

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

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

**Columbia Gas Transmission's Motion to Dismiss
Earth Pipeline Services, Inc.'s Second Amended Complaint**

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On December 2, 2020, this Court dismissed all of Plaintiff and Counter-defendant Earth Pipeline Services, Inc.’s (“EPS”) claims, providing leave for EPS to re-plead its quasicontractual claims if it could cure the legal flaws therein.¹ EPS has not only failed to cure its flawed claims, but has also re-pled a cause of action that this Court has already dismissed with prejudice. Defendant and Counter-claimant Columbia Gas Transmission, LLC (“CGT”) moves this Court to dismiss EPS’s Second Amended Complaint and all claims therein pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding by Rule 7102 of the Federal Rules of Bankruptcy Procedure. In support thereof, CGT shows the following:

INTRODUCTION

In EPS’s Second Amended Complaint—a misnomer, as EPS’s pleading is now in its fourth iteration—EPS continues its crusade to extract an unjustified payment from CGT for work it conducted on Spread 1 of CGT’s Mountaineer Xpress Pipeline Project (“MXP”) pursuant to its subcontracts (the “Subcontracts”) with Welded Construction, L.P. (“Welded”). Like its previous iterations, EPS’s “Second” Amended Complaint is legally deficient and should be dismissed with prejudice for several reasons.

First, EPS unapologetically re-pleads the subcontractor’s mechanic’s lien cause of action that this Court has already dismissed *with prejudice*. Since re-pleading was not necessary to preserve any appellate right, it is difficult to surmise why EPS continues to pursue this claim. In any event, this re-pled cause of action is barred by the law of the case and should be dismissed with prejudice again.

Second, as this Court has already held, quasicontractual claims cannot, as a matter of law, coexist with a contract governing the same subject matter. Undeterred by this legal reality or its

¹ In these consolidated proceedings, EPS is Plaintiff in Cause Nos. Adv. Pro. No. 19-50274 (CSS) and Adv. Pro. No. 19-50275 (CSS).

previous representations to this Court, EPS now attempts to manufacture a basis pursuant to which it can claim that roughly \$3.1 million of its claims on MXP fall outside the scope of its Subcontracts. In so doing, EPS relies on conclusory allegations that must give way in light of the clear and unambiguous terms of the Subcontracts and the documents incorporated into the Second Amended Complaint: the Subcontracts expressly govern work EPS performed on MXP outside of the originally-agreed scopes of work, and therefore expressly govern the work that is the subject of EPS's quasicontractual claims. Moreover, on several occasions (including within these consolidated proceedings) EPS has judicially admitted to this Court that the recovery it seeks in its allegedly quasi-contractual claims *arises out of contractual work performed for Welded*. Indeed, EPS seeks a quasicontractual recovery for the same invoices it asserts support its (already dismissed) subcontractor lien claim against CGT and its unsecured contractual claim against Welded. These admissions are fatal to the quasicontractual claims.

Enough is enough. EPS has been given several opportunities to re-plead plausible claims and has failed every single time. It is now clear that additional leave to amend would be futile, as no new allegations can change the fact that EPS's claims are governed by the Subcontracts. Moreover, additional leave to amend would unduly prejudice CGT—this case has been on file for over two years, and CGT has expended significant resources and time defending against baseless claims by EPS. For these reasons, EPS's Second Amended Complaint should be dismissed with prejudice.

NATURE AND STAGE OF THE PROCEEDING

On October 22 2018, Welded filed for Chapter 11 bankruptcy. *In re Welded*, No. 18-12378-CSS (Bankr. D. Del. Oct. 22, 2018), Dkt. 1. On February 28, 2019, within Welded's consolidated bankruptcy proceedings, EPS submitted Proof of Claim Number 592, claiming ("under penalty of perjury") \$3,650,300.42 for "contracted services" provided to Welded. Proof of Claim #592, *In*

re Welded, No. 18-12378-CSS (Bankr. D. Del. Feb. 28, 2019) (“Proof of Claim No. 592”) (attached hereto as Ex. 1).

On March 8, 2019, EPS filed two complaints against CGT in the Circuit Courts for Marshall and Wetzel Counties, West Virginia, seeking to foreclose Mechanics’ Liens against CGT’s real property interests in Spread 1 of the Mountaineer Express Pipeline. Dkt. 55 ¶ 21 (“Sec. Am. Compl.”). On April 10, 2019, CGT removed both of these cases to the United States Bankruptcy Court for the Northern District of West Virginia and additionally brought counterclaims against EPS for slander of title. On June 26, 2019, CGT transferred those cases to this Court. *See* Dkt. 1. CGT later amended its counterclaims to add breach of contract, breach of warranty, and negligence causes of action against EPS. Dkt. 10.

On May 6, 2020, this Court entered a Scheduling Order effectively consolidating the two lien foreclosure actions into a single adversary proceeding included in *Welded’s* bankruptcy proceeding. Dkt. 18. EPS subsequently amended its complaint for the first time to bring it into compliance with West Virginia lien law, adding *Welded* as a nominal defendant. Dkt. 20.

In the Scheduling Order, the Court also ordered that “within twenty-one (21) days of this Order, if *Welded* has filed an adversary proceeding relating to the subject matter of the [EPS and CGT] Adversary Proceeding, such proceeding shall be consolidated with the [EPS and CGT] Adversary Proceeding” Dkt. 18 at ¶ 4. On May 27, 2020, within that twenty-one day period, *Welded* filed a Complaint against EPS (the “*Welded* Adversary Proceeding”).² Accordingly, the

² Complaint and Objection to Proof of Claim Number 592 Filed by Earth Pipeline Services, Inc., *Welded Construction L.P. v. Earth Pipeline Services, Inc.*, No. 20-50612-CSS (Bankr. D. Del. May 27, 2020), Dkt. 1 (“*Welded* Complaint”), attached hereto as Exhibit 3.

Welded Adversary Proceeding has been consolidated with, and is part of this proceeding. *See* Dkt.

18. EPS filed its answer in the Welded Adversary Proceeding on June 26, 2020.³

On May 20, 2020, EPS amended its complaint in these proceedings for a second time, adding additional support for its Mechanics' Liens cause of action and alleging *in personam* claims against CGT for unjust enrichment and *quantum meruit*. Dkt. 23. On June 3, 2020, CGT filed a motion to dismiss all claims. Dkt. 28. On December 1, 2020, this Court granted CGT's motion, dismissing EPS's mechanic's lien claim with prejudice and dismissing EPS's unjust enrichment and *quantum meruit* claims without prejudice. Dkt. 51 ("December Order"). Pursuant to the Court's amended scheduling order entered on December 23, 2020, EPS had until January 13, 2021 to file any amended pleading.

On January 13, 2021, EPS amended its complaint for a third time, filing its Second Amended Complaint. Sec. Am. Compl.. The Second Amended Complaint reasserts EPS's prejudicially dismissed mechanic's lien cause of action, as well as amended unjust enrichment and *quantum meruit* claims against CGT. *Id.* This Motion to Dismiss follows.⁴

³ Answer of Earth Pipeline Services, Inc. to the Complaint and Objection to Proof of Claim Number 592, *Welded Construction L.P. v. Earth Pipeline Services, Inc.*, No. 20-50612-CSS (Bankr. D. Del. June 26, 2020), Dkt. 1 ("Answer to Welded Complaint"), attached hereto as Exhibit 4.

⁴ After receiving an unfavorable ruling from this Court on its Amended Complaint (Dkt. 23), EPS now attempts to dispute this Court's authority to enter final orders. However, EPS has waived this ability in these adversary proceedings as EPS has consented to this Court's jurisdiction by both (1) filing its proof of claim in the *In re Welded* bankruptcy, *see Travellers Intern. AG v. Robinson*, 982 F.2d 96, 100 (3d Cir. 1992), and (2) filing several pleadings without contesting this Court's authority to enter final orders, *see* Bankr. D. Del. R. 7008-1; Dkt. 14, Answer and Affirmative Defenses to First Amended Counterclaim (silent on consent to entry of final orders or judgments); Dkt. 20, Amended Complaint for Limited Purpose to Join Welded Construction, L.P. as Additional Defendant (same); Dkt. 23, Amended Complaint (same).

SUMMARY OF ARGUMENT

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, CGT is entitled to a dismissal of all of EPS's claims with prejudice because EPS fails to (and cannot) state any plausible claims for relief:

1. This Court has already prejudicially dismissed EPS's claim for the enforcement of Mechanics' Liens against CGT's property interests. This same claim cannot be re-plead by virtue of the law of the case.

2. EPS's claims for unjust enrichment and *quantum meruit* fail as a matter of West Virginia law because, as EPS even admits, they arise out of work that was governed by EPS's Subcontracts.

FACTUAL BACKGROUND

In early 2018, CGT hired Welded as a general contractor, pursuant to which Welded was to "furnish[] . . . materials and labor necessary for all the clearing and grubbing of all timber, brush, and vegetation" on CGT's property. Sec. Am. Compl. ¶ 7. Welded, in turn, hired EPS as a subcontractor pursuant to two Subcontracts—one dated March 8, 2018 (the "Hand Felling Subcontract"), and one dated March 20, 2018 (the "Mechanical Clearing Subcontract"). *Id.* at ¶¶ 8-9. Under its Subcontracts, EPS was to perform for Welded the "hand felling of trees . . . [and] mechanical clearing of the right-of-way, all work spaces, and necessary roads of ingress and egress." *Id.* This work was performed by EPS "as part of Welded's work for CGT under the prime contract." *Id.* at ¶ 12. EPS attaches to its Second Amended Complaint a copy of both Subcontracts, but only attaches Exhibit G, the Subcontracts' General Terms and Conditions, to the Mechanical Clearing Subcontract. Dkt. 55-1, Hand Felling Subcontract; Dkt. 55-2, Mechanical Clearing Subcontract. The same form of Exhibit G attached to the Mechanical Clearing Subcontract was

also attached to the Hand Felling Subcontract. *See* Dkt. 55-1, Hand Felling Subcontract p. 1 (referencing Exhibit G, General Terms and Conditions, attached hereto for the Court as Ex. 2).

The Subcontracts' General Terms and Conditions contain a No-Lien clause, which this Court has already discussed in detail. December Order pp. 17-20. The General Terms and Conditions also contain several provisions defining the nature of the contractual relationship between EPS and Welded. *See* Dkt. 55-1, Hand Felling Subcontract; Dkt. 55-2, Mechanical Clearing Subcontract. EPS and Welded agreed that any out-of-scope work would be governed by the Subcontracts' terms and conditions. Ex. 2, Exhibit G pp. 6-7. The General Terms and Conditions specifically address claims for work performed outside the originally agreed scope of work, through provisions addressing change directives, change orders, and claims, and contractual remedies related thereto. Dkt. 55-1, Hand Felling Subcontract p. 2; Dkt. 55-2, Mechanical Clearing Subcontract p. 2; Ex. 2, General Terms and Conditions pp. 3-4, 6-7. The Subcontracts provided Welded with the right to issue a Change Directive to EPS at any time Welded required a change in the "work, or the method, sequencing, conduct, or timing of the [w]ork." Ex. 2, General Terms and Conditions pp. 6-7. In addition, the Subcontracts empowered EPS to submit a Subcontractor Requested Change if it perceived a change in the scope of its work. *Id.* EPS "expressly waived any right to a Change" (and any other remedies) if it did not timely request that Change. *Id.*

The General Terms and Conditions also address circumstances whereby EPS's work is suspended, and EPS's contractual remedies in light thereof. *See* Ex. 2, General Terms and Conditions. For example, the Subcontracts contain language providing that Welded may, at its discretion, suspend the work at any time. *Id.* at pp. 3-4. Any such suspension would constitute a change to the contract. *Id.*

Following Welded's termination of the Subcontracts, EPS demanded payment from Welded for labor and materials in the amount of \$7,342,519.62. Sec. Am. Compl. at ¶¶ 14, 17. Welded paid a portion of that amount to EPS, and EPS alleges that Welded still owes EPS a balance of \$3,650,300.42. *Id.* at ¶ 19. EPS attaches to its Second Amendment Complaint copies of the invoices it submitted to Welded purportedly justifying its claim for \$3,650,300.42. These invoices include, among others, invoices for the roughly \$3.1 million EPS now seeks as a quasicontractual remedy from CGT: WELD-MXP-15 for \$597,396.00; WELD-MXP-17 for \$2,250,627.00; WELD-MXP-18 for \$223,938.12; and WELD-MXP-19 for \$69,960.00. Dkt. 55-3, Unpaid Invoices pp. 38, 70, 97, 102.

As this Court is aware, in spite of the No-Lien Clause, EPS filed two separate Notices of Mechanic's Liens, addressed to CGT, in Marshall County and Wetzel County, West Virginia, which EPS reattaches to Second Amended Complaint. Sec. Am. Compl. ¶ 21; Dkt. 55-4, Marshall County Notice of Mechanic's Lien; Dkt. 55-5, Wetzel County Notice of Mechanic's Lien. The Notices of Mechanic's Liens claim that EPS is entitled to a lien against CGT's property interests for the \$3,650,300.42 that EPS claimed against Welded. EPS originally filed suit on March 8, 2019 to foreclose its purported liens, and this Court eventually dismissed EPS's lien claims with prejudice on December 1, 2020, finding that "[t]he Liens at issue were . . . expressly waived by [EPS] in the Subcontract" and that therefore amendment would be "futil[e]." December Order pp. 19-20, 22.

Separately, on February 28, 2019, and within the Welded bankruptcy proceeding, EPS filed Claim No. 592, claiming ("under penalty of perjury") \$3,650,300.42 for "contracted services" provided to Welded. Ex. 1, Proof of Claim No. 592 p.2. The invoices attached to its Proof of Claim are identical to invoices EPS attaches to its live pleading in support of its lien claim.

Compare id. at pp. 12, 14-16 *with* Dkt. 55-3, Unpaid Invoices pp. 38, 70, 97, 102. Specifically, the invoices attached to EPS’s Proof of Claim show that Welded sought, among others, \$597,396.00 for stand-by (WELD-MXP-15); \$2,250,627.00 for a change order in the steep slope work (WELD-MXP-17); \$223,938.12 for stand-by time due to an Access Road 7.8 delay (WELD-MXP-18); and \$69,960.00 for a change order for timber removal (WELD-MXP-19). Ex. 1, Proof of Claim No. 592 pp. 12, 14-16 In the present case, EPS seeks payment for the same work in the same amounts, down to the cent, for its quasi-contractual claims: EPS seeks \$539,360.00 for having placed “its equipment and laborers on standby”; \$2,250,627.00 for work “under the new Steep Slope Plan”; \$223,938.12 for standby time follow a “change[] [in] the usage designation of Access Road 7.8”; and \$69,960.00 for “haul[ing] . . . timber logs . . .”. Sec. Am. Compl. at ¶¶ 42-44, 46.

ARGUMENT

I. 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). In deciding a Rule 12(b)(6) motion, the Court may also consider “documents filed with this Court in the Debtors’ jointly administered bankruptcy case, such as . . . [documents] from the claims register.” *See In re Innovation Fuels*, No. 11-12911 (DHS), 2013 WL 3835827, at *11 (Bankr. D.N.J. July 22, 2013) (citing *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006)).⁵

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)

⁵ *See also In re McClain*, No. AP 16-80100-HB, 2016 WL 6783248, at *1 (Bankr. D.S.C. Nov. 10, 2016) (proofs of claim “are of public record on this Court’s docket” and therefore can be considered by the Court “when ruling on a motion to dismiss” (citing *Katyle v. Penn Natl. Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011))); *Travelers Cas. & Sur. Co. of Am. v. Highland P’ship, Inc.*, No. 10CV2503 AJB DHB, 2012 WL 5928139, at *13 (S.D. Cal. Nov. 26, 2012) (“a court may take judicial notice of facts . . . whose accuracy cannot be easily questioned. This includes matters of public record and court documents.” (citation omitted)); *Rastegar v. Wells Fargo Bank, N.A.*, No. SACV1600078JVSDFMX, 2016 WL 7495832, at *1 (C.D. Cal. Mar. 15, 2016), *aff’d* 745 F. App’x 761 (9th Cir. 2018) (“the court may take judicial notice of federal bankruptcy records”); *Harris v. Cnty of Orange*, 682 F.3d 1126, 1192 (9th Cir. 2012) (“We may take judicial notice of undisputed matters of public record . . . including documents on file in federal or state courts).

(“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.”).

II. EPS’s Lien Claim Has Already Been Dismissed with Prejudice.

EPS has no viable claim for the enforcement of Mechanics’ Liens against CGT. In its December 1, 2020, Order, this Court dismissed that same claim with prejudice, because (1) EPS’s lien claim was capped by the amount that it could recover from Welded under the Subcontracts, and, for the reasons the Court set forth in its December Order, that amount was “nothing;” and (2) EPS unambiguously waived any purported lien claim under its Subcontracts. December Order pp. 15-16. Since any appeal on the lien claim was preserved by the dismissal with prejudice, *see Palakovic v. Wetzel*, 854 F.3d 209, 220 (3d Cir. 2017), EPS’s attempt to resurrect this previously-dismissed claim appears to be a violation of the December Order.⁶

“[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *ACLU v. Mukasey*, 534 F.3d 181, 187 (3d Cir. 2008) (quotations omitted); *see also* Fed. R. Civ. P. 41(b) (a dismissal with prejudice “operates as an adjudication on the merits”). Because EPS reasserts a claim previously dismissed with prejudice, it is subject to the doctrine of the law of the case. *Id.* This doctrine “limits re-litigation of an issue once it has been decided in an earlier stage of the same litigation.” *Hamilton v. Leavy*, 322 F.3d 776, 786-87 (3d Cir. 2003) (citation omitted). Accordingly, EPS is precluded from relitigating its lien claim, and it should once again be dismissed with prejudice. *See id.*

⁶ EPS’s previous complaint only pled the existence of one, not both, of the Subcontracts. This makes no difference factually or legally, as both Subcontracts contain the No-Lien Clause.

III. EPS's Quasi-Contractual Claims Fail as a Matter of Law Because They Cannot Coexist with EPS's Subcontracts.

The Court previously dismissed EPS's quasi-contractual claims because it found they had no legal basis under the First Amended Complaint: “neither unjust enrichment nor *quantum meruit* [were] independently supported by the facts” because they co-existed with a Subcontract relating to the same subject matter. December Order p. 21. Nevertheless, the Court provided EPS leave to amend its quasicontractual claims under the liberal amendment standard set forth in *Arthur v. Maersk, Inc.*, 434 F.3d 196, 203 (3d Cir. 2006).

As this Court previously held, and as the Northern District of West Virginia held on several occasions, under West Virginia law, “quasi-contract claims, like unjust enrichment or *quantum meruit*, are unavailable when an express agreement exists because such claims exist only in the absence of an agreement.” December Order pp. 20-21 (quoting *Ohio Valley Health Servs. & Educ. Corp. v. Riley*, 149 F.Supp.3d 709, 721 (N.D.W. Va. 2015) (citations omitted)) (emphasis omitted)). *See also Schmid Pipeline*, Adv. Pro. No. 19-50886-CSS, Mem. Order at pp. 5-6. “An implied contract and an express one covering the identical subject-matter cannot exist at the same time.” *Id.* at p. 20 (quoting *Rosenbaum v. Price Const. Co.*, 184 S.E. 261, 263 (W. Va. 1936)).

Even after amendment, EPS has not distinguished its quasi-contractual claims from the admitted subject matter of the Subcontracts—and it cannot, for several reasons. First, the Subcontracts specifically govern the work EPS has pled in its quasi-contractual causes of action; even if certain work or compensation was purportedly outside of the original scope of work listed in the Subcontracts, the Subcontracts still govern all work EPS performed on Spread 1 of MXP. Second, in at least two other instances, EPS has affirmed to this Court that the specific claims for which it now seeks quasi-contractual relief arise out of the Subcontracts. And third, EPS's quasi-contractual claims are sought in EPS's mechanics' lien recovery under the ***Subcontractor*** lien

statute—meaning that EPS is impermissibly pursuing quasicontractual remedies while seeking a recovery based on its claims’ contractual nature.

A. The Subcontracts Specifically Govern the Purportedly Quasi-Contractual Work

EPS claims that it is entitled to recovery in unjust enrichment and *quantum meruit* for the following:

- \$69,960.00 for the hauling of timber logs “from a certain part of the Property” (Sec. Am. Compl. ¶ 42);
- \$223,938.12 for “lost production of manpower and equipment rental” for “idle stand-by time,” purportedly “burning work for three (3) days” on the “mechanical clearing” (*Id.* at ¶ 43);
- \$597,396.00 in “lost production of manpower and equipment rental” for “a safety stand-down” whereby EPS was ordered “to place its equipment and laborers on stand-by” (*Id.* at ¶ 44); and
- \$2,250,627.00 for “additional manpower and equipment to perform certain mechanical clearing and hand felling work” in accordance with a Steep Slope Plan on the Project (*Id.* at ¶¶ 45-46).

See also id. at ¶ 61 (repeating and realleging same purported facts for *quantum meruit* cause of action). It is undisputed that EPS’s claims for compensation all relate to work that EPS allegedly performed on MXP Spread 1. *See id.* at ¶¶ 4, 38, 39. This, by itself, is enough to render EPS’s quasi-contractual claims invalid as a matter of law. Despite all of its protests and alleged conclusions of law to the contrary (*see, e.g., id.* at ¶¶ 42, 46-47), the Subcontracts still govern the work and compensation claimed by EPS for its work under Welded (as prime contractor) on MXP Spread 1. And when EPS’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).

Both the Hand Felling Subcontract and the Mechanical Clearing Subcontract incorporate Welded’s General Terms and Conditions—attached to EPS’s Second Amended Complaint as Exhibit G to the Mechanical Clearing Subcontract. Both Subcontracts contain the following provisions, among others:

- Integration clauses stating that the Subcontracts “embod[y] the entire agreement[s] between CONTRACTOR and SUBCONTRACTOR and supersede[] all other writings. The parties shall not be bound by or be liable for any statement, representation, promise, inducement or understanding not set forth herein.” Dkt. 55-1, Hand Felling Subcontract p. 2; Dkt. 55-2, Mechanical Clearing Subcontract p.2.
- Provisions regarding the “Suspension of Work,” governing EPS’s obligations when Welded “require[s] [EPS] to suspend the Work or any portion thereof,” and specifically giving EPS a contractual remedy for such suspending Work:

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 . . .

Ex. 2, General Terms and Conditions pp. 3-4.

- Change Directive, Change Order, and Claim provisions specifically addressing changes in scopes of work and requests for increased compensation in light thereof:

Change Directives

Contractor may at any time by issuing a Change Directive to a Subcontractor, require a change *in the work*, or the method, sequencing, conduct, or timing of the Work of this Agreement . . . 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). . . 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.

Subcontractor Request Change

Subcontractor may, at any time . . . request a Change within (2) Business Days of the event giving rise to the Subcontractor’s request. . . . 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 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, 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 the 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 . . . will be resolved pursuant to this article. . . .*

Ex. 2, General Terms and Conditions pp. 6-7 (emphasis added). These provisions confirm that EPS’s conclusory allegations regarding the extra-contractual nature of the work are meritless and have no legal basis. It does not matter whether EPS’s allegedly quasi-contractual work “was not part of any of[sic] scope of work included in the contracts between EPS” because the Subcontracts expressly govern work performed outside of the originally agreed-to scopes of work, and actually expand the scope of work in the event that originally unanticipated work is performed. Sec. Am. Compl. ¶ 42. Under the Subcontracts, out-of-scope work was governed by Change Directives – and if Welded never issued a Change Directive for out-of-scope work, it was incumbent on EPS to submit a Change Request and file a Claim with Welded in the event of the Change Request’s denial. *See* Ex. 2, Exhibit G pp. 6-7. In short, through at least the Change Directives, Change Requests, Claims, and Disputes provisions, the Subcontracts govern all work that EPS performed

for Welded on MXP Spread 1—regardless of whether that work was within or beyond the initial scope of work agreed to by Welded and EPS.

Indeed, the very invoices for this work (submitted by EPS as exhibits to its Second Amended Complaint) reference both (1) “stand-by” time under “Welded – MXP1”—explicitly governed by the Suspension of Work provision—and (2) “CORN” (i.e., change order request numbers) under “Welded – MXP1.” *See* Dkt. 55-3, Unpaid Invoices pp. 38, 70, 97, 102. Based on the face of the invoices, EPS indisputably understood and admitted that its quasicontractual claims were in fact governed by the Subcontracts. The bare conclusions to the contrary in the Second Amended Complaint cannot somehow give these claims a non-contractual basis.

That “Welded has contested [certain claims] taking the position that the claims are for work performed outside Welded’s contracts with EPS” further brings this dispute under the scope of the Subcontracts. Sec. Am. Compl. ¶ 47. Since such a dispute arises out of or relates to the Subcontracts in at least some way, that dispute is governed by the broad scope of the Disputes provision (in conjunction with the Change Request provision) in the Subcontracts. Ex. 2, Exhibit G p. 7.

In short, the Subcontracts were drafted in order to govern *any* work performed by EPS on MXP Spread 1. Indeed, EPS’s own exhibits show that EPS submitted the invoices comprising its quasicontractual claims to Welded in a manner that reflected EPS understood and admitted these invoices fall within the Subcontracts’ change and dispute procedures. EPS cannot now escape the Subcontracts’ provisions by making unsubstantiated and conclusory allegations that it performed certain work outside of the Subcontract.

B. On Several Occasions, EPS has Represented to this Court that its Allegedly Quasi-Contractual Claims were Governed by its Subcontracts.

EPS similarly cannot escape from its previous judicial admissions that its allegedly quasi-contractual claims are governed by the Subcontracts. “[J]udicial admissions are binding for the purpose of the case in which the admissions are made.” *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972).⁷ A judicial admission “is ‘any deliberate, clear and unequivocal statement, either written or oral, made in the course of judicial proceedings,’ and may include a party’s statements in its pleadings or its legal briefs.” *Weaver v. Conrail, Inc.*, No. CIV.A 09-5592, 2010 WL 2773382, at *8 (E.D. Pa. July 13, 2010) (internal citations omitted) (citing several sources).

“An answer is a judicial admission, and as such binds the party who makes it, establishes the truth of the admitted fact for the purposes of the instant proceedings, and may ‘estop’ the party making a contrary argument at trial and on appeal.” *Id.* (citing *Berkeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 n. 20 (3d Cir. 2006) and *Parilla v. IAP Worldwide Serv., VI, Inc.*, 368 F.3d 269, 275 (3d Cir. 2004)). Statements made in Proofs of Claim are also judicial admissions for the purposes of adversary proceedings relating to the subject matter of those Proofs of Claim. *See, e.g., In re Jordan*, 403 B.R. 339, 352 (Bankr. W.D. Pa. 2009) (“it is proper to treat the statements as to the nature of the collateral contained in Greentree’s Proofs of Claim as binding, judicial admissions in this adversary proceeding”); *In re Perry*, 394 B.R. 852, 857 (Bankr. S.D. Tex. 2008 (proofs of claim filed by creditors are judicial admissions); *In re Allegheny Health*,

⁷ Since “a judicial admission is not itself evidence” but rather “has the effect of withdrawing a fact from contention,” it is proper to consider judicial admissions on a motion to dismiss for failure to state a claim if they make a claim for relief implausible. *See Martinez v. Bally’s Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001) (summary judgment case); *Halprin v. Fed. Deposit Ins. Corp.*, 5:13-CV-1042-RP, 2016 WL 5718021, at *6 (W.D. Tex. Sept. 30, 2016) (“Even under the deferential standards of Rules 12(c) and 12(b)(6), the Court must conclude the statement in question was a binding judicial admission”); *Morton & Bassett, LLC v. Organic Spices, Inc.*, 15-CV-01849-HSG, 2016 WL 4608213, at *5 (N.D. Cal. Sept. 6, 2016) (judicial admission properly considered on motion to dismiss under Rule 12(b)(6)).

Educ. & Research Found., 321 B.R. 776, 799-800 (Bankr. W.D. Pa. 2005) (representations made by claimant in pre-petition district court complaint that she attached to her proof of claim in the bankruptcy court constitute binding and conclusive judicial admissions).

1. Proof of Claim Number 592

First, EPS's quasi-contractual claims are claimed in EPS's proof of claim in the Welded Bankruptcy. In its Proof of Claim for Claim Number 592, submitted to this Court "under penalty of perjury" on February 28, 2019 (Ex. 1, Proof of Claim No. 592 p. 3), EPS makes a claim against the Welded estate for \$3,650,300.42, on the basis of "contracted services provided" (*Id.* at p. 2). To the extent necessary, CGT requests this Court take judicial notice of EPS's Proof of Claim No. 592.

In its summary addendum submitted with Claim Number 592, EPS breaks out its claim into the following invoices and amounts:

- WELD-MXP-11 for \$85,649.00
- WELD-MXP-13 for \$44,550.00
- WELD-MXP-14 for \$28,134.00
- WELD-MXP-15 for \$597,396.00⁸
- WELD-MXP-16 for \$344,534.03
- WELD-MXP-17 for \$2,250,627.00
- WELD-MXP-18 for \$223,938.12; and
- WELD-MXP-19 for \$69,960.00

Id. at p. 8. EPS also attaches copies of each of these invoices. *See id.* at pp. 9-16.

The purportedly quasicontractual claims at issue in this adversary proceeding are ***the exact same claims*** that EPS made against Welded for "contracted services provided" – and are specifically claimed against Welded under invoices WELD-MXP-15, WELD-MXP-17, WELD-

⁸ The summary page by EPS states that WELD-MXP-15 was submitted for \$598,397.00, but this appears to be a typo. The invoice actually submitted and attached to the claim was for \$597,396.00. *See* Dkt. 55-3, Unpaid Invoices p. 38.

MXP-18, and WELD-MXP-19. In fact, the invoices submitted by EPS as exhibits to its Second Amended Complaint are *identical* to the invoices attached to its Proof of Claim for Claim Number 592. *Compare* Dkt. 55-3, Unpaid Invoices p. 38 *with* Ex. 1, Proof of Claim No. 592 p. 12 (WELD-MXP-15 for \$597,396.00); *compare* Dkt. 55-3, Unpaid Invoices p. 70 *with* Ex. 1, Proof of Claim No. 592 p. 14 (WELD-MXP-17 for \$2,250,627.00); *compare* Dkt. 55-3, Unpaid Invoices p. 97 *with* Ex. 1, Proof of Claim No. 592 p. 15 (WELD-MXP-18 for \$223,938.12); *compare* Dkt. 55-3, Unpaid Invoices p. 102 *with* Ex. 1, Proof of Claim No. 592 p. 16 (WELD-MXP-19 for \$69,960.00). In short, EPS’s quasicontractual claim against CGT is for the exact same monetary amount (and for the exact same work) that it already claims on a contractual basis against Welded.

EPS has thus judicially admitted that its purportedly quasicontractual claims are for “contracted services provided” by virtue of submitting its same claims against Welded in Proof of Claim 592. Nothing EPS alleges in its Second Amended Complaint can help it escape this admission, as this admission takes the contractual nature of its claims out of contention. *See, e.g., Martinez* 244 F.3d at 476.⁹

2. EPS’s Answer to Welded’s Complaint

In these consolidated adversary proceedings, Welded seeks contractual and preference relief from EPS relating to the work EPS performed under the Subcontracts. *See* Ex. 3, Welded Complaint. In Answering Welded’s Complaint, EPS makes several judicial admissions

⁹ Separately and independently, by virtue of the doctrine of judicial estoppel, the Third Circuit has “recognized the intrinsic ability of courts to dismiss an offending litigant’s complaint without considering the merits of the underlying claims when such dismissal is necessary to prevent a litigant from ‘playing fast and loose with the courts’.” *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319–20 (3d Cir. 2003) (citation omitted). This is because “absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.” *Id.* (citation omitted). This is precisely what EPS attempts here.

demonstrating that its purported quasi-contractual claims arise under the Subcontracts. *See* Ex. 4, Answer to Welded Complaint. Some of the relevant admissions include the following:

Welded Complaint	EPS' Answer to Welded Complaint
<p>28. Following numerous inquiries from Welded employees, and over three (3) months after the Steep Slope Change Order was rejected, Earth resubmitted the Steep Slope Change Order in the reduced amount of \$2,469,172.75. <i>On September 4, 2018, only six (6) days prior to filing a lien against the MXP, Earth submitted invoice WELD-MXP-17 (the "Steep Slope Invoice") to Welded in the amount of \$2,250,627 for "Change in Steep Slope Work Spec."</i> Notably, the charges reflected in the Steep Slope Invoice were not included in an initial Notice of Mechanic's Lien that Earth sent to Welded on August 1, 2018.</p> <p>Ex. 3 ¶ 28 (emphasis added).</p>	<p>28. <i>Admitted that the referenced change order and correspondence were exchanged.</i> The referenced documents, including EPS' initial Notice of Mechanic's Lien, are writings, the terms of which are their own best evidence. Denied that the steep slope plan was rejected. Welded's reference to "numerous inquiries" is denied as vague and ambiguous.</p> <p>Ex. 4 ¶ 28(emphasis added).</p>

Here, EPS expressly admits that its claim for \$2,250,627 for steep slope work (part of its quasi-contractual claim in the Second Amended Complaint) was submitted as a change order to Welded, effectively admitting that the steep slope work was, in fact, governed by the Subcontracts' change order provisions.

Welded Complaint	EPS Answer
<p>37. Earth filed Claim No. 592, in which Earth contends Welded is indebted to Earth in the aggregate amount of \$3,650,300.42 for contractual services provided to Welded on the MXP. Specifically, in the eight (8) invoices attached to Claim No. 592, Earth asserts Welded is obligated to pay Earth for (1) clearing and hand felling work, (\$85,649.90), (2) clearing and timber-mat installation (\$44,550.00), (3) clearing (\$28,134.00), <i>(4) stand-by (\$598,396.00)</i>, (5) retainage (\$344,534.03), <i>(6) the Steep Slope Invoice (\$2,250,628.00)</i>, <i>(7) stand-by for access-road delay (\$223,938.12)</i>, and <i>(8) timber removal</i></p>	<p>37. <i>Admitted that EPS filed Claim No. 592.</i> It is denied that Welded disputed any part of the invoices submitted. It is further denied that Welded has any proper basis to dispute any part of the invoices now.</p> <p>Ex. 4 ¶ 37 (emphasis added).</p>

<p>(\$69,960.00). Welded does not dispute the invoices submitted for clearing (\$28,134.00) and timber removal (\$69,960.00), except that such amounts are subject to setoff or other netting requirements. All other invoices are disputed in whole, or in part, as they: (i) relate to work that was neither approved nor completed, (ii) were improperly calculated, or (iii) reflect work that Earth was not entitled to invoice under the Subcontracts.</p>	
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<p>Ex. 3 ¶ 37 (emphasis added).</p>	
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Here, EPS expressly admits that its Claim No. 592 was submitted. By not denying the same, EPS has also admitted that Claim No. 592—and the specific invoices claimed therein—was for “contractual services provided to Welded on the MXP.” *See* Fed. R. Civ. P. 8(b)(6) (“*Effect of Failing to Deny*.”). An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.”)

Both admissions are fatal to EPS’s alleged quasi-contractual claims. Because the work for which EPS seeks quasicontractual relief is subsumed in its Claim No. 592, EPS has conceded that this work is governed by the Subcontracts. Since these judicial admissions were made in this consolidated proceeding, the Court may consider them in deciding this Motion. *See generally, Landry v. United States*, 20 F.3d 469, (5th Cir. 1994) (upholding district court’s disposal of one action based on judicial admissions made in a consolidated action); *see also Mayer*, 605 F.3d at 230; *Buck*, 452 F.3d at 260; *Harris*, 682 F.3d at 1192; *In re Innovation Fuels*, 2013 WL 3835827, at *11. To the extent necessary, CGT requests judicial notice of the Welded Complaint and EPS’s Answer thereto.

3. EPS’s Mechanic’s Lien Claim

EPS’s failure to remove its mechanic’s lien cause of action from the Second Amended Complaint is fatal to EPS’s quasicontractual claims. EPS purportedly seeks a lien recovery against

CGT's property in the amount of \$3,650,300.42. Sec. Am. Compl. ¶ 42. As EPS's exhibits show, this roughly \$3.65 million number *includes* the \$3,141,921.12 EPS claims in its quasicontractual causes of action. Dkt. 55-3, Unpaid Invoices pp. 38 (WELD-MXP-15 for \$597,396.00), 70 (WELD-MPX-17 for \$2,250,670.00), 97 (WELD-MXP-18 for \$223,938.12), 102 (WELD-MXP-19 for \$69,960.00).

Critically, EPS makes its lien claim under Article 2-2 of the West Virginia lien statute, which provides a remedy for the "LIEN OF [A] ***SUBCONTRACTOR***." W. VA. CODE § 38-2-2 (emphasis added). A lien claim arising out of Section 38-2-2 must be made "*under and by virtue of a contract with [a] general contractor*." *Id.* (emphasis added). EPS cannot simultaneously assert a lien against CGT for work allegedly performed "under and by virtue of a contract," while at the same time alleging that the same exact work was performed outside the contract. *See Ohio Valley Health Servs.*, 149 F. Supp. 3d at 721 ("quasi-contract claims . . . are unavailable when an express agreement exists because such claims only exist in the absence of an agreement"). These positions are irreconcilably inconsistent.

That EPS claims a lien under the subcontractor statute of the West Virginia Lien law is an admission that the work it claims thereunder was performed under a subcontract. EPS's quasicontractual claims arising out of this same work should therefore be dismissed with prejudice because they coexist with a contract. *See Rosenbaum*, 184 S.E. at 263. *See also Ohio Valley Health Servs.*, 149 F. Supp. 3d at 721.

* * *

In short, EPS cannot within this same bankruptcy proceeding seek a ***contractual*** claim against Welded (or a lien claim against CGT based on its Subcontracts with Welded) for the same work it seeks a ***quasicontractual*** remedy against CGT. A quasicontractual claim cannot co-exist

with a contract governing the same work. EPS's quasicontractual claims are therefore invalid as a matter of law. *Rosenbaum*, 184 S.E. at 263. *See also Ohio Valley Health Servs.*, 149 F. Supp. 3d at 721.

IV. Leave to File a Fifth Complaint Should Be Denied.

The Court should not entertain a fifth complaint from EPS. As this Court noted in its December Order, leave to amend should be denied in circumstances of "undue delay, bad faith, and futility." December Order p. 22 (citing *Arthur v. Maersk*, 434 F.3d 196, 204 (3d Cir. 2006)). However, "[w]hen a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied." *Arthur*, 434 F.3d at 204 (citations omitted).

Here, leave to further amend should be denied in light of undue delay, futility, and prejudice to CGT. EPS has had at least four different opportunities in over roughly two years to plead a cause of action upon which relief may be granted, but it has not plausibly done so. This is because it has no legally cognizable quasi-contractual claims. As this Court has previously noted, leave to amend a mechanics' lien cause of action would be futile in light of the terms of the Subcontracts. December Order p. 22. Moreover, based on the allegations in EPS's latest pleading, leave to amend a quasicontractual cause of action would also be futile in light of the breadth of the Subcontracts' terms. Because the Subcontracts necessarily cover *all* work EPS performed under Welded's direction on MXP Spread 1, and because EPS *only* has claims for work it performed under Welded's direction on MXP Spread 1, there are no circumstances under which EPS can state a legally cognizable quasicontractual claim against CGT. Additionally, CGT has been unduly burdened with litigating EPS's invalid claims for roughly two years. EPS's continued assertion of claims barred by the existence and provisions of the Subcontracts borders on the vexatious, and should weigh heavily against any request to amend.

In short, EPS has consistently “fail[ed] to take advantage of previous opportunities to amend,” and EPS cannot fix the legal flaws in its claims with another amendment. *Arthur*, 434 F.3d at 204. For these reasons, this Court should deny EPS leave to amend its claims and dismiss its Second Amended Complaint with prejudice.

CONCLUSION

As with its previous iterations, EPS’s Second Amended Complaint fails to state any claim upon which relief may be granted. EPS’s mechanic’s lien claim has already been dismissed with prejudice by this Court and it should be dismissed again. EPS’s claims for unjust enrichment and *quantum meruit* have not, and cannot, be saved by amendment because EPS only seeks a recovery for work that was governed by the Subcontracts.

CGT respectfully asks this Court to dismiss EPS’s Second Amended Complaint and all claims contained therein with prejudice, and requests all other relief to which it is justly entitled.

Date: January 26, 2021

ARCHER & GREINER, P.C.

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EXHIBIT 1

Fill in this information to identify the case:

Debtor Welded Construction, L.P.

United States Bankruptcy Court for the: _____ District of Delaware
(State)

Case number 18-12378

Official Form 410
Proof of Claim

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>Earth Pipeline Services, Inc.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? Earth Pipeline Services, Inc. Mark A. Lindsay, Esq. 707 Grant Street Suite 2200 Pittsburgh, PA 15219, USA Contact phone <u>412-456-8100</u> Contact email <u>mlindsay@bernsteinlaw.com</u>	Where should payments to the creditor be sent? (if different) Contact phone _____ Contact email _____ Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6.	Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7.	How much is the claim?	\$ <u>3,650,300.42</u> Does this amount include interest or other charges? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8.	What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>Contracted Services Provided</u>
9.	Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10.	Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11.	Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☒ No☐ Yes. Check all that apply:

Amount entitled to priority

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ _____

☐ Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.☒ I am the creditor's attorney or authorized agent.☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 02/28/2019

MM / DD / YYYY

/s/Mark A. Lindsay

Signature

Print the name of the person who is completing and signing this claim:

Name Mark A. Lindsay

First name

Middle name

Last name

Title AttorneyCompany Bernstein-Burkley, P.C.

Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____

Contact phone _____

Email _____



Case 19-50274-CSS Doc 58-1 Filed 01/26/21 Page 5 of 17
KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (888) 830-4648 | International (310) 751-2642

Debtor: 18-12378 - Welded Construction, L.P. District: District of Delaware		
Creditor: Earth Pipeline Services, Inc. Mark A. Lindsay, Esq. 707 Grant Street Suite 2200 Pittsburgh, PA, 15219 USA Phone: 412-456-8100 Phone 2: Fax: 412-456-8135 Email: mlindsay@bernsteinlaw.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: Contracted Services Provided	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: 3,650,300.42	Includes Interest or Charges: No	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Mark A. Lindsay on 28-Feb-2019 2:43:19 p.m. Pacific Time Title: Attorney Company: Bernstein-Burkley, P.C.		

Your claim can be filed electronically on KCC's website at <https://epoc.kccllc.net/welded>.

United States Bankruptcy Court for the District of Delaware

Indicate Debtor against which you assert a claim by checking the appropriate box below. **(Check only one Debtor per claim form.)**

☒ Welded Construction, L.P. (Case No.18-12378)

☐ Welded Construction Michigan, LLC (Case No. 18-12379)

Official Form 410 Proof of Claim

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Other than a claim under 11 U.S.C. § 503(b)(9), this form should not be used to make a claim for an administrative expense arising after the commencement of the case.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed.

Part 1: Identify the Claim

1. Who is the current creditor?	Earth Pipeline Services, Inc. Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent? Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Where should notices to the creditor be sent? Mark A. Lindsay, Esq. Name 707 Grant Street, Suite 2200 Number Street Pittsburgh PA 15219 City State ZIP Code USA Country Contact phone 412-456-8100 Contact email mlindsay@bernsteinlaw.com Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	Where should payments to the creditor be sent? (if different) Name Number Street City State ZIP Code Country Contact phone _____ Contact email _____
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _
7. How much is the claim? \$ 3,650,300.42	Does this amount include interest or other charges? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>Contracted Services Performed</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature of property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ _____

☐ Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation identifying which of the Debtors such goods were shipped to and the date such goods were received by such Debtors, stating whether the value of the goods asserted herein represents a combination of goods and services and, if applicable, the percentage of alleged value related to services and related to goods, and attach any documentation identifying the particular invoices for which the section 503(b)(9) claim is being asserted.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it.
FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 2/28/2019

MM / DD / YYYY

Signature

Print the name of the person who is completing and signing this claim:

Name	<u>Mark</u>	<u>A</u>	<u>Lindsay</u>
	First name	Middle name	Last name
Title	<u>Attorney</u>		

Company Bernstein-Burkley, P.C.

Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 707 Grant Street, Suite 2200

Number Street

Pittsburgh

City

PA
State

15219
ZIP Code

USA
Country

Contact phone 412-456-8100

Email mlindsay@bernsteinlaw.com

SUMMARY ADDENDUM TO PROOF OF CLAIM OF EARTH PIPELINE SERVICES, INC.

The instant claim filed by Earth Pipeline Services, Inc. is summarized as follows:

<u>Invoice #</u>	<u>Amount</u>
WELD-MXP-11	\$85,649.90
WELD-MXP-13	\$44,550.00
WELD-MXP-14	\$28,134.00
WELD-MXP-15	\$597,396.00
WELD-MXP-16	\$344,534.03
WELD-MXP-17	\$2,250,627.00
WELD-MXP-18	\$223,938.12
WELD-MXP-19	\$69,960.00
TOTAL	\$3,650,300.42

Documentation provided in support of each referenced invoice is voluminous and may contain confidential and/or proprietary information and, accordingly, is not attached hereto. However, any and all such supporting documentation has been provided to the Debtors and any interested parties. Additional copies of such supporting documentation will be provided upon request to parties entitled thereto.

**INVOICE**

Date	Invoice #
6/11/2018	WELD-MXP-11

Bill To

Welded Construction, L.P.
26933 Eckel Road
Perrysburg, OH 43551

P.O.	Project	AFE No.	Billing Period	Terms
81198	E-04-18			Net 30
Quantity	Description	Rate	Amount	
	Welded - MXP1 Work from Apr 6 to May 19 2018			
2,410	Mechanized Clearing - AR - Perform	12.00	28,920.00	
18,661	Hand Felling - AR - Perform	3.55	66,246.55	
	Retainage - 10%	-9,516.65	-9,516.65	
Please remit payment to: Earth Pipeline Services, Inc.			Total \$85,649.90	
THANK YOU FOR YOUR BUSINESS!		Phone: (724) 243-3699		



135 Technology Drive, Suite 100
Canonsburg, PA 15317

www.earthpipelines.com

INVOICE

Date	Invoice #
6/20/2018	WELD-MXP-13

Bill To

Welded Construction, L.P.
26933 Eckel Road
Perrysburg, OH 43551

P.O.	Project	AFE No.	Billing Period	Terms
81198	E-04-18			Net 30
Quantity	Description	Rate	Amount	
	Welded - MXP1 Work from Jun 10 to Jun 16 2018			
500	Mechanized Clearing - ROW - Perform	52.00	26,000.00	
600	Mechanized Clearing - AR - Perform	12.00	7,200.00	
31	Timber Mats - 18' - Provide & Install	300.00	9,300.00	
2	Perm. Bridge<30' (incl Sideboards & Geotextile Fabric)	3,500.00	7,000.00	
	Retainage 10%	-4,950.00	-4,950.00	
Please remit payment to: <u>Earth Pipeline Services, Inc.</u>			Total \$44,550.00	
THANK YOU FOR YOUR BUSINESS!		Phone: (724) 243-3699		



135 Technology Drive, Suite 100
Canonsburg, PA 15317

www.earthpipelines.com

INVOICE

Date	Invoice #
7/3/2018	WELD-MXP-14

Bill To
Welded Construction, L.P. 26933 Eckel Road Perrysburg, OH 43551

P.O.	Project	AFE No.	Billing Period	Terms
81198	E-04-18			Net 30
Quantity	Description	Rate	Amount	
2.605	Welded - MXP1 Work from Jun 17 to Jun 23 2018			
	Mechanized Clearing - AR - Perform Retainage 10%	12.00 -3,126.00	31,260.00 -3,126.00	
Please remit payment to: <u>Earth Pipeline Services, Inc.</u>			Total	\$28,134.00
THANK YOU FOR YOUR BUSINESS!		Phone: (724) 243-3699		



135 Technology Drive, Suite 100
Canonsburg, PA 15317

www.earthpipelines.com

INVOICE

Date	Invoice #
8/7/2018	WELD-MXP-15

Bill To

Welded Construction, L.P.
26933 Eckel Road
Perrysburg, OH 43551

P.O.	Project	AFE No.	Billing Period	Terms
81198	E-04-18			Net 30
Quantity	Description	Rate	Amount	
4	Welded - MXP1 Stand-By Jun 15 through & including Jun 18 2018 SEE ATTACHED COST SHEET Stand-by	149,349.00	597,396.00	
Please remit payment to: Earth Pipeline Services, Inc.			Total	\$597,396.00
THANK YOU FOR YOUR BUSINESS!			Phone: (724) 243-3699	



135 Technology Drive, Suite 100
Canonsburg, PA 15317

www.earthpipelines.com

INVOICE

Date	Invoice #
8/6/2018	WELD-MXP-16

Bill To

Welded Construction, L.P.
26933 Eckel Road
Perrysburg, OH 43551

P.O.	Project	AFE No.	Billing Period	Terms
81198	E-04-18			Net 30
Quantity	Description	Rate	Amount	
	Welded - MXP1 Retainage Held			
	* This is the changed retainage invoice. The only change is the Invoice Number *			
1	Retainage Held on Invoice 01	13,410.38	13,410.38	
1	Retainage Held on Invoice 03	5,837.06	5,837.06	
1	Retainage Held on Invoice 04	50,173.61	50,173.61	
1	Retainage Held on Invoice 05	37,599.05	37,599.05	
1	Retainage Held on Invoice 06	48,438.93	48,438.93	
1	Retainage Held on Invoice 07	47,063.97	47,063.97	
1	Retainage Held on Invoice 08	15,246.00	15,246.00	
1	Retainage Held on Invoice 09	36,976.00	36,976.00	
1	Retainage Held on Invoice 10	29,542.00	29,542.00	
1	Retainage Held on Invoice 11	10,129.03	10,129.03	
1	Retainage Held on Invoice 12	42,042.00	42,042.00	
1	Retainage Held on Invoice 13	4,950.00	4,950.00	
1	Retainage Held on Invoice 14	3,126.00	3,126.00	
Please remit payment to: Earth Pipeline Services, Inc.			Total	\$344,534.03
THANK YOU FOR YOUR BUSINESS!			Phone: (724) 243-3699	

**INVOICE**

Date	Invoice #
9/4/2018	WELD-MXP-17

Bill To

Welded Construction, L.P.
26933 Eckel Road
Perrysburg, OH 43551

P.O.	Project	AFE No.	Billing Period	Terms
81198	E-04-18			Net 30
Quantity	Description	Rate	Amount	
1	Welded - MXP1 CORN-001-REV1 Change in Steep Slope Work Spec.	2,250,627.00	2,250,627.00	
Please remit payment to: Earth Pipeline Services, Inc.			Total	\$2,250,627.00
THANK YOU FOR YOUR BUSINESS!			Phone: (724) 243-3699	

**INVOICE**

Date	Invoice #
9/4/2018	WELD-MXP-18

Bill To
Welded Construction, L.P. 26933 Eckel Road Perrysburg, OH 43551

P.O.	Project	AFE No.	Billing Period	Terms
81198	E-04-18			Net 30
Quantity	Description	Rate	Amount	
1	Welded - MXP1 CORN-003 Stand-by - Mech. - Access Road 7.8 Delay	223,938.12	223,938.12	
Please remit payment to: Earth Pipeline Services, Inc.			Total	\$223,938.12
THANK YOU FOR YOUR BUSINESS!			Phone: (724) 243-3699	

**INVOICE**

Date	Invoice #
9/4/2018	WELD-MXP-19

Bill To
Welded Construction, L.P. 26933 Eckel Road Perrysburg, OH 43551

P.O.	Project	AFE No.	Billing Period	Terms
81198	E-04-18			Net 30
Quantity	Description	Rate	Amount	
1	Welded - MXP1 CORN-004 Timber Removal on WV-WZ0004.000	69,960.00	69,960.00	
Please remit payment to: Earth Pipeline Services, Inc.			Total	\$69,960.00
THANK YOU FOR YOUR BUSINESS!			Phone: (724) 243-3699	

EXHIBIT 2



GENERAL TERMS AND CONDITIONS

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

Subcontractor shall submit a monthly signed invoice, itemized to the Contractor's satisfaction, for the portion of the work completed, less Ten percent (10%) retainage (Retention). In conjunction to Subcontractor's signed invoice, an affidavit asserting that Contractor is in compliance with the payment terms of this Subcontract Agreement must be submitted. Within thirty (30) days after a satisfactory receipt of invoice and affidavit, payment shall be made to the Subcontractor for the Net Payable amount. The remaining (Retention) will be retained by Contractor until final acceptance of the Work and payable within forty-five (45) days. Hand Felling Work may be invoiced at five percent (5%) retainage and such retention may be invoiced upon successful completion of hand felling activities and payable NET 45. The retention invoice must include a properly executed Affidavit and Release. All invoices are to be sent via email to: ap@welded.com with a copy to jconn@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.



EXHIBIT G

GENERAL TERMS AND CONDITIONS

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



EXHIBIT G

GENERAL TERMS AND CONDITIONS

As it Pertains to Project	Columbia Gas Transmission MXP Spread 1	Subcontract Number	2018-01-01
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of default or has subsequently agreed upon in writing, to remedy or to commence to remedy and 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.



EXHIBIT G

GENERAL TERMS AND CONDITIONS

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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 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



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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 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



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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.

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



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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.

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

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



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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.



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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 Contractor 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 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



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



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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 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



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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 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.



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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 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



GENERAL TERMS AND CONDITIONS

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



GENERAL TERMS AND CONDITIONS

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

EXHIBIT 3

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

In re:)	
)	Chapter 11
)	
WELDED CONSTRUCTION, L.P., <i>et al.</i> , ¹)	Case No. 18-12378 (CSS)
Debtors and Debtors In Possession.)	
)	(Jointly Administered)
)	
)	
)	
WELDED CONSTRUCTION, L.P.,)	
)	
Plaintiff,)	
vs.)	
)	Adv. Pro. No. 20-____ (CSS)
EARTH PIPELINE SERVICES, INC.,)	
)	
Defendant.)	
)	
)	
)	
)	
)	

**COMPLAINT AND OBJECTION TO PROOF OF
CLAIM NUMBER 592 FILED BY EARTH PIPELINE SERVICES, INC.**

The above-captioned plaintiff (“Welded”), by its undersigned attorneys, for its Complaint against the above-captioned defendant (“Earth”), and for its Objection to proof of claim number 592 (“Claim No. 592”), attached hereto as **Exhibit D**, filed by Earth, hereby alleges as follows:

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.

SUMMARY OF ACTION

The Mountaineer Express Pipeline Project (“MXP”) located in West Virginia is a pipeline project owned by TC Energy Corporation (f/k/a TransCanada Corporation) (“TransCanada”), a successor to NiSource Corporate Services Company/Columbia Pipeline Group and Columbia Gas Transmission, LLC (“Columbia Gas”) and is designed to transport domestically produced natural gas liquids across the state of West Virginia. Pursuant to an agreement with Columbia Gas, Welded oversaw the construction of MXP as the general contractor. According to two (2) subcontracts between Welded and Earth, Subcontract No. 2018-01-01.1 (the “Hand Felling Subcontract”) and Subcontract No. 2018-01-01.2 (the “Mechanical Clearing Subcontract”, and together with the “Hand Felling Subcontract”, the “Subcontracts”),² Earth contracted to provide hand felling and mechanical clearing services on MXP within an agreed-to Project Schedule.

During the course of its performance, Earth committed multiple breaches of the Subcontracts, including continuously failing to meet the deadlines established by the Project Schedule and committing numerous safety violations. As these failures mounted, TransCanada and Welded concluded that Earth’s consistent non-compliance with the Subcontracts was unacceptable and could not be permitted to continue. Earth’s hand felling and mechanical clearing work had to be completed before the next phase of work on MXP could be commenced. Earth’s failure to perform under the Subcontracts impeded the progress of follow on subcontractors and threatened to jeopardize the entire MXP timeline. Earth’s inability to timely and safely perform its obligations created liability exposure for Welded, as well as TransCanada. In order to ameliorate those concerns, Welded, at TransCanada’s direction, terminated Earth for “cause” in

² A copy of the Hand Felling Subcontract is attached hereto as **Exhibit A**, and a copy of the Mechanical Clearing Subcontract is attached hereto as **Exhibit B**. Each of the exhibits listed in the Mechanical Clearing Subcontract refer to and incorporate by reference each of the exhibits listed in the Hand Felling Subcontract.

accordance with the terms of the Subcontracts. As a result of Earth's breaches of the Subcontracts, Welded was forced to allocate equipment and personnel, and hire additional subcontractors, to perform the services Earth was contracted to perform, and the clearing of MXP was completed months behind schedule.

Welded brings this action against Earth to: (i) recover damages resulting from Earth's material breach of the Subcontracts, and (ii) avoid and recover \$1,811,129.30 in transfers made to Earth in the ninety (90) day period prior to the commencement of Welded's bankruptcy proceedings (the "Preference Period") pursuant to sections 547 and 550 of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). In addition, Welded hereby objects to Claim No. 592 filed by Earth, pursuant to section 502(b) of the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

JURISDICTION AND VENUE

1. On October 22, 2018 (the "Petition Date"), Welded filed for relief under chapter 11 of the Bankruptcy Code (collectively, the "Chapter 11 Cases") in the United States Bankruptcy Court for the District of Delaware (the "Court"). Welded is continuing to operate its businesses and manage its properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1409 because this adversary proceeding arises in cases commenced under title 11 of chapter 11 of the Bankruptcy Code.

4. This action is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (C), and (O). Accordingly, the Court may enter a final order or judgment consistent with Article III of the

United States Constitution. Welded consents to the entry of final orders or judgment by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution.

5. The statutory predicates for the relief sought herein are sections 502(b), 547 and 550 of the Bankruptcy Code, and Bankruptcy Rules 3007 and 7001.

PARTIES

6. Welded is a Delaware limited partnership.

7. At all relevant times, Welded's headquarters was located at 26933 Eckel Road, Perrysburg, OH 43551.

8. On information and belief, Earth is a Wyoming Corporation with its principle place of business located at 2949 S. Bridge Rd., Washington, Washington County, Pennsylvania 15301. Earth has filed Claim No. 592 in the Chapter 11 Cases and is subject to personal jurisdiction before this Court; Welded believes that Earth can be served with process by and through the attorney who filed Claim No. 592, Mark A. Lindsay, Esq., Bernstein-Burkley, P.C., 707 Grant Street, Pittsburgh, Pennsylvania 15219.

FACTUAL BACKGROUND

I. The Subcontracts

9. Following weeks of negotiations, the Hand Felling Subcontract was executed on March 8, 2018, and the Mechanical Clearing Subcontract was executed on March 20, 2018. Certain relevant provisions of the Subcontracts are as follows:³

- a. The parties agreed that Earth would complete its work in accordance with the Project Schedule, which set a completion date of June 1, 2018 with

³ All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Subcontract.

respect to hand felling and mechanical clearing work.⁴ Under the Subcontracts’ “Time is of the Essence” provisions, Earth committed “to prosecute the Work with all due diligence and to complete the Work within the time stated in the Contract Documents or the [Project] Schedule, whichever is sooner.”⁵ In recognition of the import of the Project Schedule, the Subcontracts each contained a provision regarding “Delays caused by [Earth],” which provided for certain reporting responsibilities and remedy rights to ensure that the work progressed as required.⁶

- b. Each Subcontract included a “Termination” provisions stating that Welded may, in its sole discretion, immediately terminate the Subcontracts for cause by giving written notice to Earth, if Earth, among other things, (a) fails to comply with any requirement of the Subcontracts, (b) breaches its obligations under the Subcontracts, or (c) repeatedly violates any obligation or in the reasonable opinion of Welded fails to meet a material requirement of the Subcontracts.⁷
- c. Each Subcontract included express requirements for change requests that applied to Welded and Earth. These requirements included specified change forms, which were attached as exhibits to each Subcontract.
- d. Each Subcontract included a “Warranty” provision whereby Earth represented, among other things, that it had the requisite competence, skill, physical resources, and number of trained, skilled, and licensed personnel required to perform the work.⁸

10. At the request of TransCanada, Welded was required to follow, and to ensure that all subcontractors used by Welded on the MXP follow, the Steep Slope Work Specification. As provided in the Steep Slope Work Specification:

The purpose of the Steep Slope Work Specification is to ensure that the Scope of Work for any project owned, operated or under the direction of TransCanada PipeLines Limited (the Company) as well as all partially owned entities and/or joint ventures where the Company has or might have operational control in Canada, the United States and Mexico adheres to the following requirements:

⁴ Upon information and belief, the parties subsequently agreed to the following completion dates: May 11, 2018 for hand felling work, and June 23, 2018 for mechanical clearing work.

⁵ See, e.g., Exhibit A, at Exhibit G General Terms and Conditions p. 1.

⁶ See, e.g., Exhibit A, at Exhibit G General Terms and Conditions p. 4.

⁷ See, e.g., Exhibit A, at Exhibit G General Terms and Conditions p. 2.

⁸ See, e.g., Exhibit A, at Exhibit G General Terms and Conditions p. 10.

1. Steep slopes are identified, assessed, maintained and managed according to a systematic documented and demonstrated methodology;
2. The planning, assessment, maintenance and management of steep slopes are conducted by qualified, trained, and competent crews; and
3. The planning, assessment, maintenance and management of steep slopes meet the Company, Contractor and applicable regulatory requirements.

11. Prior to the execution of the Subcontracts, on March 1, 2018, Julie A. Conn, Welded's field contract attorney for the MXP, emailed the Steep Slope Work Specification to Earth representatives indicating that "Earth Pipeline will need to comply with the attached Steep Slope Work Specification from TransCanada." The following day, Joshua D. Roberts ("Roberts"), Earth's CEO, responded stating that Earth would "review and let [Conn] know if [Earth] ha[d] any concerns." Thereafter, at no time prior to execution of the Subcontracts did Earth object to the Steep Slope Work Specification or indicate that compliance with the Steep Slope Work Specification would necessitate any deviation from the pricing schedule set forth in the Earth proposal (the "Pricing Schedule"), which the parties agreed upon and integrated into the Subcontracts as Exhibit F.

II. Earth's Failures to Comply with the Project Schedule

12. From the outset of its work on the MXP, Earth failed to comply with the Project Schedule. As a result, Welded was forced to regularly advise Earth that its non-compliance was unacceptable and corrective measures were required.⁹

13. Earth began its work on the MXP on March 10, 2018, with respect to hand felling, and April 7, 2018, with respect to mechanical clearing.

⁹ The correspondence noted in this section represents only a sample of the notifications that were provided to Earth regarding its breaches of the Subcontract.

14. On April 16, 2018, Mett Carrol (“Carrol”), the Welded Senior Project Manager on MXP, sent the first of many correspondence to Roberts, notifying him that, among other things, mechanical clearing was not proceeding quickly enough and Earth’s progress would ultimately delay the construction of the MXP. Carrol’s letter recommended the equipment that Earth should add to meet the Project Schedule.

15. On April 24, 2018, Carrol again sent correspondence to Roberts notifying him that Earth was behind schedule and needed to immediately comply with the Subcontracts. This correspondence directed Roberts to the Subcontracts’ “Project Schedule” and “Time is of the Essence” provisions, and reminded Roberts that Earth would be liable to Welded for any delay or additional cost incurred by Welded.

16. On April 28, 2018, after it became clear that Earth could not comply with the Project Schedule, Welded issued its first contractor change directive (the “First Change Directive”) to Earth in accordance with the terms of the Subcontracts. Specifically, Welded informed Earth that it was de-scoping Earth’s responsibilities on the MXP as follows:

As noted in my email to you dated April 13, 2018, my April 16, 2018 letter to you (2018-01-01-LTR-001) and my April 24, 2018 letter to you (2018-01-01-LTR-002), Earth is behind schedule for mechanical clearing Work. Welded now understands that, due to Line Strikes on Spreads 1 and 2, Earth’s clearing operations have been shut down by Columbia Gas Transmission/TransCanada (CGT/TC) pending satisfactory corrective action by Earth. Welded’s concern over anticipated schedule impact to mainline production crews has risen to the level that Welded now expects significant delays to mainline production crews, placing its contractual obligations to CGT/TC at risk. Accordingly, Welded is decreasing the scope of mechanical clearing Work to be performed by Earth under the Agreement. A Contractor Change Directive, attached hereto and hereby incorporated herein, reflects the scope change in more detail. Please send written acknowledgement of Change Directive 001, review it, sign it and return it to me as soon as possible I am available to discuss details at your earliest convenience.

Earth must maintain all resources currently working on Spread 1, but may add additional resources. Earth must continue its efforts to get back on track and to maintain the schedule agreed upon by Welded and Earth.

17. Earth's progress failed to improve after the First Change Directive. As a result, on May 2, 2018, Carrol again sent correspondence to Roberts notifying Earth that it remained behind schedule, and at that point, three (3) to eight (8) pieces of Earth's equipment had been out of service for multiple days, further exacerbating an already untenable situation.

18. On May 4, 2018, Welded notified Earth of its continued failure to comply with the Project Schedule in correspondence from Carrol to Roberts, along with a second contractor change directive further de-scoping Earth's responsibilities (the "Second Change Directive"). Specifically, with this correspondence, Carrol included an analysis that reflected, among other things, Earth was eighty-three (83) forecasted days behind schedule on Section 1 of the MXP, eighteen (18) days behind schedule on Section 2 of the MXP, and twenty-one (21) days behind schedule on Section 3 of the MXP. Regarding the Second Change Directive, Carrol notified Roberts that based upon the schedule analysis of actual progress to date and in a continuing effort to avoid additional delays to mainline crews, Earth's work for Section 1 of Spread 1 of the MXP, as it pertains to mechanical clearing, under the Mechanical Clearing Subcontract was being reduced.

19. On May 8, 2018, as Earth continued to fall further behind schedule, Carrol sent further correspondence to Roberts with yet another change directive de-scoping Earth's work (the "Third Change Directive", and together, with the First and Second Change Directives, the "Change Directives"). Akin to the prior letters, Carrol informed Roberts that, "based upon the schedule analysis of actual progress to date and in a continuing effort to avoid additional delays to mainline

crews, Welded hereby notifies Earth of a reduction to the Work for Section 1 of Spread 1 of the Mountaineer Xpress Project, as it pertains to mechanical clearing under [the Mechanical Clearing Subcontract].”

20. The Change Directives decreased the amount of the Subcontracts by \$2,808,104. In addition, Welded incurred costs and expenses of approximately \$460,000 for the personnel and equipment Welded was required to supply to assist Earth with the mechanical clearing work provided for in the Subcontracts, to maintain the Project Schedule, and to avoid further delays to Welded crews.

III. Earth’s Safety Violations While Working on the MXP

21. In addition to Earth’s failure to comply with the Project Schedule, Earth’s performance was marked by numerous safety violations and related incidents that made it clear that Earth personnel lacked the necessary qualifications or training to work on MXP and were failing to properly comply with the Steep Slope Work Specification. These violations and incidents included:

- a. On April 27, 2018, an Earth excavator operator caused an excavator to knock down a power line while attempting to fell a tree. The excavator operator was terminated by Earth following this incident.
- b. On May 5, 2018, an Earth lowboy operator unloaded a piece of broken equipment on the right-of-way that was leaking hydraulic oil. Welded employees were required to take immediate remedial action to temporarily prevent further environmental contamination while the equipment sat on the right-of-way until an Earth mechanic could repair the equipment. Although an Earth mechanic arrived to repair the faulty equipment the following day, he did so without notifying anyone from Welded, and he performed the repair improperly such that additional hydraulic oil further contaminated the area.
- c. On May 8, 2018, an Earth employee spilled several gallons of diesel fuel while refueling his machine.
- d. On May 12, 2018, an Earth bulldozer operator crashed a bulldozer into a parked vehicle. In violation of certain operating guidelines, the bulldozer

operator did not have a spotter even though he was tracking the bulldozer through a congested area. The bulldozer operator was terminated by Earth following this incident.

- e. On May 21, 2018, an Earth excavator operator was clearing brush when a vine became lodged in the excavator's cab, which shattered the glass of the excavator's cab.
- f. On June 13, 2018, an Earth excavator operator capsized an excavator after ignoring right-of-way conditions. As a result of this incident, Earth crews were directed to stand down pending further notice from Welded.
- g. On June 22, 2018, an Earth lowboy operator collided with a minivan, causing damage to the minivan.

22. These repeated safety violations, when combined with Earth's inability to comply with the Project Schedule, left TransCanada and Welded with no choice but to terminate Earth for cause.

IV. Welded Terminated Earth for "Cause"

23. On June 22, 2018, following a directive from TransCanada that Welded remove Earth from the MXP for safety concerns, Carrol provided verbal notice to Roberts that Welded was terminating the Subcontracts for "cause."

24. The same day, Welded sent correspondence reiterating that Earth was terminated for "cause" (the "Termination Letter"). In the Termination Letter, Welded reserved all of its rights under the Subcontracts, including the right to set off any costs incurred to rectify the issues caused by Earth against amounts payable to Earth.

25. On July 17, 2018, Earth sent correspondence to Welded that confirmed it had demobilized from the project effective as of July 10, 2018.

26. Earth's breaches of the Subcontracts required Welded to enter into contracts with three (3) other subcontractors to finish the work that Earth contracted to perform. The hand felling and mechanical clearing of the MXP was completed on August 17, 2018—over three (3) months

behind schedule. The cost of these additional subcontractors totaled approximately \$485,000, and Welded estimates that it incurred an additional \$2,800,000 in damages due to the delay in completing the project.

V. The Steep Slope Change Order and Invoice

27. On April 26, 2018, Earth submitted to Welded a change order related to the Steep Slope Work Specification, eight (8) weeks after the Steep Slope Work Specification was provided to Earth (the “Steep Slope Change Order”) in the amount of \$6,505,744.00. On April 28, 2018, Welded sent correspondence to Earth that, among other things, informed Earth that the Steep Slope Change Order could not be evaluated as submitted because Earth had failed to comply with the requirements for change orders specified in the Subcontracts. Further, Welded provided detailed instructions to Earth regarding what information was necessary to evaluate the Steep Slope Change Order.

28. Following numerous inquiries from Welded employees, and over three (3) months after the Steep Slope Change Order was rejected, Earth resubmitted the Steep Slope Change Order in the reduced amount of \$2,469,172.75. On September 4, 2018, only six (6) days prior to filing a lien against the MXP, Earth submitted invoice WELD-MXP-17 (the “Steep Slope Invoice”) to Welded in the amount of \$2,250,627 for “Change in Steep Slope Work Spec.” Notably, the charges reflected in the Steep Slope Invoice were not included in an initial Notice of Mechanic’s Lien that Earth sent to Welded on August 1, 2018.

VI. The Preferential Transfers

29. Historically, Welded utilized a centralized cash management system (the “Cash Management System”) to collect and transfer funds from numerous sources and accounts and disburse funds to satisfy obligations arising from daily operations. Welded used the Cash Management System to streamline the collection, transfer, and disbursement of funds generated

by Welded's business operations, and Welded accurately recorded such collections, transfers, and disbursements as they were made. Welded recorded in its books and records any receipts and/or disbursements. The Cash Management System consisted of an integrated network of bank accounts held at, *inter alia*, Huntington National Bank ("Huntington Bank"), (b) JPMorgan Chase Bank, N.A., (c) M&T Bank, and (d) MetaBank, N.A.. Disbursements to creditors were primarily made from the Huntington Bank operating account (the "Disbursement Account").

30. During the Preference Period, Welded continued to operate its business affairs, including the transfer of property, either by checks, cashier checks, wire transfers, ACH transfers, direct deposits or otherwise, to certain entities.

31. Welded and Earth conducted business with one another through and including July 10, 2018 pursuant to the Subcontracts.

32. As provided for in the Subcontracts, Welded purchased goods and/or services from Earth.

33. Welded completed an analysis of all readily available information and is seeking to avoid all of the transfers of an interest of Welded's property made by Welded to Earth within the Preference Period.

34. Welded made transfers of an interest of its property to or for the benefit of Earth during the Preference Period through payments aggregating to an amount not less than \$1,811,129.30 (the "Transfers"). The details of each of the Transfers are set forth on the Statement of Account, which is attached hereto and incorporated by reference as Exhibit C.

35. During the course of this proceeding, Welded may learn (through discovery or otherwise) of additional transfers made to Earth during the Preference Period. It is Welded's intention to avoid and recover all transfers made by Welded of any interest in its property to or for

the benefit of Earth or any other transferee. Welded reserves its right to amend this Complaint to include: (a) further information regarding the Transfers, (b) additional transfers, or (c) additional defendants (collectively, items (a)-(c) the “Amendments”), which may become known to Welded at any time during this Adversary Proceeding, through formal discovery or otherwise, and for the Amendments to relate back to this original Complaint.

36. Welded acknowledges that some of the Transfers might be subject to defenses under section 547(c) of the Bankruptcy Code, for which Earth bears the burden of proof under section 547(g) of the Bankruptcy Code.

VII. Earth Filed Claim No. 592 in the Chapter 11 Cases

37. Earth filed Claim No. 592, in which Earth contends Welded is indebted to Earth in the aggregate amount of \$3,650,300.42 for contractual services provided to Welded on the MXP. Specifically, in the eight (8) invoices attached to Claim No. 592, Earth asserts Welded is obligated to pay Earth for (1) clearing and hand felling work (\$85,649.90), (2) clearing and timber-mat installation (\$44,550.00), (3) clearing (\$28,134.00), (4) stand-by (\$597,396.00), (5) retainage (\$344,534.03), (6) the Steep Slope Invoice (\$2,250,627.00), (7) stand-by for access-road delay (\$223,938.12), and (8) timber removal (\$69,960.00). Welded does not dispute the invoices submitted for clearing (\$28,134.00) and timber removal (\$69,960.00), except that such amounts are subject to setoff or other netting requirements. All other invoices are disputed in whole, or in part, as they: (i) relate to work that was neither approved nor completed, (ii) were improperly calculated, or (iii) reflect work that Earth was not entitled to invoice under the Subcontracts.

38. With respect to the Steep Slope Invoice, in light of Earth’s repeated safety violations, including the incident in which Earth capsized equipment, it is apparent that Earth never complied with the Steep Slope Work Specification while working on the MXP. And, even if Earth was in compliance, it was aware of the Steep Slope Work Specification prior to the parties’ entry

into the Subcontracts and any change in the Pricing Schedule related to the Steep Slope Work Specification should have been negotiated at that time, or, subsequently approved in accordance with the change provisions provided for in the Subcontracts. Indeed, Earth was clearly aware of the Subcontracts' requirements for Change Orders because Welded reiterated those requirements when the Steep Slope Change Order was submitted and rejected, yet Earth failed to resubmit the Steep Slope Change Order for months, and sat silently, only to re-submit the Steep Slope Change Order after it was terminated for cause.

39. A reconciliation of the invoices submitted by Earth against Welded's books and records establishes that Claim No. 592 should be modified to an amount no greater than \$652,847.60.

40. Claim No. 592 should be reduced to reflect the amount of work Earth actually performed, and which was approved by Welded, and to account for the actual amounts due to Earth under each Subcontracts. Any failure to modify the Earth claim as indicated above will result in Earth receiving an unwarranted recovery, to the detriment of other creditors in the Chapter 11 Cases.

VIII. The Mechanics Lien Action

41. On or about March 8, 2019, Earth filed two (2) lawsuits against Columbia Gas—one in the Circuit Court of Wetzel County, West Virginia (the "Wetzel County Case") and another in the Circuit Court of Marshall County, West Virginia (the "Marshall County Case") and together with the Wetzel County Case, the "Mechanics Lien Action")—asserting a mechanic's lien claim against the MXP arising from amounts allegedly owed by Welded to Earth for work performed under the Subcontracts. The amounts asserted in Claim No. 592 relate to the same obligations for which Welded seeks to recover against Columbia Gas in the Mechanics Lien Action.

42. On May 14, 2019, following a *Notice of Removal* filed by Columbia, the United States District Court for the Northern District of West Virginia (the “WV District Court”) ordered that it would hear the Mechanics Lien Action.

43. On June 26, 2019 following a *Motion to Transfer Venue* filed by Columbia Gas, the WV District Court entered an order transferring the Mechanics Lien Action to the United States District Court for the District of Delaware (the “DE District Court”). On July 15, 2019, the DE District Court entered an order referring the Mechanics Lien Action to the Bankruptcy Court, with the Wetzel County Case pending at Adv. Pro No. 19-50274 (CSS) and the Marshal County Case pending at Adv. Pro No. 19-50275 (CSS).

44. On May 6, 2020, the Bankruptcy Court consolidated the pending adversaries and ordered the Mechanics Lien Action to be administered within Adv. Pro No. 19-50274 (CSS).

CLAIMS

COUNT I **(Breach of Contract)**

45. Welded incorporates all preceding paragraphs as if fully re-alleged herein.

46. Welded and Earth entered into the Subcontracts, which are valid and binding contracts.

47. Earth breached the Subcontracts by failing to provide hand felling and mechanical clearing services on MXP in a timely manner in accordance with the Project Schedule.

48. Earth breached the Subcontracts by failing to perform its work with the requisite competence, skill, physical resources, and number of trained, skilled, and licensed personnel required to perform the services as warranted in the Subcontracts.

49. Earth breached the Subcontracts by failing to perform its work in accordance with the various safety and environmental specifications required by the Subcontracts.

50. As a direct and proximate result of Earth's breaches of the Subcontracts: (i) Welded was required to remediate Earth's failure to safely and competently complete the work by (a) allocating equipment and personnel to Earth and (b) hiring three (3) other subcontractors to complete the work Earth agreed to perform, at great expense in cost and time; and (ii) the MXP clearing was completed well-behind schedule, at a significant cost to Welded.

51. By reason of the foregoing, Welded has been damaged in an amount in excess of \$3,750,000.

COUNT II

(Claim to Avoid Preferential Transfers Pursuant to Bankruptcy Code Section 547)

52. Welded incorporates all preceding paragraphs as if fully re-alleged herein.

53. The Transfers are avoidable as preferential transfers of interests of Welded pursuant to section 547 of the Bankruptcy Code based upon the following:

a. Each Transfer constitutes a transfer of an interest of Welded to or for the benefit of Earth within the meaning of section 547(b)(1) of the Bankruptcy Code;

b. Each Transfer was made on account of antecedent debt owed by Welded before such transfer of an interest of Welded was made within the meaning of section 547(b)(2) of the Bankruptcy Code;

c. Welded was insolvent or is presumed to have been insolvent during the ninety (90) days prior to the commencement of the Chapter 11 Cases, sections 547(b)(3) and (f) of the Bankruptcy Code;

d. Each transfer of an interest in Welded's property in respect of the Transfers falls within the ninety (90) day period prior to the Petition Date, section 547(b)(4) of the Bankruptcy Code; and

e. The Transfers, if not avoided, will enable Earth to receive more than it would receive if (i) the Chapter 11 Cases were cases under chapter 7 of the Bankruptcy Code, (ii) the Transfers had not been made, and (iii) Earth received payment of such debt to the extent provided under the Bankruptcy Code, section 547(b)(5) of the Bankruptcy Code.

54. By reason of the foregoing, Welded is entitled to a judgment avoiding the Transfers pursuant to section 547 of the Bankruptcy Code.

COUNT III
(Claim to Recover Property Pursuant to Bankruptcy Code Section 550)

55. Welded incorporates all preceding paragraphs as if fully re-alleged herein.

56. Welded is entitled to avoid the Transfers pursuant to section 547(b) of the Bankruptcy Code.

57. Earth was the initial transferee of the Transfers or the immediate or mediate transferee of such initial transferee or the person for whose benefit the Transfers were made.

58. Pursuant to section 550(a) of the Bankruptcy Code, Welded is entitled to recover the Transfers from Earth, plus interest thereon to the date of payment, and the costs of this action.

COUNT IV
(Objection to Claim No. 592)

59. Welded incorporates all preceding paragraphs as if fully re-alleged herein.

60. Earth filed Claim No. 592 against Welded on February 28, 2019.

61. Welded hereby objects to Claim No. 592 pursuant to section 502(b) of the Bankruptcy Code on the grounds that Claim No. 592 should be modified to an amount no greater than \$652,847.60 so as to reflect the amount of work Earth performed and Welded approved, and to account for the actual amounts due to Earth under the Subcontracts.

62. Further, to the extent it is determined that Welded owes any amounts to Earth on account of or in connection with Claim No. 592, then, pursuant to section 558 of the Bankruptcy

Code and applicable state law, Welded is entitled to judgment that it is permitted to offset the amounts Welded owes to Earth under the Subcontracts against Welded's liability on account of Claim No. 592.

63. Welded reserves any and all other defenses and rights to object to Claim No. 592 on any other grounds.

COUNT III
(Declaratory Judgment—Setoff)

64. Welded incorporates all preceding paragraphs as if fully re-alleged herein.

65. Welded and Earth entered into the Subcontracts, which are valid and binding contracts.

66. The Subcontracts provide that if Earth was noncompliant with the Project Schedule, Welded could offset costs and expenses incurred on account of Earth's delay or noncompliance from any payments due to Earth.

67. The Subcontracts provide a warranty by Earth that it, among other things, had the requisite competence, skill, physical resources, and number of trained, skilled, and licensed personnel required to perform the work.

68. Earth breached the Subcontracts by failing to provide hand felling and mechanical clearing services on the MXP in a timely or competent manner in accordance with the Subcontracts.

69. As a direct and proximate result of Earth's breach of the Subcontracts: (i) Earth was required to remediate Earth's failure to complete the work by (a) allocating equipment and personnel to Earth and (b) hiring three (3) other subcontractors to complete the work Earth agreed to perform, at great expense in cost and time, and (ii) the MXP clearing was completed well-behind schedule, at a significant cost to Welded.

70. Claim No. 592 represents amounts relating to disputed payments that Welded allegedly owes to Earth pursuant to the Subcontracts.

71. To the extent that it is later determined at trial that amounts are owed by Welded to Earth on account of the Claim No. 592, pursuant to section 558 of the Bankruptcy Code, and applicable state law, Welded is entitled to offset the damages Welded suffered as result of Earth's material breach of the Subcontracts against Welded's liability on account of Claim No. 592.

72. To the extent applicable, an actual controversy exists between the parties regarding Welded's right to offset any amounts that Welded allegedly owes to Earth under the Subcontracts.

73. To the extent applicable, there exists a substantial controversy between Welded and Earth of sufficient immediacy and reality to warrant the issuance of a declaratory judgment under 28 U.S.C. § 2201. A prompt judicial determination of the respective rights and duties of the parties in these respects is necessary and appropriate.

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RELIEF REQUESTED

WHEREFORE, Welded respectfully requests judgment against Earth including the following:

- A. An award of damages to Welded in an amount to be determined at trial, but in no event less than \$3,750,000;
- B. An order avoiding the Avoided Transfers under section 547 of the Bankruptcy Code, in the total aggregate amount of not less than \$1,811,129.30;
- C. An order that the Avoided Transfers, to the extent that they are avoided pursuant to section 547 of the Bankruptcy Code, be recovered by Welded pursuant to section 550 of the Bankruptcy Code;
- D. An order declaring that Claim No. 592 is modified to an amount no greater than \$652,847.60;
- E. An order, to the extent necessary, declaring that Welded is permitted to offset the amounts Earth owes to Welded for its breaches of the Subcontracts against Welded's liability, if any, on account of Claim No. 592;
- F. An award of attorneys' fees, pre- and post-judgment interest, costs, and expenses; and
- G. Such other or further relief as the Court finds just and equitable.

Dated: May 27, 2020
Wilmington, Delaware

**YOUNG CONAWAY STARGATT & TAYLOR,
LLP**

/s/ Kevin A. Guerke

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Counsel to Welded

EXHIBIT 4

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

<p>In re:</p> <p>WELDED CONSTRUCTION, L.P., et al.,</p> <p style="text-align: center;">Debtors.</p>	<p>Chapter 11</p> <p>Case No. 18-12378 (CSS)</p> <p>(Jointly Administered)</p>
<p>EARTH PIPELINE SERVICES, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>COLUMBIA GAS TRANSMISSION, LLC, WELDED CONSTRUCTION, L.P.,</p> <p style="text-align: center;">Defendants.</p>	<p>Adv. No. 19-50274 (CSS)</p> <p>Adv. No. 19-50275 (CSS)</p> <p>(Consolidated)</p>
<p>WELDED CONSTRUCTION, L.P.,</p> <p>Plaintiff,</p> <p style="text-align: center;">v.</p> <p>EARTH PIPELINE SERVICES, INC.</p> <p>Defendants.</p>	<p>Adv. Proc. No. 20-50612 (CSS)</p> <p>(Consolidated)</p>

**ANSWER OF EARTH PIPELINE SERVICES, INC. TO THE COMPLAINT
AND OBJECTION TO PROOF OF CLAIM NUMBER 592**

Defendant, Earth Pipeline Services, Inc. (“EPS”), by and through its undersigned attorneys, hereby responds to the Complaint and Objection to Proof of Claim Number 592 of Debtor and Plaintiff Welded Construction, L.P. (“Welded”) as follows:

SUMMARY OF ACTION

The Summary of Action set forth before the numbered paragraphs of Welded's Complaint do not constitute specifically enumerated allegations of fact to which a response is required. To the extent that a response is required to any allegations of fact, those allegations are denied. By way of further answer and as set forth more fully herein, the accuracy of Welded's characterizations is specifically denied.

JURISDICTION AND VENUE

1. Admitted that Welded filed its petition as stated. After reasonable investigation, EPS is without sufficient information to admit or deny the allegations of this paragraph, and therefore the same are denied.

2. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

3. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

4. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied. Defendant does not consent to the entry of final orders or judgment by the Bankruptcy Court in this action.

5. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

PARTIES

6. Admitted.

7. Admitted.

8. Admitted that EPS is a Wyoming Corporation with a place of business at the address stated. EPS has agreed, through its undersigned counsel, to accept service of Welded's Complaint.

FACTUAL BACKGROUND

I. The Subcontracts

9. a-d Admitted that the referenced Subcontracts were signed on the dates stated. The Subcontracts are documents, the terms of which are their own best evidence. The accuracy of Welded's characterization of those terms is specifically denied. By way of further answer, on or about April 27, 2018, Welded purported to unilaterally revise the construction schedule, which revision EPS did not consent to. It is specifically denied that EPS fell behind schedule. To the contrary, Welded unilaterally attempted to compress EPS' schedule without EPS' consent and failed to provide information requested.

10. After reasonable investigation, EPS is without sufficient information to admit or deny the allegations of this paragraph, and therefore the same are denied.

11. Denied. To the contrary, EPS rejected the steep slope plan as part of EPS' proposals. EPS conditioned its Proposal on the following, which was accepted by Welded: "Based on IFC documents dated: 02/23/18; Based on Construction Line

List dated: 02/23/18; Based on moving in a linear direction with zero (0) move arounds; Based on full access road availability and usability shown in IFC documents dated: 02/23/18; Based on Earth Pipelines' winch plan submitted on 02/12/18. All items may be revised if scope or schedule changes, as stated above."

II. EPS's Alleged Failure to Comply with the Project Schedule

12. Denied. To the contrary, Welded was delayed, including but not limited to a shut-down caused by Welded having a line strike and work being delayed because Welded failed to have access roads constructed, available and usable for EPS.

13. Denied as stated. Work on each of the three sections began on different days.

14. Admitted that the correspondence was sent by Julie Conn on behalf of Mett Carrol. The referenced correspondence is a document, the contents of which is its own best evidence.

15. Admitted that the correspondence was sent by Julie Conn on behalf of Mett Carrol. The referenced correspondence is a document, the contents of which is its own best evidence.

16. Admitted that the written directive correspondence was sent by Welded. The referenced directive is a document, the contents of which is its own best evidence. It is specifically denied that EPS could not comply with an agreed upon project schedule.

17. Admitted that the referenced correspondence was sent by Welded. The

referenced directive is a document, the contents of which is its own best evidence. The remaining allegations of this paragraph are specifically denied.

18. Admitted that the written directive correspondence was sent by Welded. The referenced directive is a document, the contents of which is its own best evidence. The remaining allegations of this paragraph are specifically denied.

19. Admitted that the written directive correspondence was sent by Welded. The referenced directive is a document, the contents of which is its own best evidence. The remaining allegations of this paragraph are specifically denied.

20. After reasonable investigation, EPS is without sufficient information to admit or deny the allegations of this paragraph regarding costs allegedly incurred by Welded, and therefore the same are denied. The change directives are documents, the contents of which are their own best evidence.

III. Alleged Safety Violations

21. a-g Denied as stated. It is admitted that some of the incidents occurred, though it is specifically denied that EPS was responsible for the incidents or that the incidents constituted safety violations. The characterization that EPS' performance was "marked" by such incidents is denied as vague and ambiguous. By way of further answer, after reasonable investigation, EPS is without sufficient information to admit or deny the allegations of this paragraph.

22. Denied.

IV. Termination of EPS for Convenience

23. After reasonable investigation, EPS is without sufficient information to admit or deny the allegations of this paragraph regarding communications between Welded and TransCanada. The remaining allegations of this paragraph are denied.

24. Admitted that the referenced correspondence was sent. The referenced correspondence is a document, the contents of which is its own best evidence. The remaining allegations of this paragraph are specifically denied.

25. Admitted.

26. Denied that EPS was in breach of the Subcontracts. After reasonable investigation, EPS is without sufficient information to admit or deny the remaining allegations of this paragraph

V. The Steep Slope Change Order and Invoice

27. Admitted that the referenced change order and correspondence were exchanged. The referenced documents are writings, the terms of which are their own best evidence.

28. Admitted that the referenced change order and correspondence were exchanged. The referenced documents, including EPS' initial Notice of Mechanic's Lien, are writings, the terms of which are their own best evidence. Denied that the steep slope plan was rejected. Welded's reference to "numerous inquiries" is denied as vague and ambiguous.

VI. The Alleged Preferential Transfers

29. After reasonable investigation, EPS is without sufficient information to admit or deny the allegations of this paragraph, and therefore the same are denied.

30. After reasonable investigation, EPS is without sufficient information to admit or deny the allegations of this paragraph, and therefore the same are denied.

31. Denied. The allegations of this paragraph are denied as conclusions of law to which no response is necessary. To the extent that a response is required, the allegations are denied.

32. Admitted.

33. After reasonable investigation, EPS is without sufficient information to admit or deny the allegations of this paragraph, and therefore the same are denied.

34. Admitted.

35. This paragraph does not contain any allegations of fact to which a response is necessary. To the extent that a response is required, the allegations are denied.

36. This paragraph does not contain any allegations of fact to which a response is necessary. To the extent that a response is required, the allegations are denied.

37. Admitted that EPS filed Claim No. 592. It is denied that Welded disputed any part of the invoices submitted. It is further denied that Welded has any proper basis to dispute any part of the invoices now.

38. Denied.

39. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

40. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

VII. The Mechanics Lien Action

41. Admitted.

42. Admitted.

43. Admitted.

44. Admitted.

CLAIMS

COUNT I (Breach of Contract)

45. This paragraph does not contain any allegations of fact to which a response is necessary.

46. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

47. Denied. The allegations of this paragraph are denied as false. By way of further answer, the allegations of this paragraph are conclusions of law to which no response is necessary.

48. Denied. The allegations of this paragraph are denied as false. By way of further answer, the allegations of this paragraph are conclusions of law to which no

response is necessary.

49. Denied. The allegations of this paragraph are denied as false. By way of further answer, the allegations of this paragraph are conclusions of law to which no response is necessary.

50. Denied. The allegations of this paragraph are denied as false. By way of further answer, the allegations of this paragraph are conclusions of law to which no response is necessary.

51. Denied. The allegations of this paragraph are denied as false. By way of further answer, the allegations of this paragraph are conclusions of law to which no response is necessary.

COUNT II

(Claim to Avoid Preferential Transfers Pursuant to Section 547)

52. This paragraph does not contain any allegations of fact to which a response is necessary.

53. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

COUNT III

(Claim to Recover Property Pursuant to Bankruptcy Code Section 550)

54. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

55. This paragraph does not contain any allegations of fact to which a response is necessary.

56. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

57. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

58. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

59. This paragraph does not contain any allegations of fact to which a response is necessary.

60. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

61. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

62. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

63. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

COUNT V (DESIGNATED AS COUNT III)
(Declaratory Judgment – Setoff)

64. This paragraph does not contain any allegations of fact to which a response

is necessary.

65. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

66. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

67. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

68. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

69. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

70. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

71. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

72. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

73. The allegations of this paragraph are conclusions of law to which no response is necessary, and therefore the same are denied.

WHEREFORE, for all of the foregoing reasons, Defendant Hajoca

Corporation respectfully requests that the Court enter judgment on all claims against Plaintiff and its favor and grant Defendant such other and further relief as is just and proper.

AFFIRMATIVE DEFENSES

1. Plaintiff has failed to state a claim upon which relief can be granted.
2. All or part of Plaintiff's claims are barred by the statute of limitations.
3. All or part of Plaintiff's claims are barred by the doctrine of laches.
4. Plaintiff's claims are barred by the doctrine of unclean hands.
5. Plaintiff's claims are barred by its attempt to unilaterally change terms of the Subcontract after accepting EPS' Proposal.
6. Defendant EPS performed all of its obligations under the Subcontract in a timely and workmanlike manner under all of the circumstances.
7. Plaintiff's claims are barred by its own breaches of the covenants of good faith and fair dealing.
8. Plaintiff's claims are contrary to the terms and conditions to which they mutually agreed.
9. Plaintiff failed to properly mitigate its alleged damages.
10. At the time of the alleged preferential transfers, Debtor was not insolvent, nor did Debtor become insolvent as a result of the alleged transfer.
11. The alleged preferential transfers cannot be recovered because the

transfers did not enable Defendant to receive more than it would have received if the case were a liquidation under Chapter 7, the transfer had not been made, and/or the Defendant received payment to the extent provided by the Bankruptcy Code.

12. The transfers or conveyances allegedly received by Defendant are not avoidable because some or all of the transfers or conveyances were (a) in payment of a debt in the ordinary course of business or financial affairs of the debtor and the Defendant; (b) made in the ordinary course of business or financial affairs of the and the Defendant; and (c) made according to ordinary business terms.

13. The transfers or conveyances received by Defendant cannot be recovered because such transfers were intended by Debtor and Defendant to be a contemporaneous exchange for new value, and in fact were a substantially contemporaneous exchange.

14. The transfers or conveyances received by Defendant cannot be recovered because after receiving the alleged preferential transfers, Defendant advanced new value to the Debtor in that EPS refrained from asserting a lien claim against the property owner because of its receipt of each such payment.

15. The transfers or conveyances received by Defendant cannot be recovered because EPS waived its lien rights against the property owner in reliance on each such payment.

16. Plaintiff's claims are excepted from avoidance pursuant to 11 U.S.C. §

547 (c) 1, 2 and 4.

17. The alleged transfers are not avoidable pursuant to the provisions of the United States Bankruptcy Code, 11 U.S.C. § 101, et. seq.

18. Debtor received fair consideration and/or reasonably equivalent value for any alleged transfers after the transfers were made.

19. Plaintiff is not entitled to pre-judgment interest or costs.

20. Plaintiff's claims are barred by equitable principles, including, but not limited to latch use, estoppel, waiver, unjust enrichment and unclean hands.

21. Plaintiff's claims are subject to set off, recoupment and other equitable defenses.

22. Plaintiff cannot recover some or all of the alleged transfers as the funds were not received from Debtor and/or were not property of the estate of the Debtor.

23. Plaintiff has failed to plead the allegations of fraud with such specificity needed to sustain a claim to recover property pursuant to section 550 of the Bankruptcy Code.

24. Any transfer made to Defendant by Plaintiff are not avoidable given the nature of the services provided and the status of the debt at the time of the transfer.

25. Plaintiff's claims are barred because Defendant, by and through its

principals, was engaged in fraudulent and deceptive conduct at the time the Petition was filed and throughout the preference period.

26. Plaintiff is precluded from recovering attorney's fees because some of the allegations of the Complaint are made without any good faith factual or legal basis.

27. Defendant reserves the right to assert such additional claims, defenses and third party claims as may be revealed through discovery and ongoing investigation.

WHEREFORE, for all the foregoing reasons, Creditor Earth Pipeline Services respectfully requests that it be deemed to have an allowed claim in the amount of \$3,650,300.42 for purposes of voting on the Debtor's Proposed Plan.

COHEN, SEGLIAS, PALLAS, GREENHALL
& FURMAN, P.C.

/s/ Sally J. Daugherty

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DATED: June 26, 2020 *Attorneys for Earth Pipeline Services, Inc.*

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

<p>In re:</p> <p>WELDED CONSTRUCTION, L.P., et al.,</p> <p style="text-align: center;">Debtors.</p>	<p>Chapter 11</p> <p>Case No. 18-12378 (CSS)</p> <p>(Jointly Administered)</p>
<p>EARTH PIPELINE SERVICES, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>COLUMBIA GAS TRANSMISSION, LLC, WELDED CONSTRUCTION, L.P.,</p> <p style="text-align: center;">Defendants.</p>	<p>Adv. Pro. No. 19-50274 (CSS) Adv. Pro. No. 19- 50275 (CSS)</p> <p>(Consolidated)</p>
<p>WELDED CONSTRUCTION, L.P.,</p> <p>Plaintiff,</p> <p>v.</p> <p>EARTH PIPELINE SERVICES, INC.</p> <p>Defendants.</p>	<p>Adv. Proc. No. 20-50612 (CSS)</p> <p>(Consolidated)</p>

CERTIFICATE OF SERVICE

I, Sally J. Daugherty, hereby certify that on this 26th day of June 2020, I caused a true and correct copy of *Earth Pipeline Services, Inc.’s Answer and Affirmative Defenses to Welded’s Adversary Proceeding* to be served upon the parties identified below via email and by the Court’s CM/ECF System:

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