed by the Subcontracts' provisions.

C. The Alternative Pleading Rule is Irrelevant to Whether the Subcontracts Govern the Subject-Matter of EPS's Quasicontractual Claims, and EPS has not pleaded Independent Facts to Escape the Subcontracts

1. EPS has not Pleaded Independent Facts that Could Support its Quasicontractual Claims

EPS argues that it is allowed to "plead alternative theories of liability in its complaint that are inconsistent with one another." Dkt. 61 p.18. CGT does not take issue with the alternative pleading rule in general, nor does it argue that the alternative pleading rule should be disregarded. The alternative pleading rule is simply irrelevant to CGT's arguments concerning the ***scope and***

subject matter of the Subcontracts. Whether the Subcontracts govern the same subject matter as EPS's quasicontractual claims is an issue of law that can be decided based on the face of the Subcontracts and the allegations made by EPS concerning its work. *See* Mot. pp. 12-15. If, as CGT contends, the Subcontracts' change order and disputes provisions govern the subject matter of EPS's work and whether it is entitled to additional payments, EPS can have no equitable claims.

EPS cannot viably plead an alternative cause of action by merely *ignoring* or *not referencing* the Subcontracts in its quasicontractual causes of action. Here, a viable alternative claim would need to be supported by independent factual allegations that would call into question whether the Subcontracts actually govern the subject matter of the disputed work—for example, allegations that the Subcontracts are forged or fraudulently procured, or that the work was performed on an unrelated pipeline project not covered by the Subcontracts. EPS has made no such allegations here and instead concedes (as it must) that the Subcontracts exist and are valid (Dkt. 55 ¶¶ 8-9), and that they "provide a procedure for the ordering, documenting and approval or disapproval of changes to the original scope of work of the subcontracts" (Dkt. 61 p. 12). EPS cannot amend to make alternative allegations regarding the validity and existence of the Subcontracts in good faith, not least because it has sworn to the existence and validity of the Subcontracts under oath in its Proof of Claim and in its Mechanic's Liens under the ***Subcontractor*** Mechanic's Lien Statute. *See* Proof of Claim #592, *In re Welded*, No. 18-12378-CSS (Bankr. D. Del. Feb. 28, 2019) ("Proof of Claim"); Dkt. 55-4; Dkt. 55-5. Simply put, EPS has not and cannot plausibly allege independent facts that could support the legal viability of its claims in equity.

EPS's cases are inapposite. EPS cites to several cases for the proposition that its claims:

> are commonly pled alternative claims in cases . . . where genuine issues of fact exist as to whether or not services were performed by a subcontractor as part of a contract for one party or whether the services were performed outside of any contractual agreement and for direct the[sic] benefit of a certain other party instead.

See Dkt. 61 p. 25 (citing several cases). But here, there are no issues of fact regarding the existence or the validity of the Subcontract, or the scope of its terms—making EPS's exposition irrelevant. All of the cases EPS brings to the Court's attention involve disputes over the terms or the existence of the contracts at issue—and none of these cases recite West Virginia law.[5]

Here, as discussed in CGT's Motion, and as conceded in EPS's Response, the change order and disputes provisions in the Subcontracts govern EPS's claims for additional payment upon which it seeks quasicontractual recovery. The Court may assess those terms on their face, because there is no dispute over their validity or incorporation into the Subcontracts. Either the change order and disputes provisions govern EPS's claims for additional payment, or they do not. Because they do, CGT requests dismissal of EPS's claims.

2. Courts Throughout the Country Regularly Dismiss Quasicontractual Claims in the Face of Contractual Change Order and Disputes Provisions that Govern Increases and Additions to Scopes of Work

Critically, EPS cites to no cases—in West Virginia or elsewhere—discussing whether a plaintiff is entitled to assert quasi-contractual claims for work in the face of a contractual change

[5] *See Span Constr. & Eng'g, Inc. v. Uwharrie Builders, LLC*, No. 3:18-CV-178, 2019 WL 1574233, at *2 (N.D. W. Va. Jan. 30, 2019) ("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"); *United States ex rel. Asphalt Contractors & Site Work, Inc. v. KAR Contracting, LLC*, No. CIV.A. 3:14-27451, 2015 WL 3651279, at *2-3 (S.D. W. Va. June 11, 2015) (under the Miller Act, a dispute over the contract's terms was sufficient for alternative pleading "in the event that there is no express contract covering the extra services and materials"); *U.S. ex rel. Master Masonry, LLC v. Travelers Cas. and Sur. Co.*, No. 3:16-CV-50, 2016 WL 7156587 (N.D. W. Va. Dec. 7, 2016) (under the Miller Act, and unlike here, there was a dispute over whether "Plaintiff performed work under their subcontract"); *Mancini Enters., Inc. v. American Express Co.*, 236 F.R.D. 695 (S.D. Fla. 2006) (under Florida law, plaintiff was "permitted to plead alternative equitable claims for relief [because] the existence of express contracts between the Parties has yet to be proven"); *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609 (S.D.N.Y. 2003) (under New York law, plaintiffs could assert unjust enrichment claim because they "do not allege that the parties executed a written contract[, a]nd whether the agreement between [two parties] amounted to . . . an oral contract, is a question that cannot be resolved without additional discovery").

order provision and/or a disputes provision that governs the subject-matter of work performed outside of a contract's original scope. As stated by EPS, "there is nothing unique about these particular facts" and the change order provisions at issue. Dkt. 61 p. 34. Indeed, courts considering ***the exact issue*** before this Court regularly hold that, in the face of a change order provision governing work outside an originally-agreed scope of work, a plaintiff ***may not*** bring quasi-contractual claims because the contract governs the subject-matter of that out-of-scope work.

For example, in *J.A. Moore*, the District Court held that, in light of a broad change order provision in a contract, a "plaintiff may not assert a *quantum meruit* theory as an alternative basis for recovery on the written contracts, either as to work described in the contacts[sic] ***or as to work done in addition to what the contracts called for***." *J.A. Moore Constr. Co. v. Sussex Assocs. Ltd. P'ship*, 688 F. Supp. 982, 988 (D. Del. 1988) (emphasis added). Specifically,

> With respect to any contract extras or modifications, not covered by the contracts, the executed contracts provide the mechanism by which such work will be authorized and paid for, *i.e.,* the written change order provisions. Absent any subsequent agreement concerning such additional work, therefore, the change order requirements govern the relationship of the parties. ***A quantum meruit action cannot be the basis of a claim for extras or modifications since a procedure for approval of and compensation for this work is provided for in the written contracts***

Id. at 989 (emphasis added).

Similarly, in *Litton*, Frigitemp argued that Litton interfered with Frigitemp's ability to perform its work, causing delays and disruptions for which Frigitemp sought quantum meruit relief. *Litton Sys., Inc. v Frigitemp Corp.*, 613 F. Supp. 1377, 1384 (S.D. Miss. 1985). The relationship between Frigitemp and Litton was governed by a subcontract with change order, delay, and disruption provisions. *Id.* The Southern District of Mississippi held that "it is clear that such delays and disruptions are covered" by the subcontract, and that,

> Therefore, although the extent of the changes in the work, and the delays and

> disruptions involved therein are highly contested factual issues, resolutions of these issues is not necessary in determining this Motion. It is clear that under Mississippi law, ***Frigitemp is bound by the contractual terms dealing with changes, delays and disruptions, and is not entitled to ignore the contract and sue on quantum meruit.***

Id. (emphasis added).

Additionally, in *Central States*, the Tenth Circuit affirmed a bankruptcy court ruling that "concluded that the parties had not waived the express contractual requirements for change orders and claims, and therefore declined to award [claimant] *quantum meruit* recovery on the disputed change orders" because "an implied-in-fact remedy would conflict with the express provisions of the contract." *In re Cent. States Mech., Inc.*, 556 F. App'x 762, 772 (10th Cir. 2014).[6]

The principles discussed in *J.A. Moore*, *Litton*, and *Central States* bar EPS's quasicontractual recovery—hook, line, and sinker.

3. EPS's Other Cases Provide No Support for its Position

EPS's attempts to distinguish two cases cited by CGT in CGT's Motion to Dismiss EPS's ***First*** Amended Complaint (Dkt. 28)—a motion that this Court has already granted—have no merit.[7] First, EPS's discussion of *HERC* is irrelevant, because, as discussed in CGT's Reply in Support of its Motion to Dismiss EPS's First Amended Complaint, "Judge Bailey never addressed this line of argument" and "CGT never cited *HERC* for the authority that EPS claims it did." Dkt 42 n.4.

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[6] *See also Pa. Elec. Coil, Ltd. v City of Danville,* 329 F. App'x 399, 404 (4th Cir. 2009) (holding that "Virginia law forecloses [plaintiff's] quantum meruit claim" in light of contractual change order procedure that governs additional payment); *Cambridge Strategic Mgmt. Grp., Inc. v IDT Domestic Telecom, Inc.*, C.A. N12C-03-290 CLS, 2013 WL 2480887, at *6-7 (Del. Super. Ct. Apr. 8, 2013) (because the contract contained change order provisions that "provided for certain procedures in the event that the parties made material changes to the scope (including adding a substantive issue), duration, or manner of performance," the "claim for quantum meruit based on the expanded scope cannot survive [defendant's] motion to dismiss").

[7] These arguments appear almost verbatim in EPS's Opposition to CGT's Motion to Dismiss the First Amended Complaint. *See* Dkt. 36 pp. 17-18.

EPS's attempt to distinguish the *Schmid* case also fails. Although CGT did not discuss the *Schmid* decision in its pending Motion, *Schmid*—along with *Worldwide Machinery* and *Ohio Valley* (unaddressed in EPS's Response)—are completely applicable here and support CGT's arguments.[8] These cases stand for the proposition that quasi-contractual causes of action such as unjust enrichment and quantum meruit cannot exist in the face of an express contract governing the same subject matter.

EPS does not appear to disagree with this proposition. Instead, EPS's arguments appear to concern whether it has pleaded independent facts to support quasi-contractual relief, and whether Welded's denial of its change orders bring its quasi-contractual claims outside of the scope of the Subcontracts. For this reason, EPS's diatribe on these cases is unclear. To the extent EPS argues that these cases have no precedential value here, EPS is mistaken.

EPS attempts to distinguish *Schmid* by claiming that "the allegations in the complaint at issue" there "are not the allegations at issue in this lawsuit, nor are the allegations in Counts II and III of Earth Pipeline's second amended complaint in any way 'based in contract.'" Dkt. 61 p. 29. These arguments are the core of EPS's misunderstanding of the law. The Plaintiff in *Schmid* (as well as the plaintiff in *Worldwide Mach.*) worked on the same property as EPS (MXP Spread 1), and their work was governed under virtually identical subcontracts with Welded. Both claimants had their quasi-contractual claims dismissed by U.S.D.J. Johnson in the Northern District of West Virginia (and the *Schmid* dismissal was upheld on a denial of reconsideration by Judge Gross[9]).

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[8] *Schmid Pipeline Constr., Inc. v. Columbia Gas Transmission, LLC*, No. 5:19-cv-00257-JPB, Order for Partial Dismissal (N.D. W. Va., Oct. 21, 2019), *aff'd on mot. for reconsid*., Adv. Pro. No. 19-50886-CSS, Mem. Order (Bankr. D. Del. Dec. 20, 2019) (Hon. Gross, U.S.B.J.); *Worldwide Mach. L.P. v, Columbia Gas Transmission, LLC*, No. 5:19-CV-208, 2019 WL 3558174 (N.D. W. Va. Aug. 5, 2019); *Ohio Valley Health Servs. & Educ. Corp. v. Riley*, 149 F.Supp.3d 709 (N.D.W. Va. 2015).

[9] Instead of addressing Judge Gross's opinion, EPS focuses on a preceding opinion by U.S.D.J.

EPS's other propositions concerning West Virginia law are also incorrect. West Virginia law is clear: "quasi-contract claims, like unjust enrichment or quantum meruit, are unavailable when an express agreement exists because such claims only exist in the absence of agreement." *Ohio Valley*, 149 F. Supp. at 721. *Stand Energy* and *Span* do not stand for the opposite conclusion, and their holdings are irrelevant to the issues here. In *Stand Energy*, the Court did not dismiss quasi-contractual claims because it "ha[d] not determined whether the contracts identified by Plaintiffs applied to the course of dealing alleged." *Stand Energy Corp. v. Columbia Gas Transmission Corp*, 373 F. Supp. 2d 631, 644 (S.D.W. Va. 2005), on reconsideration in part, 521 F. Supp. 2d 537 (S.D.W. Va. 2007), and on reconsideration in part, CV 2:04-0867, 2008 WL 11430046 (S.D.W. Va. Jan. 4, 2008). Here, there can be no dispute that the Subcontracts' change order and disputes provision apply "to the course of dealing alleged" – and EPS admits as such. *Id.*; Dkt. 61 p. 12. And EPS's discussion of *Span Construction* is also irrelevant, because (1) *Span Construction* concerns federal, not West Virginia law, and (2) the holding there depended on a "dispute" over "the terms of the contract." *Span Constr.*, 2019 WL 1574233, at *2-3 ("it appears that the terms of the contract . . . is in dispute").

EPS's citations to other cases purportedly concerning West Virginia law provide it no support. *See* Dkt. 61 pp. 31-32. *Asphalt Contractors* and *Master Masonry* were cases decided under the federal Miller Act—*Asphalt Contractors* dealt with a dispute over the ***existence*** of an express contract governing services and materials, and *Master Masonry* dealt with whether "Plaintiff performed work ***under*** their subcontract." *Asphalt Contractors,* 2015 WL 3651279 at *2-3; *Master Masonry*, 2016 WL 7156587 at *2 (emphasis added). There are no such disputes here. Further, the *Lemartec* decision did not address whether the existence of a contract barred

Bailey in the Northern District of West Virginia.

quasicontractual recovery, and only addressed whether a benefit had been conferred—indeed, the relevant ***defendant*** argued that it "did not contract with" Plaintiff and that "there is no basis for a contract to be implied." *Lemartic Corp. v. Enstorga W. Va., LLC,* No. 3:18-CV-22, 2018 WL 9988269 at *2-3 (N.D. W. Va. Sept. 14, 2018). Here, by contrast, there is no dispute over the existence of the Subcontracts.

D. Welded's Denial of EPS's Change Orders does not bring the Change Orders Outside the Scope of the Subcontracts

EPS incorrectly claims that the Subcontracts' change order provisions "do[] not change the adequacy of Earth Pipeline's claims for unjust enrichment and *quantum meruit* against CGT." Dkt. 61 p. 34. EPS's position is incorrect because, as discussed above, in light of the change order provisions EPS may not assert quasicontractual theories of recovery "as an alternative basis for recovery on the written contracts, either as to work described in the [contracts] ***or as to work done in addition to what the contracts called for***." *J.A. Moore*, 688 F. Supp. at 988 (emphasis added).

EPS first seems to rely on the fact that Welded denied EPS's change order requests:

> Often times that change order process fails, is wrongfully ignored by the contractor and/or the owner, or the contractor and/or owner disputes the change order, and the subcontractor is left with no redress under the subcontract to receive payment for the changed and/or additional work.

Dkt. 61 p. 35. But failure of the change order process or a dispute over entitlement to change orders does not bring the disputed work outside the scope of the subcontract; nor is it true that the subcontractor is left with no redress under the subcontract. First and foremost, if the change order process fails—both in general, and specifically under the Subcontracts at issue—the subcontractor has a remedy sounding in ***breach of contract***. *See* Mot. 12-15. The Subcontracts specifically contain a disputes provision that provides EPS contractual remedies for failure of the change order process, and by its plain terms, this provision governs any wrongful denial or dispute of a change order. Second, if under the Subcontracts, EPS is not entitled to a change order (for example,

because it submitted a change order request late, or the work was already included in the original scope of work), that does not mean its claims no longer sound in contract. The opposite is true: ***it is by virtue of the terms of the Subcontracts that EPS would not be entitled to the change orders.***

Whether a change order denial is proper or improper does not matter: the Subcontract still governs. EPS "is bound by the contractual terms dealing with changes, delays and disruptions, and is not entitled to ignore the contract and sue" CGT on equitable claims. *Litton Sys.*, 613 F. Supp. at 1384. The resolution of "highly contested fact issues" of change order denials "is not necessary in determining this Motion" and dismissing EPS's quasicontractual claims. *Id.; see also J.A.* Moore, 688 F. Supp. at 988.

EPS also asks the Court to consider "financial weakness" of Welded in allowing its claims to survive. Dkt. 61 p. 33. But the solvency of Welded has no bearing on whether the Subcontracts govern the subject-matter of EPS's quasicontractual claims, and EPS's case from Florida is inapposite.[10] General principles of equity do not support EPS's position either—as this Court already held, EPS chose to contractually waive its rights to a mechanic's lien that could have required CGT to pay EPS if EPS were entitled to any additional recovery (which it is not). Dkt. 51 pp. 19-20. EPS cannot now undo its lien waiver by pointing to Welded's insolvency.[11]

EPS then makes a scattershot of arguments concerning (1) CGT's third party beneficiary status, (2) whether the presence of a potential affirmative defense renders a claim for relief invalid, and (3) whether contractual provisions effecting a forfeiture should be strictly construed. *See* Dkt. 61 p. 35. These arguments have no merit because (1) third party beneficiary status is irrelevant in

[10] *Deanna Constr. Co. v. Sarasota Entm't Corp.*, 563 So. 2d 150 (Fla. Dist. Ct. App. 1990) (financial strength or weakness of tenant irrelevant to Court's decision).

[11] Indeed, EPS cannot plausibly expect recovery from CGT when it is entitled to "nothing" from Welded because it liened CGT's property in violation of the Subcontracts. *See* Dkt. 51 pp. 19-20. These liens remain recorded in the real property records in West Virginia to this day.

determining whether the Subcontracts govern the subject-matter of EPS's allegedly quasicontractual claims;[12] (2) the existence of the Subcontracts is not an affirmative defense, but an indisputable fact in the face of which EPS cannot state a legally cognizable claim for relief; and (3) the Subcontracts' change order and disputes provisions do not effect forfeitures or penalties.

EPS further resorts to citing cases involving the interpretation of ambiguous terms and provisions. *See id.* pp. 35-36. These cases are not relevant because there is no ambiguity in the terms of the Subcontracts. That the change order process allegedly "failed" or that EPS's requests were disputed has no bearing on contractual interpretation. *See Blake v. State Farm Mut. Auto. Ins. Co*., 224 W. Va. 317, 324 (2009) (there is no "support for the proposition that conduct creates an ambiguity" because "extrinsic evidence only comes into play after an ambiguity is found").

EPS finally attempts to create a fact issue by stating that "unless the fact finder ultimately determines that the additional work was incorporated into the scope of [work under] the subcontract and CGT paid for such work, the terms of the Subcontract do not control." Dkt. 61 p. 37. This too, is incorrect[13] because there are no issues of fact concerning whether the terms of the Subcontract govern the same subject-matter as EPS's quasicontractual claims. The breadth of the Subcontract's terms may be decided as a legal matter of contractual interpretation. *See generally*, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 490 (1962). Whether CGT paid for the work is irrelevant to the issue of contractual interpretation.[14] *See Blake*, 224 W. Va. at 324.

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[12] *See*, *e.g.*, Dkt. 51 p. 15 ("Thus, even if the Court finds that as a third-party to the Subcontract, Columbia Gas cannot enforce the Subcontract, the Subcontract limits the amount Earth can recover from Columbia Gas to nothing . . ..") (emphasis removed).

[13] If it were true, a project owner or prime contractor would face a quasi-contractual claim every time a request for a change was denied, no matter the basis of denial—effectively rendering the contractual change order process moot.

[14] In an apparent attempt to color this Court's opinion of CGT, EPS repeats *ad nauseum* that EPS did not receive full value for the services it provided on MXP Spread 1. While this issue is not legally or factually relevant to CGT's Motion, this matter will be disproven in the surviving matters

F. Dismissal with Prejudice is Proper

In its Motion, CGT stated that the Court should not entertain a fifth complaint from EPS because of undue delay, futility, and prejudice to CGT. Mot. pp. 22-23. EPS's grumblings about this argument are much ado about nothing. EPS argues that CGT has mischaracterized EPS's prior pleadings because EPS has not "substantively" amended its complaint four times. This argument is incorrect and mischaracterizes both CGT's position and EPS's pleadings. CGT only argued that EPS has had ***four Complaints***, not ***four amendments*** (i.e., five Complaints). More importantly, all of EPS's amendments were substantive in the sense that they either attempted to correct dispositive flaws or introduced brand new causes of action. EPS filed its first amendment to cure a dispositive flaw in its first complaint: EPS had failed to name a necessary and indispensable party—Welded—as a defendant in that complaint. Absent this amendment, CGT would have moved to dismiss EPS's Complaint for want of a necessary party. The remaining amendments were just as substantive.

The number of substantive amendments need not be reached by the Court, however, because amendment to try, yet again, to state a quasi-contractual claim would be futile. EPS cannot in good faith allege new facts that would call the validity of the Subcontract into doubt or vary its terms. EPS was already effectively given another chance to try and plead facts in support of a quasi-contractual claim and failed. EPS should not be entitled to file a fifth Complaint.

CONCLUSION

For the reasons set forth in CGT's Motion and this Reply, CGT respectfully asks this Court to dismiss EPS's Second Amended Complaint and all claims contained therein with prejudice, and requests all other relief to which it is justly entitled.

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between the parties to these consolidated adversary proceedings.

ARCHER & GREINER, P.C.

Date: February 16, 2021

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