Docket #0064 Date Filed: 11/6/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WELDED CONSTRUCTION, L.P., *et al.*,* Debtors and Debtors In Possession.	Case No. 18-12378 (KG)
	(Jointly Administered)
WELDED CONSTRUCTION, L.P. AND WELDED CONSTRUCTION MICHIGAN, LLC,	
Plaintiffs,	Adv. Pro. No. 19-50180 (KG)
vs.	
PRIME NDT SERVICES, INC.,	Re: D.I. 13, 42, 52
Defendant.	

THIRD AMENDED AGREED SCHEDULING ORDER

The above-captioned plaintiffs (collectively, the "Plaintiffs" or "Debtors") and the defendant Prime NDT Services, Inc. (the "Defendant," and collectively with the Plaintiffs, the "Parties"), by and through their undersigned counsel, hereby submit this Second Amended Agreed Scheduling Order and in support thereof state as follows:

A. On March 27, 2019, Plaintiffs commenced an adversary proceeding (the "Adversary Proceeding") by filing a *Complaint* alleging claims of breach of contract and breach of warranty [Adv. Docket No. 1] against Defendant.

* 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 26933 Eckel Road, Perrysburg, OH 43551.

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B. On April 26, 2019, the Defendant filed its *Motion to Withdraw the Reference of the Adversary Proceeding* [Adv. Docket No. 5] ("Motion to Withdraw Reference") and its *Partial Motion to Dismiss Plaintiffs' Complaint* [Adv. Docket No. 7] ("Partial Motion to Dismiss"). On April 29, 2019, the Court entered the *Transmittal Sheet for Withdrawal of the Reference to the U.S. District Court for the District of Delaware* (the "District Court") [Adv. Docket No. 8] and was subsequently assigned Civil Action No. 19-778-CFC (the "District Court Matter"). The submission of this Second Amended Agreed Scheduling Order is not intended to affect or act as a waiver with respect to the Motion to Withdraw Reference.

C. On May 10, 2019, the Debtors filed their objection to the Motion to Withdraw the Reference. The District Court has not ruled on the Motion to Withdraw the Reference to date.

D. On May 31, 2019, Plaintiffs filed their opposition to the Partial Motion to Dismiss [Adv. Docket No. 12], and on June 7, 2019, Defendant filed its reply in support of its Partial Motion to Dismiss [Adv. Docket No. 14].

E. Following a meet and confer regarding various deadlines and dates in the Adversary Proceeding, on June 7, 2019, the Parties submitted a *Certification of Counsel Regarding Proposed Agreed Scheduling Order* [Adv. Docket No. 13]. On June 10, 2019, the Court entered the *Agreed Scheduling Order* (the "Agreed Scheduling Order") [Adv. Docket No. 16], which set deadlines and dates related to discovery, mediation, pre-trial conference, and trial provided the District Court determines not to withdraw the reference.

F. Following oral argument on the Partial Motion to Dismiss, the Court issued a *Memorandum Opinion* [Adv. Docket No. 30] and entered an order [Adv. Docket No. 33], denying Defendant's Partial Motion to Dismiss in its entirety.

G. On September 3, 2019, pursuant to the Agreed Scheduling Order, the Parties filed a stipulation regarding the appointment of a mediator and related terms of the mediation (the "Stipulation") [Adv. Docket No. 36], proposing that David A. White of McCarter & English, LLP be appointed as mediator in the Adversary Proceeding. The Court entered an order [Adv. Docket No. 37], approving the Stipulation on September 5, 2019 [Adv. Docket No. 37] (the "Mediator Stipulation Order").

H. On September 9, 2019, the Court entered an *Order Assigning Adversary Proceeding to Mediation, Appointing Mediator, and Setting Mediation Deadline and Trial Date* (the "Mediation Order") [Adv. Docket No. 38], assigning the Adversary Proceeding to mediation and imposing various deadlines on the Parties related thereto.

I. Following a meet and confer regarding various deadlines and dates in the Agreed Scheduling Order, on September 13, 2019, the Parties submitted under certification of counsel the *Amended Agreed Scheduling Order* (the "Amended Agreed Scheduling Order") [Adv. Docket No. 42], which set updated deadlines and dates related to expert discovery and mediation. The Court entered the Amended Agreed Scheduling Order on September 16, 2019.

J. Following a meet and confer regarding various deadlines and dates in the Amended Agreed Scheduling Order, on October 10, 2019, the Parties submitted under certification of counsel the *Second Amended Agreed Scheduling Order* (the "Second Amended Agreed Scheduling Order") [Adv. Docket No. 52], which, among other things, bifurcated expert discovery deadlines and updated the mediation date. The Court entered the Second Amended Agreed Scheduling Order on October 15, 2019.

NOW, THEREFORE, the Parties hereby request that the Court approve the following Third Amended Agreed Scheduling Order governing discovery, mediation, and related matters in the Adversary Proceeding:

1. Rule 7026(a)(1) Initial Disclosures. The Parties shall make their initial disclosures pursuant to Bankruptcy Rule 7026(a)(1) and Del. Bankr. L.R. 7026-3 within seven (7) days of the entry of this order.

2. Joinder of other Parties and Amendment of Pleadings. All motions to join other parties, and to amend or supplement the pleadings shall be filed on or before seven (7) days after an order entered by the Court deciding Defendant's Partial Motion to Dismiss (the "Decision Order"). Notwithstanding, the Parties may seek leave at a later date to amend or supplement for good cause.

3. Discovery.

a. Discovery Cut-Off. All fact discovery in this case, including all fact witness depositions and any deposition(s) to be conducted pursuant to Fed. R. Civ. P. 30(b)(6), shall be initiated so that it will be completed on or before December 17, 2019. 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. The Defendant and the Debtors shall each complete their respective document productions, by no later than November 20, 2019.

b. Disclosure of Expert Testimony. The opening Bankruptcy Rule 7026(a)(2) disclosures of expert testimony, or any supplemental disclosures to previously submitted opening expert reports, shall be filed on or before December 18, 2019; and they shall file a disclosure to rebut evidence on the same subject matter identified by December 30, 2019. The Parties shall meet and confer to discuss scheduling and coordinate expert witness depositions, which shall occur no later than January 10, 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.

c. Discovery Disputes. Del. Bankr. L.R. 9013-1(b) notwithstanding, the Parties will not file discovery motions unless the Court requests briefing. Should counsel find they are unable to resolve a discovery dispute, the party seeking the relief shall contact chambers at **(302) 252-2913, extension 3** to schedule a telephone conference. Not less than forty-eight hours prior to the conference, the party seeking relief shall file with the Court a statement, not to exceed three pages, outlining the issues in dispute and its position on those issues. (The Court does not seek extensive argument or authorities at this point; it seeks simply a statement of the issue to be addressed and/or summary of the basis for the party's position on the issue.) Not less than twenty-four hours prior to the conference, any party opposing the application for relief may file a statement, not to exceed three pages, outlining that party's reason for its opposition. Should the Court find itself unable to resolve the disputes in the telephone conference, the Court will order motion and briefing practice. Disputes over protective orders are to be addressed in the first instance in accordance with this paragraph. The Court will accept and encourages telephone

calls during depositions in an attempt to resolve disputes arising in the course of the deposition without delay or the need for extensive briefing.

4. Application to Court for Protective Order. In the event it is necessary to apply to the Court for a protective order specifying terms and conditions for the disclosure of confidential information, counsel should confer and attempt to reach an agreement on a proposed form of order and submit it to the Court within ten days from the date of this Order. If counsel is unable to reach an agreement on a proposed form of order, the counsel must first follow the provisions of Paragraph 3c above.

Any proposed order should include the following paragraph:

> Other Proceedings. By entering this order and limiting the disclosure of information in this case, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes subject to a motion to disclose another party's information designated "confidential" pursuant to this order shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

5. Papers Filed Under Seal. When filing papers under seal, counsel should deliver to Chambers an original and one copy of the papers.

6. Interim Status Report. On or before August 8, 2019, counsel shall file with the Court an interim report on the nature of the matters in issue and the progress of discovery to date.

7. Status Conference. On October 21, 2019, the Court will hold a Rule 16(a), (b) and (c) Conference by telephone with counsel beginning at 9:30 a.m. Plaintiff's counsel shall initiate the telephone call. If all parties agree that there is nothing to report, nor anything to add to the interim status report to this order, they may so notify the Court in writing before the conference is scheduled to occur, and the conference will be taken off of the Court's calendar.

8. Mediation.

a. On or before seven (7) days after the Decision Order, the Adversary Proceeding shall be referred to mandatory mediation (the "Mediation"). No later than 14 days after the Decision Order, the Parties shall file a Stipulation Regarding Appointment of a Mediator or a statement that the Parties cannot agree on a mediator and a request that the Court select and appoint a mediator to the Adversary Proceeding.

b. On or before 60 days from the mediator's appointment, the mediator shall either (a) file the mediator's certificate of completion or (b) if the Mediation is not concluded, file a status report that provides the projected schedule for completion of the Mediation. The parties agree to mediate, in accordance with the terms of the Mediator Stipulation Order, to commence on November 4, 2019.

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 7, 2020. Any reply brief in response to the case dispositive motions shall be served and filed on or before January 14, 2020. Briefing will be presented pursuant to Del. Bankr. L.R. 7007-1.

10. Applications by Motion. Except as otherwise specified herein, any application to the Court shall be by written motion filed with the Clerk. Any non-dispositive motion should contain the statement required by District Court Local Rule 7.1.1.

~~11. Pretrial Conference. On _____, 2020, 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 _____, 2020.~~

12. Motions *in Limine*. No separate briefing shall be submitted on *in limine* requests, unless otherwise permitted by the Court. All *in limine* requests and responses thereto shall be set forth in the proposed pretrial order. Each party shall be limited to five *in limine* requests, unless otherwise permitted by the Court. The *in limine* request and any response shall contain the authorities relied upon; each *in limine* request may be supported by a maximum of five pages of facts and argument. If more than one party is supporting or opposing an *in limine* request, such support or opposition shall be combined in a single five (5) page submission, unless otherwise ordered by the Court.

13. Pre-Trial Briefs. Parties may or shall if the Court requests, file a pre-trial brief. In order to preclude an advantage to a party, the parties should submit and exchange briefs at the pretrial conference.

14. Trial. This matter will be ~~is~~ scheduled for a 4 day trial ~~beginning at 9:30 a.m. on _____, 2020,~~ if the District Court does not withdraw the reference.

Dated: November 6, 2019.

Kevin Gross

KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE