

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

In re	)	Chapter 11
	)	
	)	Case No. 18-12378 (CSS)
WELDED CONSTRUCTION, L.P. <i>et al.</i> ,	)	
	)	(Jointly Administered)
	)	
Debtors.	)	
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WELDED CONSTRUCTION, L.P.,	)	
	)	
Plaintiff,	)	
v.	)	Adv. Pro. No.: 19-50194 (CSS)
	)	
THE WILLIAMS COMPANIES, INC.,	)	
WILLIAMS PARTNERS OPERATING	)	
LLC, and TRANSCONTINENTAL	)	
GAS PIPE LINE COMPANY, LLC,	)	Related Adv. Docket No.: 267
	)	
Defendants.	)	

**MEMORANDUM ORDER**

Upon consideration of *Plaintiff's Motion for an Order (I) Enforcing the Waiver Orders and (II) Imposing Sanctions*, filed on August 24, 2021 (the "Motion for Sanctions")<sup>1</sup>; the Court having reviewed the Motion for Sanctions and the objection thereto<sup>2</sup>; the Court having conducted an *in-camera* review of the documents at issue; the Court having found that: (i) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and (iii) the Court has judicial power to enter a final order;

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<sup>1</sup> Adv. D.I. 267. All references to the Adversary Proceeding Docket will be cited as "Adv. D.I." and will refer to this Adversary Proceeding unless otherwise stated.

<sup>2</sup> In connection with the Motion for Sanctions, the Court received the *Defendants' Opposition to Welded's Motion for an Order (I) Enforcing the Waiver Orders and (II) Imposing Sanctions*, Adv. D.I. 269, as well as

IT IS HEREBY FOUND AND ORDERED as follows:

**BACKGROUND<sup>3</sup>**

1. On October 28, 2019, Plaintiff filed its *Motion for Partial Summary Judgment* (the “Summary Judgment Motion”).<sup>4</sup> In opposition to the Summary Judgment Motion, Defendants submitted, among other things, a fifteen-page Declaration of Phil Burke (the “Declaration”) of Oil and Gas Contracts Services (“OGCS”).<sup>5</sup>

2. The Declaration discussed, in detail, certain findings regarding OGCS’s Audit of Plaintiff’s invoices to Defendant Transcontinental Gas Pipe Line Company, LLC (“Transco”) in connection with the Atlantic Sunrise Project.

3. On June 8, 2020, the Court denied Plaintiff’s *Motion for Partial Summary Judgment*.<sup>6</sup> In doing so, the Court explained that it was relying on the

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*Welded’s Reply in Support of its Motion for an Order (I) Enforcing the Waiver Orders and (II) Imposing Sanctions*, Adv. D.I. 272.

<sup>3</sup> A thorough recitation of the facts giving rise to this Adversary Proceeding can be found in the Court’s Opinion denying Plaintiff’s *Motion for Partial Summary Judgment* at Adv. D.I. 120. A more expansive recitation of the facts surrounding the parties’ discovery dispute may be found in the Court’s Memorandum Order denying Defendants’ *Motion for Clarification/Reconsideration of Order Granting Welded’s Motion to Compel Production of Audit Documents* at Adv. D.I. 236. For purposes of brevity and completeness, the Court will incorporate the factual background contained therein and summarize the relevant background herein.

<sup>4</sup> Adv. D.I. 50.

<sup>5</sup> Adv. D.I. 73.

<sup>6</sup> Adv. D.I. 120.

Burke Declaration, which created a genuine dispute of material fact as to Labor Costs.<sup>7</sup>

4. In the meantime, on January 8, 2020, Plaintiff served Defendants with document requests, seeking production of documents pertaining to the Audit.<sup>8</sup> On March 16, 2020, Plaintiff also served OGCS with a subpoena, seeking documents related to the Audit.<sup>9</sup>

5. After Defendants and OGCS refused to produce certain documents related to the Audit in reliance on attorney client privilege and the work product doctrine, on July 27, 2020, the parties met and conferred in accordance with Local Rule 7026-1(d). They were unable to reach a resolution with respect to production of the Audit documents.

6. Thereafter, Plaintiff filed a *Motion to Compel Production of Audit Documents* (the “Motion to Compel”),<sup>10</sup> which was granted on September 9, 2020.<sup>11</sup> In granting the Motion to Compel, the Court found that the “Defendants have complete[ly] waived the protection of the attorney client privilege and work

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<sup>7</sup> *Welded Constr., L.P. v. The Williams Cos., Inc. (In re Welded Constr., L.P.)*, 616 B.R. 649, 662 (Bankr. D. Del. 2020) (“Even if the [2019] Burke Declaration does not comprehensively explain the contractual basis for concluding that the Disputed Labor Costs were erroneously invoiced, the Burke Declaration – a sworn statement of an independent auditor that describes the findings of his audit – is sufficiently probative of disputed Labor Costs to deny the Motion. A more substantial factual record will be necessary to resolve the Disputed Labor Costs.”).

<sup>8</sup> Adv. D.I. 88.

<sup>9</sup> Adv. D.I. 108.

<sup>10</sup> Adv. D.I. 135.

<sup>11</sup> Adv. D.I. 155 (the “Production Order”).

product doctrine in connection with the Audit.”<sup>12</sup> Accordingly, the Court ordered Defendants to produce, “without redaction, all documents related to the Audit ....”<sup>13</sup>

7. In response to the Production Order, Defendants and OGCS produced 2,534 documents but withheld 196 documents on grounds that they constituted “Opinion Work Product,” which they believed was not covered by the Production Order.

8. On that basis, the Defendants filed a *Motion for Clarification/Reconsideration of Order Granting Welded’s Motion to Compel Production of Audit Documents* (the “Reconsideration Motion”).<sup>14</sup> Ultimately, on February 15, 2021, the Court denied the Reconsideration Motion, finding that its “prior ruling clearly included Opinion Work Product and required its production ....”<sup>15</sup>

9. Although Defendants produced the 196 documents pursuant to this Court’s ruling on the Reconsideration Motion, Defendants nonetheless redacted 28 documents, arguing that certain information in these documents is “not related to the Audit” and, thus, need not be produced without redactions.

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<sup>12</sup> *Id.* The Court’s holding was upheld on appeal by the District Court for the District of Delaware. *See* D.I. 264 (finding that this Court’s conclusion that Defendants have “complete[ly] waived” work product protection was the “appropriate language.”).

<sup>13</sup> *Id.*

<sup>14</sup> Adv. D.I. 159.

<sup>15</sup> Adv. D.I. 236.

10. That being so, on August 24, 2021, Plaintiff filed this instant Motion for Sanctions, requesting that the Court order Defendants to produce the 28 documents without redactions and impose sanctions in (i) the form of attorneys' fees and costs, (ii) an adverse inference at trial that the Audit was not independent and that its credibility is impacted as a result thereof; and (iii) by estopping the Defendants from "switching their entire theory of the case ...."<sup>16</sup>

11. On December 6, 2021, the Court requested that defense counsel provide the 28 documents without redactions to the Court *in-camera* so that the Court could determine how to proceed with this matter. The documents were provided on December 8, 2021. Accordingly, this matter is now ripe for decision.

### ANALYSIS

#### *Whether the 28 Redacted Documents are "Related To" the Audit*

12. The issue before the Court is whether the 28 redacted documents are "related to the Audit" such that they need be produced without redactions in accordance with the Court's September 9, 2020 Production Order and the February 15, 2021 Reconsideration Order.

13. After this Court's *in-camera* review of the documents at issue, it is apparent that the redacted information within the documents *is*, in fact, "related to the Audit." It appears, at a minimum, that all the redacted information stems from OGCS's Audit findings and the implications and ramifications of those

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<sup>16</sup> Adv. D.I. 267, ¶ 3.

findings. Although the information itself may or may not have been produced as part of the direct goal of the auditing process<sup>17</sup>, the Court believes that the redacted information, including financial figures, would not have been attainable without the Audit. Indeed, the redacted information references the Audit throughout. Accordingly, the Court finds that the documents are “related to” the Audit such that they need be produced in an unredacted form in accordance with the Court’s September 9, 2020 and February 15, 2021 Orders.

14. In light of the foregoing, the Defendants will have seven days from the date of this Order to produce the 28 documents, without any redactions.

*Whether Sanctions are Appropriate*

15. Federal Rule of Bankruptcy Procedure 7037 incorporates Rule 37 of the Federal Rules of Civil Procedure, which permits an award of sanctions against a party who fails to comply with certain rules of discovery.<sup>18</sup> Sanctions are

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<sup>17</sup> See Burke Dep. Tr. At 22:9-15. According to Phil Burke, the primary purpose of the Audit was “an assessment of the contractual validity of Welded’s charges.”

<sup>18</sup> Discovery sanctions for failure to comply with a court order include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of the court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37.

“deemed a tool to protect innocent parties to litigation or parties subjected to ... a lack of discovery compliance ....”<sup>19</sup>

16. In addition to, or instead of, the sanctions set forth in Fed. R. Civ. P. 37(b)(2), the Court “must order the disobedient party, the attorney advising the party, or both, to pay the reasonable expenses caused by the failure, including attorney’s fees, unless the failure was substantially justified.”<sup>20</sup>

17. “A party is substantially justified in failing to produce required discovery when a reasonable person could conclude that parties could differ as to whether disclosure was required.”<sup>21</sup> Otherwise stated, where reasonable minds could disagree as to whether the information at issue needs to be disclosed, the withholding party is substantially justified in refusing to disclose the materials. On the other hand, “[w]here withheld documents are clearly relevant and discoverable, parties are not substantially justified in failing to disclose them.”<sup>22</sup>

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<sup>19</sup> *In re Bernard*, 85 B.R. 864, 867 (Bankr. D. Colorado).

<sup>20</sup> *In re Vaso Active Pharms, Inc.* 514 B.R. 416, 421 (Bankr. D. Del. 2014).

<sup>21</sup> *In re Atomica Design Group, Inc.*, 591 B.R. 217, 233 (Bankr. E.D.Pa. 2018) (citing *LightStyles, Ltd. ex rel. Haller v. Marvin Lumber & Cedar Co.*, No. 1:13-CV-1510, 2015 WL 4078826 at \*2 (M.D. Pa. July 6, 2015)); see also *Johnson v. Fed. Express Corp.*, No. 1:12-CV-444, 2014 WL 65761, at \*1 (M.D.Pa. Jan. 8, 2014) (“Substantial justification for the failure to make a required disclosure means justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request.”) (internal citations and quotations omitted).

<sup>22</sup> *Id.*

18. “[T]he type of sanction to issue for Rule 37 violations is committed to the sound discretion of the court, [but] the sanction must be just, and must specifically relate to the claim or claims at issue within the discovery order.”<sup>23</sup>

19. Based on the Court’s *in-camera* review of the redacted documents, the Court finds that, although the documents at issue are related to the Audit and need to be produced, Defendants were substantially justified in withholding these documents.

20. At the outset, the Court notes that the parties have been engaged in contentious motion practice with respect to production of the Audit documents for almost two years. It is clear that the parties and counsel have had legitimate differing views and opinions on the discoverability of these documents for quite some time.

21. Prior to the filing of this Motion, Defendants communicated to Plaintiff that certain content contained within the 28 documents was not related to the Audit and, thus, did not need to be produced. For instance, Defendants “redacted the work-product unrelated to the audit and produced the documents.”<sup>24</sup> Based on the Court’s review, Defendants did, in fact, produce documents that had both information about the Audit (which was unredacted) and information related to the Audit but not directly concerning the Audit (which was redacted).

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<sup>23</sup> *Vaso*, 514 B.R. at 421.

<sup>24</sup> *See* D.I. 269.



22. Since the Court previously found that Defendants had completely waived attorney client and work product privilege in connection with the Audit and ordered production of *all* documents “related to” the Audit in an unredacted form, Defendants cannot now claim that certain information contained in these 28 documents, which are “related to” the Audit, are protected by the work product doctrine. Since the documents are “related to” the Audit, they must be produced in an unredacted form in accordance with this Court’s prior Orders.

23. Nevertheless, while the Court’s September 9, 2020 Production Order clearly stated that all documents “related to the audit” needed to be produced “without redaction,” the Court will give Defendants the benefit of the doubt for producing documents, which contained unredacted information directly concerning the Audit, but redacted information that, although not directly about the Audit, was “related to” the Audit. Given the level of protection generally afforded to work product, it is reasonable that Defendants believed they needed to produce all documents with unredacted information only as to the direct Audit and its findings, as opposed to all information (and the implications of that information) that they may have received as part of the auditing process, and which may be work product “related to” the Audit.

24. Accordingly, in light of the foregoing, the Court will not sanction Defendants in connection with this discovery dispute and this portion of Plaintiff’s Motion for Sanctions is denied.

## CONCLUSION

Consistent with the foregoing, Plaintiff's Motion for Sanctions is GRANTED in part and DENIED in part. Defendants must produce the 28 documents without any redactions to Plaintiff within seven days of the date of this Order.



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Christopher S. Sontchi  
United States Bankruptcy Judge

Dated: December 20, 2021