

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

| | | |
|---------------------------------|---|------------------------------|
| In re: |) | |
| |) | |
| |) | Chapter 11 |
| WELDED CONSTRUCTION, L.P. et al |) | |
| |) | Case No. 18-12378 (CSS) |
| Debtors. |) | |
| |) | (Jointly Administered) |
| _____ |) | |
| |) | |
| MERSINO DEWATERING, INC., |) | |
| d/b/a Global Pump |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Adv. Pro. No. 20-_____ (CSS) |
| |) | |
| COLUMBIA GAS TRANSMISSION, |) | |
| LLC, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMPLAINT FOR ENFORCEMENT OF MECHANIC'S LIEN

Mersino Dewatering, Inc. d/b/a Global Pump ("Mersino"), by and through its attorneys, Butzel Long PC and Bayard, P.A., for its Complaint for Enforcement of Mechanic's Lien, states as follows:

PARTIES, JURISDICTION, AND VENUE

1. Mersino is a duly organized and existing Michigan corporation that has its principal place of business located at 10162 E. Coldwater Road, Davison, MI 48423 and that conducts business in the State of West Virginia, in particular, the County of Marshall in the State of West Virginia.

2. Upon information and belief, TC Energy Corporation ("TC Energy") f/k/a TransCanada Corporation ("TransCanada") is, upon information and belief, a duly organized and



existing Canadian corporation that has its principal place of business located at 450 – 1 Street SW Calgary, AB Canada, T2P 5H1 and that conducts business in the State of West Virginia, in particular, the County of Marshall in the State of West Virginia. TC Energy and/or TransCanada acquired Columbia Pipeline Group (“Columbia Pipeline”) d/b/a Columbia Gas Transmission, LLC (“Columbia Gas”) in 2016. Upon information and belief, TC Energy, TransCanada, Columbia Pipeline, and/or Columbia Gas (TC Energy, TransCanada, Columbia Pipeline, and/or Columbia Gas shall hereinafter be referred to collectively as the “Owner”) own the project commonly known as the Mountaineer Xpress Pipeline Project (the “Project”) and/or the real property consisting of approximately 99,500 linear feet of pipeline right-of-away and related work areas and access roads spanning the County of Marshall and the County of Wetzel in the State of West Virginia (the “Property”). Upon information and belief, the physical address or staging yard for the Project and/or the Property is 1591 Wheeling Avenue, Glen Dale, WV 26038, which is legally described as:

Property located at the municipal address of WHEELING AVE GLEN DALE, WV 26038, GLEN DALE, WV 26038. In the county of MARSHALL. APN 06-9-00020000. Briefly described as 3.39 A BETWEEN B&O RR CO. Municipality / Township of GLENDALE CORP. Township/Range/Section. Legal Lot = Book/Page.

3. The legal description of the Project is approximate 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.

4. The work performed by Mersino was temporary pumping services for a creek diversion as part of the project. Mersino delivered and operated equipment, provided pumping services and ultimately demobilized equipment upon completion of its services.

5. Mersino's services were performed at Mile 7.1 on the pipeline, in Marshall County, West Virginia.

6. Mersino is aware of the following additional lienholders against the Pipeline, at least some of whom have liens including the area around Milepost 7.1 where Mersino provided services:

- Welded Construction, L.P. – 26933 Eckel Road, Perrysburg, OH 43551
- Earth Pipeline Services, Inc. – 135 Technology Drive, Suite 400, Canonsburg, PA 15317
- Bayou City Equipment LLC – 14500 E. Hardy Road, Houston, TX 77039
- CADD Enterprises, L.L.C.

7. Jurisdiction is proper in this Court as a proceeding related to Welded's bankruptcy under 28 U.S.C. §1334(b).

8. Venue is proper in this Court under 28 U.S.C. §1409(a).

9. Mersino previously sought to intervene in Case No. 19-50275, Earth Pipeline Services, Inc. v. Columbia Gas Transmission. Mersino's Motion for Mandatory or Permissive Intervention was denied by Order dated July 31, 2020, for the reasons set forth in an Opinion of the same date (the Order and Opinion are attached as **Exhibits "A" and "B"**, respectively).

10. The Order and Opinion denied intervention, but affirmed Mersino's ability to bring this independent action.

COUNT I
ENFORCEMENT OF MECHANIC'S LIEN

11. Upon information and belief, the Owner and Welded Construction, L.P. ("Welded") entered into a contract in 2018 pursuant to which Welded would furnish certain work, services, labor, materials, supplies, equipment, and/or machinery to the Project and/or for certain improvements to the Property.

12. Welded and Mersino entered into a subcontract in 2018 pursuant to which Mersino would furnish certain work, services, labor, materials, supplies, equipment, and/or machinery to the Project and/or for certain improvements to the Property (the “Subcontract”). A true and accurate copy of the Subcontract is attached hereto as **Exhibit “C”** and is, by reference, incorporated herein and made part hereof.

13. Pursuant to the Subcontract, Mersino furnished work, services, labor, materials, supplies, equipment, and/or machinery to the Project and/or for the improvements to the Property. Specifically, Mersino provided services related to the temporary diversion of Fish Creek at Milepost 7.1 of the Pipeline.

14. Mersino’s first date of furnishing work, services, labor, materials, supplies, equipment, and/or machinery to the Project and/or for the improvements to the Property was August 19, 2018.

15. Mersino’s last date of furnishing work, services, labor, materials, supplies, equipment, and/or machinery to the Project and/or for the improvements to the Property was October 3, 2018.

16. On December 11, 2018, Mersino properly and timely recorded a Notice of Mechanic’s Lien for \$330,670.00 with the Clerk of the County Commission of the County of Marshall of the State of West Virginia at Instrument 1448713 (Book 0011, Page 0626) for the work, services, labor, materials, supplies, equipment, and/or machinery that it furnished to the Project and/or for the improvements to the Property (the “Lien”). A true and accurate copy of the Lien is attached hereto as **Exhibit “D”** and is, by reference, incorporated herein and made part hereof.

17. Mersino performed all of the steps prescribed by W. Va. Code § 38-2-1 et seq. (i.e. West Virginia Mechanic's Lien Statute) to perfect the Lien, and therefore, has a valid and enforceable mechanic's lien against the Project and/or the Property.

18. In the Opinion, this Court held that Mersino's description of the property subject to the Lien was adequate, and that Mersino's enforcement of the lien was timely. The Court did not decide, and left open issues related to the propriety of notice given by Mersino and its Lien.

19. To date, Mersino is owed \$330,670.00 for the work, services, labor, materials, supplies, equipment, and/or machinery that it furnished to the Project and/or for the improvements to the Property.

20. Mersino will file a Notice of Lis Pendens (the "Lis Pendens") with the Clerk of the County Commission of the County of Marshall of the State of West Virginia as soon as possible after it files this Complaint. A true and accurate copy of the form of the Lis Pendens is attached hereto as **Exhibit E** and is, by reference, incorporated herein and made part hereof.

WHEREFORE, Mersino respectfully requests that this Court grant the following relief:

- a. Declare that Mersino has a valid and enforceable mechanic's lien against the Property;
- b. Declare that the value of the Lien is \$330,670.00;
- c. Determine the priority of all parties claiming an interest in the Property or a lien against the Property;
- d. Establish the statutory proceedings required for the sale of the Property and order the sale of the Property and the payment of the proceeds from the sale of the Property to satisfy the Lien and all fees and costs provided by law that are owed to Mersino.
- e. Grant any further relief to Mersino that this Court deems appropriate under the circumstances.

Respectfully Submitted,

BAYARD, P.A.

/s/ Gregory J. Flasser

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August 13, 2020

EXHIBIT A

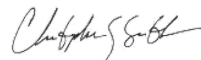
(Order Denying Motion to Intervene)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|-------------------------------|
| In re |) | Chapter 11 |
| |) | Case No. 18-12378 (CSS) |
| WELDED CONSTRUCTION, L.P. <i>et al.</i> , |) | |
| |) | (Jointly Administered) |
| |) | |
| Debtors. |) | |
| |) | |
| <hr/> 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, |) | (Consolidated) |
| L.P., |) | |
| |) | Adv. Docket No.: 22 |
| Defendant. |) | |
| <hr/> COLUMBIA GAS TRANSMISSION, |) | |
| LLC, |) | |
| Counter-claimant, |) | |
| v. |) | |
| |) | |
| EARTH PIPELINE SERVICES, INC, |) | |
| |) | |
| <hr/> Counter-defendant. |) | |

ORDER

For the reasons set forth in the Court's Opinion dated July 31, 2020, Intervenor Mersino Dewatering's Motion to Intervene and Brief in Support of Motion for Intervention [Adv. Docket No.: 22] filed on May 14, 2020, is DENIED.



Christopher S. Sontchi
Chief United States Bankruptcy Judge

Date: July 31, 2020

EXHIBIT B

(Opinion Denying Motion to Intervene)

IN THE UNITED STATES BANKRUPTCY COURT
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| In re |) | Chapter 11 |
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| EARTH PIPELINE SERVICES, INC. |) | |
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| COLUMBIA GAS TRANSMISSION, |) | |
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| |) | |
| Defendant. |) | |
| <hr/> | | |
| COLUMBIA GAS TRANSMISSION, |) | |
| LLC, |) | |
| Counter-claimant, |) | |
| v. |) | |
| |) | |
| EARTH PIPELINE SERVICES, INC, |) | |
| |) | |
| Counter-defendant. |) | |

OPINION¹

ARCHER & GREINER, P.C.

David W. Carickhoff
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-and-

MAYER BROWN LLP

Charles S. Kelley
Andrew C. Elkhoury

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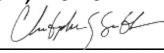
Counsel for Earth Pipeline Services, Inc.

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

700 Louisiana Street
Suite 3400
Houston, TX 77002

Counsel for Columbia Gas
Transmission, LLC

Dated: July 31, 2020

Sontchi, C.J. 

INTRODUCTION²

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.

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 Dismiss¹⁰, to which Earth Pipeline filed a Response¹¹ 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

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

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

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:

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

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

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

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

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

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

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

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*

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.

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.

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).

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

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

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.

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

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

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

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

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

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

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

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

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

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 case¹⁴⁵ 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

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

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.

EXHIBIT C

(Subcontract)



CONSTRUCTION SUBCONTRACT

Subcontract Number: **2018-01-15**

Subcontractor: Mersino
Address: 10162 East Coldwater Road
Davison, MI 48423
Contact: Marco Mersino
marco@mersino.com
810-658-3472 cell: 386-566-3356

Work Locations: Marshall and Wetzel Counties, WV

Yard Address: 1307 Wheeling Avenue, Glen Dale, WV 26038

This subcontract is effective as of the 16th day of August 2018, by and between **Welded Construction, L.P.**, a Delaware Limited Partnership (CONTRACTOR) and the above-named SUBCONTRACTOR (the "Parties"). The Parties hereby agree that all Work specified below shall be performed by the SUBCONTRACTOR understanding that CONTRACTOR is committed to safety, health and the protection of the environment as core values reflected in all aspects of its operations. SUBCONTRACTOR shall perform all activities in accordance with these principles and all provisions of this Subcontract Agreement that consists of this Subcontract Agreement, the following documents and the attachments, appendices, drawings, specifications, documents and exhibits specified therein and hereby incorporated herein (Subcontract):

Subcontract Form of Agreement

Exhibit "A" – Labor and Equipment Rates – Extra Work
Exhibit "B" – Administrative Forms
Exhibit "C" – Insurance Requirements
Exhibit "D" – Additional Insured
Exhibit "E" – Baseline Schedule
Exhibit "F" – Subcontractor Proposal
Exhibit "G" – General Terms & Conditions
Exhibit "H" – Safety Requirements
Exhibit "I" – Columbia Pipeline Group Environmental Construction Standards – West Virginia; Rev. Feb. 2018
Exhibit "J" – Columbia Pipeline Group Pipeline Construction Standard CS.220.001 (6/21/2016)
Exhibit "K" – Minimum Requirements for Pipeline Construction In Close Proximity To High Voltage A.C. Overhead Electric Power Lines (Procedure No. 70.002.055)
Exhibit "L" – Steep Slope Procedures (Welded and TransCanada)
Exhibit "M" – MXP Spread 1 Construction Stipulations.as of 3-30-18 (Line List)

A. **WORK TO BE PERFORMED (Work):** Except as specified elsewhere in the subcontract, SUBCONTRACTOR shall furnish all project; union labor; materials; tools; supplies; equipment; transportation (other than stipulated in this article); supervision; technical, professional and other services; and shall perform all operations necessary and required to satisfactorily perform the following:

- Subcontractor will provide temporary pumping services for the creek diversion for Fish Creek on the Mountaineer Express Pipe project.
- MERSINO will supply the contractor a bypass pumping system capable of delivering approximate flows up to 55,000 gpm. Each pump will pull from the river upstream of the temporary dam and open discharge back into the river downstream. Pumps will be set into the river and will be required to discharge up a bank then parallel to the river 250 LF and back down the bank into the river.

- The bypass pumping system will consist of multiple hydraulic submersible pumps to deliver the required flows of 55,000 gpm. This will be accomplished by utilizing 4 – 18" hydraulic submersibles each capable of 9,000 gpm, and 1 – 24" hydraulic submersible capable of 21,000 gpm. Mersino has also included pricing to supply and install two temporary Hydro-Dam (8' Tall X50' Long) to dam flows from in front and behind of the excavation area. Hydro-dam shall be able to bulkhead up to 6' maximum height.
- Mersino will provide an installation crew to fuse the HDPE discharge piping, set and plumb pumps for this pumping system. Additionally, upon completion of the bypass pumping portion of the project Mersino will provide a teardown crew to deconstruct the pumping system so that it may be loaded on trucks for demobilization. Should project delays occur due to weather conditions pumping equipment shall be provided at stand-by rates, however installation/ removal and pump watch rates shall remain the same.

SUBCONTRACTOR will be responsible for the following work:

- Assistance with the development of standard submittals required of the contractor by the engineer for the bypass pumping on the project
- Delivery of the bypass pumping equipment to Welded lay down yard
- Operators required for the installation of the bypass pumping system
- Fusion machine for installation
- Equipment required for the operation of the bypass pumping, including the pumps, power packs, discharge piping, isolation valves, spill containment berms, etc.
- Blocking/ bulkheading of the creek to provide sufficient submergence for the pumps
- 24 Hour pump watch as required
- Preventative maintenance of the pumps for duration of project (checking of levels, oil changes, etc.) – Will be provided if pump watch option is chosen
- Operators required for the breakdown and removal of the bypass pumping system upon completion
- Demobilization of equipment upon completion

CONTRACTOR will be responsible for the following:

- The return of this rental agreement signed by an authorized representative of the Contractor, along with a letter of Commencement' or a copy of the performance bond
- All applicable sales and use taxes
- Delivery of equipment from Welded yard to the site
- All fuel and fueling operations required for the bypass pumping systems
- Loaders, excavators and operators to assist in placement/ removal of pumps to/from the creek and placement/removal of the temporary dam
- Clearing of boulders and other debris from the temporary dam placement area to ensure good seal
- Unrestricted access to the jobsite for installation/ removal purposes
- Any and all permits required
- Assistance in unloading/loading of equipment on trucks
- All site restoration required as a result of the use of the pumping equipment
Subcontractor shall perform the work in accordance with Columbia Gas Pipeline Construction Specifications CS.220.001 (Effective 6/21/16).
- Subcontractor shall be solely responsible, and shall reimburse Contractor if necessary, for any expenses incurred to relocate or replace any protected property corners, line monuments, survey markers, or government benchmarks that have been damaged or destroyed by Subcontractor, its agents, or employees.
- Subcontractor shall police the ROW to remove and dispose of all construction related trash and debris in a manner acceptable to inspection.
- Subcontractor shall furnish and require all employees to wear and visibly display identification badges at all times while they are on the job and they relate to the project. Photos are not required; however, each worker must be able to provide a photo style identification upon Company request.
- Subcontractor shall provide and maintain a written plan, approved by CONTRACTOR, identifying their DOT Operator Qualification program that meets the requirements of 49 CFR, Part 192,

subpart N. Subcontractor shall use only qualified employees to perform covered tasks and will immediately provide Contractor with documentation of any modifications that are made in their written plan or their employees qualification to perform covered tasks.

- Company will provide an on-site inspection team. Members of this team will have a stop-work authority, and will be responsible for insuring Contractor/Subcontractor compliance on the project.
- Subcontractor shall comply with all OSHA Standards and all applicable State and Local Laws and Regulations.
- In the event Company/Contractor identifies any property corners or line monuments, or government benchmarks that are to be protected. Subcontractor shall reimburse contractor for any expenses incurred by Contractor in relocating or replacing same which have been damaged or destroyed by Subcontractor, its agents, or employees.
- Care should be taken to avoid spills and other types of pollution while work is being performed in streams and other bodies of water and in their immediate drainage areas.
- Where navigable rivers or other streams under the jurisdiction of any governmental agency are crossed, construction shall conform to any code, specifications or special requirement of such agencies.
- Project requires hard hats in compliance with ANSIZ89.1 type II with side impact protection.
- Subcontractor shall provide daily reports to Contractor by 10 am for the previous day's work.
- Subcontractor shall attend progress meetings as required throughout the term of this agreement.

See attached Exhibit F Subcontractor's proposal dated Friday 13th day of July 2018 for pricing.

The Work is a portion of the goods and services to be provided by CONTRACTOR to Columbia Gas Transmission, I.L.C (OWNER) for **Spread 1 of the Mountaineer Express Pipeline Project in Marshall and Wetzel Counties in West Virginia.**

- B. **SCHEDULE:** The Work shall be performed in accordance with the dates set forth in the Exhibit "E".

In accordance with Exhibit E- Subcontractor will operate ten (10) hours a day six (6) days a week, any overtime hours worked must be approved by the Contractor's Project Superintendent and Project Manager.

- C. **COMPENSATION:** As full consideration for the satisfactory performance by SUBCONTRACTOR of this subcontract, CONTRACTOR shall pay to SUBCONTRACTOR compensation in accordance with the prices set forth in Exhibits "A", "F" and with the payment provisions of this subcontract (Exhibit G).
The estimated value of this subcontract is: **\$298,380.00, (Two-hundred, ninety-eight thousand, three hundred, eighty and 00.00)**

Payment terms NET 30 days after approved invoice
Retainage – 0%

Exhibit F – Subcontractor Proposal is attached as reference for clarifications and assumptions of the work to be performed.

This subcontract embodies the entire agreement between CONTRACTOR and SUBCONTRACTOR and supersedes all other writings. The parties shall not be bound by or be liable for any statement, representation, promise, inducement or understanding not set forth herein.

CONTRACTOR:

Welded Construction, L.P.

SUBCONTRACTOR:

Mersino Dewatering, Inc.

Authorized
Signature:



Authorized
Signature:



Print Name: Mett S. Carroll

Print Name: Gino Mersino

Print Title: Project Manager

Print Title: President

38-3267850

(Federal Tax Payer I.D. Number)

SUBCONTRACT CHANGE ORDER

Mountain Xpress Pipeline Project



Subcontractor: Mersino Dewatering, Inc.

Change Order No.: 2018-01-15-CO-001 Rev 1

Address: 10162 East Coldwater Road
Davison, MI 48423

Subcontract No.: 2018-01-15 – MXP

Representative: Marco Mersino (810) 658-3472

Effective Date: 13 November 2018

Email: Marco@mersino.cocm

Issued by: Marcus Beckford

Change Scope: ☒ In Scope ☐ Out of Scope

DESCRIPTION OF CHANGES

1.0 SUBCONTRACTOR REQUESTED CHANGES (SRC) 001

This change order is being done to increase value and closeout subcontract in accordance proposed pricing and approved invoicing. A revision to the subcontract proposal was issued on 8 August 2018 to include the supply and installation of two temporary Hydro-Dams (8-foot-tall x 150-foot-long) to dam flows from in front and behind the excavation area. The Hydro-Dam shall be able to bulkhead up to 6' maximum height.

The subcontractor was responsible for the following: (1) Assistance with the development of standard submittals required of the contractor by the engineer for the bypass pumping on the project. (2) Delivery of the bypass pumping equipment to Welded laydown yard. (3) Operators required for the installation of the bypass pumping system. (4) Fusion machine for installation. (5) Equipment required for the operation of the bypass pumping, including the pumps, power packs, discharge piping, isolation valves, spill containment berms, etc. (6) blocking / bulkheading of the creek to provide sufficient submergence for the pumps. (7) 24-hour pump watch as required. (8) Preventative maintenance of the pumps for duration of project (checking of levels, oil changes, etc.) – will be provided if pump watch is chosen. (9) Operators required for the breakdown and removal of the bypass pumping system upon completion. (10) Demobilization of equipment upon completion.

The invoiced amounts are as follows:

| | |
|--------------------------------|---|
| Mobilization / Demobilization: | \$28,250 |
| Daily Installation Rate: | \$119,400 (the day rate that was estimated was 10 days x \$9,950 = \$99,500. It took 12 days to complete the scope of work 12 days x \$9,950 = \$119,400) |
| Bypass Pumping System | \$159,450 (the minimum rental was one month) |
| Pump Watch mobilization | \$3,600 (Time and Material \$1,800 x 2 = \$3,600) |
| Day Pump Watch | \$2,400 (Time and Material \$1,200 x 2 = \$2,400 for 8 hours) |
| OT Day Pump Watch | \$960 (Time and material \$120/hr (2 x 4 hrs = 8 hrs) |
| Night Pump Watch | \$2,400 (Time and Material \$1,200 x 2 = \$2,400 for 8 hours) |
| OT Night Pump Watch | \$960 (Time and material \$120/hr (2 x 4 hrs = 8 hrs) |
| Truck Pay | \$500 (Time and material \$125/day (4 x \$125 = \$500) |
| Tear Down Crew | \$12,750 (the day rate that was estimated was 6 days x \$4,250 = \$25,500. It took 3 days to complete the scope of work 3 days x \$4,250 = \$12,750) |
| TOTAL: | \$330,670 |
| Invoiced amount: | \$330,670 |
| Subcontract Estimated Value | \$298,380 |
| Increase | \$32,290 |

| Mersino (new) | | Temporary Pumping Services (new) | | | | | |
|---------------|--------------|----------------------------------|--|---------------|----------------|----------------|---------------|
| Date Received | Invoice Date | Invoice # | Description | Gross Invoice | Retainage Rate | Retainage Rate | Net |
| 09/12/18 | 08/31/18 | 61162 | Mobilization / Day Installation | 133,525.00 | 0% | \$ - | \$ 133,525.00 |
| 09/30/18 | 09/30/18 | 62134 | Equipment and labor @ Fish Creek Pump Around | 197,145.00 | 0% | \$ - | \$ 197,145.00 |
| | | | | 330,670.00 | | \$ - | \$ 330,670.00 |

ATTACHMENTS/REFERENCES: This Change Order includes the following supporting documents:

- Contractor Proposal to be used as SCHEDULE A, Pricing, Schedule and Rates for this CO-001

CONTRACT PRICE SUMMARY -

| | | |
|--|------------|---------------------|
| Original Contract Value: | USD | \$298,380.00 |
| Value of previously approved Changes: | USD | \$.00 |
| Value of this Change Order: (Total amount is estimated for 23 Days) | USD | \$32,290.00 |
| New Contract Value: | USD | \$330,670.00 |

WORK SCHEDULE SUMMARY -

| | |
|------------------------------------|------------|
| Estimated Impact to Schedule: | TBD |
| Previously Accepted Days: | TBD |
| Total Days Schedule Impact: | TBD |

► The price adjustment and time extension (if any) granted under this Change Order constitute payment in full for the Work covered by this Change Order, including, without limitation, all direct costs, indirect costs, overhead costs, general and administrative expenses, profit, and all effects (direct, indirect, and consequential, including impacts and ripple effects) of the Work covered by this Change Order on all Contract Work, whether or not changed by this Change Order.

► The Completion Date, Subcontract Price, and all other terms, covenants and conditions of the above-referenced Subcontract, except as duly modified by this and previous Change Orders and Amendments, if any, remain in full force and effect.

► Subcontractor acknowledges that Contractor, by authorizing this Change Order, does not waive or modify any contractual rights or responsibilities unless such waiver or modification is expressly set forth in this Change Order.

APPROVALSContractor: **Welded Construction, LP**Subcontractor: **Mersino Dewatering, Inc.**Authorized
Signature:

Name: Marcus Hood

Title: Sr. Projects Manager - MXP

Authorized
Signature:

Name:

Title:

CFO

Reviewed By:

| | | | |
|--------------|---------------------|----------------------|-----------------|
| AUTHOR MB | CONTRACTS MGR MB | PROJ. CONTROLS SS | PROJ. MGR MH |
|--------------|---------------------|----------------------|-----------------|

Exhibit B-2: Subcontractor Requested ChangeSUBCONTRACT NO. 2018-01-15SUBCONTRACTOR REQUESTED CHANGE NO. 1CORRESPONDENCE NO. 1

Additional Pages attached to this request: _____

Total No. of Pages 1**COMMITMENT SECTION**1591 Wheeling Ave. Glen Dale, WV Mountaineer Xpress Pipeline10/1/181

PROJECT LOCATION

DATE

COMPANY WORK
ORDER NO.Mersino Dewatering, Inc.10162 E. Coldwater Rd. Davison, MI 48423

SUBCONTRACTOR

ADDRESS

Contractor is hereby notified that the following circumstances have arisen that Sub-Contractor believes entitles it to request a change:

Reference to Contract Sections associated with this requested change:

Reference to Drawings associated with or impacted by this requested change (as required):

Detailed Description of the Change: Pump Watch was not included in original subcontract amount. Due to site constraints our estimated quantities for install are higher.

Project Scope of Work:

☐ Unchanged☐ Reduced☐ Increased

Cost Proposal Basis:

☐ Lump Sum☐ Unit Cost☐ Time and Material

Estimated Value of Change

\$32,290.00

Estimated Impact to Schedule

Calendar Days (Enter # of Days)

NOTE: By executing this Change Order Request, Subcontractor acknowledges that all cost and schedule impacts have been expressly identified. No further adjustments for this Work shall be made.

Sub-Contractor's Representative:

Stacy Simon
AUTHORIZED REPRESENTATIVE10/1/18
DATE

Remarks:

Welded Approval:

Date:

The Subcontractor is responsible to complete this form in its entirety and provide associated backup as noted above in this request and / or provide additional backup required to substantiate the change order request.

All T&M/Unit Cost changes will require timesheets for Welded Project Manager (or designee) approval.

Signed authorization by a Welded representative is required to commence Work noted in this Change Request.

Subcontractor acknowledges that Contractor, by authorizing this change request, does not waive or modify any contractual rights or responsibilities unless such waiver or modification is expressly set forth in this change request.

EXHIBIT D

(Lien)

STACY SEIMS
10162 EAST COLD WATER RD
DAVISON MI 48423-9598

BOOK 0011 PAGE 0626

**PREPARED BY, RECORDING
REQUESTED BY AND RETURN TO:**

Khalid Mohammed
Mersino Dewatering, Inc.
10162 E. Coldwater Rd.
Davison, MI 48423

Marshall County
Jan Pest, Clerk
Instrument 1448713
12/11/2018 @ 01:15:41 PM
MECHANICS LIEN
Book 11 @ Page 626
Pages Recorded 1
Recording Cost \$ 11.00

**SUBCONTRACTOR'S NOTICE OF MECHANIC'S LIEN
West Virginia § Code 38-2-9**

TO: TransCanada
54 Seclusion Crescent, Brampton, ON ON L6R 1 L

You will please take notice that the undersigned, Mersino Dewatering, Inc., 10162 E. Coldwater Rd., Davison, MI 48423, Phone: (810) 658-3472, Fax: (810) 653-7828, was and is subcontractor with Welded Construction, 26933 ECKEL RD, PERRYSBURG, OH 43551-1215, who was and is general contractor for the furnishing of materials and doing of the work and labor, necessary to the completion of Dewatering/Pumping Services and/or equipment rentals on that certain building Mountaineer Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26038 in the County of Marshall, owned by you and situated on lot number of block number as shown on the official map of and that the contract price and value of said work and materials is \$330,670.00 . You are further notified that the undersigned has not been paid therefor (or has been paid only \$0.00 thereof) and that he claims and will claim a lien upon your interest in the said lot (or tract) of land and upon the buildings, structures and improvements thereon to secure the payment of \$330,670.00.

Dated December 7, 2018 for Mersino Dewatering, Inc., 10162 E. Coldwater Rd., Davison, MI 48423, Phone: (810) 658-3472, Fax: (810) 653-7828.

By: Khalid Mohammed Khalid Mohammed, Credit Manager

AFFIDAVIT

State of Michigan)
) §
County of Macomb)

Khalid Mohammed, Credit Manager for Mersino Dewatering, Inc. being first duly sworn, upon his oath says that the statements in the foregoing notice of mechanic's lien contained are true, as he verily believes.

Given under my hand this 7th day of December 2018 before me, Jeremy White, NOTARY PUBLIC:

Signature Jeremy J. White
My Commission Expires: 04/16/2023

JEREMY J WHITE
Notary Public, State of Michigan
County Of Macomb
My Commission Expires 04-16-2023
Acting in the County of Lapeer



STATE OF WEST VIRGINIA, MARSHALL COUNTY, SCT.:

I, JAN PEST, Clerk of the County Commission of said County, do hereby certify that the annexed writing, bearing date on the 7th day of December 2018, was presented for and by me, admitted to record in my office upon the above certificate as to the parties therein named this 11th day of December 2018 at 1:15 o'clock P.M.

TESTE: Jan Pest Clerk

~~RECEIVED~~ 12/11/2018 01:15:41 PM

Jan Pest, Clerk

12/11/2018 @ 01:15:41 PM

Receipt 201800008518

Paid By MERSINO DEWATERING INC

| | | |
|-----------|----|-------|
| Total Due | \$ | 11.00 |
|-----------|----|-------|

| | | |
|-------|----|-------|
| Check | \$ | 11.00 |
|-------|----|-------|

| | | |
|----------------|----|-------|
| Total Received | \$ | 11.00 |
|----------------|----|-------|

List of Checks

| | | |
|-------|----|-------|
| 19066 | \$ | 11.00 |
|-------|----|-------|

Marshall County

Jan Pest, Clerk

Instrument 1448713

12/11/2018 @ 01:15:41 PM

MECHANICS LIEN

Book 11 @ Page 626

Pages Recorded 1

MERSINO DEWATERING INC

WELDING CONSTRUCTION

TRANSCANADA

| | | |
|-----------|----|------|
| Recording | \$ | 5.00 |
|-----------|----|------|

| | | |
|------------------|----|-----|
| Additional Pages | \$ | .00 |
|------------------|----|-----|

| | | |
|--------------|----|-----|
| County SB592 | \$ | .10 |
|--------------|----|-----|

| | | |
|-------------|----|-----|
| State SB592 | \$ | .90 |
|-------------|----|-----|

| | | |
|-----------------|----|------|
| Farm Land HB622 | \$ | 2.50 |
|-----------------|----|------|

| | | |
|----------------|----|------|
| Heritage HB622 | \$ | 2.50 |
|----------------|----|------|

| | | |
|------------------|----|-------|
| Instrument Total | \$ | 11.00 |
|------------------|----|-------|

EXHIBIT E

(Lis Pendens)

NOTICE OF LIS PENDENS

Notice is hereby given that Mersino Dewatering, Inc. d/b/a Global Pump (“Mersino”) has filed a Complaint entitled Mersino Dewatering, Inc. d/b/a Global Pump v. Columbia Gas Transmission, LLC, Adversary Proceeding Number 20-_____ (CSS) in the bankruptcy case entitled *In re Welded Construction, L.P. et al.* and bearing Case No. 18-12378 pending in the United States Bankruptcy Court for the District of Delaware for the enforcement of a mechanic’s lien recorded by Mersino with the Clerk of the County Commission of the County of Marshall in the State of West Virginia at Instrument 1448713 (Book 0011, Page 0626) on December 11, 2018 against real property related to the Mountaineer Xpress Pipeline (the “Pipeline”) which is: (i) comprised of approximately 99,500 linear feet of pipeline right-of-way and related work areas and access roads spanning the County of Marshall and the County of Wetzel in the State of West Virginia; (ii) owned by TC Energy Corporation, TransCanada Corporation, Columbia Pipeline Group, and/or Columbia Gas Transmission, LLC; (iii) the staging area for the Pipeline is property commonly referenced as 1591 Wheeling Avenue, Glen Dale, WV 26038; and (iv) the staging area is legally described as:

Property located at the municipal address of WHEELING AVE GLEN DALE, WV 26038, GLEN DALE, WV 26038. In the county of MARSHALL. APN 06-9-00020000. Briefly described as 3.39 A BETWEEN B&O RR CO. Municipality / Township of GLENDALE CORP. Township/Range/Section. Legal Lot = Book/Page.

For further information, the services provided by Mersino were at the intersection of the Pipeline and Fish Creek at approximately Milepost 7.1 of the Pipeline.

BUTZEL LONG, a professional corporation

By: _____
Max J. Newman
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(248) 258-1616
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Attorneys for Mersino Dewatering, Inc.
d/b/a Global Pump

The foregoing instrument was acknowledged before me this ____ day of _____, 2020, by Max J. Newman, as attorney for Mersino Dewatering, Inc. d/b/a Global Pump, on behalf of the company, who appeared before me and who is personally known to me or has produced sufficient evidence that he is the individual described in and who executed the foregoing instrument.

_____, Notary Public
_____, County, Michigan
Acting in _____ County
My commission expires: _____

PREPARED BY AND RETURN TO:

Max J. Newman
Stoneridge West Building
41000 Woodward Avenue
Bloomfield Hills, MI 48304