UNITED STATES BANKRUPTCY COURT
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.,	Adversary Proceeding Nos.: 19-50274 (CSS)
Plaintiff,	19-50275 (CSS)
v.	(Consolidated)
COLUMBIA GAS TRANSMISSION, LLC,	
Defendant.	
COLUMBIA GAS TRANSMISSION, LLC,	
Counter-Claimant,	
v.	Courtroom 824 Market Street Wilmington, Delaware 19801
EARTH PIPELINE SERVICES, INC.,	
Counter-Defendant.	Thursday, April 29, 2021 10:00 a.m.

TRANSCRIPT OF ZOOM HEARING
BEFORE THE HONORABLE CHRISTOPHER S. SONTCHI
CHIEF BANKRUPTCY JUDGE

Electronically Recorded By: Leslie Murin

Transcription Service: Reliable
1007 N. Orange Street
Wilmington, Delaware 19801
Telephone: (302) 654-8080
E-Mail: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

APPEARANCES:

For Columbia Gas Transmission, LLC:

David W. Carickhoff, Esquire
ARCHER & GREINER, P.C.
300 Delaware Avenue
Suite 1100
Wilmington, Delaware 19801

-and-

Andrew C. Elkhoury, Esquire
MAYER BROWN, LLP
700 Louisiana Street
Suite 3400
Houston, Texas 77002

For Earth Pipeline Services, Inc.:

Stephen A. Venzie, Esquire
COHEN SEGLIAS PALLAS GREENHALL & FURMAN, PC
500 Delaware Avenue
Suite 730
Wilmington, Delaware 19801

INDEX

MOTIONS: PAGE

Agenda
Item 1: Columbia Gas Transmission's Motion to Dismiss Earth Pipeline Services, Inc.'s Second Amended Complaint [D.I. 58; filed on 1/26/2021] 4

Court's Ruling: 32

Transcriptionist's Certificate 33

(Proceedings commenced at 10:00 a.m.)

THE COURT: Good morning, everybody.

COUNSEL: Good morning.

THE COURT: We're obviously here for the oral argument in Earth Pipeline v Columbia Gas, which is Case Number 19-50274, on the motion to dismiss.

I understand the parties have communicated with each other ahead of time. You're going to split the time 50/50. We have no more than three hours. Feel free not to use three hours, but we have no more than three hours, because I have an appointment.

And unless there's -- I'll just turn it over to the parties. So, however you'd like to proceed. I did receive the PowerPoint, so I have that.

MR. CARICKHOFF: Great. And may I please the Court, Your Honor, David Carickhoff of Archer & Greiner, on behalf of the Columbia Gas Transmission. I have at the hearing this morning with me, co-counsel from Mayer Brown, Andrew Elkhoury and Anna Durham. Mr. Elkhoury will be the one that's arguing our motion to dismiss. I don't believe we'll need anywhere near three hours, so that should be good for everybody.

And I believe since it's our motion, we would probably like to take the first shot.

THE COURT: That's fine.

MR. VENZIE: Your Honor, if I could just introduce myself?

THE COURT: Yes.

MR. VENZIE: Stephen Venzie, counsel for Earth Pipeline. I have been practicing construction litigation for 16 years. I haven't had the honor to been in your courtroom in the bankruptcy court, but it's a pleasure to meet you.

On the issue of agreeing to time, Andrew did reach out to me to ask if we wanted to split time. I just said to him, I'm not sure what Your Honor, you know, wanted to inquire about, so it wasn't really necessarily a split-time issue, with just the matter of, you know, having the discussion about the motion. So, certainly, I am the one requesting oral argument because of the importance of the issue, but if the movant wants to begin, then I'm fine with that.

THE COURT: Okay. Well, I think it's appropriate, because they're the movant.

MR. VENZIE: Sure.

THE COURT: And I wish we could be welcoming you in Wilmington in my real courtroom, which is much nicer than this and it's a better experience, but maybe someday soon. We're hoping for the fall. We'll see.

All right. Mr. Elkhoury, you may proceed.

MR. ELKHOURY: Thank you, Your Honor. I will

begin by sharing my PowerPoint presentation.

Is my screen presenting, Your Honor?

(No verbal response)

MR. ELKHOURY: All right. Thank you, Your Honor.

Today, we're here on Columbia Gas Transmission or Columbia Gas or CGT's motion to dismiss Earth Pipeline Services, or EPS' live complaint, which was filed as the second amended complaint.

I'll try and keep the background brief, as Your Honor has already issued a ruling on Columbia Gas' previous motion to dismiss. Columbia Gas is the owner of the MXP pipeline project, located primarily in West Virginia. Construction on MXP began in early 2018. Columbia Gas contracted with the debtor, Welded, to be the general contractor for the construction of spread one of MXP. Welded, in turn, contracted with several subcontractors to perform specific scopes of work. One of those subcontractors is the plaintiff, EPS.

Welded contracted with EPS under two subcontracts in March of 2018. Under those contracts, EPS was to perform hand-filling and mechanical-clearing work on spread one of MXP. Both Columbia Gas and Welded claim that Welded terminated EPS' subcontracts for cause in June of 2018 after certain safety failures and other performance issues, but EPS' termination from the job is not our issue in this

motion.

EPS claims that it was fully compensated by Welded for the work it performed on spread one on MXP. EPS claims that it submitted several invoices for Welded, detailing different work and amounts owed, which Welded rejected.

As you know, Welded filed for bankruptcy on October 22nd, 2018. In the Welded bankruptcy, EPS submitted a proof of claim, number 592, for these purportedly rejected invoices. EPS also filed a notice of mechanic's lien on Columbia Gas' real property interests on MXP and initiated lien litigation against Columbia Gas for those rejected invoices.

Your Honor has already dismissed EPS' lien claim with prejudice and has also dismissed EPS' prior clause and contractual claims against Columbia Gas, but you have allowed EPS to replead clause and contractual claims against Columbia Gas if it could replead them in a (indiscernible). EPS most recently amended its complaint on January 13th of this year, asserting four specific items for which it is entitled compensation. Those four items are on this slide and they are: uncompensated standby time, a steep slope change order, access road delay, and timber removal. Columbia Gas has moved to dismiss all of these plans and all of EPS' clause and contractual claims because they are invalid as a matter of law.

West Virginia governs and the parties don't dispute that. Under West Virginia law, EPS has no clause and contractual rights against Columbia Gas, because its claims are governed by its subcontracts with Welded.

West Virginia law is clear. An implied contract and an express one, governing the identical subject matter cannot exist at the same time. If the latter exists, the former is precluded and the fact that a third party to the express contract benefited, does not change the rule, or phrased another way, quasi-contract claims like unjust enrichment or *quantum meruit* are unavailable when an express agreement exists because such claims only exist in absence of an agreement.

The only question before the Court today is whether there is an agreement that exists that addresses EPS' alleged quasi-contract claims. And the answer to that question is, yes, and we can arrive at that conclusion in two separate and independent ways. First, the terms of EPS' subcontracts with Welded, on their face, cover the same subject matter as EPS' claims against Columbia Gas and, second, EPS has judicially admitted that it has contract claims against Welded for the same work that it's claiming entitlement to compensation for from Columbia Gas.

We'll go through each of these in turn. First, the terms of the subcontracts. Each of EPS' subcontracts are

integrated agreements covering the work that EPS performed for Welded on MXP spread one. Additionally, each of the subcontracts incorporated Exhibit G or (indiscernible) Exhibit G of subcontract terms and conditions. Your Honor has already considered term provisions of Exhibit G in dismissing EPS' lien claims with prejudice back in December of 2020.

One of the easiest ways you can determine if the subcontracts address EPS' claims against Columbia Gas is to see whether EPS can bring the breach of contract claim against Welded for rejecting these same claims and the answer to that question is yes. Exhibit G contains several provisions detailing EPS' contractual rights against Welded. First and foremost, there's a change directive provision and it says that when Welded requires a change in the scope of the work that EPS is to perform, that EPS has to perform the adjusted scope of work with the right to claims adjustment and pricing for compensation for that work. It also says that there's no agreed-upon pricing that EPS will proceed with the work and be compensated on a time and material basis.

So, from the outset, any work that's performed outside of the originally agreed-to scope of work, is either subject to additional compensation or compensation on a time and material basis. On top of that, this provision says that

if there's a dispute regarding the adjustment for the compensation for this extra work, then there's a disputes profession in the subcontract that will govern this dispute.

Second of all, if EPS, on its own, believes it's entitled to additional compensation for work, it can submit its own change order. If Welded rejects the requested change, then EPS has to continue working without the change, and if there's a disagreement on whether the change should be accepted or rejected, again, the disputes provisions governs.

And here we see the broad claims and disputes provision that governs all claims and disputes for matters in question arising out of or relating in any way to the subcontracts. And the disputes provision has several procedures that the parties will have to follow before commencing litigation, including a senior officer meeting and then mandatory mediation.

Now, circling back to EPS' claim against Columbia Gas, in paragraph 47 of the live complaint, for example, EPS claims that an invoice to Welded for all the compensation it now seeks from Columbia Gas and that Welded has contested EPS' entitlement to this compensation.

But all of the subcontract provisions I've just gone through provide a mechanism for EPS to recover for work outside the original scope of work in the subcontracts. It's the disputes and change order provisions that govern EPS'

entitlement to compensation and because a contract exists that governs compensation for this work, EPS cannot have a clause and contractual claim.

If EPS disagrees with Welded's alleged determination that it's not entitled to additional compensation, then it has a contractual remedy against Welded and that contractual remedy cannot coexist with the clause and contractual remedy against Columbia Gas and that's just a matter of West Virginia law.

EPS even agrees that the subcontracts provide a procedure for the ordering and documenting and approval or disapproval of the changes and that inquiry should end here. Here, you see an excerpt from EPS' response to Columbia Gas' live motion to dismiss.

In applying the same exact legal principle under Delaware law, the District Court dismissed similar *quantum meruit* claims in the face of change order provisions. In the J.A. Moore (phonetic) case, the District Court held that a plaintiff may not assert the *quantum meruit* theory as an alternative basis for recovery on written contracts, either as to the work described in the contracts or, importantly, as to work done in addition to what the contracts called for.

There, the plaintiff brought quasi-contract claims and alleged that certain work was performed outside the scope of the original contract. The District Court dismissed those

claims because even though the work was outside the contract's original scope, the subcontract included change order provisions that governed compensation for additional work outside the scope of the originally agreed to contract.

The District Court states that a *quantum meruit* action cannot be the basis for a claim, basis of a claim for extras or modification since the procedure for approval of and compensation for this work is provided for in the written contracts. This is the same factual and legal situation we find ourselves in here.

EPS is suing a quasi-contract for work outside of the original scope of the subcontract. EPS' subcontracts had change order provisions governing compensation for that work. Because the subcontracts govern the allegedly out-of-scope work, a quasi-contract claim for that work cannot exist and so EPS' quasi-contract claims should be dismissed.

The facts that EPS alleges concerning its dispute between itself and Welded do not matter for purposes of this dismissal motion. It is a huge red herring. If Welded and EPS dispute EPS' entitlement to these claims, then the subcontract governs that dispute. EPS has contractual remedies against Welded, if Welded wrongfully denied EPS' claims and because those contractual remedies exist, the quasi-contractual remedy cannot exist.

And, Your Honor, the alternative pleading rule

does not apply here. EPS has brought up the alternative pleading rule in its response to Columbia Gas' motion to dismiss in which it's saying it's entitled to claim breach of contract and quasi-contractual claims in the alternative. But the alternative pleading rule allows EPS to allege inconsistent facts in the alternative and use those facts to support different causes of action.

But EPS has alleged no facts in the alternative or otherwise that let it escape from the fact that the subcontracts have mechanisms that address these claims. EPS has not and cannot challenge the terms of the subcontracts or the authenticity of the subcontracts and so, there are no other alternative allegations that are relevant to the disposition of Columbia Gas' motion.

Your Honor, the second way we can arrive at the conclusion that the subcontracts govern EPS' quasi-contract claims against Columbia Gas is through EPS' own judicial admissions. A judicial admission establishes the truth of the admitted facts and it estops the party making the admission from arguing or from making any other contrary argument and it takes the issue out of contention.

There are three different sources of judicial admissions, which I'll get through, in turn: First, from the proof of claim that EPS submitted; second, in its admissions, in its answer to Welded's complaint against it in a

consolidated adversary proceeding; and, third, in its own notice of mechanic's liens, which is attached to EPS' live complaint, and which is filed in the West Virginia property records for the world to see.

EPS filed its proof of claim under oath in the Welded bankruptcy before it filed for its lien litigation against Columbia Gas. In its proof of claim, EPS claims entitlement to a claim for contractual services provided. As you will see in the next few slides, the invoices attached in EPS' proof of claim are for the same work and for the same amounts of money that EPS is seeking clause and contractual relief, in fact, they're the same invoices that EPS attaches to its live complaint.

The admission that this work was for a contractual service or was a contractual service is a judicial admission that this Court may consider on the motion to dismiss. And if this work was a contractual service, then a quasi-contract claim for that same work should not exist.

So, this slide shows excerpts from the invoices submitted along with EPS' proof of claim. These are all taken from attachments in EPS' proof of claim and the four invoices and amounts that you see here are for the same claims for the same work and for the same dollar amounts, down to the penny, that EPS is seeking quasi-contractual relief from Columbia Gas.

I'll go through the next slides quickly, Your Honor, because they show the same thing. The top excerpt is from the proof of claim and the bottom excerpt is a paragraph from EPS' live complaint showing that the work is for the exact same kind of work, timber removal, for the exact same amount of money. And, again, the invoices not only attach to the proof of claim, but it's also attached to the live complaint, as well.

And you see this for the four different claims that EPS is submitting that it was entitled to compensation for from Columbia Gas. This is the safety stand-down invoice. This is the steep slope invoice.

So, in its proof of claim, because EPS admits to all the work for which it's seeking the relief for is for a contractual service, it can't claim quasi-contract relief against Columbia Gas. The two claims cannot coexist under West Virginia law.

The second source of judicial admissions are from EPS' answer to Welded's live complaint against EPS. Welded has brought an adversary proceeding against EPS within this court and by virtue of the scheduling order issued in May of last year, that adversary proceeding has been consolidated for all purposes with the litigation between Columbia Gas and EPS.

So, in EPS' answer to Welded's complaint, which is

for all intents and purposes, a pleading within this proceeding, EPS admits that it submitted the various invoices we've talked about to Welded and on top of that, it admits that this work is for contractual services provided to Welded on MXP. EPS has admitted this, and to the extent that there's any doubt on the scope of the admission, EPS did not deny any relevant part of paragraph 37 of the Welded complaint and under the Federal Rules, the lack of denial is construed as an admission. And, again, because EPS admits that this work was for contractual services, there can be no quasi-contract claim.

The third kind of admission is from EPS' notice of mechanic's liens. EPS filed a notice of mechanic's liens against Columbia Gas under the West Virginia subcontractor mechanic's liens statute. That only allows the filing of a lien for a work done under and by virtue of a contract -- I'm sorry -- with a general contractor.

The notice of mechanic's lien itself refers to EPS' subcontractor status and, critically, the contents of the lien are signed and sworn to by EPS, are filed in West Virginia for the whole world to be put on notice, and the notices themselves are attached to EPS' complaint. Because this mechanic's lien claim is premised on the existence of a subcontract governing that same work, the filing of the notice of mechanic's lien is essentially an admission that

the work claimed thereunder was performed under the subcontract. And it claims the same exact work under its mechanic's lien that it's claiming against Columbia Gas in the quasi-contract, but if that's the case, then the quasi-contract claims for that work can't exist.

Despite the opportunity Your Honor granted EPS to replead its quasi-contract claims, EPS has not and cannot plead legally viable quasi-contract claims against Columbia Gas for the work it did on MXP. No amount of artful pleading can helpful EPS get around the terms of the subcontracts, which provide the mechanisms for EPS to seek recovery from Welded. And no pleading can get around EPS own judicial admissions that the work for which it claims compensation was for contractual work.

And so, for each of these independent and separate reasons, EPS' remaining claims against Columbia Gas should be dismissed with prejudice. And I'm happy to address any of your questions, Your Honor.

THE COURT: I have no questions. Thank you.

Unshare your screen, please.

MR. ELKHOURY: Yes.

THE COURT: Mr. Venzie?

MR. VENZIE: Yes. Good morning, Your Honor.

Well, I want to say this first and then I'll come back and address some of the slides that Andrew has shared.

I appreciate Andrew's efforts in putting together the slides. I want to object to them to the extent that, you know, they're not evidence, other than the exhibits that he attached, but any comments he's put on there would obviously, should not be construed as evidence.

THE COURT: No, this isn't an evidentiary hearing; it's an oral argument. He's allowed to use demonstratives in oral argument.

MR. VENZIE: I understand. Got it, Your Honor.

What I want to say is, in my 16 years of doing construction litigation, the scenario of unjust enrichment claims and breach of contract claims come up almost all the time. You know, a contractor will come to me and say, you know, I have a claim and here's the components of the claim. I'm owned retainage from the party that I have a direct contract with. I'm owed money on change orders that have been executed and incorporated into the contract, and I'm also owed money on change order requests, which are, I was asked to do work. I went out and I performed that work, because my subcontract requires me to do the work and deal with getting paid for it later. I made that into a change order request and I submitted that to the party that I have a contract with. There was never approval of the change order request, yet I performed the work.

And so this component of change order request of a

claim is very common. And almost every complaint we do, it's that portion of your claim has to be pled as an unjust enrichment claim against the owner, because you performed the work, the owner received the benefit and hasn't paid for it.

And the CORs have been floating out, they're floating out there, all right. They're not tied to anything. But, clearly, they're for work that we performed that somebody has to pay for.

So, these unjust enrichment *quantum meruit* equity claims are pled all the time, because if the fact-finder says that my client's work was not incorporated into the subcontract, the equity allows us to say, well, okay, but we did perform it, it was asked of us, the owner received it and is enjoying the benefit of it, but he never had to pay for it.

And, you know, in my 16 years, I've never had a motion to dismiss an unjust enrichment claim because that principle is so clear. But in saying that, and I want to go back and address some of Andrew's arguments, I'd like to present to Your Honor what I wanted to say today, with respect to this position, the first point obviously being this is a motion to dismiss a second amended complaint, so Your Honor, obviously understands the standard there of accepting all facts as true, construing them in a light most favorable to the plaintiff. Our claim has facial

plausibility if we plead the facts that allow you to draw a reasonable inference that the defendant is liable.

So, that's the standard route. We're not at a motion for summary judgment. The question is, has our second amended complaint, you know, adequately made a claim here of unjust enrichment and *quantum meruit* against the owner such that the case should move forward and we should now start getting a fact-finder to determine these issues on the merits.

The second point I want to make, excuse me, Your Honor, is the second amended complaint that we drafted, it cured the deficiencies that Your Honor had mentioned in your December 1st, 2020, opinion. You had mentioned that repeating and realleging the existence of a subcontract as to Counts 2 and 3 brought in the subcontract and ultimately defeats the unjust enrichment claims.

That point was also made by Judge Gross in the Schmid Pipeline, where he pointed out that Schmid had made an allegation in paragraphs 6 and 7 of the existence of a subcontract and had incorporated that throughout the complaint. And even in Schmid, they had said that in the subheading that these facts are common to all counts and, Judge Gross said that he agreed with Judge Bailey from the Northern District that that defeated the unjust enrichment claims. And Your Honor was alluding to that, as well, in

your December 1st opinion.

The second amended complaint has cured that deficiency. The first, I believe, 1 through 6 or 1 through 5, were incorporated into Counts 2 and 3, but everything else is not incorporated and that's the way it should be. We have background facts and then when we get to Counts 2 and 3, we plead independent facts about how this worked. It was outside the scope of the subcontract, ordered by Columbia Gas, and they received it and they have not paid for it. So, our second amended complaint curious that deficiency.

Another deficiency that you mentioned was, you know, independently supporting the alternative claims with independent facts. We argue we've done that, as well, in our paragraphs 38 to 54 and our paragraphs 62 and 64 through 67. We specifically point out how the four change order requests were ordered by, upon information and belief, were ordered by Columbia Gas to Welded, and we also -- the amount of claims in Counts 2 and 3 are less than the amounts of the claims that we had against Welded, because we've only carved out the change order requests, as it should be.

Another -- the last deficiency I saw that you mentioned in your opinion, Your Honor, was that we didn't have factual allegations that the work in question was disputed by Welded. That also is cured in the second amended

complaint, paragraph 47, paragraphs 66 and 67. We point out that Welded has disputed this work as being included in their contract and they say it's extra.

So, I believe, like I said, Judge Bailey in the Schmid Pipeline decision and Judge Gross on reaffirmation, agreed with Your Honor that this incorporating by reference can be fatal and we've cured that. So, I think Your Honor can deny Columbia Gas' motion and it would be in compliance with what Judge Gross has already said and what Judge Bailey has said.

The next point I want to make, Your Honor, is that if the curing of these deficiencies was not enough to convince Your Honor, I would like to say that we strongly believe that the cases we've cited, Spann (phonetic), Master Masonry (phonetic), and Lamar Tech (phonetic), which are all Northern District of West Virginia cases, and even the ATRC (phonetic) case, which was Judge Bailey, which I believe was the same project are directly on point to the situation here, because in those cases, Spann, Master Masonry, and Lamar Tech, the Court allowed the unjust enrichment claims to go forward for the subcontractor. Those cases' facts were directly on point because you had a subcontractor suing an owner. That's the situation here.

And I can talk in more detail about these cases if you want, and I will, but I want to point out the differences

in the cases cited by Andrew. The Rosenbaum v (indiscernible) case that he mentioned and the Ohio Valley and the J.A. Moore, none of those cases were the situation of a subcontractor versus an owner. Those cases involved -- Rosenbaum was a subcontractor going after a GC. Ohio Valley was not a construction case. It involved a plaintiff that was, I think an employee benefit plan who was going after the party they had an administrative contract with. So, again, one contracted party against another contracted party. The J.A. Moore case, which aisle point out is not West Virginia law -- that's Delaware -- and the Whitton case, which is a Mississippi case, that -- Whitton was a contractor and a subcontractor and J.A. Moore was a GC going against an owner.

And so, this idea that you can't have an implied contract with an express contract in the cases cited by Andrew would make sense because you have the contracted parties going against the contracted parties. So, the law should be, well, if you have an express contract witness/Defendant, you can't also have an implied contract.

That's not our situation. Our situation is the situation in Spann and Master Masonry and Lamar Tech, that it's a sub going against an owner. And I guess I will go through those cases for you. In Spann, the Court said that there was a question of fact that existed as to whether the owner had fully compensated the general contractor and

whether the general contractor had failed to pay its subs or whether the owner had never paid for the additional work at all.

So, you know, whether a payment had been tendered by the owner for the work was what was in dispute and the Court denied a motion to dismiss and let the sub proceed with unjust enrichment.

In Master Masonry, the Court said that an alternative pleading is allowed until it's determined whether the work was within or outside the scope of the subcontract. And in that case, the Court even expressly discussed and rejected Rosenbaum and Ohio Valley, by saying that those cases don't apply where the general contractor denies that the work was performed within the scope of the subcontract and Welded has denied that these CORs are part of the subcontract. That places them outside of the subcontract.

In Lamar Tech, the Court allowed the sub's claims for unjust enrichment to move forward, because it recognized that the owner had clearly received the benefit of Lamar Tech's work but had not paid.

So, again, going to the fixing the deficiencies that both, Your Honor and Judge Gross were concerned about, and in addition to the West Virginia cases I've cited being directly on point, I believe Your Honor should rule in our favor.

Now, to address Andrew's slideshow I'd just like to say that these issues of judicial admissions and subcontract terms, you know, they're clouding the issue, because (indiscernible) basically trying to do is say that the facts have already been found. That's not what's going to happen in this case. The case needs to move forward so a fact-finder can determine whether the work was performed under the subcontract and incorporated into the subcontract.

If they decide that it was not, well, then, Earth needs to have the opportunity to make a claim for unjust enrichment that it was ordered by Columbia Gas and we performed it and they didn't pay for it. This idea that we billed Welded via invoices for the change order work is what always happens. Earth is not allowed to send an invoice to Columbia Gas. That would be a breach of the subcontract. They're not allowed to communicate with Columbia Gas in such a matter. They can't not submit a claim for the work they've performed because then they'll have no way to prove or say that they ever made a claim for it.

So, what always happens is you send the invoice to the general contractor and base it off record, but if the fact-finder determines that well, the general contractor doesn't owe that money, well, then the owner does. So, this idea of the procedures of invoicing and change orders are just that. There's a way that we request the money. What is

issue in this case is, who is going to pay the money?

Another point to make here, Your Honor, is that as you said in your December 1st opinion, Columbia Gas is not a third-party beneficiary to the contract and they're not entitled to assert subcontract clauses or language as a defense. The defense to the unjust enrichment claim should be that either they didn't order the work or they didn't appreciate the benefit of it or they did, but they paid for it already and for whatever reason, Welded hasn't paid the money down to us.

But their defense isn't, well, there's change order provisions. The defense is, we paid for it or it wasn't extra work. Go read the scope of your subcontract. It's all in there. There was never extra. Those are the defenses.

So, in sum, on that issue, I'll just say that the slides of judicial, so-called judicial admissions are not judicial admissions; they're Earth's claims. Earth is claiming that Welded owes it the money. If a fact-finder decides that Welded doesn't owe all that money, well, then Earth has the right to claim it against the owner, because they did the work. Somebody has to pay for it.

And I believe the idea of focusing on a subcontract clause as a judicial admission is simply an attempt to redirect Your Honor from the problem here that

Columbia Gas has ultimately taken, which is that they asked for it, they received it, and they appreciated over $3.1 million of our work and what we believe they have not paid for.

So, it's really an attempt to avoid the potential liability here and equity, which is why these unjust enrichment claims are always in these cases, doesn't allow that to happen. So, we believe we've plausibly stated alternative unjust enrichment claims here in compliance with West Virginia law, clear West Virginia law that is not criticized, and the case now needs to move forward on the merits so that we can get determinations of these key factual issues.

THE COURT: Okay. Thank you, Mr. Venzie.

Reply, Mr. Elkhoury?

MR. ELKHOURY: Yes, Your Honor.

I'd like to first address the cases that were just addressed by Mr. Venzie, and I'd briefly like to share maybe two of my slides, again, as I discuss, if that's okay with you, Your Honor?

So, the first case that I'd like to discuss, which I think is very on point is the Rosenbaum case. Mr. Venzie characterized the Rosenbaum case as a case of a subcontractor against a general contractor, but that characterization isn't accurate. To paint you a picture of what was happening in

Rosenbaum, there was an owner that had a general contractor on the project. The general contractor hired a subcontractor. That subcontractor defaulted on the project and was kicked off, so the subcontractor's surety steps in.

The surety, then, hired another subcontractor to finish that subcontractor's scope of work. Then, unfortunately, the surety went under, became insolvent, and couldn't pay the new subcontractor for the work that it performed. So, the new subcontractor sued the general contractor for *quantum meruit* claims. But the new subcontractor's only contractual relationship was with the surety. It had no contract with the general contractor at all, and even there, the court in West Virginia said that the quasi-contract claim against the general contractor cannot exist because the subcontractor's contract with the surety covered the same subject matter of the work.

And it didn't matter that the surety couldn't pay it anymore. It didn't matter that general contractor got the benefit of the new subcontractor fulfilling the old subcontractor's scope of work. The existence of a contract governing the same work meant that no quasi-contract claim against any party could exist for that same work.

So, although, it's not technically an owner versus a subcontractor case, it's still a case where somebody brings a *quantum meruit* claim against a third party to the direct

contract, but that direct contract's existence in and of itself barred the existence of the quasi-contract claim.

MR. VENZIE: Your Honor, can I offer rebuttal on that?

THE COURT: Absolutely not. This is oral argument. You had your shot.

MR. VENZIE: No, I --

THE COURT: No. No.

MR. ELKHOURY: And, Your Honor, while the other cases are not exactly subcontractor versus owner cases, I believe there's a very good reason for that under the law on governing legal principles and that's because most of the time when subcontractors need to go after the owner, they have lien claims under relevant state laws.

Here, EPS has waived its own lien claim as you've already found and that's why it can't pursue recovery. In the other cases that Mr. Venzie referred to like Spann, Master Masonry, and Lamar Tech, there was an actual dispute over the existence of the subcontract and its terms.

We don't have that here. There's no dispute regarding the terms and conditions of the sought contracts or what they govern. There's only a dispute over, you know, whether Welded needs to pay EPS for some of its work. And so, all of these cases are extremely distinguishable because it's not even clear that a subcontract exists.

The Spann Construction case, and I'm reading from the case directly, says 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.

And there was a dispute there and later on in that very case it said it happens that the terms of the contract are in dispute.

The same thing happened in Master Masonry. Master Masonry was a case under federal Miller Act and Master Masonry held that the quasi-contract claims can exist when there's a dispute over whether the work performed had any relation to the subcontract at all.

The Lamar Tech case had a similar issue and the Lamar Tech did not address whether the existence of a contract or a quasi-contractual recovery. The dispute this was about whether a benefit had been conferred to the party who had a quasi-contract claim asserted against it to begin with. The relevant defendant there argued that it did not contract with the plaintiff and that there was no basis for a contract to be implied.

And so, none of these cases hit on the issue here and the issue here is whether the scope of the subcontracts in their disputes provisions govern the same subject matter that EPS is claiming here. And, Your Honor, every single

case that we found discussing the breadth of change order provisions in the face of quasi-contract claims has found that those provisions governed the claims work, and so a quasi-contract claim cannot exist.

In our briefing, we've cited case law from Delaware, from Mississippi, from Virginia, from Iowa, Tenth Circuit, Fourth Circuit. I mean, this is the majority rule everywhere, and when courts discuss the situation with respect to change order clauses, they find the exact same thing that we're asking the Court to find here.

Additionally, the issue of whether Columbia Gas is a third-party or can assert the subcontract's terms of the third-party beneficiary, that's not an issue here. Your Honor can look at the terms of the subcontracts and see whether they govern the claims with or without Columbia Gas being a third-party beneficiary.

And, frankly, Your Honor the issue of whether Columbia Gas appreciated, asked for, and received the work is not at issue here. If this case proceeds with Earth's claims and even if it doesn't proceed with Earth's claims, Columbia Gas will establish that what Earth is contending isn't correct. But it's just not relevant for the issue in front of Your Honor right now. Thank you.

THE COURT: You're welcome. Thank you.

All right. Thank you very much for the argument.

The Court will take the matter under advisement and issue a decision as quickly as potential. I've got a bit of a backlog, to be perfectly honest, so I'll get to it as quickly as I can. Thank you all very much.

We're adjourned.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 10:47 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

/s/ William J. Garling March 11, 2020

William J. Garling, CET**D-543

Certified Court Transcriptionist

For Reliable