IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WELDED CONSTRUCTION, L.P., *et al.*,[1] Debtors and Debtors In Possession.	Case No. 18-12378 (KG)
	(Jointly Administered)
WELDED CONSTRUCTION, L.P. AND WELDED CONSTRUCTION MICHIGAN, LLC, Plaintiffs, vs. PRIME NDT SERVICES, INC., Defendant.	Adv. Pro. No. 19-50180 (CSS)
	Adv. Ref. Docket No. 86

PLAINTIFFS' OBJECTION TO DEFENDANT, PRIME NDT SERVICES, INC.'S MOTION *IN LIMINE* TO PRECLUDE JOSHUA BELL FROM OFFERING IMPERMISSIBLE OPINIONS AS TO LEGAL CONCLUSIONS

The above-captioned debtors (the "Debtors" or "Plaintiffs"), by and through their undersigned counsel, submit this objection (the "Objection") in response to *Defendant, Prime NDT Services, Inc.'s Motion* in Limine *to Preclude Joshua Bell from Offering Impermissible Opinions As to Legal Conclusions* [Adv. Docket No. 86] (the "Motion"). In support of this Objection, the Plaintiffs respectfully represent as follows:

1. The subcontract at issue required Prime NDT Services, Inc. ("Prime") to perform 100% non-destructive testing inspection of welds on the project in accordance with API Standard

[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.

1104. The subcontract also required Prime to provide supervision over its performance. Instead, as Prime has admitted repeatedly, it provided no supervision over its technicians. One unsupervised technician submitted seventy-three (73) fabricated radiographic films of welds and represented to Welded and Sunoco that Prime interpreted each film and concluded that such welds met the contract standards during the course of several months on the Mariner East Pipeline project. As a result, the Debtors were required to dig up completed pipeline installation and re-inspect seventy-three (73) welds at locations across an expansive pipeline project.

2. The *Expert Report* dated December 16, 2019 authored by Joshua Bell of Aurora Inspection and Consulting (the "Expert Report"), provides expert opinions within scope of Federal Rules of Evidence 702 and 704. Mr. Bell does not provide impermissible legal conclusions. Instead, Mr. Bell provides his expert opinion, well within the norm for the construction industry, as to the impact of the lack of supervision over a new employee who was certified as a Level II in radiography only two (2) days prior to starting work on the project. Mr. Bell's opinions are limited to his observations and analysis of the facts underlying this adversary proceeding. *See Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) ("While [the expert's] testimony that Defendants deviated from industry standards supported a finding that they acted in bad faith, [the expert] never testified that he had reached a legal conclusion that Defendants actually acted in bad faith (*i.e.*, an ultimate issue of law).").[2] As a result, the Expert Report and Mr. Bell's anticipated testimony should be allowed.

[2] The Third Circuit has recognized that the admissibility line "becomes blurred" when expert testimony as to the customs and practices of an industry also implicate legal duties. *See Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 218 (3d Cir. 2006) ("[T]he line between admissible and inadmissible expert testimony as to the customs and practices of a particular industry often becomes blurred when the testimony concerns a party's compliance with customs and practices that implicate legal duties.").

3. Even if Mr. Bell's one-sentence statement addresses an issue that will be presented to the Court at trial, Mr. Bell's testimony should still be considered by the Court and admitted. Federal Rule of Evidence 704 provides that an opinion, such as expert testimony, "is not objectionable just because it embraces an ultimate issue . . . ." To be admissible, testimony on an ultimate issue must be otherwise admissible under the Rules of Evidence. *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 227 n. 8 (3d Cir. 2008). Under Rules 701 and 702, the opinions must be helpful to the trier of fact. *Id.* Here, the complex nature of the present case concerning the specialized industry of construction and radiographic inspection highlights the need for an expert well-versed in the nuances of the industry. To that end, Mr. Bell analyzes and provides expert testimony concerning the relationship between a certifying radiographic inspection company, a newly certified employee, and the governing standards that apply in the inspection industry. *See, e.g., Collins v. Cottrell Contracting Corp.*, 733 F.Supp.2d 690, 702 (E.D.N.C. 2010) (admitting the expert's proposed testimony, over an objection regarding the provision of improper legal opinions, as it would assist the jury in navigating the complex waters of marine safety regulation). Even though the Expert Report may arguably state legal a conclusion in one sentence, it is necessary and helpful to the trier of fact, and thus should be admissible.[3] *See, e.g., In re NewStarcom Holdings, Inc.*, 547 B.R. 106, 112–13 (Bankr. D. Del. 2016) (admitting an expert opinion that contained improper legal conclusions because the adversary did not involve a jury, so there was minimal concern of misleading the trier of fact and "only a small portion of the report contain[ed] improper legal conclusions; the vast majority of the report consist[ed] of relevant, admissible expert analysis").

[3] Moreover, the Debtors do not dispute that the Court will make the ultimate determination as the trier of fact whether Prime's conduct constituted gross negligence or willful misconduct. *See Chale v. Allstate Life Ins. Co.*, 353 F.3d 742, 749 (9th Cir. 2003) (noting legal determinations fall within the province of the court).

CONCLUSION

WHEREFORE, the Plaintiffs respectfully request that the Court (i) deny the Motion, and (ii) grant such other relief as is just and proper.

Dated: January 14, 2020
Wilmington, Delaware

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