IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re: WELDED CONSTRUCTION, L.P., et al. *et al,* Debtors and Debtor in Possession.	Chapter 11 Case No. 18-12378 (KG) (Jointly Administered)
WELDED CONSTRUCTION, L.P., Plaintiff, v. PRIME NDT SERVICES, INC., Defendant.	Adversary Proceeding Adv. Pro. No. 19-50180 (KG)

PRIME NDT SERVICES, INC.'S MOTION TO EXTEND DISCOVERY DEADLINES AND ADJOURN TRIAL

Defendant Prime NDT Services, Inc. ("Prime"), by and through counsel, moves the Court to extend the applicable discovery deadlines and adjourn the present trial date as follows:

1. Prime is forced to take this Motion because, on Tuesday, October 22, 2019 at 9 p.m., after months of litigation and years of discussions regarding the claim, Welded Construction, L.P. and Welded Construction Michigan, LLC (collectively "Welded") submitted the expert report of Scott D. Gray, an apparent economist, that radically changes the nature of this litigation. This was when Prime's rebuttal report is due on October 31, 2019 and discovery closes on November 22, 2019.

2. The expert report essentially *doubled* the amount at issue in this matter. Welded essentially claims that it has now located approximately six million dollars in previously

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undisclosed work it performed as a direct result of Prime's nonconforming x-rays. That is three times the amount of direct work that was initially claimed. Further, Mr. Gray makes several claims that are demonstrably false in several material respects.[1]

3. Attached as exhibits to this expert report were a number of documents that were within Welded's possession and control for years and spoke to the key issue in this case, the costs Welded incurred in connection with digging up and covering the deficient x-rays after Prime re-examined them.[2] The majority of these documents were produced for the first time with Mr. Gray's report.

4. Some discussion of these documents and Mr. Gray's report is important here. Mr. Gray relied on timesheets, and daily reports among other things, and those two documents in particular were used to calculate Welded's purported damages. With rare exceptions, these documents had never been produced in discovery. Rather, only a select few timesheets and daily reports had been produced in pre-litigation discussions. When they were produced in pre-litigation discussions, they were purported to constitute the work done in relation to Prime's non-conforming issues.

5. In this respect, prior to the initiation of this lawsuit, Welded had internally compiled invoices for work it performed in relation to Prime's deficient x-rays. These were submitted to Prime, along with documents indicating the work that they had performed to dig up the affected welds, allow them to be re-x-rayed, and cover them. These documents were provided to Prime by

[1] Unfortunately, this is clear from the face of the documents cited by Mr. Gray. For instance, he attributes numerous crews that were only working on "anomalies" to Prime's nonconforming x-rays. An anomaly is a term of art in the construction pipeline business relating to a dent, gouge, or other physical defect in a pipeline. Work on an anomaly would be per se unrelated to a nonconforming x-ray. As a further example, all of the nonconforming welds were in Pennsylvania, but Mr. Gray has attributed at least one crew that was performing work in West Virginia to Prime's nonconforming welds. The list goes on.

[2] Prime does not contest that it provided deficient x-rays or that some additional work was required on Welded's behalf. The cost and scope of this work is contested; especially now that it has apparently tripled.

Welded personnel, as well to Prime's counsel by Welded's Counsel.

6. As seen by Mr. Gray's opinions, the timesheets and daily reports are key items for the calculation of damages in this matter. In fact, they appear to be almost exclusively what Mr. Gray relied upon in his calculation of damages. Essentially, they reflect, in summary form, the time spent and work done by any individual crew on the Project. One report relates or timesheet relates to one crew's work on one day. On Tuesday, Welded produced approximately five times the amount of those documents as had ever been produced in this dispute, essentially claiming that five times the amount of crews were dedicated to addressing Prime's nonconforming x-rays than Welded had been claiming for years.

7. Prime and its counsel relied on Welded's representations and documents in forming their understanding of this lawsuit, particularly in negotiating responses to Requests for Production of Documents, timing discovery, as well as negotiating scheduling orders and extensions thereto.

8. Most importantly, Welded objected to providing numerous documents related to work performed for the PP1 spread and, in reliance on Welded's representations, Prime agreed that Welded would produce only documents that concerned work performed by Welded in relation to the nonconforming x-rays, as the parties contemplated at that time. And that was what was produced – until Wednesday. Now, a significantly larger world of documents is relevant.

9. Similarly, Prime and Welded mutually negotiated several brief extensions to the Scheduling Order in this matter. These largely anticipated a relatively straightforward lawsuit, as it had been represented for several years, with limited fact and expert witness depositions to take place following a mediation scheduled for November 4, 2019.

10. Now, this matter, and its related discovery and motion practice, has a significantly

different scope and tone than it did last week. Prime must now undertake, in quick fashion, to take 30(b)(6) depositions of third parties, namely Sunoco, Tetra Tech Rooney, as well as other third party entities that are not known but clearly exist, particularly, construction managers, and project managers. Welded's prior discovery responses must be re-examined to determine what is being withheld that is responsive to Welded's new theory of its case. Additional documents must be requested. The scope of deponents with knowledge of the claim from Welded's perspective is significantly broader. Simply put, Prime must now figure out what approximately five times the numbers of crews were doing on this Project, and all in contravention of Welded's previous representations and in a very short period of time.

11. Discovery was already tight and hampered by productions from third parties. Particularly, Sunoco recently made a production of approximately 800 documents that bear upon the issues in this case. Moreover, Tetra Tech Rooney indicated today that it is reviewing twelve to fifteen *gigabytes* of information to be produced to Prime in response to its Subpoena.

12. This creates an unworkable discovery schedule. As a threshold matter, Prime's expert now has to consider exponentially more work to discern what was and was not related to the nonconforming x-rays, as well as the reasonableness of the charges, and so on. This is in the space of a few days. Moreover, the fact witnesses described above are going to be numerous, and it is not realistic to force counsel to work on this schedule – before trial that will immediately follow discovery.[3] Further, there is no guarantee that third party discovery can be completed in the short remaining window.

13. Further, this development will cause an unnecessary burden for the court. Prime

[3] Welded seems to understand the gargantuan task. In fact, it offered to double-book depositions to complete discovery. While Prime appreciates this offer, Prime does not have the capacity to meet such an unreasonable schedule. Nor should it be reasonably anticipated that the parties would undertake such a burden.

agreed to a very tight scheduling order because Welded had created the appearance of a very straight-forward case. As it presently stands, there is an approximate two week turn around between the close of discovery and trial. It is now abundantly clear that Prime will have to, at least, file a *Daubert* Motion, relative to Mr. Gray, and likely a significant number of other pre-trial motions that had not been previously anticipated. It is not fair to the Court to have to work on such an unanticipated tight schedule.

WHEREFORE, for the reasons set forth above and in the underlying Motion, Defendant Prime NDT Services, Inc. respectfully requests that this Honorable Court grant its Motion, and enter a trial scheduling order that (a) extends all applicable discovery deadlines for a period of sixty (60) days and (b) adjourns the current trial date for a date at least sixty (60) days following December 10, 2019.

Respectfully submitted,

GORDON REES
SCULLY MANSUKHANI LLP

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Dated: October 28, 2019

CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 7.1.1

I hereby certify that a reasonable effort has been made to reach agreement with the opposing party on the matters set forth in the motion. These reasonable efforts include telephone calls with Delaware Counsel seeking an agreement on the relief sought in this Motion.

/s/ Michael C. Heyden, Jr.
Michael C. Heyden, Jr.

CERTIFICATE OF SERVICE

I certify that on October 28, 2019, I electronically filed the foregoing with the Court using the CM/ECF system, and served counsel below via the CM/ECF system.

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/s/ Michael C. Heyden, Jr.
Michael C. Heyden, Jr.

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In Re: WELDED CONSTRUCTION, L.P., et al. *et al,* Debtors and Debtor in Possession.	)	Chapter 11
	)	Case No. 18-12378 (KG)
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WELDED CONSTRUCTION, L.P., Plaintiff, v. PRIME NDT SERVICES, INC., Defendant.	)	Adversary Proceeding
	)	Adv. Pro. No. 19-50180 (KG)

ORDER

AND NOW, this ___ day of _____, 2019, upon consideration of the Motion to Extend Discovery Deadlines and Adjourn Trial filed by Defendant, Prime NDT Services, Inc. ("Prime"), and any response thereto, it is hereby ORDERED that Defendant's Motion is GRANTED and the applicable discovery and trial deadlines are extended by sixty (60) days. It is further ORDERED that the Second Amended Scheduling Order (D.I. 52) is amended as follows:

Paragraphs 3(a), 3(b), 9, 11, and 14 are stricken and replaced as follows:

3. Discovery

a. Discovery Cut-Off. All fact and expert discovery in this case shall be initiated so that it will be completed on or before January 21, 2010. Discovery requests and written

responses may be served electronically by email on counsel. Del. Bankr. L.R. 7026-3 shall apply with respect to electronic discovery concerning the Adversary Proceeding.

b. Disclosure of Expert Testimony. The initial Bankruptcy Rule 7026(a)(2) disclosures of expert testimony with respect to damages shall be filed on or before October 22, 2019; and they shall file a disclosure to rebut evidence on the same subject matter identified by December 30, 2019. With respect to causation, disclosures of expert testimony shall be filed on or before January 7, 2020; and they shall file a disclosure to rebut evidence on the same subject matter identified by January 14, 2012. The Parties shall meet and confer no later than November 5, 2019 to discuss scheduling and coordinate fact and expert witness depositions, which shall occur no later than January 21, 2020. To the extent any objection to expert testimony is made pursuant to the principals announced in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), it shall be made by motion no later than the deadline for dispositive motions set forth herein, unless otherwise ordered by the Court.

9. Case Dispositive Motions. All case dispositive motions, an opening brief, and affidavits, if any, in support of the motion shall be served and filed on or before January 14, 2020. Briefing will be presented pursuant to Del. Bankr. L.R. 7007-1.

11. Pretrial Conference. On _____, the Court will hold a Final Pretrial Conference in Chambers with counsel beginning at 2:30 p.m. Unless otherwise ordered by the Court, the Parties should assume that filing the pretrial order satisfies the pretrial disclosure requirement of Bankruptcy Rule 7026(a)(3). The parties shall file with the Court the joint proposed final pretrial order with the information required by the form of Final Pretrial Order on November 18, 2019.

14. Trial. This matter is scheduled for a 4 day trial beginning at 9:30 a.m. on _

_____, if the District Court does not withdraw the reference.

BY THE COURT:

_____

J.

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on October 28, 2019, Prime NDT Services, Inc. filed with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") a Motion to Extend Discovery Deadlines and Adjourn Trial (the "Motion").

PLEASE TAKE FURTHER NOTICE that if you wish to respond to the Motion, you are required to file such response on or before **November 8, 2019 at 4:00 pm prevailing Eastern Time** (the "Objection Deadline").

At the same time, you must serve a copy of such response on the undersigned counsel so as to be received by the Objection Deadline.

PLEASE TAKE FURTHER NOTICE THAT a hearing on the Motion will be held on November 18, 2019, at 10:00 a.m. before the Honorable Kevin Gross, United States

Bankruptcy Court, for the District of Delaware, 824 North Market Street, 5th Floor, Courtroom #3, Wilmington, Delaware 19801.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF DEMANDED BY THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

GORDON REES
SCULLY MANSUKHANI LLP

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Dated: October 28, 2019