IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)
	) **Chapter 11**
WELDED CONSTRUCTION, L.P., *et al.*,[1]	)
	) **Case No. 18-12378 (CSS)**
Debtors.	)
	) **Jointly Administered**
	)
	) **Hearing Date: June 24, 2020 @ 10:00 a.m. (ET)**
	) **Objection Deadline: June 17, 2020 @ 5:00 p.m.**
	) **(ET)**
	)
	) **RE DI: 1363, 1364 and 1365**

OBJECTION TO AMENDED CHAPTER 11 PLAN OF WELDED CONSTRUCTION, L.P. AND WELDED CONSTRUCTION MICHIGAN, LLC

Transcontinental Gas Pipe Line Company, LLC ("Transco"), The Williams Companies, Inc., and Williams Partners Operating LLC (collectively, the "Williams Parties") hereby file this Objection (the "Objection") to the Amended Chapter 11 Plan of Welded Construction, L.P. ("Welded LP") and Welded Construction Michigan, LLC ("Welded Michigan", collectively with Welded LP, the "Debtors") (D.I. 1363) (the "Plan"), and state:

PRELIMINARY STATEMENT

1. As discussed further below, the Williams Parties' Objection has two parts. First, the Plan does not comply with sections 502(e)(1)(C) and 509(b)(1) of Title 11 of the United States Code (the "Bankruptcy Code" or the "Code"). Federal Insurance Company (the "Surety") has exercised its rights of equitable subrogation with respect to claims of certain creditors who asserted payment bond claims against the Williams Bond.[2] With respect to these claims, when the Surety

[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.

[2] Any capitalized term not otherwise defined in the Preliminary Statement shall either have the same meaning as that ascribed to it later in the Objection or in the Plan.

elects to subrogate it is limited to recovery under section 509 and cannot receive payment of a portion of the subrogated claim on the basis of general unsecured claim under section 502. *See* 11 U.S.C. §§ 502(e)(1)(C), 509(b)(1)(B). Sections 502 and 509 are mutually exclusive and cannot be used simultaneously with respect to the same subrogated claims. As such, the Plan does not meet the standards of section 1129(a)(1) of the Code.

2. The Plan also effectively prohibits parties-in-interest, other than the Post-Effective Date Debtors and the Plan Administrator, from objecting to the Surety's proofs of claim in violation of section 502(a). Second, the Williams Parties object to the Plan based upon language contained therein that prejudices the Williams Parties' rights and defenses vis-à-vis the pending adversary proceeding styled as *Welded Construction, L.P. v. Williams Co., Inc., et al.*, Adv. Pro. 19-50194 (CSS) (the "Adversary Proceeding"). The Plan also prohibits the Williams Parties and the Surety from amending their claims and permits a party other than the Court to make final adjudication of claims.

3. The Surety filed three unsecured proofs of claim in this case. (*See* Claim Numbers 522, 529, and 551, together the "Surety Proofs of Claim"). The Surety Proofs of Claim assert claims for subrogation and indemnification/reimbursement under a Performance & Payment Bond No. 8219-2458 (the "Williams Bond") naming one debtor Welded LP, as bond principal, and Transco, as obligee, for construction of the Atlantic Sunrise Natural Gas Pipeline (the "Williams Project"). In addition, the Surety Proofs of Claim also assert claims for subrogation and indemnification/reimbursement under two other unrelated bonds against the Welded LP debtor and the Welded Michigan debtor that have no relation whatsoever to the Williams Bond or the Williams Project. To date, none of the Surety Proofs of Claims have been objected to by any party and are currently deemed to be allowed.

4. In an attempt to recover claimed contract balances from the Williams Project, the Surety and Welded LP entered into a Litigation Funding and Cooperation Agreement (the "Cooperation Agreement"), which was approved pursuant to the Order Approving Litigation Funding and Cooperation Agreement (D.I. 745) (the "Surety Cooperation Agreement Order") entered on May 22, 2019. The Cooperation Agreement sets forth a funding arrangement between the Surety and Welded LP for the Adversary Proceeding. It is premised upon the Surety's rights to assert equitable subrogation derived from the Williams Bond against claimed contract balances on the Williams Project (*See id.*).[3] .

5. The Plan provides that the Surety's total Surety Bond Claim[4] is classified as a Class 3 creditor and will receive payment for subrogation claims under the Williams Bond pursuant to the formula established in the Cooperation Agreement. The Surety will also receive payment for unsatisfied portion of its subrogation claim plus its non-Williams Bond-related claims on a *pro rata* basis with the holders of Class 4 General Unsecured Claims. Specifically, the Surety will receive "in full satisfaction of such Allowed Surety Bond Claim, [] the Surety Bond Share and its Pro Rata share of the General Unsecured Claim Distribution (i.e. Pro Rata on a combined dollar for dollar basis with the Holders of Allowed Class 4 Claims)". (*See* Plan, § 3.3.1). The Plan conflates the Surety's equitable subrogation claim under the Williams Bond with the Surety's general unsecured claims arising from losses that are not derived from the Williams Bond. The Plan proposes to impermissibly split the Surety's equitable subrogation claims by partially paying them with funds derived from the Williams contract balances awarded in the Adversary Proceeding.

[3] In the Adversary Proceeding, Williams disputes the claims asserted in the Complaint and no statement or omission made in this pleading is intended to be a waiver or admission of any kind. Williams reserves all rights.

[4] The Plan defines "Surety Bond Claim" as "[c]laims schedule in the Schedules for, or asserted against the Debtors by, Federal Insurance Company on the basis of the Debtors' indemnification obligations or the like under a surety bond." (*See* Plan, § 1.106). As noted, the Surety has filed three unsecured proofs of claim.

Then, to the extent that the subrogated claims are not satisfied in full from Williams contract balance proceeds resulting from the Adversary Proceeding, the Plan permits the Surety to receive a second payment on the subrogated claims from a pro rata share of the General Unsecured Claim Distribution paid to holders of Class 4 – General Unsecured Claims.

6. Stated differently, the Plan proposes to pay (i) the Surety's subrogation claims stemming from payments made under the Williams Bond for which the Surety plans to recover from the Adversary Proceeding under the Cooperation Agreement; and (ii) on a *pro rata* basis with the holders of Class 4 - General Unsecured Claims, the Surety will next receive another distribution on the unpaid portion of the subrogated claims under the Williams Bond that were partially paid with subrogated funds, plus the Surety's indemnification/reimbursement rights stemming from payments made under the other two bonds, along with the Surety's other losses. . Consequently, the Plan proposes a payment structure to the Surety that does not comply with sections 502(e) and 509(b) and therefore violates section 1129(a)(1).

7. Further, in order for the Surety to be entitled to payment on either its subrogation or reimbursement claims, it has to meet the criteria set forth in section 509 or 502, as applicable, *i.e.*, the Surety must pay, in full, a valid, allowed claim of the Debtors' estates and affirmatively demonstrate and identify the creditor against whose claim the Surety is exercising its right of subrogation. *See* 11 U.S.C. § 509(c).

8. There is, however, no mechanism for parties-in-interest to test that the requirements of section 509 have been met because the Plan limits claims evaluation, allowance, and objection to the Post-Effective Date Debtors and the Plan Administrator and effectively denies any other party-in-interest the right to object to the Surety Bond Claim. (*See* Plan, § 8.1-8.2; *see also* Plan Administrator Agreement). *But see* 11 U.S.C. § 502(a) (granting parties in interest the right to

object to a claim). There is simply no mechanism by which the Surety is required to prove that it has met the requirements of section 509 in order demonstrate that it is eligible to subrogate or stand in the shoes of a particular creditor.

9. The Williams Parties are parties to the complaint (Adv. Docket No. 1) (the "Complaint") filed by Welded LP on May 3, 2019 initiating the Adversary Proceeding. The Complaint asserted the following twelve counts: Count I (breach of contract), Count II (breach of implied covenant), Count III (tortious interference with contractual relationships), Count IV (turnover of property of the estate), Count V (stay violation), Count VI (impermissible setoff), Count VII (unjust enrichment), Count VIII (objection to Claim 632), Count IX (objection to Claim 636), Count X (no amounts owed to Transco in connection with postpetition reconciliation), Count XI (violation of the Pennsylvania Contractor and Subcontractor Payment Act), and Count XII (attorneys' fees).

10. The Adversary Proceeding is intended to determine all issues related to the Contract dispute, including those issues underlying the Williams Proofs of Claim and the Administrative Claim. Confirmation of the Plan should not prejudice those issues. Through this Objection, the Williams Parties also wish to ensure that all Contract-related issues, including their claims and defenses, are to be determined within the Adversary Proceeding, and not prejudiced by the Plan. With the inclusion of the Williams Proposed Language in the Confirmation Order, this aspect of the Objection will be considered resolved.

BACKGROUND

11. Transco and Welded LP entered into a pipeline construction contract (the "Contract"), which became effective August 10, 2016.

12. On September 19, 2017, the Surety, on behalf of and at the request of Welded LP, issued the Williams Bond in the amount of $454,471,254 naming Welded LP, as principal, and

Transco, as obligee, relating to the Williams Project.

13. On October 22, 2018 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court").

14. On February 26, 2019, the Surety filed a proof of claim assigned claim number 522 ("Claim Number 522") against Welded Michigan relating to bond no. 82192456 naming Consumer Energy Company (the "Welded Michigan Bond") as obligee, which claim asserts an unliquidated claim in the amount of $55,897,580 based on the total penal sum of the Welded Michigan Bond. Claim Number 522 asserts rights of subrogation and reimbursement for a project that is unrelated to the Williams Project.

15. Also, on February 26, 2019, the Surety filed a proof of claim assigned claim number 529 ("Claim Number 529") against Welded LP relating to: (i) the Williams Bond; (ii) the Welded Michigan Bond; (iii) bond no. 82444383 naming the West Virginia Division of Labor as obligee (the "WVDL Bond", collectively with the Williams Bond and the Welded Michigan Bond, the "Surety Bonds"); and (iv) an indemnity agreement. In Claim Number 529, the Surety asserts an unliquidated claim based on a total penal sum of $523,868,834 stemming from the three different bonds that name different obligees and relate to different obligations. The Surety does not attribute the losses to a specific bond or provide a break-down to explain the derivation of Claim Numbers 529. The Surety also asserts rights of subrogation and reimbursement under the Surety Bonds.

16. On February 27, 2019, the Surety filed a proof of claim assigned claim number 551 ("Claim Number 551") against Welded LP relating to the Surety Bonds and an indemnity agreement. In Claim Number 551, the Surety asserts an unliquidated claim based on a total penal sum of $523,868,834 stemming from the three different bonds that name different obligees and

relate to different obligations. The Surety does not attribute the losses to a specific bond or provide a break-down to explain the derivation of Claim Numbers 551. The Surety also asserts rights of subrogation and reimbursement under the Surety Bonds.

17. On February 28, 2019, Transco timely filed (a) a proof of claim assigned claim number 632, asserting a $16,320,000 unsecured claim against Welded LP relating to Welded LP's estimated obligation to repair defects and anomalies in the pipeline ("Claim Number 632") and (b) a proof of claim assigned claim number 636, asserting a $94,291,513.58 unsecured claim against Welded LP, consisting of asserted damages against Welded LP relating to improper overbillings, failure to follow policies and procedures, failure to meet the completion date, and failure to pay subcontractors and suppliers ("Claim Number 636" and, together with Claim Number 632, the "Williams Proofs of Claim").

18. On April 26, 2019, Transco filed a proof of claim, assigned claim number 775 by the Debtors' claims agent, asserting a $2,399,279.48 administrative expense claim (the "Administrative Claim"), based on Transco's calculation of Transco's overpayments to Welded LP pursuant to the Orders Approving Commitment Letters.[5]

19. On May 3, 2019, Welded LP filed the Complaint against the Williams Parties.

20. On May 22, 2019, the Court entered the Surety Cooperation Agreement Order. (D.I. 745).

21. On July 3, 2019, the Williams Parties filed Defendants' Motion to (I) Abstain, or

[5] The term "Orders Approving Commitment Letters" includes the following orders: On October 23, 2018, the Court entered its *Order Approving Commitment Letter from Transcontinental Gas Pipe Line Company, LLC* [D.I. 45], pursuant to which Transco funded $4.6 million on account of Welded LP's postpetition work under the Contract from October 22, 2018 through October 28, 2018. On October 23, 2018, the Court entered its *Order Approving Second Commitment Letter from Transcontinental Gas Pipe Line Company, LLC* [D.I. 111], pursuant to which Transco provided additional funding in the amount of $1.8 million for post-petition work under the Contract from October 29, 2018 through November 11, 2018. On November 7, 2018, the Court entered its *Order Approving Third Commitment Letter from Transcontinental Gas Pipe Line Company, LLC* [D.I. 172], whereby Transco funded $1.65 million for post-petition work under the Contract from November 5, 2018 through December 8, 2018.

(II) in the Alternative, Transfer Venue, or (III) in the Alternative, Dismiss Certain Counts of the Complaint (the "Motion to Dismiss"). (Adv. Docket Nos. 24, 25).

22. On October 16, 2019, the Court granted the Motion to Dismiss as to Count II (breach of implied covenant, as to Transco only), Count IV (turnover of property of the estate), Count V (stay violation), and Count VII (unjust enrichment, as to the non-Transco defendants), and denied the Motion to Dismiss as to Count VI (impermissible setoff) and Count VII (unjust enrichment, as to Transco only). (Adv. Docket Nos. 48, 49).

23. On October 28, 2019, Welded LP filed a *Motion for Partial Summary Judgment* (the "Summary Judgment Motion") as to Counts I and XI of the Complaint. (Adv. Docket Nos. 50, 55).

24. On June 8, 2020, the Court denied the Summary Judgment Motion in its entirety. (D.I. 1430).

25. In the Adversary Proceeding, the Parties have exchanged their initial disclosures pursuant to Bankruptcy Rule 7026(a)(1) and are in the discovery phase as of the filing of this Objection. The Parties have agreed to a modified scheduling order, which will extend discovery through February 2021.

ARGUMENT

I. THE PLAN CANNOT BE CONFIRMED UNDER §1129(a)(1) BECAUSE IT CONFLATES THE SURETY'S EQUITABLE SUBROGATION CLAIM UNDER § 509 WITH ITS INDEMNIFICATION CLAIM UNDER § 502.

26. Section 1129(a)(1) requires a plan must comply with all of the applicable provisions of the Code in order to achieve confirmation. *See* 11 U.S.C. § 1129(a)(1); *see also In re Frascella Enters., Inc.*, 360 B.R. 435, 441 (Bankr. D. N.J. 2007). Failure to satisfy section 1129(a)(1) results in the denial of confirmation of a plan. *See In re Frascella Enters., Inc.*, 360 B.R. 435, 441 (Bankr. D. N.J. 2007); *In re Machne Menachem, Inc.*, 233 Fed. Appx. 119, 121 (3rd Cir. 2007) (affirming

the reversal of a confirmation order when the proposed plan failed to comply with all provisions of Title 11); *In re ACandS, Inc.*, 311 B.R. 36, 42 (Bankr. D. Del. 2004) (denying confirmation under when the proposed plan failed to comply with all provisions of Title 11); *In re Beyond.com Corp.*, 289 B.R. 138, 143 (Bankr. N.D. Cal. 2003) (denying confirmation when the proposed plan sought to modify statutory notice provisions under Title 11 and violated § 1129(a)(1)); *In re PTM Techs., Inc.*, No. 10-50980C-11W, 2013 WL 4519306, * (Bankr. M.D. N.C. Aug. 26, 2013) (denying plan confirmation because the plan had provisions contrary to § 502 in violation of § 1129(a)(1)).

27. As discussed further below, the Plan blurs the distinction between the Surety's subrogation claim under section 509(a) arising from the Williams Bond and its indemnification/contribution claim under section 502 arising from non-Williams Bond related losses. The Plan also impermissibly splits the Surety's subrogation claims stemming from the Williams Bond. A portion of the subrogated claim will be paid under the Cooperation Agreement. The remaining portion of the subrogated claim that is not paid under the Cooperation Agreement will be paid *pro rata* with the Class 4 General Unsecured Creditors. Stated differently, the Plan proposes to partially pay the Surety's Williams-Bond related subrogated claims with funds derived from the Adversary Proceeding and then impermissibly re-classifies the unpaid portion of these subrogation claims as general unsecured claims under section 502. The Plan thus violates §§ 502(a), 502(e)(1)(C), and 509(b) of the Code and cannot be confirmed under § 1129(a)(1).

A. The Lumping Together of Disparate §§ 502 and 509 Claims Violates § 1129(a)(1).

28. The Plan places the total Surety Bond Claim in a stand-alone class and proposes to pay the Surety from (i) the Surety Bond Share of the Adversary Proceeding recovery; and (ii) its *pro rata* share of the General Unsecured Claim Distribution. Specifically, the Plan proposes the

following treatment of the Surety Bond Claim:

> **3.3.1. Class 3: Surety Bond Claims.** On, or as soon as reasonably practicable after, the Effective Date, the Holder of any Allowed Surety Bond Claim shall receive from the Post-Effective Date Debtors, ***in full satisfaction of such Allowed Surety Bond Claim***, (i) the Surety Bond Share[6] ***and*** its Pro Rata share of the General Unsecured Claim Distribution (i.e. Pro Rata on a combined dollar basis with the Holders of Allowed Class 4 Claims); or (ii) such other less favorable treatments as to which such Holder and the Post-Effective Date Debtors shall have agreed upon in writing. ***Class 3 is Impaired, and therefore Holders of Surety Bond Claims are entitled to vote on this Plan.***

(*See* Plan, § 3.3.1). Neither the Plan nor the Cooperation Agreement explain how the Surety Bond Claim will be calculated for purposes of payment under the Plan. The Debtors and the Surety do not distinguish the specific claims or the total amount of the claims to which the Surety is exercising its rights of subrogation and receiving direct recovery with funds from the Williams Adversary Proceeding.

29. The "surety acquires rights of 'equitable subrogation' to the balance of funds payable from the owner of the contract for which the [] bond was written." Chad L. Schexnayder, *Bankruptcy*, in THE LAW OF PAYMENT BONDS, 688 (Kevin L. Lybeck, Wayne D. Lambert, & John E. Sebastian, eds., 2d ed. 2011). The Surety acknowledges this fundamental principal in the Cooperation Agreement as it states: "[p]ursant to the Surety's right of equitable subrogation, the Surety asserts that it has a right to all contract balances due under the Williams Contract to the extent the Surety has satisfied claims made by subcontractors and suppliers under the [Williams] Bond[.]" (*See* Cooperation Agreement, p. 1). Indeed, the Surety acknowledged that "the net proceeds of any recovery on the Williams Claims should be paid to subcontractors and suppliers on the Williams Project, or otherwise to the Surety pursuant to its equitable subrogation rights to

[6] The Plan defines "Surety Bond Share" as "[t]he Williams Litigation Proceeds allocable to the Allowed Surety Bond Claim in accordance with the Surety Cooperation Agreement Order." (*See* Plan, § 1.110).

the extent the Surety has satisfied claims made by subcontractors and suppliers under the [Williams] Bond." (*See id.* at p. 2).

30. Payment to the Surety under the Plan, however, does not meet the requirements of section 509 of the Code. Section 509 governs how a surety may exercise its right of equitable subrogation in a bankruptcy case. Under section 509(a), a surety must: (a) identify the creditor to which it is subrogating; (b) demonstrate that it paid the creditor; and (c) only seek to subrogate "to extent of such payment." 11 U.S.C. § 509(a). Neither the Surety nor the Debtors present information to determine if any of these steps have been completed. The Plan proposes payment to the Surety without requiring the Surety to follow this rule.

31. The surety "has two types of claims: (1) a claim for reimbursement or contribution, and (2) a subrogation claim; and it is clear under the Bankruptcy Code that it cannot have an allowed claim in both categories because that would permit it to effectuate a double recovery." *In re Richardson*, 193 B.R. 378, 380 (D. D.C. 1995) (internal citation omitted). Sections 502 and 509 of the Code are mutually exclusive. The Plan must segregate the Surety's subrogation claims and payment on the Surety's section 509 subrogation claim such that it is paid from the proceeds of the Williams Project and the Williams Bond. The Surety may not elect to exercise its right of subrogation under 509 plus receive an additional payment on the same subrogated claim from the pool used to satisfy the Class 4 General Unsecured Claims. The Plan simply lumps the Surety's claims and treats its losses in totality without respecting the distinction between 502 and 509 claims and the bar against utilizing both sections to recover. *See In re Richardson*, 193 B.R. 378, 380-381 (D.D.C. 1995).

32. Section 509(b) of the Code provides that:

> Such entity [*e.g.*, the Surety] is not subrogated to the rights of such creditor to the extent that –

> (1) a claim of such entity for reimbursement or contribution on account of such payment of such creditor's claim is –
>
> (A) allowed under section 502 of this title;
>
> (B) disallowed other than under section 502(e) of this title; or …

11 U.S.C. § 509(b)(1)(A)-(B).

33. Section 509(b) is mutually exclusive to section 502(e)(1)(C). Section 502(e)(1)(C) provides that the court "***shall disallow*** any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that … such entity ***asserts a right of subrogation*** to the rights of such creditor under section 509 of this title." 11 U.S.C. § 502(e)(1)(C) (emphasis added). Consequently, if a creditor elects to pursue its subrogation rights, it cannot also simultaneously advance a claim for reimbursement or contribution on the same loss. Conversely, if a creditor elects to advance its claim for reimbursement or contribution against the debtor's estate, it is barred from asserting its subrogation rights for the same loss. *See In re Trasks' Charolais*, 84 B.R. at 650-651 (disallowing a creditor's proof of claim wherein the creditor elected to pursue its subrogation rights against the debtor's estate); *In re Watkins Oil Serv., Inc.*, 100 B.R. 7, 12 (Bankr. D. Ariz. 1989) (same); *Matter of Baldwin-United Corp.*, 55 B.R. 885, (Bankr. S.D. Ohio 1985) ("Section 502(e)(1)(C) then disallows any claim for contribution if the claimant has also asserted a right of subrogation under § 509, thereby requiring the codebtor to elect either a claim for contribution or one for subrogation."); *In re Richardson*, 193 B.R. 378, 380-381 (D. D.C. 1995) (explaining the interplay between sections 502(e)(1) and 509(b)(1)(A) and (B) and the requirement that the creditor must elect to pursue subrogation or reimbursement claims, but not both); *In re Buckingham*, 197 B.R. 97, 104 (Bankr. D. Mont. 1996) (same); *In re Medicine Shoppe*, 210 B.R. 310, 314 (Bankr. N.D. Ill. 1997) (same); *Fibreboard Corp. v. The Celotex Corp.*, No.803CV1479T23MSS, 2005 WL

2429508, *1, n. 1 (M.D. Fla. Sept. 30, 2005) (noting that because the creditor had elected to pursue its subrogation rights, it was foreclosed from asserting a claim for reimbursement or contribution under section 509); *In re Canopy Fin., Inc.*, No. 09-44943, 2015 WL 110595, * (Bankr. N.D. Ill. Jan. 7, 2015) ("This means that [the creditor] may not simultaneously pursue proofs of claim for contribution and subrogation.").

34. The conflation of the Surety's claims carries through in the Surety's Proofs of Claim[7], which are presently deemed allowed. *See* 11 U.S.C. § 502(a). In fact, the Surety Proofs of Claim assert both equitable subrogation and indemnification/reimbursement for payments made under the Williams Bond plus similar claims under the Welded Michigan Bond and the WVDL Bond. (*See* Claim Numbers 522, 529, and 551.) The Welded Michigan Bond and the WVDL Bond, however, are unrelated to the Williams Bond and the Williams Project. The Surety's claim arising from these losses is a general unsecured claim under section 502 of the Code. It may not exercise subrogation rights to recover for these losses because there are no contract funds under the Welded Michigan Bond and the WVDL Bond to assert the right of equitable subrogation against. The Surety simply states that it has made payments under all three Surety Bonds and incurred other expenses but does not attribute the payments or expenses to a particular bond. (*See id.*) The Surety is prohibited from electing dual treatment on the same claims under sections 502 and 509 of the Code and the Surety Proofs of Claim lack particularity leaving it impossible to determine the amount of the Surety's claims and the underlying basis to support how the claims were calculated.[8] *See* 11 U.S.C. §§ 502(e)(1)(C), 509(b); *see also In re Watkins Oil Serv., Inc.*, 100 B.R. 7, 12 (Bankr. D. Ariz. 1989) ("this election, between filing a claim and asserting a right

[7] The definition of the "Surety Bond Claim" is defined such that it encompasses the Surety's claims asserted in the Surety's Proofs of Claim. (*See* Plan, § 1.109).

[8] Subsection 502(e)(1)(C) and subsections 509(b)(1)(A) and (B) "must be read together." *In re Trasks' Charolais*, 84 B.R. 646, 650 (Bankr. D. S.D. 1988).

to subrogation, is to prevent a party from receiving more than one recovery"); *Matter of Baldwin-United Corp.*, 55 B.R. 885, 895 (Bankr. S.D. Ohio 1985) ("This statutory scheme thus protects the debtor's estate from making multiple payments on a single claim.").

B. The Williams Parties Are Uniquely Situated to Evaluate the Surety Bond Claim and Could Save the Estate Money and Resources if Allowed to Do So.

35. Article VIII of the Plan effectively limits claims objections to two parties: the Post-Effective Date Debtors and the Plan Administrator. *See* Plan, Art. VIII. Section 8.2 provides, in relevant part, that "***[a]ll objections*** to Claims … ***shall be*** Filed by the Post-Effective Date Debtors on or before the Claim Objection Deadline[.]" *See* Plan, § 8.2 (emphasis added). Section 8.2 goes on to state the "Claim Objection Deadline" may only be extended "upon a motion filed by the Post-Effective Date Debtors." *See id.* In short, the language of the Plan vests with the Post-Effective Date Debtors and the Plan Administrator the sole authority to object to claims. *See id.*

36. Section 502(a) of the Code, however, provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest … objects." 11 U.S.C. § 502(a). Consequently, the language contained in Article VIII effectively limits the parties eligible to object to claims to just the Post-Effective Date Debtors and the Plan Administrator while denying any other party-in-interest (*e.g.*, the Williams Parties) the right to object to the Surety Bond Claim/the Surety's Proofs of Claim. *See* Plan, § 8.1-8.2.

37. The Plan also vests the Post-Effective Date Debtors and the Plan Administrator with the authority to enter into agreements, ***without Court approval***, regarding the allowance of claims. *See* Plan, § 8.1. Specifically, the Plan provides that any such agreements "with respect ***to the allowance of any Claim shall be conclusive evidence and a final determination of the Allowance of such Claim***." *Id.* (emphasis added).

38. Parties-in-interest should be afforded an opportunity to object to the Surety's Proofs

of Claim and evaluate the Surety's exercise of its subrogation rights resulting in the Surety Bond Claim. In particular, the Williams Parties' involvement as the obligee under the Williams Bond affords them the unique insight as to bond claims that are valid claims against the Debtors' estate arising from the Williams Project. The Surety should be held to strict proof to demonstrate that its losses under the Williams Bond actually pertain to the Williams Project (as opposed to an unrelated job or bond) and were rightfully paid, as well as strict proof related to its other bond losses. As it currently stands, the Surety has three claims on file totaling $1,103,635,248: Claim 522 asserts total, global losses in the amount of the penal sum of the Welded Michigan Bond, $55,897,580. Claims 529 and 551 each assert total global losses in the amount of the combined penal sums of all of the Surety Bonds, $523,868,834. Clearly, these claims are incorrect and should be amended. Parties-in-interest should have the right to object to the Surety's Proofs of Claim in order to ensure that the Surety is not overpaid to the detriment of unsecured creditors in this case.

39. Permitting parties-in-interest, such as the Williams Parties, to retain their rights under section 502(a) to object to the Surety's Proofs of Claim and permitting Williams to evaluate the Surety Bond Claim could result in greater realization for the benefit of the Debtors' other unsecured creditors as a whole. Consequently, by limiting who is entitled to object to claims in violation of section 502(a), the Plan fails to satisfy section 1129(a)(1)'s requirements for confirmation.

II. THE PLAN PREJUDICES ISSUES THAT ARE TO BE DETERMINED IN THE ADVERSARY PROCEEDING.

A. Exculpation Should Not Include Transco's Administrative Claim.

40. Section 11.12 of the Plan provides as follows:

> On the Effective Date . . . none of the Exculpated Parties shall have or incur any liability to any Person or Entity, including, without

> limitation, to any Holder of a Claim or an Interest, for any act or omission in connection with, relating to, or arising out of these Chapter 11 Cases, the formulation, negotiation, preparation, dissemination, solicitation of acceptances, implementation, confirmation or consummation of this Plan, the Disclosure Statement, the Plan Administrator Agreement or any contract, instrument, release or other agreement or document created, executed or contemplated in connection with this Plan, or the administration of this Plan or the Assets and property to be distributed under this Plan[.]

41. The Administrative Claim relates to Welded LP's postpetition conduct—Welded LP unused and/or potentially wrongfully used the $8,050,000 in funds provided by Transco under the Orders Approving Commitment Letters. These funds were supposed to be used by Welded LP to complete the Williams Project between October 22, 2018 and December 8, 2018, although the Williams Parties challenge whether Welded LP did in fact use all of these funds for this specified, limited purposes.

42. The Administrative Claim should be determined in the Adversary Proceeding,[9] and the Debtors should not be exculpated from liability through confirmation of the Plan. The Williams Parties will consider this issue resolved with the inclusion of the following language in the Confirmation Order:

> Notwithstanding anything contained in section 11.12 or elsewhere of the Plan, no Exculpated Party is exculpated from any claim or cause of action of the Williams Parties, including but not limited to any asserted Administrative Claim of Transco, and such claims shall be determined through the Williams Litigation.

B. Welded LP's Claims Against the Williams Parties Should Not Be Vested Free and Clear.

43. There are various provisions in the Plan which seek to define and/or limit legal and equitable objections, defenses, and setoff and recoupment rights. For example, section 3.6

[9] In its answer to the Complaint, Transco included the dispute underlying the Administrative Claim in its counterclaims, and, therefore, intends for it to be adjudicated in the Adversary Proceeding. *See* Adv. Docket No. 63.

provides that nothing in the Plan affects the rights and defenses of the Debtors, the Estates, and the Post-Effective Date Debtors, including all rights in respect of legal and equitable objections, defenses, setoffs, or recoupment against such claims. *See* Plan, § 3.6. It also explicitly provides that the Post-Effective Date Debtors may setoff against any claim for purposes of determining the amount of allowance for distribution purposes. In other words, this provision explicitly permits the Debtors to setoff mutual obligations as between Transco and Welded LP.

44. Also, section 7.9 provides that the Post-Effective Date Debtors can setoff against any claim, payments, retained causes of action or other distributions to be made by the Post-Effective Date Debtors pursuant to this Plan. This section also affords the Debtors setoff rights.

45. Critical to the resolution of this issue is clarity that the Plan does not authorize the Debtors to setoff mutual obligations between Transco and Welded LP.

46. Other provisions of the Plan seek to foreclose the ability to assert claims against the Post-Effective Date Debtor Welded Construction, L.P. *See, e.g.*, § 5.1 (providing that all assets of the estates, including all claims, rights, Retained Causes of Action vest in the Post-Effective Date Debtor Welded Construction, L.P. free and clear).

47. This is improper, as to the Williams Parties. All objections, defenses, and setoff and recoupment rights should also be determined in the Adversary Proceeding, and not prejudiced by the Plan.

48. The Williams Parties will consider this issue resolved with the inclusion of the following language in the Confirmation Order:

> Notwithstanding anything contained in section 3.6 or elsewhere in the Plan, confirmation of the Plan shall not authorize any party to setoff or recoup any obligations relating to the Williams Parties or the Williams Litigation, and any such rights of setoff or recoupment shall be determined through the Williams Litigation.

> Notwithstanding anything contained in section 5.1 or elsewhere in the Plan, Retained Causes of Action relating to the Williams Parties are not vested free and clear of all Claims, Liens, charges, and other encumbrances; but, instead, such Retained Causes of Action are vested fully subject to any and all rights and defenses of the Williams Parties, with such Retained Causes of Action, defenses, and rights to be determined through the Williams Litigation.

C. Transco's Rights to Amend the Williams Proofs of Claim Should Not Be Prejudiced by the Plan.

49. Section 8.5 of the Plan provides that on or after the effective date of the Plan, a claim may not be filed or amended to increase liability or to assert new liabilities without prior authorization of the Court or the Post-Effective Date Debtors. Furthermore, any claims filed after the applicable bar date deadlines or deadlines in the Plan would be automatically deemed disallowed in full and expunged without further action.

50. The Williams Parties object to this automatic prohibition on filing claim amendments. The Adversary Proceeding will likely go beyond any claim deadlines set forth in the Plan or bar date pleadings, and thus, the Williams Parties' right to amend their claims as determined in the Adversary Proceeding would be foreclosed under the Plan.

51. Claim Number 632 is based on an estimate of the costs associated with Welded LP's obligation to repair defects and anomalies in the pipeline pursuant to the Contract. The Administrative Claim is based on a reconciliation of postpetition overpayments, in connection with the Orders Approving Commitment Letters. Depending on continued internal review by the Williams Parties and subject to discovery and other proceedings, those claims may need to be amended. As drafted, the Plan prejudices the Williams Parties' right to do so.

52. Further, as explained herein, the Surety may need to amend its claims in order to clearly articulate its separate losses under each bond, including the payments made under the Williams Bond relating to the Williams Project.

53. The Williams Parties will consider this issue resolved with the inclusion of the following language in the Confirmation Order:

> Notwithstanding anything contained in section 8.5 or elsewhere in the Plan, to the extent Transcontinental Gas Pipe Line Company, LLC ("Transco") amends its proofs of claim, or asserts new or different Claims, such Claims are not automatically deemed disallowed in full and expunged; but, instead, Transco shall be permitted to so amend or assert such Claims to the extent permitted under applicable law, by agreement of the Plan Administrator, or by order of the Bankruptcy Court.

D. The Williams Parties Do Not Consent to the Third-Party Releases.

54. Section 11.11 of the Plan provides for broad third-party releases. Subsection (d) states that a Class 4 claimholder is a Releasing Party (as such term is defined in the Plan) unless such holder (i) timely submits a Release Opt-Out (as defined in the Plan), or (ii) files an objection to the releases prior to the confirmation objection deadline.

55. In accordance with the Plan, the Williams Parties hereby object to the third-party releases in section 11.11(b). Accordingly, the Williams Parties shall not be considered "Releasing Parties" under the Plan.

CONCLUSION

56. The Williams Parties file Section I of this Objection because the Plan violates section 1129(a)(1) by impermissibly affording the Surety two bites at the apple on its equitable subrogation claims and reimbursement/indemnification claims in violation of sections 502 and 509. Further, the Plan effectively eviscerates the rights of parties-in-interest, *e.g.*, the Williams Parties, to object to the Surety's Proofs of Claim, a right that is granted by the Code under section 502(a). The Plan's blurring of the Surety's distinct claims and losses under the Williams Bond and the other non-Williams Bonds and projects is thus violative of the Code and cannot be confirmed. The violation of section 1129(a)(1) can be cured and the Plan can be confirmed if the following

modifications (the "Plan Modifications") are made:

a) With respect to the claims to which the Surety wishes to exercise the right of subrogation, it must: (a) identify the creditor to which it is subrogating; (b) demonstrate that it paid the creditor for its work on the Williams Project and under a Williams Bond claim; and (c) only seek to subrogate to extent of such payment to that creditor.

b) For those claims to which the Surety wishes to exercise the right of subrogation, the Surety cannot carry-over unsatisfied subrogated claims and receive its *pro rata* share of the General Unsecured Claim Distribution made to the holders of Class 4 claims.

c) The Williams Parties should be included under § 8.2 of the Plan as a party that has a right to object to the Surety Proofs of Claim, the Surety Bond Claim, or any claim that the Surety identifies it is subrogating to.

d) The Surety Bond Claim, the Surety Proofs of Claim, or any claim that the Surety identifies it is subrogating to should be excluded from the last sentence of § 8.1 of the Plan that permits out-of-court agreements by the Post-Effective Date Debtors and the Plan Administrator as to the allowance of claims.

57. The Williams Parties file Section II of this Objection to ensure that the Plan does not prejudice their rights, claims, and defenses while the Adversary Proceeding is pending. Section II of the Objection will be considered resolved as to above subsections A, B, and C with the inclusion of the following paragraph in the Confirmation Order (the "Williams Proposed Language"):

> Notwithstanding anything contained in section 11.12 or elsewhere of the Plan, no Exculpated Party is exculpated from any claim or cause of action of the Williams Parties, including but not limited to any asserted Administrative Claim of Transco, and such claims shall be determined through the Williams Litigation. Notwithstanding anything contained in section 3.6 or elsewhere in the Plan, confirmation of the Plan shall not authorize any party to setoff or recoup any obligations relating to the Williams Parties or the Williams Litigation, and any such rights of setoff or recoupment shall be determined through the Williams Litigation. Notwithstanding anything contained in section 5.1 or elsewhere in the Plan, Retained Causes of Action relating to the Williams Parties are not vested free and clear of all Claims, Liens, charges, and other encumbrances; but, instead, such Retained Causes of Action are

> vested fully subject to any and all rights and defenses of the Williams Parties, with such Retained Causes of Action, defenses, and rights to be determined through the Williams Litigation. Notwithstanding anything contained in section 8.5 or elsewhere in the Plan, to the extent Transcontinental Gas Pipe Line Company, LLC ("Transco") amends its proofs of claim, or asserts new or different Claims, such Claims are not automatically deemed disallowed in full and expunged; but, instead, Transco shall be permitted to so amend or assert such Claims to the extent permitted under applicable law, by agreement of the Plan Administrator, or by order of the Bankruptcy Court.

WHEREFORE, the Williams Parties respectfully request that this Court: (i) sustain this Objection; (ii) deny confirmation of the Plan on the grounds that it violates section 1129(a)(1) unless the Plan Modifications are made to the Plan or are addressed by language in the Confirmation Order acceptable to the Williams Parties; (iii) condition confirmation of the Plan on the inclusion of the Williams Proposed Language in the Confirmation Order, and (iv) grant such further relief as is necessary and just.

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Dated: June 17, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2020 a copy of the forgoing *Objection to Amended Chapter 11 Plan of Welded Construction, L.P. and Welded Construction Michigan, LLC* was served on the following in the manner indicated:

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