IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re WELDED CONSTRUCTION, L.P., *et al.*,[1] Debtor.	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
MERSINO DEWATERING, INC. Plaintiff, v. COLUMBIA GAS TRANSMISSION, LLC, Defendant.	Adv. Proc. No. 20-50812 (CSS)

DEFENDANT COLUMBIA GAS TRANSMISSION, LLC'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: Welded Construction, L.P. (5008) and Welded Construction Michigan, LLC (9830). The mailing address for each of the Debtors is P.O. Box 470, Perrysburg, OH 43552-0470.

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Defendant Columbia Gas Transmission, LLC ("CGT") moves this Court to dismiss Plaintiff Mersino Dewatering, Inc.'s ("Mersino") Complaint for Enforcement of Mechanic's Lien ("Complaint") and all claims therein pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6), made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. In support thereof, CGT shows the following:

Having failed to intervene in a separate lien lawsuit proceeding against CGT in this Court, Mersino now brings a lawsuit that is roughly a year and half late. Mersino is undeterred by this Court's previous determination that Mersino's notice of its lien was invalid, and presses on in an attempt to extract a payment from CGT. This tactic is meritless. This lawsuit must be dismissed for a host of separate and independent reasons: (1) Mersino did not timely provide notice of its purported lien to CGT; (2) Mersino did not timely file a lien lawsuit; and (3) Mersino waived its lien rights in its subcontract with Welded Construction, L.P. ("Welded"). Even if Mersino could proceed—which it cannot—Mersino may not proceed without joining Welded as a defendant under Federal Rule of Civil Procedure 19(a), made applicable to this proceeding by Rule 7019 of the Federal Rules of Bankruptcy Procedure.

I. NATURE AND STAGE OF THE PROCEEDING

On October 22, 2018, Welded and Welded Construction Michigan, LLC, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Compl. at Ex. B at 3.

A. Mersino's First Bite at the Apple

On March 8, 2019, Earth Pipeline Services, Inc. ("EPS") filed two identical complaints against CGT and Welded in state court in West Virginia, seeking to enforce a mechanic's lien against CGT. *Id*. at Ex. B at 4. In May 2020, after EPS's lawsuit was removed and transferred to this Court, Mersino moved to intervene in the EPS lawsuit. CGT opposed Mersino's intervention, arguing that Mersino had not established a basis to intervene under Federal Rule of Civil Procedure

24. CGT also argued that Mersino's Motion to Intervene should be denied because intervention would be futile: (1) Mersino failed to provide timely notice of its purported lien to CGT, and (2) Mersino waived its lien rights under its subcontract with Welded.

On July 31, 2020, this Court denied Mersino's motion to intervene, finding that Mersino did not meet the standard for intervention set by Federal Rule of Civil Procedure 24. Compl. at Exs. A, B (Sontchi, J.). In so doing, this Court also addressed CGT's futility arguments.

With respect to CGT's argument regarding failure of notice, the Court stated that "Mersino's arguments are unpersuasive" and "[u]nwritten actual knowledge of underlying events does not suffice." Compl. at Ex. B at p. 29. Additionally, the Court stated that "section 38-2-32's relaxed notice requirement does not apply here" because "the subcontractor's mechanic's lien is claimed under section 38-2-9." *Id.* at 30. "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. Because TransCanada was not the property owner at the time, ***Mersino's notice was invalid***." *Id.* (emphasis added) (citing several sources). The Court did not address the fact that Mersino did not even appear to give notice to TransCanada. Ultimately, the Court did not rule that the Mersino's failure to give notice was sufficient to dismiss Mersino's motion to intervene on futility grounds because "the caselaw on futility does not indicate that a motion to intervene should be treated as a motion to dismiss . . . . A motion to dismiss is the more appropriate stage to address these issues." *Id.* at pp. 30-31.

With respect to CGT's lien-waiver argument, the Court did not decide the issue because "[t]he parties have not addressed which state law applies to this dispute." Compl. at Ex. B at p. 26. In so noting, the Court stated that it would use the factors contained in the Restatement (Second) of Conflict of Laws to decide whether the lien waiver in the Subcontract is enforceable.

Id. at pp. 26-27. "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." *Id.* at 27.

B. Mersino's Second Bite at the Apple

Completely disregarding the Court's warnings regarding its invalid notice, Mersino filed the present adversary proceeding on August 13, 2020. Soon thereafter, Mersino and CGT agreed to an extended answering and briefing deadline in exchange for CGT's waiver of service of process. This Motion to Dismiss follows.

II. FACTUAL BACKGROUND

Welded, a general contractor hired by CGT to construct Spread 1 of the Mountaineer Xpress Pipeline Project ("MXP"), hired Mersino as a subcontractor in early 2018. Compl. at ¶12. Mersino attaches a copy of its subcontract with Welded as Exhibit C to its Complaint (the "Subcontract"). Compl. at Ex. C. Mersino was to provide temporary pumping services for a creek diversion as part of the MXP Project. Compl. at ¶13. This subcontracted work is the subject of Mersino's mechanic lien claim.

A. Mersino did not Provide Notice of its Lien to CGT.

Mersino alleges that its last day of work on MXP was October 3, 2018, and that it recorded a Notice of Mechanic's Lien (the "Notice") for $330,670 on December 11, 2018. Compl. at ¶16. Under W. Va. Code 38-2-9, Mersino had "one hundred days after the completion of [its] subcontract" to "give to the owner or his or her ***authorized agent***, by any of the methods provided by law for the service of a legal notice or summons, a notice of line . . ." (emphasis added). According to Mersino's own allegations, notice to CGT was due 100 days after October 3, 2018, i.e., January 11, 2019. *See* Compl. at ¶16. In its Complaint, Mersino makes no factual allegations regarding notice provided to CGT. Instead, it merely recites that it "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 [MXP]." *Id.* ¶17. Mersino's silence regarding notice is significant, not least because this Court has already stated that Mersino's notice was invalid. Compl. at Ex. B at p. 30.

Even if Mersino alleged any facts concerning its attempts to provide notice of its lien to CGT, its failure to actually provide notice is twofold. First, as is evidenced on the face of the Notice, Mersino addressed the Notice (and attempted to send the Notice) to "TransCanada," as opposed to CGT—but TransCanada is not the actual owner of MXP and the real property interests associated with MXP. *See* Compl. at Ex D. Second, Mersino sent the Notice to the address of "54 Seclusion Crescent, Brampton, ON L6R 1L," which CGT has never used for any purpose. *Id.*; *See* Ex. 1, Decl. of A. Flores at ¶4. Nor is CGT's West Virginia registered agent for service of process located in Brampton, Ontario, Canada. *Id.* Indeed, we are not aware of any affiliation between this address and any entity under the TC Energy (formerly TransCanada) trade name. *See id.* at ¶¶ 4, 7. Instead, based on an internet search, the address belongs to a residential property in Brampton, Ontario, Canada. *Id.* at ¶8.

B. Mersino's Adversary Proceeding is Late.

The statutory time limit to file an action to enforce a lien is six months under W. Va. Code § 38-2-34. Mersino filed the present adversary proceeding on August 13, 2020, nearly two years after it alleges it completed its work on MXP.

C. Mersino waived its right to any purported Lien on MXP.[2]

As part of its lien claim, Mersino alleges that it is owed, and seeks recovery of $330,670

[2] CGT raises a virtually identical argument in the pending motion to dismiss in the EPS matter, and a ruling in the EPS matter may have precedential value here.

for its work on MXP. Compl. at ¶20(b). However, Mersino's Subcontract contains a clear and unequivocal no-lien clause that waives Mersino's rights to file and recover on any liens against CGT's property interests by, among other things, requiring Mersino to release and discharge any such lien at its own cost and expense:

> 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.

Ex B, Subcontract at Ex. G, General Terms and Conditions pp. 7-8 (the "No-Lien Clause").[3] The Subcontract also states that Mersino shall be liable to CGT for "any and all Claims incurred by or suffered by" CGT or its property to the extent caused by Mersino's non-compliance with "any term or provision" of the Subcontract, which necessarily includes breaches of the No-Lien Clause. *See id.* at p. 8.

The No-Lien Clause clearly prohibits Mersino, as the subcontractor, from maintaining a lien action against CGT, as the Company/Owner. One cannot maintain an action to enforce a lien that it has contractually agreed to release (i.e., waive). Despite the No-Lien Clause, on December 11, 2018, Mersino recorded its Notice. Compl. at Ex. D. Mersino then sued to enforce the purported lien. By failing to release or obtain a release of these liens, and then going so far as to

[3] While Mersino attaches the Subcontract to its Complaint, it does not attach the Subcontract's exhibits. A true and correct copy of Subcontract Exhibit G, General Terms and Conditions, is attached to this motion as **Exhibit 2.**

initiate this adversary proceeding against CGT to enforce the very purported lien that it agreed to release, Mersino violated the No-Lien Clause of its Subcontract. But more fundamentally, because the No-Lien Clause acts as a lien waiver by mandating the release of any lien filed by Mersino, the purported lien upon which Mersino files this adversary proceeding is unenforceable and must be released by Mersino.

The Subcontract also states 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." Ex. 2, Subcontract Ex. G at p. 8. Because Mersino filed a lien on MXP, it is not entitled to any payment from Welded.

III. SUMMARY OF ARGUMENT

Mersino fails to state a legally cognizable claim against CGT because (1) Mersino failed to provide proper notice under W. Va. Code § 38-2-9, (2) Mersino did not file its lawsuit within six months as required under W. Va. Code § 38-2-34, (3) Mersino waived any right to maintain and enforce a mechanic's lien against CGT's property interests under the No-Liens Clause of the Subcontract, and (4) Mersino must name Welded as a defendant in this proceeding if its claim is able to proceed.

(1) This Court has already stated that Mersino's attempted notice is invalid, and has rejected Mersino's arguments on this topic. Under W. Va. Code § 38-2-14, Mersino had 100 days from the completion of its work in which to provide notice of its purported mechanic lien. At best, Mersino, attempted to notice TransCanada, not CGT, at an address unassociated with either TransCanada or CGT.

(2) Mersino had six months after the completion of the work in October 2018 to file suit to enforce its lien. Mersino waited until August 2020 to file this adversary proceeding, far past the statutory deadline in W. Va. Code § 38-2-34.

(3) Mersino waived any purported mechanic's lien it may have had on MXP pursuant to the No-Lien Clause of its Subcontract with Welded. Separately and independently, Mersino has not suffered any injury because it is not entitled to payment from Welded—the general contractor—so long as a lien exists on CGT's property.

(4) Welded is a necessary and indispensable party to this dispute. If Mersino is able to proceed on its lien claim, which it cannot, Mersino must name Welded as a defendant in this matter.

IV. ARGUMENT

A. Legal Standard.

"A complaint may be dismissed under Rule 12(b)(6) for 'failure to state a claim upon which relief can be granted.'" *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016); Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Under the pleading regime established by *Twombly* and *Iqbal*, a court reviewing the sufficiency of a complaint must . . . 'tak[e] note of the elements [the] plaintiff must plead to state a claim.'" *Connelly*, 809 F.3d at 786 (quoting *Iqbal*, 556 U.S. at 675). "[A] pleading offering only 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

"In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). If the plaintiff's "exhibits contradict [its] own allegations in the complaint, the exhibits control." *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 112 (3d Cir.

2018); *see also Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) ("When an exhibit incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss."); *Sierra Invs., LLC v. SHC, Inc.*, 329 B.R. 438, 442 (Bankr. D. Del. 2005) ("if the allegations of [the] complaint are contradicted by documents made a part thereof, the document controls and the Court need not accept as true the allegations of the complaint.").

A contractual lien waiver defeats a mechanics' lien claim on a motion to dismiss for failure to state a claim. *See, e.g., Nw. Constr. Servs., L.P. v. Seraph Apartments, L.P.*, No. 6:08-CV-335, 2011 WL 13196507, at *5 (E.D. Tex. July 12, 2011); *see also Richardson Eng'g Co. v. Int'l Bus. Machines Corp.*, 554 F. Supp. 467, 471 (D. Vt. 1981) (dismissing lien claim but converting 12(b)(6) motion to summary judgment because Court considered extrinsic documents outside the pleading and contract), *aff'd*, 697 F.2d 296 (2d Cir. 1982).

Because CGT also challenges Mersino's standing to bring suit under West Virginia's lien laws, Rule 12(b)(1) may apply. However, "[i]n reviewing a facial challenge under Rule 12(b)(1), the standards relevant to Rule 12(b)(6) apply." *Univar, Inc. v. Geisenberger*, 409 F. Supp. 3d 273, 279 (D. Del. 2019); *see also Willekes v. Serengeti Trading Co.*, 783 F. App'x 179, 183 (3d Cir. 2019) (applying Rule 12(b)(6) standard to a Rule 12(b)(1) motion to dismiss). The court may consider "documents integral to or explicitly relied upon in the complaint" and may consider "exhibits to a motion to dismiss without converting the motion to a summary judgment motion, if the plaintiff's claims are based on the documents and the documents are undisputedly authentic exhibits." *Pfizer, Inc. v. Ranbaxy Labs., Ltd.*, 525 F. Supp. 2d 680, 684 (D. Del. 2007).

B. Mersino Fails to State a Mechanic's Lien Claim Because it Failed to Provide Proper Notice.

Mersino failed to provide proper notice under W. Va. Code § 38-2-9. Mersino's failure

results in a "complete discharge of such owner and of such property from all liens for claims and charges of any such . . . subcontractor . . . ." W. Va. Code § 38-2-14.[4] *See also Worldwide Machinery L.P. v. Columbia Gas Transmission, LLC,* No. 5:19-cv-00208-JPB, 2019 WL 358174 (N.D. W. Va. Aug. 5, 2019) (dismissing mechanic's lien claim brought by another MXP subcontractor for improper notice under § 38-2-14).

West Virginia's lien statute mandates that Mersino had "one hundred days after the completion of [its] subcontract" to "give to the ***owner*** or his or her ***authorized agent***, by any of the methods provided by law for the service of a legal notice or summons, a notice of lien . . ." W. Va. Code § 38-2-9 (emphasis added). As discussed above, because Mersino's last day of work on MXP was October 3, 2018, it was required to provide notice of its lien to CGT by January 11, 2019. It did not do so. Mersino makes no allegations regarding its attempts to provide notice of its lien to CGT—sufficient grounds for dismissal by itself—and its Notice attached to its Complaint is telling. At best, Mersino attempted to serve "TransCanada" – not CGT – at an address unaffiliated with either CGT or TransCanada. *See id.; see also* Ex. 1, Decl. of A. Flores at ¶¶4, 7-8.

This Court has already found Mersino's arguments to the contrary unpersuasive. First and foremost, Mersino does not allege that CGT had any knowledge of the lien (actual or otherwise) by January 11, 2019. And even if Mersino made such an allegation, "[u]nwritten actual knowledge

[4] W. Va. Code § 38-2-14 states, in relevant part,

> 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 . . . .

of underlying events does not suffice." *See* Compl. at Ex. B at pp. 29-30 (citing, among other cases, *Bailey Lumber Co. v. General Const. Co.,* 101 W. Va. 567, 569, 133 S.E. 135, 137 (1926)). "Section 38-2-9 requires notice 'by any of the methods provided by law for the service of a legal notice or summons,' 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." *Id.* at p. 30 (citing *Burkes v. Fac-Chek Food Mart Inc.,* 217 W. Va. 291, 298, 617 S.E.2d 835, 845 (2005)). Second of all, "section 38-2-32's relaxed notice requirement does not apply here . . . when the subcontractor's mechanic's lien is claimed under 38-2-9." *Id.* (distinguishing *Southern Erectors Inc. v. Olga Coal Co.*, 159 W. Va. 385, 385, 223 S.E.2d 46, 46 (1976)). And "[f]inally, 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." *Id.* (citing *Badger Lumber Co.*, *Inc. v. Redd,* 213 W. Va. 453, 456, 583 S.E.2d 76, 79 (2003)).

In light of this Court's previous examination of Mersino's failure to provide CGT notice, the present adversary proceeding has no merit. While Mersino states in its complaint, "[t]he Court did not decide, and left open issues related to the propriety of notice given by Mersino and its Lien," it is difficult to ascertain ***anything*** that was "left open" by the Court. The Court even stated that "***Mersino's notice was invalid***." *Id.* at 30 (emphasis added) (citing several sources). In any event, the time is ripe for the Court to dismiss Mersino's Complaint under Rules 12(b)(1) or 12(b)(6) as appropriate.

C. Mersino's Adversary Proceeding is Untimely.

Mersino may not proceed with its lawsuit because Mersino did not timely file suit to enforce its lien. W. Va. Code § 38-2-34 mandates that a "lien shall be discharged" "[u]nless an action to enforce any lien authorized by this article is commenced in a circuit court within six months after the person desiring to avail himself or herself of the court has filed his or her notice

in the clerk's office." W. Va. Code § 38-2-34.[5] However, Mersino waited over 20 months to file its adversary proceeding. This clearly violates the lien statute of limitations. *See generally See In re Williamson Shaft & Slope Co.*, 20 B.R. 73, 77 (Bankr. S.D. Ohio 1982) (West Virginia mechanic's lien invalid where purported lien holder waited more than six months to institute a suit to enforce its lien). Mersino's adversary proceeding must accordingly be dismissed.

While § 38-2-34 contains a savings clause, it is not applicable here. Section 38-2-34 permits that "an 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." W. Va. Code § 38-2-34 (emphasis added). Here, this Court has already denied Mersino's attempt to intervene in the EPS case, which would arguably estop Mersino from intervening in the other lien adversary proceedings related to MXP. Compl. at Exs. A, B. No state court case remains in which Mersino can intervene. As a result, Mersino's claim fails under W. Va. Code § 38-2-34.

D. Mersino Fails to State a Claim for a Mechanic's Lien Because it Waived and Therefore Cannot Enforce any Mechanic's Lien Against CGT's Property.

Mersino has no viable mechanic's lien claim against CGT's property interests because the No-Liens Clause waives Mersino's right to maintain and enforce a mechanic's lien against CGT's property interests.

[5] W. Va. Code § 38-2-34 states that the lien "shall be discharged" unless an action is filed within a "circuit court" within 6 months. "Circuit court" presumably means a circuit court of West Virginia. If so, the lien was discharged because no action was filed in a West Virginia circuit court. While CGT would have undoubtedly removed and transferred any such case to this Court (should such a case survive a motion to dismiss in front of the Northern District of West Virginia), that does not change the effect of the discharge for failure to comply with the statute.

1. West Virginia Law Applies.

As this Court has already surmised, the Subcontract does not contain a choice-of-law provision. This Court has determined (in the context of another adversary proceeding associated with the Welded bankruptcy) that:

> 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.

Compl. at Ex. B at p. 26. Importantly, "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue." Restatement (Second) of Conflict of Laws § 188 (1971).

Here, the Restatement's significant relationship test overwhelmingly favors the application of West Virginia law. The most important contacts with a construction contract like the Subcontract is the place of performance and the subject matter of the contract:

> When the contract deals with a specific physical thing, such as land or a chattel . . . the location of the thing . . . is significant . . . The state where the thing . . . is located will have a natural interest in transactions affecting it. Also the parties will regard the location of the thing . . . as important. Indeed, when the thing . . . is the principal subject of the contract, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the thing . . . was located would be applied to determine many of the issues arising under the contract.

Restatement (Second) of Conflicts § 188 comment on subsection (2) (1971) ("*Situs of the subject matter of the contract.*").

The place of performance and the subject matter of the Subcontract is indisputably West Virginia, as MXP is located in West Virginia.[6] The Subcontract lists the "Work Locations" as being "Marshall and Wetzel Counties, WV" and explicitly states that the "Work" is performed for "Spread 1 of the Mountaineer Express Pipeline Project in Marshall and Wetzel Counties in West Virginia." Compl. at Ex. C at pp. 1, 3. The location of the subject matter of the contract—Spread 1 of the MXP Project—is located exclusively in West Virginia. The physical address for the MXP Project and/or the property at issue is in Glen Dale, West Virginia. Compl. at ¶2. Mersino's purported lien also is filed in West Virginia, and Mersino proceeds with its lien claim under West Virginia law. And, while Mersino may not be domiciled in West Virginia, its Compliant emphasizes that it "conducts business in the State of West Virginia, in particular, the County of Marshall in the State of West Virginia." *Id.* at ¶1. Because the Subcontract's contacts with West Virginia trump any other contact that may exist, West Virginia law should govern the enforceability of the lien waiver. *See Process & Storage Vessels, Inc. v. Tank Serv., Inc.*, 541 F. Supp. 725, 730 (D. Del. 1982), *aff'd*, 760 F.2d 260 (3d Cir. 1985) ("Because all parties to the principal contract were to perform their respective obligations in New York, and the other arguable contacts to be taken into account are dispersed among several states, none of which appears to have a larger stake in the controversy, this performance factor is singularly persuasive on the choice of law issue."); *see also Kipin Indus., Inc. v. Van Deilen Int'l, Inc.*, 182 F.3d 490, 496 (6th

[6] Courts will presume that the law of the state that is the location where services are rendered will apply. Restatement (Second) of Conflict of Laws § 196 (1971) ("The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the event the local law of the other state will be applied.").

Cir. 1999) (applying Restatement § 188 and finding a Michigan court would apply Kentucky law because the "contract entailed the rendition of services solely in the state of Kentucky" and "the particular issue in question . . . is the placement of a lien on property situated in Kentucky."); *L & L Builders Co. v. Mayer Associated Servs., Inc.*, 46 F. Supp. 2d 875, 882 (N.D. Iowa 1999) (applying Restatement § 188 and finding Iowa law applies because the "lien waiver waives rights the holder might otherwise have had on property in Iowa," the construction project is in Iowa, the mechanic's lien is on property in Iowa, the "justified expectations" of the parties would be served by Iowa law applying because of the location of the property, and Iowa had the greatest interest, in part, because the issue in question involved lien rights regarding property in Iowa).

2. Mersino Waived its Mechanic Lien Claim.

Mersino has no viable mechanic's lien claim against CGT's property interests because the No-Liens Clause waives Mersino's right to maintain and enforce a mechanic's lien against CGT's property interests. Ex. 1 at 7-8. Mersino's mechanic's lien claim must fail.

Under West Virginia law, "[a] valid written instrument which expresses the intent of the party in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *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) (citing *Kopf v. Lacey*, 540 S.E.2d 170, 175 (W. Va. 2000)). This principle of contract construction extends to contractual waivers of statutory mechanic's liens—"Undoubtedly, a contractor may waive his right to file a mechanic's lien." *Id.* (citing *Bauer Enters., Inc. v. Frye*, 382 S.E.2d 71, 74 (W. Va. 1989)); *see also Bruce McDonald Holding Co. v. Addington, Inc.*, 825 S.E.2d 779, 787-88 (W. Va. 2019) (Under West Virginia law, waiver is "the voluntary, intentional relinquishment of a known right . . . whether [the right is] conferred by law or by contract." (quotations and citations omitted)*; In re Lee*, 356 B.R. 177, 182 (Bankr. N.D. W. Va. 2006) ("as a general rule, '[a] party may waive any

provision, either of a contract or of a statute, intended for his benefit.'" (citations omitted)). Indeed, No-Lien provisions are routinely enforced because parties enjoy the freedom of contract to waive any statutory mechanic's lien claims as part of the consideration for entering the agreement.[7]

Here, the No-Lien Clause is unambiguous, and must be applied and enforced according to its own language. The No-Lien Clause requires Mersino to "releas[e] and discharge[e]" "***any*** Lien" filed against CGT's property "at the cost and expense of" Mersino. "***Any*** Lien" naturally includes liens filed by Mersino itself. Thus, Mersino is contractually required to discharge the purported liens at the heart of its claims at its own cost and expense. This amounts to a lien waiver, and is enforceable as such under West Virginia law. *See id.*[8] After all, any right to enforce a lien is meaningless if the party seeking enforcement of the lien must release and discharge that lien at its own expense. *See Fuller,* 678 F. Supp. at 514 (finding lien waiver when contract was "clear and unambiguous to the extent it required [lien claimant] to discharge any lien that it did file or to furnish . . . a bond against any such mechanic's lien."); *see also Bruce McDonald Holding Co.*,

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[7] *See, e.g., Ridgeview Const. Co. v. Am. Nat. Bank & Tr. Co. of Chicago*, 256 Ill. App. 3d 688, 692 (1993) ("[S]ubcontractors are held accountable for knowing, absent fraud or deception, the realities and implications of any agreements they sign with a general contractor and must learn to protect themselves from 'no-lien' contractual provisions."); *see also Nw. Constr. Servs.*, 2011 WL 13196507; *Richardson Eng'g Co.,* 554 F. Supp. at 471; *Charles Simkin & Sons, Inc. v. Massiah*, 289 F.2d 26, 28 (3d Cir. 1961) (holding lien waiver valid, and reversing and remanding for district court to "enter an interlocutory injunction requiring the defendant to waive and release the Notice of Lien claim[.]"); *In re Vill. Homes of Colo., Inc.*, 405 B.R. 479, 484-85 (Bankr. D. Colo. 2009) (mechanic's lien waiver was not "void as against public policy" and "not an invalid exculpatory clause under Colorado law"); *Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.*, 678 F. Supp. 506, 514 (E.D. Pa. 1987) (Mechanic's lien waiver language "slightly tortured," but "clear and unambiguous to the extent that it required BMT to discharge any lien that it did file. . ."); 3 Bruner & O'Connor Construction Law § 8:151 n.11 (citing *Pero Bldg. Co., Inc. v. Smith*, 6 Conn. App. 180 (1986) (unambiguous "no lien" language enforced)); *Greco-Davis Contracting Co. v. Stevmier, Inc.*, 162 So. 2d 285 (Fla. 2d DCA 1964) (same); *Jankoviak v. Butcher*, 22 Ill. App. 2d 126, (2d Dist. Ill. 1959) (same); *Aetna Cas. And Sur. Co. v. U.S.*, 228 Ct. Cl. 146 (1981) (contractor could waive its lien rights in advance of construction); *Beacon Const. Co., Inc. v. Matco Elec. Co., Inc.*, 521 F.2d 392, 400 (2d Cir. 1975).

[8] "[T]he mere fact that" the parties "could have drafted the [lien waiver] provision in a better way does not render the clause unclear and unambiguous." *Fuller*, 678 F. Supp. at 514.

825 S.E.2d 779 (waiver occurs where a party in possession of a right "forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it." (citations omitted)).

Separately and independently, even if the Subcontract did not categorically waive Mersino's right to file any lien on MXP, the Subcontract ensures that Mersino cannot ***pursue*** a lien claim by denying EPS the right to compensation so long as any lien remains filed on CGT's property interests. The Subcontract is clear: "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." Ex. 2, Subcontract Ex. G at 8. It is black letter law that a subcontractor's recovery for a lien claim is capped by its potential recovery against the general contractor. *See, e.g., Kane & Keyser Hardware Co. v. Cobb*, 79 W. Va. 587 (1917) ("The effect of our mechanic's lien laws is to give to a party doing work or furnishing material for the construction of a building, when such party is a subcontractor, the same right to subject the building to ***the satisfaction of his claim as he has against the principal contractor . . .***" (emphasis added)). Thus, since Mersino is not entitled to payment from Welded so long as a lien exists on CGT's property, Mersino has not suffered any injury, and it does not have standing to pursue a mechanic's lien enforcement action.[9]

Welded's purported breaches of contract and alleged failures to pay Mersino cannot save Mersino from the No-Lien Clause. As the District of Vermont has aptly explained, a breach of

[9] Mersino has no standing under Article III of the Constitution if it has no injury-in-fact. "Constitutional standing requires an 'injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Reilly v. Ceridian Corp*., 664 F.3d 38, 41 (3d Cir. 2011) (citations omitted). West Virginia law also requires injury-in-fact for standing to bring a claim. *See, e.g., Coleman v. Sopher,* 459 S.E.2d 367, 372 n.6 (W. Va. 1995). A $0 lien claim is not an injury-in-fact.

contract can have no effect on a mechanic's lien waiver, because the existence of the lien waiver contemplates and determines the rights of the claimant ***in the event of a contractual breach***:

> Surely, in waiving its statutory right to a lien on defendant's property, plaintiff contemplated a contractual breach . . . were there no breach, the lien likely would never come into play. By waiving its lien plaintiff acknowledged that if it was injured by a breach of contract, it could assert no lien on defendant's property but must instead rely on defendant's general credit. Thus the validity of the waiver is unaffected by IBM's and Crow's alleged breaches of contract.

Richardson Eng'g Co., 554 F. Supp at 471 (collecting cases under several states' laws), *aff'd* 697 F.2d 296.

In sum, the Subcontract dismantles Mersino's ability to pursue any lien claim. Under its express terms, Mersino's liens are either waived or worthless. Since neither CGT nor its property could ever be liable to Mersino for a mechanic's lien claim, Mersino fails to state a viable mechanic's lien claim, and Mersino's Complaint must be dismissed. *Connelly*, 809 F.3d at 786; *Fowler,* 578 F.3d at 210; *Nw. Constr. Servs., L.P. v. Seraph Apartments, L.P.*, No. 6:08-CV-335, 2011 WL 13196507, at *5 (E.D. Tex. July 12, 2011); *Richardson Eng'g Co.*, 554 F. Supp. at 471.

E. If Mersino is able to Proceed—which it cannot—it must Name Welded as a Defendant in this Lawsuit.

If this Court denies CGT's Motion to Dismiss—which it should not—it should require Mersino to name Welded as a defendant because Welded is a necessary party to this dispute under West Virginia law. *See Accu-Fire Fabrication, Inc. v. Corrozi-Fountainview, LLC*, No. CIVA08L09-048PLA, 2009 WL 930006, at *1 (Del. Super. Ct. Mar. 26, 2009) (subcontractor's mechanic's lien action barred where it failed to join a general contractor because the general contractor was a necessary party); *see also Brown v. Smith*, 100 S.E. 279, 280 (W. Va. 1919) (subcontractor's attempt to enforce a mechanic's lien against owner for work performed at the

instance of the general contractor barred because plaintiff failed to name general contractor as a party).

Rule 19(a) of the Federal Rules of Civil Procedure requires a court to join a party that is necessary to "accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1). The Court is unable to afford complete relief among Mersino and CGT in this adversary proceeding without Welded being a party. The "principal contractor is necessary because the lien claim may affect its rights as against the owner." *Accu-Fire*, 2009 WL 930006, at *3; *see also Gist v. Virginian Ry. Co*., 90 S.E. 554, 555 (W. Va. 1916) (principal contractor is a necessary party to a suit to enforce a mechanic's lien); *Augir v. Warder*, 70 S.E. 719, 719 (W. Va. 1911) (principal contractor a necessary party, and noting that "great injustice is liable to be done an owner by subjecting his property to a lien for material which was not in fact used in the construction of his building, if the contractor is not made a party.").

Here, the rights of CGT and Welded vis-à-vis each other may be affected by whether (and how much) Mersino is able to secure a monetary recovery from CGT. Further, Mersino has an outstanding unsecured claim against Welded for the amounts it seeks from CGT in this proceeding. If this case is not dismissed, Welded's inclusion will be necessary to determine the amounts, if any, that Mersino may claim against Welded (which will act as a ceiling for the amounts Welded can claim against CGT). Mersino's failure to name Welded as a party to this dispute is fatal, and minimally requires Mersino to add Welded as a Defendant.

V. CONCLUSION

Mersino has failed to abide by West Virginia's lien statute at every stage of this dispute: (1) Mersino failed to provide adequate notice of its purported lien to CGT, (2) Mersino filed this adversary proceeding nearly a year and a half too late, and (3) Mersino attempts to proceed on a lien claim for which it has already waived a lien. Instead of heeding this Court's previous ruling,

Mersino continues to force CGT to defend against its meritless lien claim. For at least the foregoing reasons, Mersino should be denied a second bite at the apple. CGT respectfully requests the Court dismiss Mersino's Complaint with prejudice, and asks the Court for all other relief to which it may be justly entitled.

Date: November 12, 2020

ARCHER & GREINER, P.C.

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Attorneys for Columbia Gas Transmission, LLC

219732632v1

EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

Declaration of Ann Flores

1. My name is Ann Flores. I am of sound mind, over 21 years old, and fully competent to make this declaration. I declare under penalty of perjury that the statements contained herein are true and correct to the best of my knowledge.

2. I am employed as a paralegal at TransCanada USA Services, Inc. ("TCE USA"). I have been a paralegal at TCE USA for roughly 5 years. In that role, I perform paralegal functions for Columbia Gas Transmission, LLC ("CGT").

3. As part of my job duties, I have access to and knowledge of addresses associated with TCE USA, CGT, and their registered agents.

4. I am unfamiliar with the address "54 Seclusion Crescent, Brampton, ON ON L6R 1L." Neither TCE USA nor CGT have ever used that address for any purpose. Nor have they had a registered agent located at that address.

5. CGT's principal office is located in Houston, Texas. CGT's mailing address listed with the West Virginia secretary of state is the address of CGT's principal office in Houston.

6. CGT's registered agent for the State of West Virginia is Corporation Service Company, located at 209 W. Washington Street, Charleston, West Virginia, 25302.

7. To my knowledge, no entity associated with TC Energy uses the address "54 Seclusion Crescent, Brampton, ON ON L6R 1L."

8. Based on a google search of "54 Seclusion Crescent, Brampton, ON ON L6R 1L," this address appears to be a residential property or home in Brampton, Ontario, Canada.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 26, 2020.

DocuSigned by:

6085E4D31B0B402...

Ann Flores

EXHIBIT 2

EXHIBIT G

GENERAL TERMS AND CONDITIONS

As it Pertains to Project	Columbia Gas Transmission MXP Spread 1	Subcontract Number	2018-01-15

Invoicing

Subcontractor shall submit a monthly signed invoice, itemized to the Contractor's satisfaction, for the portion of the work completed, less retainage (Retention). In addition to Subcontractor's signed invoice, Subcontractor must also submit an affidavit (**see Exhibit B**) asserting that Contractor is in compliance with the payment terms of this Subcontract Agreement. Within sixty (60) days after a satisfactory receipt of invoice and affidavit, payment shall be made to the Subcontractor for the Net Payable amount. The remaining 10% (Retention) will be retained by Contractor until final acceptance of the Work. Upon Contractor approval of successful completion of the work, Subcontractor may invoice for release of the retention, payable within thirty (30) days after approved invoice. The retention invoice must include a properly executed Affidavit and Release (see Exhibit B). All invoices are to be sent via email to: ap@welded.com with a copy to mcarroll@welded.com, kbranning@welded.com, telischer@welded.com, and gheimrick@welded.com

Right to Setoff

Contractor may set off against any amount payable under the Agreement any and all present and future indebtedness of Subcontractor to Contractor.

Project Schedule

Prior to starting the Work Subcontractor shall supply a detailed Project Schedule and Man Power Chart that is in compliance with the requirements of Contractor and this Agreement. The Project Schedule shall reflect all required activities with duration, and the Man Power Chart shall reflect the required manpower to accomplish the Work and shall be updated weekly. Subcontractor shall administer the Work in accordance with the Project Schedule. Subcontractor also shall notify Contractor immediately in writing at any time that Subcontractor has reason to believe that there will be a material deviation in the Project Schedule and shall specify in said notice the corrective action planned by Subcontractor.

Time is of the Essence

Subcontractor agrees that time is of the essence in the performance of its Work. Subcontractor agrees to prosecute the Work with all due diligence and to complete the Work within the time stated in the Contract Documents or the Schedule, whichever is sooner. Prior to commencement of the Work, Subcontractor shall prepare and submit a Schedule in accordance with Contractor's requirements for completion of the Work.

Subcontractor shall continuously monitor, report, forecast and control the progress of the Work in accordance with the Schedule. Subcontractor shall provide scheduling detail as the Work progresses. If such reporting or forecasting indicates a delay or potential delay, Subcontractor shall promptly take corrective action to mitigate such delay or potential delay and to get back on schedule and to avoid such delay at no cost to Contractor.

Subcontractor's reports shall be sufficiently detailed to present Contractor with an accurate status of the Work's Schedule, variances from the Schedule and reasons therefore, and planned corrective action. Reports shall be in writing and provided as established by Contractor.

Contractor's Right to Accelerate the Work at no Additional Cost to Contractor

If Subcontractor's progress impacts Contractor's linear progression of the work, or if in the reasonable belief of the Contractor, the Subcontractor will not meet the completion dates set forth in the Subcontractor's Project Schedule, the Contractor may direct the Subcontractor to accelerate the Work in a manner acceptable to the Contractor and at no additional cost to the Contractor unless the delay is the result of the acts or omissions of the Contractor. If Contractor directs the Subcontractor to accelerate the Work, Subcontractor shall promptly provide a plan, including its recommendation, for the most effective and economical acceleration of the Work. If such plan is unacceptable to the Contractor or the Subcontractor fails to provide a plan within seven (7) Days, Contractor may direct Subcontractor to follow an acceleration plan provided by Contractor.

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Termination

Termination for Convenience. In addition to any other rights that Contractor may have hereunder, or in Law, Contractor may at any time, in the exercise of its sole and arbitrary discretion, terminate the Agreement, the Work or any portion thereof by giving no less than fourteen (14) Days' notice to Subcontractor specifying the Work or portion thereof to be terminated and the effective date of the termination. Upon receipt of such notice, Subcontractor shall continue to perform all other portions of the Work not terminated, if any, in strict accordance with the Agreement. If the Agreement or any portion thereof is terminated, in accordance with this article Subcontractor agrees to waive any claims for damages, including loss of anticipated profits or any other consequential or special damages, arising out of such termination and agrees that the sole and exclusive remedy for such termination shall be only for payment of the Work performed, including demobilization. Contractor shall not be liable for any damages (consequential, special or otherwise, including loss of profits) as a result of the termination of the Work or any portion thereof.

Termination for Cause. Contractor may, in its sole discretion, immediately terminate the Agreement or any part of the Work by giving written notice to Subcontractor if any of the following occur:

1. Subcontractor becomes insolvent or seeks protection from creditors under federal or state Law, or if a bankruptcy petition is filed against Subcontractor and not dismissed with in forty-five (45) days.
2. If an order is made or a resolution is passed for the winding up or liquidation of Subcontractor
3. If a custodian, receiver, manager or other officer with similar powers is appointed in respect of Subcontractor or any of Subcontractor's property
4. If Subcontractor ceases to carry on in the ordinary course of business
5. If a creditor takes possession of any of Subcontractors' property, or if a distress, execution or any similar process is levied or enforced against such property and remains unsatisfied by Subcontractor
6. If Subcontractor fails to comply with any requirement of this Agreement
7. If Subcontractor breaches its obligations under this Agreement
8. If Subcontractor repeatedly violates any obligation or in the reasonably opinion of Contractor has failed to meet a material requirement of this Agreement
9. If the project receives an order from any Governmental Authority for breach of Law that requires an immediate suspension of the Work, including a stop work order related to safety or environmental violations.

   Upon receipt of such notice from Contractor, Subcontractor shall discontinue the Work in accordance with the notice, and shall (I) cease performance of the Work to the extent directed by Contractor in the notice; (ii) take all actions that Contractor may direct, or as may be necessary or expected under Prudent Industry Practices for the protection and preservation of the Facility and all property or other Project Supplied Materials or supplies related thereto (in whatever stage of completion), including return of the Project Supplied Materials (including unloading and stocking for proper storage) as directed by Contractor; and (iii) at Contractor's instruction, assign its rights under all Permits, subcontracts, warranties, guarantees, and other agreements or documents pertaining to the Work to Contractor or its respective designees.
10. Subcontractor shall be liable to Contractor for all additional directs costs and expenses incurred by Contractor in completing the Work that would not have been incurred but for the termination hereunder (including any additional direct costs to complete or to have a third party complete the Work), in addition to all other rights and remedies of Contractor pursuant to the Agreement and at Law.
11. In addition to the termination rights set forth in herein, if Subcontractor has failed to comply with any of the terms of the Agreement, or is in material breach of any representation, declaration or warranty, including representations and warranties obligations, Contractor may, in its sole discretion, give Subcontractor notice of default. Subcontractor shall have five (5) Days immediately following receipt of the notice, or such longer time as Contractor believes to be reasonable and has specified in the notice of default or has subsequently agreed upon in writing, to remedy or to commence to remedy and

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diligently continue to remedy such default, failing which, Contractor may by further notice to Subcontractor terminate or suspend the whole or any part of the Agreement or the Work; provided that, where Contractor determines, in its reasonable discretion, that the default is not capable of being remedied or not capable of being remedied within a reasonable amount of time, Contractor may, by notice to Subcontractor, immediately terminate or suspend the whole or any part of the Agreement. Upon receipt of such notice from Contractor, Subcontractor shall discontinue the Work in accordance with the notice and shall (i) cease performance of the Work to the extent directed by Contractor in the notice; (ii) take all actions that Contractor may direct, or as may be necessary or expected under Prudent Industry Practices for the protection and preservation of the Facility and all property or other Project Supplied Materials or supplies related thereto (in whatever stage of completion), including return of the Project Supplied Materials (including unloading and stocking for proper storage) as directed by Contractor; and (iii) at Contractor's instruction, assign its rights under all Permits, subcontracts, warranties, guarantees, and other agreements or documents pertaining to the Work to Contractor or its respective designees. Subcontractor acknowledges that it will not be reimbursed for any costs arising from a suspension.

12. Where the whole or any part of the Agreement is suspended under this article, Contractor may, at any time, immediately terminate any or all of the suspended portion of the Agreement.

13. If the Agreement or any portion of the Work is terminated pursuant to this article, Contractor may complete or have others complete the Work. If the Agreement is terminated, Subcontractor is not entitled to further payment from Contractor until the Work is complete and Contractor has fully ascertained all of its costs and damages arising out of or related to the default (including, without limitation, legal, expert, design) (the "Completion Costs"). Any amount payable to Subcontractor for Work satisfactorily performed to the date of termination will be offset by the Completion Costs, the sum of any monies already paid to Subcontractor and any additional amount Contractor must pay to obtain satisfactory completion of the Work by others.

14. Contractor shall not be liable for any damages (consequential, special or otherwise, including loss of profits) as a result of the termination of the Work or any portion thereof by Contractor pursuant to any provisions of this article. The rights and remedies of Contractor provided in this article are in addition to the rights and remedies of Contractor provided by Law, or under any other provision of the Agreement.

15. If Contractor elects to terminate or suspend this Agreement or any part of the Work, and a court or other body of competent jurisdiction finds such termination or suspension was invalid, such termination or suspension shall be considered to be a termination for convenience.

Suspension of Work. Contractor may, in the exercise of its sole and arbitrary discretion, at any time or times, by notice to Subcontractor specifying the effective date of the suspension, require Subcontractor to suspend the Work or any portion thereof. Upon receiving written notice, Subcontractor shall discontinue the Suspended Work immediately, place no further purchase orders or subcontracts with respect to the Suspended Work, properly protect and secure the Work in accordance with Prudent Industry Practice, not remove any Work or equipment or tangibles forming part of the Work from the Work Site without written consent of Contractor, and promptly make reasonable efforts to obtain suspension terms satisfactory to Contractor with respect to all existing purchase orders, subcontracts, supply contracts and rental agreements related to the Suspended Work. Subcontractor shall continue to perform all other portions of the Work which have not been suspended by Contractor.

Contractor may at any time authorize resumption of the Suspended Work or any part thereof, by giving Subcontractor reasonable notice specifying the part of the Suspended Work to be resumed and the effective date of such resumption. Subcontractor shall resume the Suspended Work on the date and to the extent specified in the notice.

Subcontractor shall utilize its employees, equipment and materials in such manner, and take such other steps as may be necessary or desirable to minimize the costs associated with the Suspended Work. During the period of Suspended

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Work, Subcontractor shall secure and protect the Suspended Work and the impacted Facilities and all materials and equipment to be used or incorporated therein.

If there is Suspended Work, such event shall constitute a Change and Contractor shall reimburse Subcontractor for those direct costs, exclusive of profit, reasonably incurred by Subcontractor as a direct result of the suspension of the Work if reimbursement is provided by Company to Contractor and provided that Subcontractor takes reasonable measures to minimize all such costs. Contractor shall not be liable for any other costs or damages, including loss of profits or any other consequential or special damages, on account of the Suspended Work or any part thereof or the deletion of Suspended Work from the Agreement. Subcontractor shall promptly provide all information and records Contractor may require to verify claimed costs.

Subcontractor acknowledges that it will not be reimbursed for any costs arising from Suspended Work that causes Subcontractor to cease all or a portion of the Work for a period of time which is less than two (2) hours before the Work can recommence. It is further acknowledged by Subcontractor that it has made adequate allowance in the Price for delays of less than two (2) hours in duration.

Notwithstanding anything else in this Suspension Article, in any circumstance where the Subcontractor is entitled to a Work Schedule extension the Contractor may, in its discretion, require compression of the Work Schedule rather than an extension of time to the extent schedule compression is reasonably practicable. In such case Subcontractor will be entitled to compensation through the change order process or as otherwise agreed for the additional efforts necessary to meet the compressed Work Schedule.

Delays caused by Subcontractor

If Subcontractor is responsible for a delay in the progress of the Work, or fails to complete any portion of the Work in accordance with the Work Schedule, then Subcontractor shall, at no additional cost to Contractor; (a) work overtime, acquire and use any necessary additional labor and equipment and perform whatever other acts are required or requested by Contractor to make up the lost time and to avoid further or other delay in the performance of the Work; (b) prepare and implement a recovery plan; and (c) work diligently to mitigate all damages incurred as a result of the delay.

Subcontractor shall promptly notify Contractor in writing: (i) of any occurrence that Subcontractor has reason to believe will materially adversely affect the Project Schedule or the Work Schedule; or (ii) if the performance of the Work is not in compliance with the Project Schedule or the Work Schedule or Subcontractor's adherence to any Critical Path progress of the Work Schedule and/or the Project Schedule is behind for any reason by more than five (5) Days.

If at any time, in the reasonable opinion of Contractor, Subcontractor is not in compliance with the Project Schedule or the Work Schedule or its adherence to the Critical Path progress of the Work Schedule and/or the Project Schedule is behind for any reason by more than five (5) Days Contractor may provide notice to Subcontractor.

Where Subcontractor has provided notice in accordance with this article, Subcontractor will specify in said notice the corrective action recommended by Subcontractor in the form of a recovery plan. Where Contractor has provided notice to Subcontractor, Subcontractor shall prepare and provide to Contractor a recovery plan within five (5) Days of receipt of the notice. The recovery plan will set forth in reasonable detail the manner in which Subcontractor intends to meet the dates set forth in the Work Schedule and the Project Schedule, including the specific steps to be taken, the expected pace of recovery, and the expected recovery date, and shall require Subcontractor to take such steps as are necessary to make up the lost time and to avoid further or other delays in the performance of the Work including, if necessary, working overtime, increasing the number of working Days or hours per Day, and acquiring and using any necessary additional labor and equipment and whatever other acts are required by Contractor. If Contractor has not commented within ten (10) Days, it shall be deemed to have reviewed the plan without comment, provided that in no event shall Contractor be considered to have approved a recovery plan. Subcontractor shall, at no cost to Contractor, promptly implement and thereafter shall diligently continue to adhere to the recovery plan in order to meet the dates set forth in the Work Schedule and Project Schedule. During implementation of the recovery plan Subcontractor shall provide sufficient information to Contractor to show its compliance with the recovery plan and indicating the improvements being made to the Work Schedule and Project Schedule. It is a breach of this Agreement if

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Subcontractor, in the opinion of Contractor, is not complying with the recovery plan or fails to provide sufficient detail to show its compliance.

Subcontractor acknowledges that the Project Schedule and Work Schedule are vital to the success of the project. In addition to any other rights and remedies of Contractor hereunder, Subcontractor further acknowledges that Contractor may incur additional costs and expenses if the Project Schedule and Work Schedule are not complied with, including costs of Other Subcontractors, internal personnel, overhead and standby costs of Contractor and Other Subcontractors, and that where such costs and expenses are incurred Subcontractor is liable therefor. In addition to any other remedies Contractor may have, where Subcontractor is not in compliance with the Project Schedule and Work Schedule the reasonable and verifiable amount of such costs and expenses may be deducted from any payments due to Subcontractor and retained by Contractor on account of such costs and expenses.

Claims for costs associated with any weather-related delays and the associated productivity impacts shall not be compensated by Contractor.

Force Majeure

"Force Majeure" means any unforeseeable act or event that: (i) renders it impossible for the affected Party to perform its obligations under this Agreement; (ii) is beyond the reasonable control of the affected Party; (iii) is not due to the fault or negligence of the affected Party; and (iv) could not have been avoided by such Party through the exercise of due diligence, including the expenditure of any reasonable sum of money. Without limiting the generality of the foregoing, Force Majeure may include any of the following events: war, riot, terrorism, act of vandalism, rebellion, epidemic, Catastrophic Weather, general strike, fire, explosion, and also includes any late delivery of Project Supplied Materials where such delay is due to any event of Force Majeure. Notwithstanding the foregoing, Force Majeure shall not include: (a) late delivery of any Subcontractor supplied equipment and materials (except to the extent that such delay is due to any event of Force Majeure), (b) delays resulting from the breakdown of any Subcontractor supplied equipment and materials, (c) delays caused by inefficiencies on the part of Subcontractor, (d) Work Site specific labor disruptions, (e) the condition of the Work Site (unless caused by an event of Force Majeure), (f) late performance caused by Subcontractor's inefficiency in hiring or failure to hire (due to unavailability or otherwise) adequate labor or supervisory personnel, (g) any local, general or seasonal weather conditions or climates except Catastrophic Weather, or (h) financial issues affecting the Party claiming the Force Majeure.

If any Party cannot comply with any obligation hereunder as a result of Force Majeure, such Party shall notify the other Party in writing as promptly as possible, but in any event within twenty-four (24) hours of such event, giving the reason for the non-compliance, particulars of the Force Majeure and the obligation or condition affected. Such event of Force Majeure shall constitute a Change, and any obligation of a Party shall be temporarily suspended during the period in which such Party is unable to perform by reason of Force Majeure, but only to the extent of such inability to perform. The obligations of Subcontractor to perform as provided by the Agreement through means not affected by the Force Majeure shall continue. The Party affected by the Force Majeure shall promptly notify the other Party as soon as such event no longer prevents it from complying with its obligation, and shall thereafter resume performance of the Work.

The Party that has given a notice of Force Majeure shall mitigate the effects of such Force Majeure on the performance of its obligations. Where the Parties reasonably believe that the Force Majeure will continue for more than five (5) Days or where the Force Majeure does continue for more than five (5) Days, the Parties shall meet as soon as practicable to review the situation and its implications on the Work Schedule and to discuss the appropriate course of action in the circumstances.

No adjustment of the Work Schedule for any event of Force Majeure shall be made with respect to the first forty-eight (48) hours of direct and actual adverse impact to the milestone dates set forth in the Work Schedule arising out of such event of Force Majeure. If the performance of the Work is delayed or interrupted as a result of Force Majeure beyond forty-eight (48) hours, the Work Schedule, only as it relates to the direct and actual adverse impact to the milestone dates set forth in the Work Schedule, shall be adjusted on an equitable basis. Any Work Schedule adjustment shall include only that period of time by which the Work Schedule is directly and actually delayed by such Force Majeure.

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An event of Force Majeure shall not give rise to any increase to the Price or claim for delay and no productivity impact costs shall be due or payable by Contractor as a result of an event of Force Majeure.

Notwithstanding anything else in this Article, in any circumstance where the Subcontractor is entitled to a Work Schedule extension the Contractor may, in its discretion, require compression of the Work Schedule rather than an extension of time to the extent schedule compression is reasonably practicable. In such case Subcontractor will be entitled to compensation in accordance with the change order process or as otherwise agreed for the additional efforts necessary to meet the compressed Work Schedule.

Change Directives

Contractor may at any time by issuing a Change Directive to Subcontractor, require a change in the work, or the method, sequencing, conduct, or timing of the Work of this Agreement. See Exhibit B-1 for Contractor Change Directive. Subcontractor shall comply with any Change Directive, but shall have the right to claim an adjustment, if applicable. If Contractor issues a Change Directive and no agreement has been reached as to an adjustment, then the Subcontractor shall diligently proceed as though on a time and materials basis pursuant to Exhibit A (Labor and Equipment Rates). Subcontractor shall keep such project records of the daily cost incurred by completing such Change Directive and submit such records to the Contractor on a daily basis AND Subcontractor shall receive payment for completing the work associated with the Change Directive until the parties mutually agree to the terms of a Change Order. If Subcontractor and Contractor fail to agree on an Adjustment, then the provisions of the section titled “Disputes” may be invoked to resolve the dispute.

Change Orders shall contain full particulars of the Changes and any Adjustments and shall represent the full and final agreement as to the Change and any Adjustments.

In addition, in the event of an emergency which Contractor determines endangers life or property, Contractor may use oral orders to Subcontractor for any work required by reason of such emergency. Subcontractor shall commence and complete such emergency work as directed by Contractor. Such changes must be formalized in writing within forty-eight (48) hours of the event.

Subcontractor Requested Change

Subcontractor may, at any time, by written notice in a form consistent with Exhibit B-2 Subcontractor Requested Change to Contractor, request a Change within (2) days Business Days of the event giving rise to the Subcontractor’s request. Only a Change Order submitted on the approved form to the Contractor may be deemed adequate for consideration. Subcontractor expressly waives any right to a Change in the event such notice is not made within forty-eight (48) hours of the change event. Subcontractor is not permitted to proceed with any work which Subcontractor will seek a change request without prior written authorization from Contractor. Contractor will review and respond no later than (10) Business Days. All Subcontractor change requests must include all supporting documentation. Contractor shall notify Subcontractor of its acceptance or rejection of such request or such request shall be deemed rejected. If Contractor rejects the Change requested by Subcontractor, Subcontractor shall continue with the Work without the Change. If Subcontractor and Contractor fail to agree on an Adjustment, then the provisions of the Section titled “Disputes” may be invoked to resolve the dispute.

Claims

If Subcontractor has any claim against Contractor, excluding claims for payment relating to Change Orders, notice of each such claim shall be submitted in writing to Contractor within five days after the occurrence of the event giving rise to the claim. Resolution of properly filed claims is within Contractor’s sole discretion. If the Subcontractor disputes Contractor’s decision on Subcontractor’s properly filed claims, then Subcontractor may invoke the Dispute Resolution procedures of this Agreement following Final Completion of the specific Project.

Disputes

Applicability of Dispute Resolution Procedures. Except for matters requiring immediate injunctive or similar equitable relief or matters where the relief is prescribed by Statute, all claims, disputes or other matters in question between the Parties arising out of or relating in any way to this Agreement (hereinafter collectively referred to as a "Dispute") will be resolved pursuant to this article.

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Senior Officers to Resolve. The Parties shall make all reasonable efforts to resolve Disputes arising out of the performance of the Work by amicable negotiations and agree to provide without prejudice, frank, candid and timely disclosure of relevant facts, information, and documents to facilitate these negotiations. Any Dispute shall initially be submitted to a senior officer from each Party for resolution by mutual agreement between said senior officers. If either Party wishes a Dispute to be submitted to senior officers pursuant to this clause, such Party shall serve upon the other Party a notice in writing (a "Senior Officer's Notice") requesting that the Dispute be so referred. Such negotiation shall be on a without prejudice basis. However, should such senior officers fail to arrive at a mutually agreed resolution of the Dispute within thirty (30) Days, or such longer period as may be agreed by such senior officers, after service of the Senior Officer's Notice, the Dispute shall then be referred to mediation.

Mediation Proceedings
(A) If the Parties agree to refer a Dispute to mediation the Parties have thirty (30) Days from the Day such agreement is reached to agree on the appointment of a mediator (the "Project Mediator"). If the Parties do not agree on the appointment of a Project Mediator, then either Party may request the American Arbitration Association, or any similar body acceptable to the Parties, in the state where the Work Site is located (or such other state as the Parties may agree upon) to appoint a chartered mediator to act as Project Mediator, who, when so appointed, will be deemed acceptable to the Parties and to have been appointed by them. In the event such Project Mediator is unavailable to mediate a particular dispute, then the American Arbitration Association, or any similar body acceptable to the Parties may be asked to appoint a suitable replacement.

(B) The Parties will submit the Dispute in writing to the Project Mediator, and afford to the Project Mediator access to all records, documents and information related to the Dispute that the Project Mediator may request; provided however, no Party will be required to provide anything that would be protected by privilege, including but not limited to lawyer-client communications, work product, and litigation privilege, and any comparable privilege in any court or other adjudicatory body. The Parties shall meet with the Project Mediator at such reasonable times as the Project Mediator may require and shall, throughout the intervention of the Project Mediator, negotiate in good faith to resolve the dispute. All proceedings are agreed to be without prejudice, and the cost of the Project Mediator will be shared equally between the Parties.

(C) If the dispute cannot be resolved within forty-five (45) Days of the Project Mediator being requested to assist, or within such further period agreed to by the Parties, the Project Mediator may terminate the negotiations by giving notice to the Parties. However, the Project Mediator may declare an impasse and terminate the negotiations at any time during the mediation period.

Agreement in Full Force and Effect. Performance of the Agreement and the Work shall continue during any Dispute, provided that performance of the Work in dispute shall only continue if, and in the manner, Contractor so directs. Except as otherwise provided in this Agreement, no payments due or payable by Contractor shall be withheld on account of a Dispute other than payments which are the subject of the Dispute.

Insurance
Without limiting in any way, the scope of any obligations or liabilities assumed hereunder by Subcontractor, Subcontractor shall procure or cause to be procured and maintained at its expense, for the duration of this Subcontract, the insurance policies described in **Exhibit C - Insurance**.

The General Liability, Business Automobile Liability, Umbrella or Excess Liability and Pollution Liability Policies shall include Contractor, Company and its subsidiaries and affiliates, and the third parties as listed in **Exhibit D – Additional Insured.**

Liens
Subcontractor shall cause any Lien which may be filed or recorded against the Work, the Facility, the Work Site or any lands or property of Company to be released and discharged forthwith at the cost and expense of Subcontractor. If Subcontractor fails to release or obtain the release and discharge any such Lien, then Contractor may, but shall not be obliged to, discharge, release or otherwise deal with the Lien, and Subcontractor shall pay any and all costs and expenses incurred by Contractor in so releasing, discharging or otherwise dealing with the Lien, including fees and expenses of legal counsel. Any amounts so paid by Contractor may be deducted from any amounts due Subcontractor

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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.

Subcontractors Liability and Indemnity

Subcontractor shall be liable to Contractor and Company for any and all Claims incurred by or suffered by Contractor or Company, to the property of Company, the Work or the Facilities, to the extent caused by Subcontractor's breach or non-compliance with any term or provision of this Agreement, or inaccuracy or incompleteness of any representation or warranty herein, or the fault, negligence or willful misconduct, whether active or passive, of Subcontractor or any of Subcontractor's third party vendors or Subcontractors, or their respective directors, officers, employees, agents, servants, representatives or any other person directly or indirectly acting on their behalf or under their direction or control.

Subcontractor shall defend, indemnify and hold harmless Contractor, its Affiliates, and each of their officers, directors, employees, invitees, consultants, contractors, representatives and agents and any other person directly or indirectly acting on any of the foregoing's behalf or under their direction or control (collectively, the "Contractor Indemnified Parties") from and against any and all Claims of whatever nature, including all fees and expenses of legal counsel, legal proceedings, investigations or dispute resolution costs which may be brought against Contractor Indemnified Parties or which Contractor Indemnified Parties may incur, suffer, sustain or pay to the extent caused by:

(A) any breach or non-compliance with any term or provisions of this Agreement, or inaccuracy or incompleteness of any representation or warranty, by Subcontractor;

(B) the fault, negligence, or willful misconduct, whether active or passive, of Subcontractor or any third party Subcontractor, or their respective directors, officers, employees, agents, servants, representatives or any other person directly or indirectly acting on their behalf or under their direction or control (or any acts or omissions of Contractor, Other subcontractors or their respective employees or agents while acting under the direction and control of Subcontractor or any of Subcontractor's third party vendors or Subcontractors or their respective employees or agents), related to this Agreement or the performance or non-performance of the Work hereunder;

(C) any taxes or third-party obligations, or any related contributions and penalties, imposed on Subcontractor or Contractor by any Governmental Authority or other authority, to the extent payable by and the responsibility of Subcontractor as a result of the Agreement;

(D) the failure of Subcontractor or any of Subcontractor's third-party vendors or Subcontractors to comply with the Law, including any fine, penalty, sanction imposed or assessed by any Governmental Authority relating to such failure, related to this Agreement or the performance or non-performance of the Work hereunder;

(E) any patent, trademark, copyright, industrial design, or other intellectual property infringement pertaining to any equipment, machinery, materials, compositions, processes, methods or designs, specified for use or used by Subcontractor in connection with the Work, except for those supplied or specified for use by Contractor to Subcontractor;

(F) all Liens and claims made or liability incurred by Contractor on account of the Work performed or materials supplied by any Subcontractor, including fees and expenses of legal counsel, but only to the extent Subcontractor has been paid by Contract all amounts due under this Agreement; and

(G) any of Subcontractor Prepared Documents being incorrect or inconsistent with the Agreement or the Law.

Subcontractor shall, at its sole cost and expense, if requested by Contractor, defend any Contractor Indemnified Party entitled to be indemnified under this article. Contractor shall have the right, if it so elects, to participate in any such defence and Subcontractor shall have the right to settle claims without first consulting Contractor, provided that if any settlement of any Claim would lead to liability or create any financial or other obligation on the part of any Contractor Indemnified Party, Subcontractor shall not enter into any such settlement without the consent of Contractor. If Contractor, acting reasonably, considers that the failure to settle any claim, demand, action or proceeding to which it or

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others are entitled to be indemnified by Subcontractor would be detrimental to its interests, it may so notify Subcontractor, and if, within ten (10) Days thereafter, Subcontractor fails to conclude a settlement with the claimant, then Contractor may, in its sole discretion, settle the claim, demand, action or proceeding in such amount as it considers reasonable and Subcontractor agrees to immediately pay to Contractor all or such portion of the amount so paid in settlement as Contractor, in its sole discretion, designates as Subcontractor's liability.

The obligations of Subcontractor under this article shall not be construed to negate, abridge or reduce other rights or remedies of any Contractor Indemnified Parties which would otherwise exist.

Contractor shall indemnify and hold harmless Subcontractor and its officers, directors, employees, consultants, and agents (collectively, the "Subcontractor Indemnified Parties") from and against any and all Claims which may be brought against Subcontractor Indemnified Parties or which Subcontractor Indemnified Parties may incur, suffer, sustain or pay arising out of or in connection with any Claims which arise on account of and are attributable to:

(A) a lack of or defect in title or an alleged lack of or defect in title to the Work Site;

(B) an environmental condition at the Work Site which is the responsibility of the project;

(C) Hazardous Materials supplied by Contractor in connection with this Agreement and while under Contractor's care and control;

(D) defective Project Supplied Materials; and

(e) the negligence or willful misconduct of Contractor Indemnified Parties.

If Contractor accepts the responsibility to indemnify a Subcontractor Indemnified Party, then it shall be entitled to retain and instruct legal counsel to act for and on behalf of such Subcontractor Indemnified Party and to settle, compromise and pay any claim, demand, action or proceeding without obtaining prior approval from the Subcontractor Indemnified Party in whose favor the indemnity has been provided. Subcontractor shall, and shall cause any other Subcontractor Indemnified Party to co-operate in all respects in contesting any third-party claim for which Contractor has accepted responsibility.

The obligations of Contractor under this article shall not be construed to negate, abridge or reduce any other rights or remedies of any Subcontractor Indemnified Party which would otherwise exist.

Notwithstanding anything else in the Agreement, neither Party shall be liable to the other Party for consequential, incidental or indirect damages, except (i) to the extent of amounts recoverable under a policy or policies of insurance required to be maintained pursuant to the provisions of the Agreement, whether required to be maintained by Subcontractor or Contractor, (ii) the obligation to indemnify and defend against third party Claims arising in tort for bodily injury and property damage pursuant to article 32, or (iii) as caused by the applicable Party's willful misconduct or gross negligence.

Notwithstanding anything else in this Agreement, the maximum liability of either Party under this Agreement, whether based on tort, strict liability, breach of contract or otherwise, shall be limited to the Price, except: (i) to the extent such liability arises from the Party's fraud, gross negligence or willful misconduct; (ii) amounts recoverable under a policy or policies of insurance required to be maintained by the indemnifying Party hereunder shall be in addition to the cap on liability in this section; or (iii) pursuant to the obligation to indemnify and defend against third party Claims arising in tort for bodily injury and property damage pursuant to this Article.

Warranty:

Subcontractor represents and warrants that it has the requisite competence, skill, physical resources, and number of trained, skilled, and licensed personnel (qualified by education and experience to perform its assigned tasks), required

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hereunder and that it has and shall maintain the capability, experience, registrations, licenses, permits, and government approvals required to perform the Work herein.

Subcontractor shall be duly incorporated and validly existing under the Law and it is registered and qualified to do business and perform the Work in each jurisdiction in which the Work is to be performed.

Subcontractor hereby warrants and guarantees that all Subcontractor furnished materials will be merchantable, new, unless specifically noted otherwise in the Subcontract Documents, and will be free from defects in design, workmanship, and materials; and that all Work shall be (i) performed in accordance with the industry practices within the industry prevailing at the time of the Agreement (ii) performed in compliance with all applicable federal, state or local laws, ordinances, and regulations, including all Environmental Requirements, Safety and Health Requirements, 29 CFR part 470 (the Beck Notice), and all applicable judicial decrees or voluntary remediation agreements; (iii) performed in conformance with the Subcontract Documents for the specific Project; (iv) suitable for its intended purpose as specified in the Subcontract Documents or as otherwise known by Subcontractor; (v) fit for the particular purpose intended by the Subcontract Documents; (vi) fully tested pursuant to the Subcontract Documents; and (vii) performed in a manner that does not infringe any patent, copyright, trade secret right, trademark right, or any other intellectual property or proprietary right of any third party.

In addition to Subcontractor's warranty obligations, Subcontractor agrees when applicable to the Work to be performed under this Agreement, at any time during the term of this Agreement, to repair, re-perform or replace, at Contractor's option, any Defective Work (including, without limitation, materials). All costs and expenses associated with access to or repair or replacement of Defective Work, including all transportation costs, shall be paid by Subcontractor, and Contractor may charge Subcontractor all expenses of unpacking, examining, repacking, and reshipping any rejected Defective Work. This obligation shall extend for a period of one year from the date of final payment or from the completion date for a specific Project, whichever occurs later. All warranties for any repaired or replaced Defective Work shall be extended to one year from the date of Contractor's acceptance of the repaired or replaced Defective Work or for the duration of the unused warranty period if such period is longer; however, in no event shall the Warranty Period exceed an aggregate of twenty-four (24) months. Subcontractor shall maintain equipment and replace Work damaged as a consequence of Defective Work, all without any cost to Contractor.

With respect to any materials or equipment procured by Contractor from a vendor, Contractor's liability for such materials and equipment shall be limited to "passing through" to Company the benefits of any warranty received from the applicable vendor to Company. The foregoing warranties are in lieu of all other express, implied and/or statutory warranties.

Hazardous Materials

"Hazardous Material" means any pollutant, contaminant, constituent, chemical, mixture, raw material, intermediate product, finished product or by-product, hydrocarbon or any fraction thereof, asbestos or asbestos-containing material, polychlorinated biphenyls, or industrial, solid, toxic, radioactive, infectious, disease-causing or hazardous substance, material, waste or agent, including all substances, material or wastes which are identified or regulated under any Law or the Policies and Guidelines or which may threaten life or property or adversely affect human, animal or vegetation health or the environment

Subcontractor shall examine the Project Sites involved in performing the Work and shall secure full knowledge of all reasonably ascertainable conditions under which the Work is to be executed and completed.

Subcontractor shall not perform any Work in which it uses or incorporates, in whole or in part, any Hazardous Materials in violation of any such Environmental Requirements, or in such a manner as to leave any Hazardous Materials which could be hazardous to persons or property or cause liability to Contractor. Subcontractor shall notify Contractor in writing upon receipt of any material at the Project Site requiring Material Safety Data Sheets (MSDS), and Subcontractor shall promptly provide the MSDS; furthermore, Subcontractor shall remove all unused materials and Subcontractor Waste Materials from the Project Site upon completion of the Work and properly dispose of all such Waste Materials.

Unless the release of Hazardous Materials is the subject of the Project, Subcontractor shall upon discovery of an existing or suspected release on or at the Project Site, cease Work in that area, immediately contact the Contractor's Designated Representative and notify Contractor in writing. If the release is subject to reporting pursuant to any

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Environmental Requirements, Subcontractor shall timely report the release to governmental authorities, or ensure in a timely manner Contractor's Representative is notified and reports the release to governmental authorities. Subcontractor shall continue Work at the Project Site in the areas unaffected by the release unless otherwise advised by Contractor. Upon receiving Contractor's prior written approval, Subcontractor shall remove and properly dispose of all Hazardous Materials and Waste Materials in compliance with all applicable federal, state, and local requirements governing such Hazardous Materials and removal, transportation, and disposal thereof. Upon request, Subcontractor shall provide Contractor with a copy of any licenses, permits, or manifests used in connection with the disposal of any Hazardous Materials or Waste Materials.

In the event Subcontractor transports Waste Materials to an off-site facility (or facilities) for treatment and/or disposal, Subcontractor shall ensure that such facility is in compliance with all Environmental Requirements.

Subcontractor shall handle and preserve, all Waste Materials samples, cuttings, or Hazardous Materials taken for characterization or other like reasons in a manner consistent with the level of care and skill exercised by other Subcontractors under similar circumstances at the time the samples are obtained.

Safety

The Subcontractor acknowledges Contractor's drug free workplace policy and agrees employees shall be subject to pre-employment and random testing in accordance with the Contractor's policy.

Subcontractor shall comply with all applicable local and federal safety and health requirements and laws, regulations, order, directives, codes and guidelines, including OSHA. Subcontractor shall also comply with Owner Safety and Security Requirements as attached by Exhibit, and do so without demanding further compensation from Contractor for such compliance. Site specific safety training will be required. All training will be at Subcontractors sole cost.

Subcontractor represents and warrants that it has an effective health and safety management system that ensures the Work at the Work Site will be carried out safely and in compliance with OHS Legislation and the Agreement. More specifically, Subcontractor represents and warrants that its health and safety management system includes (i) safe work procedures and policies; (ii) safety orientation courses; and (iii) any other operational controls (the "Safety Programs"), all of which meet or exceed the safety requirements of all OHS Legislation and the specifications provided by Exhibit attached as Occupational Health and Safety Specifications for Prime/General Contractors.

Subcontractor shall undertake and implement all safety measures, precautions and programs, including any special precautions which may be required due to hazardous or otherwise dangerous parts of the Work and shall provide all necessary protection to prevent damage, injury or loss to:

(a) All persons performing the Work and all other persons who may be affected by the Work;

(b) All the Work and all materials and equipment whether in storage on or off the Site, under the care, custody or control Subcontractors or agents; and

(c) Other property at the Site or adjacent areas, including trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction.

Subcontractor shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of any public authority having jurisdiction for the safety of persons or property to protect them from damage, injury, or loss. As required by law, existing conditions, and the progress of the Work, Subcontractor shall erect, maintain, and otherwise implement all such safeguards necessary for safety and protection. Such safeguards shall include, but are not limited to, posting danger signs and other warnings against hazards, promulgating safety procedures and notifying owners and users of adjacent facilities.

Contractor and Company shall have the right to stop any work at the Work site which is thought to be unsafe or not in conformity with OHS Legislation or the Site Specific Safety Plan.

Subcontractor shall exercise the utmost care when the use or storage of explosives or other Hazardous Materials or equipment is necessary for the performance of the Work. Subcontractor shall place all explosives or Hazardous

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Materials under the supervision of properly qualified personnel in accordance with all existing laws, ordinances, codes, rules, regulations, orders, and decisions of all governmental authorities having jurisdiction over the Project Site.

In any emergency affecting the safety of persons or property arising out of the Work, Subcontractor shall act immediately (i) to prevent threatened damage, injury, or loss, and (ii) contact the Contractor's Designated Representative of such emergency.

Substance Abuse Policy

a) For Projects that involve natural gas pipelines or liquefied natural gas facilities, the Department of Transportation (DOT) has instituted rules to control the use of drugs and alcohol in the Natural Gas and Hazardous Liquid Pipeline Industry as well as at Liquefied Natural Gas (LNG) facilities. All contractors that have employees who work in positions covered by the applicable regulations are required to establish an anti-drug and alcohol testing program that complies with (1) 49 CFR Parts 199 and 40 of the DOT Regulations and/or (2) applicable state requirements for natural gas pipelines or LNG facilities. The Subcontractor warrants that all of its employees performing Work for the project are in compliance with the above referenced regulations and such anti-drug and alcohol testing programs.

Personal Protective Equipment (PPE) shall be worn and properly utilized, at all times, by Subcontractor's employees while on the job site or while undertaking any work associated with the Project. Subcontractor shall furnish, at its own expense, any necessary material and/or training to conform to these requirements.

Owner's employees or agents may stop work or require corrective action should they determine, in their sole discretion, that Subcontractor's work procedures or equipment do not comply with applicable safety requirements. Owner's decision to stop or alter Subcontractor's unsafe work procedures or equipment shall not obligate Owner or Contractor to reimburse Subcontractor for any associated lost time or other costs. Such costs shall be the sole responsibility of the Subcontractor

Prior to commencement of construction activities, Subcontractor shall make the necessary notification(s) to the appropriate utility warning one call system(s). In areas not covered by one call systems, Subcontractor shall notify Operators of any foreign facilities encountered during construction.

Subcontractor acknowledges that it has received, read, understands, and will comply with the Minimum Requirements For Pipeline Construction In Close Proximity To High Voltage A.C. Overhead Electric Power Lines and shall comply with all requirements and standards therein.

Operator Qualification

For Projects that involve natural gas pipelines or liquefied natural gas facilities, the DOT has instituted rules establishing the requirements and responsibilities for the qualification of individuals who perform covered tasks as defined within 49 CFR, Part 192. If required by Owner or 49 CFR, Part 192 prior to October 28, 2002 and for all Projects which involve covered tasks as defined in 49 CFR, Part 192 after October 28, 2002, Subcontractor shall provide and maintain a written plan identifying its DOT Operator Qualification program that meets the requirements of 49 CFR, Part 192, Subpart N and Owner's approval. The Subcontractor shall certify that all of its employees performing Work for the project are in compliance with the above referenced regulations and any subsequent regulations issued by DOT. Subcontractor shall use only qualified employees to perform covered tasks and provide Contractor with documentation of any modifications that are made in its written plan or its employee's qualifications to perform those covered tasks (at an interval of not less than once per month).

Confidential Information

During the term of this Agreement and thereafter, except as Contractor may authorize in writing, Subcontractor shall (i) treat and cause to be treated as confidential all Confidential Information; (ii) not disclose any Confidential Information to any third party or make available any reports, recommendations, extracts, summaries, analysis or conclusions

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based on the Confidential Information; (iii) reveal the Confidential Information only to those employees of Subcontractor who require such access in order to perform the Work hereunder; (iv) grant access to Confidential Information only to employees of Subcontractor who have signed a confidentiality agreement (v) use or grant access to Confidential Information only in connection with the performance of Work pursuant to this Agreement; (vi) make copies of any tangible embodiment of Confidential Information only as necessary for the performance of such Work; (vii) remove any tangible embodiment of Confidential Information from the premises of Owner (viii) maintain the security of Confidential Information; and (ix) maintain policies and procedures and comply with all applicable laws and regulations to detect, prevent and mitigate the risk of loss, unauthorized access, use, modification, destruction or disclosure of Owner's and its Affiliates' Confidential Information.

Subcontractor may disclose only such Confidential Information as is necessary to comply with a regulatory, legal, or governmental request and only after providing immediate notification to Contractor and Owner allowing sufficient time for Owner to seek a protective or limiting order or otherwise prohibiting the disclosure of the requested Confidential Information as Owner deems necessary in its sole discretion. Subcontractor shall act in good faith to assist to seek a protective order or order limiting disclosure.

In performing the Work, at a minimum, Subcontractors shall employ industry standard data and system security measures for securing Confidential Information so as to reasonably ensure that Confidential Information is not lost or stolen, or otherwise used, modified or accessed, attempted to be accessed, or allow access to any third party without Owner's prior express written approval or by any Subcontractor employee or agent who is not authorized to access the Confidential Information. Subcontractors shall upon discovery of any breach of security or unauthorized access, immediately: (i) notify Contractor and Owner of any loss or unauthorized disclosure, possession, use or modification of the Confidential Information or any suspected attempt at such activity or breach of Subcontractors' security measures, by any person or entity; (ii) investigate and take corrective action in response thereto; and (iii) provide assurance to Owner's reasonable satisfaction that such activities or breach or potential breach shall not reoccur.

While at Owner's or its Affiliate's facilities or using Owner's or its Affiliate's equipment or accessing Owner's or its Affiliate's systems (including telephone systems, electronic mail systems, and computer systems) Subcontractors and their respective personnel shall observe and follow all applicable Owner or Affiliate policies and standards, including those policies relating to security of and access to Confidential Information as such policies and standards are modified and supplemented from time to time. Applicable policies will be made available upon request.

Upon termination of this Agreement, excluding one (1) complete set of documents for Subcontractor's records, the Subcontractor, shall either return the Confidential Information, at Owners sole discretion, to Contractor or Owner or comply with the following minimum standards regarding the proper disposal of Confidential Information: (i) implement and monitor compliance with policies and procedures that prohibit unauthorized access to, acquisition of, or use of Confidential Information during the collection, transportation and disposal of Confidential Information; (ii) paper documents containing Confidential Information shall be either redacted, burned, pulverized or shredded so that Confidential Information cannot practicably be read or reconstructed; and (iii) electronic media and other non-paper media containing Confidential Information shall be destroyed or erased so that Confidential Information cannot practicably be read or reconstructed.

If Subcontractors provision of Work involves the processing of Confidential or other information so as to place Subcontractors in a position to observe indicators of identity theft (e.g. consumer fraud alerts, notifications or warnings; suspicious documents, personal identification information, or activity; or notice from customers, law enforcement or others regarding identity theft), Subcontractors shall: (i) maintain policies and procedures to identify, detect and respond to Red Flags, substantially in accordance with Owner's program regarding such Red Flags, as updated from time to time, a current copy of which will be made available upon request, (ii) report the detection of any such Red Flags to Owner; and (iii) take appropriate measures to prevent or mitigate the risk of identity theft that may arise in the performance of such Work.

Ownership of Work Product

Any and all products of the Work performed by Subcontractor and any of its employees under this Agreement used in connection with this Agreement, including all inventions, discoveries, formulas, processes, devices, methods, compositions, compilations, outlines, notes, reports, system plans, flow charts, source codes, and other forms of

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computer software, algorithms, procedures, policies, data, documentation, and other materials or information which Subcontractor or any of its employees may conceive, invent, author, create, reduce to practice, construct, compile, develop, or improve in the course of performing the Work or otherwise delivered to Owner as part of the Work (collectively, "Work Product") shall be the sole and exclusive property of Owner from and after the time it is created. Subcontractor agrees to disclose to Contractor and Owner the existence of any Work Product of which Owner would not otherwise be aware promptly upon its creation.

Subcontractor agrees to assign and hereby does assign to Owner (together with its successors and assigns) the sole and exclusive right, title, and interest in all Work Product, including any and all related patent, copyright, trademark, trade secret, and other property or proprietary rights of any nature whatsoever. Subcontractor warrants and agrees to execute and deliver to Owner, and Subcontractor and the employees of Subcontractor to execute and deliver to Owner, any and all documents that Owner may reasonably request to convey to Owner any interest Subcontractor, or any of its employees may have in any Work Product or that are otherwise necessary to protect and perfect Owner's interest in any Work Product. Subcontractor further warrants and agrees to take, and Subcontractor agrees to cause Subcontractor's employees to take, such other actions as Owner may reasonably request to protect and perfect Owner's interest in any Work Product. Subcontractor further agrees that the sums paid to Subcontractor by Contractor in connection with Subcontractor's performance of the Work serve, in part, as full consideration for the foregoing assignment, and that said consideration is fair and reasonable, and was bargained for by Subcontractor. Subcontractor represents and warrants that it has full right, power, and authority to grant the assignment granted under this Article.