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. 87

PLAINTIFFS' OBJECTION TO PRIME NDT SERVICES, INC.'S MOTION *IN LIMINE* TO PRECLUDE DEBTORS FROM PRESENTING EVIDENCE OF SUBCONTRACTOR EXPENSES THEY DID NOT INCUR

The above-captioned debtors (the "Debtors" or "Plaintiffs"), by and through their undersigned counsel, submit this objection (the "Objection") in response to *Prime NDT Services, Inc.'s Motion* In Limine *to Preclude Debtors from Presenting Evidence of Subcontractor Expenses They Did Not Incur* [Adv. Docket No. 87] (the "Motion"). In support of this Objection, the Plaintiffs rely on the *Affidavit of Frank A. Pometti in Support of Plaintiffs' Objection to Prime NDT Services, Inc.'s Motion* in Limine *to Preclude Debtors from Presenting Evidence of Subcontractor Expenses They Did Not Incur* attached hereto as Exhibit A (the "Pometti

[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.

Affidavit"). In further support of the relief requested herein, the Plaintiffs respectfully represent as follows:

PRELIMINARY STATEMENT[2]

The Motion is based on demonstrably flawed logic and is a blatant attempt by Prime to avoid reimbursing Welded for the nearly $2.5 million in damages that Welded incurred to excavate numerous welds in hard-to-reach locations. Specifically, Prime contends that the Debtors should be precluded from presenting evidence of remedial work that three Welded subcontractors, Maxx HDD LLC ("Maxx"), Schmid Pipeline Construction, Inc. ("Schmid"), and Mears Group, Inc. ("Mears" and collectively with Maxx and Schmid, the "Re-Work Subcontractors") performed. Its purported basis for this contention is that the pipeline Project's owner, Sunoco Pipeline, L.P. and Sunoco Partners Marketing & Terminals, L.P. (collectively, "Sunoco") paid the claims directly so Welded did not "incur" the damages expense.

Fundamentally, the Debtors would not have hired the Re-Work Subcontractors to go back and dig up the seventy-three (73) welds that needed to be re-shot were it not for Prime's defective work that required immediate correction. Indeed, Prime admits that its technician submitted fabricated radiographic x-ray films for every one of the affected welds.[3] Prime's conduct on the Project endangered employees and the public alike. Upon discovery of this alarming safety issue, Sunoco directed the Debtors to take immediate remedial action to verify the sufficiency of the welds. Over a span of thirty (30) days, the Debtors lodged a massive redeployment effort to excavate all of the affected welds throughout approximately fifty (50) miles of the nearly

[2] Capitalized terms used in the Preliminary Statement shall have the meanings ascribed to them in the body of the Objection.

[3] *See Welded's Response in Opposition to Prime NDT Services, Inc.'s Motion for Partial Summary Judgment* p. 6 [Docket No. 92].

completed pipeline. The Debtors organized its work force, retained additional subcontractor labor, hauled large machinery, and constructed work stations, all on an expedited basis.

The Re-Work Subcontractors were paid over $2.5 million with assets the Debtors obtained for the estate as part of their bargained-for consideration in a settlement of all claims and counterclaims by and between the Debtors, as contractor, and Sunoco, as owner. Sunoco did not freely gift payments to subcontractors where it shared no direct contract obligations. As part of the settlement, the Debtors were required to follow the procedures for addressing subcontractor claims as agreed by the settlement parties in order to reduce administrative costs related to subcontractors filing liens and to permit the Debtors to negotiate claim reductions to maximize the amount of designated funds to pay such claims, with the remainder of funds reverting back to the Debtors at the completion of the subcontractor claim process. This was a condition of the settlement to ensure that no liens or other claims remained extant to potentially encumber the Project. Thus, the Settlement Consideration was reduced dollar-for-dollar by the amounts paid to the Re-Work Subcontractors.

Prime does not, and cannot, meet its heavy burden to establish that this evidence is clearly inadmissible on all grounds given that it is directly relevant to the issue of the Debtors' damages. The fact that Sunoco paid the Re-Work Subcontractors directly (from a segregated account set up for such purpose), as opposed to Welded, does not alter the fact that the Settlement Consideration was proportionately reduced to Welded's detriment. The costs and expenses associated with the work that the Re-Work Subcontractors performed was directly attributable to Prime's faulty work. Accordingly, the Re-Work Subcontractors' payment amount is relevant to the issue of the Debtors' damages. Thus, such evidence should be admitted at trial, and the Motion must be denied.

BACKGROUND

A. The Prime Re-Work

1. Prior to commencing their chapter 11 cases, the Debtors worked on a portion of the Mariner East Pipeline (the "Project") for Sunoco. The Debtors subcontracted with Prime NDT Services, Inc. ("Prime") to provide 100% of non-destructive testing inspection of welds on the Project in accordance with API Standard 1104. In a flagrant breach of contract, Prime's technician falsified x-ray films on seventy-three (73) pipeline welds and represented to Welded and Sunoco that Prime interpreted each film and concluded that such welds met the contract standards. This breach required the Debtors to, among other things, hire the Re-Work Subcontractors to excavate various affected weld sites and otherwise remediate the damage Prime caused.

B. The Sunoco Litigation

2. Welded Construction, L.P. ("Welded") and Sunoco (together, the "Parties") are parties to that certain *Master Construction Services Agreement No. 4600000999 between Sunoco Partners Marketing & Terminals, L.P. and Sunoco Pipeline, L.P., and Welded Construction, L.P.* dated September 8, 2015 (including that certain *Completion Agreement* dated May 23, 2018, and all other amendments, attachments, and associated agreements) (the "Pipeline Construction Agreement").

3. Pursuant to the Pipeline Construction Agreement, Welded was responsible for the construction of three separate "spreads" on the Project. In the ordinary course of construction of the Project, the Debtors would issue invoices to Sunoco, and Sunoco would pay such invoices according to the terms of the Pipeline Construction Agreement. Sunoco was entitled to, and did, hold back payment on portions of all invoices as retainage (the "Retainage"). *See* Pipeline Construction Agreement ¶ 5.6. Upon completion of the work on a particular spread, the Pipeline

Construction Agreement contemplated that the Debtors would submit a final invoice and an affidavit confirming that Welded had satisfied the claims of its employees, including union dues, subcontractors and vendors that provided goods or services to Welded on the Project spread (the "Subcontractors"). *Id.* at ¶ 5.9. In the event that a Subcontractor was unpaid or a lien notice was received, Sunoco had the right to directly pay a subcontractor out of the amounts withheld as Retainage, thus reducing the Retainage on a dollar-for-dollar basis (the "Direct Pay Rights"). *Id.* at ¶ 5.6.1. In addition, Sunoco had the option at its sole discretion, to undertake the defense, litigation, settlement or satisfaction of any Subcontractor claim, with a corollary indemnification right against Welded (the "Indemnity Obligations"). Therefore, while the Subcontractors were in privity solely with Welded, Sunoco retained the right to pay them directly through its Direct Pay Rights out of the Retainage or to assert an indemnity claim against Welded pursuant to the Indemnity Obligations. *See* Pometti Affidavit ¶ 5.

4. During the course of the Project, significant disputes arose between Sunoco and the Debtors, which culminated in Sunoco's purported termination of the Pipeline Construction Agreement. Sunoco issued the Debtors the notice of termination (the "Notice of Termination"), attached hereto at Exhibit C. The Debtors subsequently commenced an adversary proceeding for declaratory and injunctive relief.[4] On October 26, 2018, the Court entered the *Order Approving Stipulation and Agreement Between the Debtors and Sunoco Partners Marketing & Terminals, L.P. and Sunoco Pipeline, L.P.* [Adv. 18-50928 Docket No. 11] (the "TRO Stipulation"). Pursuant to the TRO Stipulation, the Parties agreed to meet and confer in an attempt to resolve various

[4] On October 24, 2108, the Debtors filed *Verified Complaint for Declaratory Relief (under Section 362(a) of the Bankruptcy Code, Injunctive Relief Under Sections 105(a),108(b) and 362(a) of the Bankruptcy Code, and a Preliminary Injunction Under Rule 7065 of the Federal Rules of Bankruptcy Procedure* [Adv. 18-50928 Docket No. 1]. The Debtors also filed a *Motion for a Temporary Restraining Order and Preliminary Injunction* [Adv. 18-50928 Docket No. 2].

disputes related to the claims and counterclaims arising from the Pipeline Construction Agreement (the "Sunoco Litigation").

B. The Settlement Agreement and Settlement Funds

5. On December 21, 2018, the Debtors filed the *Motion of the Debtors for Approval of Compromise and Settlement Resolving Certain Disputes with Sunoco Partners Marketing & Terminals L.P. and Sunoco Pipeline, L.P. Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 105* [Docket No. 360 (sealed) & 361 (redacted)] (the "9019 Motion"). The *Stipulation and Settlement Agreement* (the "Settlement Agreement") was attached as Exhibit 2 to the 9019 Motion.[5] On January 3, 2019, the Bankruptcy Court entered the Settlement Order (together with the 9019 Motion and the Settlement Agreement, the "Settlement Documents").

6. As set forth in the Settlement Documents, the Settlement Agreement was a global resolution of the parties' various claims and potential counterclaims. Specifically, the Debtors alleged that Sunoco had failed to pay it for work performed under the Pipeline Construction Agreement in amounts exceeding [redacted] (the "Debtor Claims"). The Debtors were prepared to commence an adversary proceeding against Sunoco for (i) wrongful termination of the Pipeline Construction Agreement; (ii) turnover of estate assets pursuant to section 542 of the Bankruptcy Code; (iii) breach of contract; and (iv) other equitable relief. On the other hand, Sunoco alleged that it intended to assert counterclaims in excess of [redacted] (the "Sunoco Counterclaims"). *See* Pometti Affidavit ¶¶ 7–8. The Settlement Agreement avoided contentious litigation on these issues.

[5] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Settlement Agreement.

7. As consideration (the "Settlement Consideration") for the Settlement Agreement, the parties agreed that, among other things: (i) Sunoco would pay [redacted] for the benefit of the Debtors' estates and creditors, by (a) directly paying [redacted] to fund obligations of the Debtors related to prepetition union dues and benefits and [redacted] to three Subcontractors that had asserted claims against the Debtors and liens or claims against the Project related to the Debtors' non-payment; (b) Sunoco would establish a Subcontractor Settlement Fund of [redacted] to be exclusively used to first, pay Welded's Subcontractor claims and second, to the Debtors' estates for their general use; (ii) the Parties were required to follow the procedures for addressing the over [redacted] Subcontractor claims in order to reduce administrative costs related to Subcontractors filing liens [redacted] to maximize the Subcontractor Settlement Funds that would ultimately be returned to the Debtors for their general use; and (iii) mutual release of claims, including over [redacted] in asserted Sunoco Counterclaims. The Subcontractor Settlement Fund was to be held by Sunoco pending the resolution of the Subcontractor claims and the expiration of the applicable statutory lien deadline by which Subcontractors could assert mechanics, materialman or other liens on the Project.[6] *See* Pometti Affidavit ¶ 9.

8. While there were many factors that were considered in creating the Settlement Agreement construct, at no time did the Settlement Consideration benefiting the Debtors include compensation to Welded for remedial work related to Prime's fabricated radiographic films and admitted breach of contract. *See* Pometti Affidavit ¶ 13; *see also* Notice of Termination at p.1 (citing reasons for Sunoco's purported termination, including "ongoing and continuous welding and x-ray issues").

[6] In fact, the statutory lien deadlines were also established milestones under the Settlement Agreement to pay certain critical and non-critical subcontractors. Settlement Agreement ¶ 4(c)–(d).

9. Pursuant to the Settlement Agreement, the Debtors were required to perform the Certification Process, which required the Debtors to reach a final settlement with each Subcontractor. *See* Settlement Agreement ¶ 4(b); *see also* Transcript of Deposition of Steven D. Hawkins, dated November 7, 2019 (the "Hawkins Transcript"), at 195:19–22 ("[Determining which subcontractors had amounts due and owing] was handled through Young Conaway and Alix Partners."), an excerpt of the Hawkins Transcript is attached hereto as Exhibit B. In exchange for payment, the Subcontractor completed a *Subcontractor Direct Pay Agreement and Authorization* and *Subcontractors' Release of Liens and Claims*, copies of which are attached as Exhibit B to the Settlement Agreement, and agreed to release any claims, including liens, against the Debtors and/or Sunoco. *Id.* at ¶ 4(c). Once Sunoco reviewed and approved the settlement documents, each Subcontractor's final settlement amount was satisfied from the Subcontractor Settlement Fund reducing that fund on a dollar-for-dollar basis. Once all Subcontractor claims were satisfied, the Settlement Agreement provided that any remaining funds left in the Subcontractor Settlement Fund would revert to the Debtors' estates for general use. *Id.* at ¶ 4(h); *see also* Hawkins Transcript at 194:19–21, 196:1–2 (testifying "the settlement was part of the bankruptcy . . . [a]nd it included a quantum of money to pay off subcontractors" from an estate account).

10. The Settlement Consideration resulted in (i) the satisfaction of over [redacted] Subcontractor claims in excess of [redacted], (ii) the release of the Sunoco contingent claim of over [redacted] and (iii) payment to the Debtors estates of over [redacted] for the benefit of its other creditors. The Settlement Agreement construct included a claim-payment mechanism to ensure that no remaining claims would encumber the Project. *See* Pometti Affidavit ¶ 12.[7]

[7] Prime's Project claims unrelated to the remedial work were likewise resolved through the settlement process. However, unlike the other Subcontractor claims, the Debtors required Prime to execute that certain *Escrow Agreement*, dated April 17, 2019. The parties' acknowledged that the Debtors had an interest in the escrowed funds and Prime

C. Subcontractors' Settlement Process

11. The Re-Work Subcontractors participated in the Certification Process. They submitted pre-petition invoices to the Debtors for their work on the Project, which covered both re-work and, in some cases, base contract work. With respect to the re-work only, the Debtors' damages expert Ankura Consulting Group LLC ("Ankura") determined in its *Supplemental Expert Report*, dated December 18, 2019, (the "Expert Report") that: (1) Maxx cost the Debtors [redacted] for horizontal directional drilling work and pipe extraction at Linden Road; (2) Mears cost the Debtors [redacted] for horizontal directional drilling work and pipe extraction at Highway 43; and (3) Schmid cost the Debtors [redacted] for earthwork, including dig-ups, padding and backfill. Ankura further determined that the Debtors incurred [redacted] in costs related to the Re-Work Subcontractors' remedial work.

12. The Re-Work Subcontractors were paid with the Debtors' assets under the Settlement Agreement. Were it not for Prime's faulty x-ray work, the residual amount of the Subcontractor Settlement Fund returned to the Debtors' estates would have increased by more than [redacted] to be used for the Debtors' general use. *See* Pometti Affidavit ¶ 16. If not paid to the Re-Work Subcontractors under the Settlement Agreement, the money would have reverted to the Debtors' estates. *See* Settlement Agreement ¶ 4(h).

OBJECTION

A. The Re-Work Subcontractors' Payment Is Relevant to the Damages Suffered By the Debtors and Should Therefore Be Admitted

13. The purpose of motions *in limine* is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence. *See Luce v. United States*,

owed the Debtors more than the amount escrowed, so as a condition of settlement, the funds were escrowed pending resolution of the adversary proceeding.

469 U.S. 38, 40 n. 2 (1984). Evidence should be excluded only when the evidence is clearly inadmissible on all potential grounds. *Wechsler v. Hunt Health Sys., Ltd.*, 381 F.Supp.2d 135, 140 (S.D.N.Y. 2003). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Despite Prime's contention to the contrary, the Re-Work Subcontractors' payment is relevant to the issue of the Debtors' damages, and the Motion should therefore be denied.

14. Prime inappropriately takes one small piece of the Settlement Agreement out of context and draws erroneous conclusions about the extent of the Debtors' damages. This approach is patently incorrect. Courts have routinely looked to settlement agreements as a whole in considering the intent of the parties. *See, e.g., Pohl v. Agave Dentistry, LLC*, No. CV-14-01037-PHX-SRB, 2014 WL 12575867, at *2 (D. Ariz. Oct. 14, 2014) (finding movant's argument unpersuasive because it took a piece of a settlement agreement out of context and ignored the rest of it); *Air Line Stewards & Stewardesses Assoc., Local 550, TWU, AFL-CIO v. Trans World Airlines, Inc.*, 713 F.2d 319, 322 (7th Cir. 1983) (noting that portions of a settlement agreement must not be taken out of context to achieve a party's desired result).[8]

15. Once the entirety of the Court-approved Settlement Agreement is taken into account, it becomes clear Prime's argument that the Debtors have not suffered damages by virtue of Sunoco's payment to the Re-Work Subcontractors has no merit. As set forth in the Pometti Affidavit, the Settlement Consideration was created in part to satisfy estate liabilities and to ensure the Project remained unencumbered. More importantly, however, Sunoco's contractual

[8] Indeed, courts have looked to substance over form in considering certain transactions. *See, e.g., In re Doctors Hosp. of Hyde Park, Inc.*, 463 B.R. 93, 112 (Bankr. N.D. Ill. 2011) ("A court must look to the substance of the transaction, rather than its form."); *In re Glob. Envtl. Servs. Grp., LLC*, No. 04-00748, 2006 WL 980582, at *2 (Bankr. D. Haw. Mar. 16, 2006) ("[T]he argument focuses on the form of the transaction and ignores its economic substance.").

obligations to the Debtors *vis-a-vis* the Settlement Agreement, and the Subcontractor Settlement Fund that derived therefrom, were at all times considered an asset of the Debtors' estates. *See* Pometti Affidavit ¶¶ 9–12. The fact that Sunoco paid the Re-work Subcontractors from the Settlement Consideration plainly establishes that the Debtors suffered damages, as those funds did not include payment for remedial work and would never had been paid but for Prime's faulty x-rays. *Id.* at ¶ 16; *see also* Pipeline Construction Agreement ¶ 6.9.

16. Prime cites to *Great Am. Ins. Co. v. Norwin Sch. Dist.*, 544 F.3d 229, 254 (3d Cir. 2008) for the proposition that if a plaintiff will not be required to pay damages, it cannot sue in contract for those damages.[9] That case is inapposite. *Great American* involved a dispute over two bonded, public school construction contracts where a surety incurred substantial losses and sued a school district for breach of contract for failing to obtain the surety's consent prior to a general contractor's receipt of final payment. *Id.* at 238. The school district filed a third-party complaint against the general contractor and a construction manager. *Id.* The surety, school district, and general contractor reached a secret settlement, which provided the surety would not seek satisfaction of a judgment entered against the school district unless the school district first obtained a judgment and received payment from the construction manager. *Id.* at 239, 251. At trial, the district court ruled on a motion *in limine*, ordering that neither the school district nor construction manager could introduce the settlement agreement into evidence, as it was irrelevant. *Id.* at 242.

[9] The other cases cited in the Motion are also inapposite because they discuss Pennsylvania damages concepts generally and do not otherwise advance Prime's argument. *Trosky v. Civil Serv. Comm'n*, 652 A.2d 813, 817 (Pa. 1995) (stating "we may note that in the law of contracts remedies for breach are designed to protect either a party's expectation interest 'by attempting to put him in as good a position as he would have been had the contract been performed, that is, had there been no breach'; his reliance interest 'by attempting to put him back in the position in which he would have been had the contract not been made'; or his restitution interest '[by requiring] the other party to disgorge the benefit he has received by returning it to the party who conferred it'"); *Hayfield v. Home Depot USA, Inc.*, 168 F. Supp. 2d 436, 453 (E.D. Pa. 2001) (noting "we remain within Pennsylvania's 'one satisfaction' rule that although 'a plaintiff may obtain a judgment against several tortfeasors for the same harm, [under Pennsylvania law] he or she is entitled to only one satisfaction for that harm'").

On appeal, the Third Circuit disagreed, reversing the district court's damages judgment and finding that the fact the school district had no obligation to pay the surety was relevant to the issue of the school district's damages (and should have been admitted) and established the school district did not suffer damages because it was not required to pay the surety. *Id.* at 254.

17. Here, unlike the *Great American* settlement agreement which included a conditional pass through payment obligation to the surety, Sunoco held and administered the Subcontractor Settlement Fund for a very specific reason—to avoid encumbrances on the Project—and once the applicable statutory periods passed and the Subcontractors were paid, the funds reverted to the Debtors' estates for general use. *See* Pometti Affidavit ¶ 11. The Debtors will show that they were damaged and the Subcontractor Settlement Fund was an estate asset that diminished upon payment to the Re-Work Subcontractors. Like the Third Circuit's holding in *Great American*, the Settlement Agreement construct is relevant to the issue of the Debtors' damages, so evidence of the Re-Work Subcontractors payment should not be precluded from admission at trial.

18. Despite Prime's suggestion to the contrary, in no way did the Re-Work Subcontractor payment operate as a gift from Sunoco such that the Debtors no longer suffered damages.[10] But for Prime's faulty work, the Re-Work Subcontractor payment would never have been paid from the Subcontractor Settlement Fund, and that money would have reverted to Debtors' estate. *See In re Nova Tool & Eng'g, Inc.,* 228 B.R. 678, 685 (Bankr. N.D. Ind. 1998)

[10] Moreover, to the extent the Re-Work Subcontractors payment is considered a third-party payment, pursuant to the collateral source rule under Pennsylvania law, the Debtors' damages should not be diminished merely because payment was provided by a collateral source; rather, the Debtors clearly suffered damages, which include the Re-Work Subcontractors' payment, as a result of Prime's fabricated x-rays and admitted breach of contract. *See Ocasio v. Ollson*, 596 F. Supp. 2d 890, 904 (E.D. Pa. 2009) ("In Pennsylvania, '[t]he collateral source rule provides that payments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer.'"); *Nigra v. Walsh*, 797 A.2d 353, 360 (Pa. Super. 2002) ("[T]he primary focus of the collateral source rule is to avoid the preclusion or diminution of the damages otherwise recoverable from the wrongdoer based on compensation recovered from a collateral source . . . .").

(observing that if assets belonging to the estate are not made available to creditors, the debtor's creditors would be deprived because their recovery would be reduced). Accordingly, the Debtors have suffered damages because the residual amount of the Subcontractor Settlement Fund returned to the Debtors' estates would have been over [redacted] higher.

CONCLUSION

Based on the foregoing, the Re-Work Subcontractors payment is relevant to the issue of the Debtors' damages and should be admitted, and the Motion should therefore be denied.

Dated: January 14, 2020
Wilmington, Delaware

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EXHIBIT A

Pometti Affidavit

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)

AFFIDAVIT OF FRANK A. POMETTI IN SUPPORT OF PLAINTIFFS' OBJECTION TO PRIME NDT SERVICES, INC.'S MOTION *IN LIMINE* TO PRECLUDE DEBTORS FROM PRESENTING EVIDENCE OF SUBCONTRACTOR EXPENSES THEY DID NOT INCUR

STATE OF _____)
)
COUNTY OF _____)

I, Frank A. Pometti, hereby declare under penalty of perjury:

1. I am the Chief Restructuring Officer of the above-captioned debtors and debtors in possession (collectively, the "Debtors" or "Plaintiffs"). In this capacity, I am familiar with the Debtors' day-to-day operations, businesses, financial affairs, and books and records.

[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. I submit this affidavit (this "Affidavit") in support of the *Plaintiffs' Objection to Prime NDT Services, Inc.'s Motion* In Limine *to Preclude Debtors from Presenting Evidence of Subcontractor Expenses They Did Not Incur* [Adv. Docket No. 87] (the "Motion").

3. The facts set forth in this Affidavit are based upon my personal knowledge, information and belief, my review of relevant documents or my opinion based upon experience, knowledge and information concerning the Debtors, and upon information supplied to me by the Debtors' advisors. If called as a witness, I could and would testify competently to the facts set forth herein.

A. The Sunoco Litigation

4. Welded Construction, L.P. ("Welded") and Sunoco Partners Marketing & Terminals L.P. and Sunoco Pipeline, L.P. (together "Sunoco" and collectively, with Welded, the "Parties") are parties to that certain *Master Construction Services Agreement No. 4600000999 between Sunoco Partners Marketing & Terminals, L.P. and Sunoco Pipeline, L.P., and Welded Construction, L.P.* dated September 8, 2015 (including that certain *Completion Agreement* dated May 23, 2018, and all other amendments, attachments, and associated agreements) (the "Pipeline Construction Agreement").

5. Pursuant to the Pipeline Construction Agreement, Welded was constructing three separate "spreads" of the Mariner East Pipeline – over 150 miles of high pressure liquefied natural gas pipeline (the "Project") for Sunoco. In the ordinary course of construction of the Project, the Debtors would issue invoices to Sunoco and Sunoco would pay such invoices according to the terms of the Pipeline Construction Agreement. Sunoco was entitled to, and did, hold back payment on portions of all invoices as retainage (the "Retainage"). Upon completion of the work on a particular spread, the Pipeline Construction Agreement contemplated that the Debtors would

submit a final invoice and an affidavit confirming that Welded had satisfied the claims of its employees, including union dues, subcontractors and vendors that provided goods or services to Welded on the Project spread (the "Subcontractors"). *See* Pipeline Construction Agreement ¶ 5.9. In the event that a Subcontractor was unpaid or a lien notice was received, Sunoco had the right to directly pay a subcontractor out of the amounts withheld as Retainage, thus reducing the Retainage on a dollar-for-dollar basis (the "Direct Pay Rights"). In addition, Sunoco had the option at its sole discretion, to undertake the defense, litigation, settlement or satisfaction of any Subcontractor claim, with a corollary indemnification right against Welded (the "Indemnity Obligations"). Therefore, while the Subcontractors were in privity solely with Welded, Sunoco retained the right to pay them directly through its Direct Pay Rights out of the Debtors' Retainage or to assert an indemnity claim against Welded pursuant to the Indemnity Obligations. This contractual protection is common for the owner, Sunoco, to ensure that no mechanics, materialman or other liens, claims or encumbrances are placed on the Project or asserted against them based on the conduct of Welded, as contractor.

6. During the course of the Project, significant disputes between Sunoco and the Debtors arose. The disputes culminated in Sunoco purporting to terminate the Pipeline Construction Agreement by issuing the Debtors a notice of termination. The Debtors rejected the validity of Sunoco's purported termination and subsequently commenced an adversary proceeding for declaratory and injunctive relief that any attempt by Sunoco to exercise control over the Debtors' property with respect to the Project was prohibited by the automatic stay, and filed a motion for a temporary restraining order to prevent Sunoco from interfering with equipment owned or leased by the Debtors.[2] On October 26, 2018, the Court entered the *Order Approving Stipulation*

[2] On October 24, 2108, the Debtors filed *Verified Complaint for Declaratory Relief (under Section 362(a) of the Bankruptcy Code, Injunctive Relief Under Sections 105(a),108(b) and 362(a) of the Bankruptcy Code, and a*

and Agreement Between the Debtors and Sunoco Partners Marketing & Terminals, L.P. and Sunoco Pipeline, L.P. [Adv. 18-50928 Docket No. 11] (the "TRO Stipulation"). Pursuant to the TRO Stipulation, the Parties agreed to meet and confer in an attempt to resolve various disputes related to the claims and counterclaims arising from the Pipeline Construction Agreement (the "Sunoco Litigation").

B. The Settlement Agreement and Settlement Funds

7. Among other things, the Debtors alleged that Sunoco had failed to pay the Debtors for work performed under the Pipeline Construction Agreement in amounts exceeding [redacted] (the "Debtor Claims"). In the absence of a settlement that was in the best interest of the Debtors' estates, the Debtors were prepared to commence an adversary proceeding against Sunoco for (i) wrongful termination of the Pipeline Construction Agreement; (ii) turnover of estate assets pursuant to section 542 of the Bankruptcy Code; (iii) breach of contract; and (iv) other equitable relief.

8. On the other hand, Sunoco alleged that if the Sunoco Litigation was not settled, it intended to assert counterclaims in excess of [redacted] (the "Sunoco Counterclaims"). Sunoco asserted damages arising from, among other things, (i) costs to complete the Project after termination; (ii) contractual liquidated damages; (iii) repairs to non-conforming work; (iv) shutdown/standby expense; and (v) Indemnity Obligations. In addition to its Direct Pay Rights that would result in a direct reduction of Welded's Retainage, Sunoco also maintained general setoff rights.

Preliminary Injunction Under Rule 7065 of the Federal Rules of Bankruptcy Procedure [Adv. 18-50928 Docket No. 1]. The Debtors also filed a *Motion for a Temporary Restraining Order and Preliminary Injunction* [Adv. 18-50928 Docket No. 2].

9. Following arduous, good-faith negotiations, the Parties agreed to a comprehensive resolution of their disputes, the terms of which are embodied in the *Stipulation and Settlement Agreement* [Docket No. 360; Ex. 2] (the "Settlement Agreement") and approved by the Court pursuant to the *Order Granting Motion of the Debtors for Approval of Compromise and Settlement Resolving Certain Disputes with Sunoco Partners Marketing & Terminals L.P. and Sunoco Pipeline, L.P. Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 105* [Docket No. 392] entered on January 3, 2019.[3] The settlement consideration consisted of, among other things, the following (the "Settlement Consideration"): (i) Sunoco would pay over [redacted] for the benefit of the Debtors' estates and creditors, by (a) directly paying [redacted] to fund obligations of the Debtors related to prepetition union dues and benefits and [redacted] Subcontractors that had already asserted claims against the Debtors and liens or claims against the Project related to the Debtors' non-payment; (b) Sunoco would establish a Subcontractor Settlement Fund of [redacted] to be exclusively used to first, pay Welded's Subcontractor claims and second, to the Debtors' estates for their general use; (ii) the Parties were required to follow the procedures for addressing the over [redacted] Subcontractor claims in order to reduce administrative costs related to Subcontractors filing liens [redacted] to maximize the Subcontractor Settlement Funds that would ultimately be returned to the Debtors for their general use; and (iii) mutual release of claims, including over [redacted] in asserted Sunoco Counterclaims.

10. The protections built into the Settlement Agreement were similar to those built into the Pipeline Construction Agreement, such as Direct Pay Rights and Retainage. In essence, the Subcontractor Settlement Funds were treated as Retainage, whereby Welded [redacted]

[3] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Settlement Agreement.

of over [redacted] Subcontractors and Sunoco retained its Direct Pay Rights from the Subcontractor Settlement Fund to ensure the satisfaction of all Subcontractor claims before the remainder of the Subcontractor Settlement Fund was paid to the Debtors for their general use. As described in more detail below, the Subcontractor Settlement Fund was to be held by Sunoco pending the resolution of the Subcontractor claims and the expiration of the applicable statutory lien deadline by which Subcontractors could assert mechanics, materialman or other liens on the Project.[4]

11. Pursuant to the Settlement Agreement, the Debtors were required to perform the Certification Process, which required the Debtors to reach a final settlement amount with each Subcontractor. Settlement Agreement ¶ 4(b). In exchange for payment, the Subcontractor completed a *Subcontractor Direct Pay Agreement and Authorization* and *Subcontractors' Release of Liens and Claims*, copies of which are attached as Exhibit B to the Settlement Agreement, and agreed to release any claims, including liens, against the Debtors and/or Sunoco. *Id.* at ¶ 4(c). Once Sunoco reviewed and approved the settlement documents, each Subcontractor's final settlement amount was paid from the Subcontractor Settlement Fund reducing that fund on a dollar-for-dollar basis. Once that occurred and all Subcontractor claims were satisfied, the Settlement Agreement provided that any remaining funds left in the Subcontractor Settlement Fund would revert to the Debtors' estates for general use. *Id.* at ¶ 4(h). Indeed, upon completion of the Certification Process, Sunoco and the Debtors executed a release of funds agreement, whereby the remaining excess funds of [redacted] were released, made available for the Debtors' general use, and became property of the Debtors' estates.

[4] In fact, the statutory lien deadlines were also established milestones under the Settlement Agreement to pay certain critical and non-critical subcontractors. Settlement Agreement ¶ 4(c)–(d).

12. Thus, the Settlement Consideration resulted in (i) the satisfaction of over [redacted] Subcontractor claims [redacted], (ii) the release of the Sunoco contingent claim of [redacted] and (iii) payment to the Debtors estates of [redacted] for the benefit of its other creditors. The Settlement Agreement construct was necessary as Sunoco was focused on ensuring that the Settlement Consideration was used to address those claimants that could encumber the Project. Moreover, the Debtors have obtained Court approval for similar customer deals whereby the customers demanded similar protections, namely with TransCanada, as successor to NiSource Corporate Services Company/Columbia Pipeline Group and Columbia Gas Transmission, LLC (collectively, "Columbia Gas") [*see* Docket No. 43] and Consumers Energy Company [*see* Docket No. 181].[5] In each of these settlements, the project owners structured the settlement and use of funds to reduce or eliminate potential encumbrances on their respective pipeline projects.

C. The Settlement Consideration Did Not Resolve Remedial Work Damages Suffered By the Debtors

13. The Pipeline Construction Agreement required the Debtors to remedy "as rapidly as reasonably possible" any defective or non-conforming work at their sole expense and otherwise indemnify Sunoco for work performed by the Debtors that was incorrect, defective, or otherwise in error. *See* Pipeline Construction Agreement ¶ 6.9. As such, while there were many factors that were considered in creating the Settlement Agreement construct, at no time did the Settlement

[5] By contrast, for example, pursuant to the Columbia Gas Agreement (as defined below), the parties agreed to a funding mechanism that required Columbia Gas to pay (i) the post-petition costs of completion of the Columbia Gas projects (namely, LXP and MXP projects), and (ii) certain labor and unpaid prepetition claims of certain critical vendors from funds that were provided to the Debtors and held in a segregated account that was the exclusive property and assets of Columbia Gas. Columbia Gas then would approve applicable invoices related to post-petition costs and labor for payment. Unlike with Sunoco, once that process was complete, the amount of funds in the segregated account would revert back to Columbia Gas and Welded has retained its ability to assert additional claims. The Columbia Gas Agreement did not include a release. *See generally Stipulation of Welded Construction, L.P. and Columbia Gas Transmission, LCC* [Docket No. 43] (the "Columbia Gas Agreement").

Consideration benefiting the Debtors include compensation to Welded for remedial work related to Prime NDT Services Inc.'s ("Prime") fabricated radiographic films and admitted breach of contract. In fact, I believe that the Settlement Consideration received was lower as a proximate cause of Prime's breach since part of the Sunoco Counterclaim and setoff arguments included repairs to non-conforming work, delay damages and other Indemnity Obligations. Moreover, the Subcontractor Settlement Fund amount returned to the Debtors was reduced on a dollar-for-dollar basis by the amounts required to satisfy the remedial work caused by Prime's breach.

14. In particular, the Debtors were forced to hire a number of subcontractors, including the three (3) subcontractors that are the subject of Prime's Motion, Maxx HDD LLC ("Max"), Schmid Pipeline Construction, Inc. ("Schmid"), and Mears Group, Inc. ("Mears" and together with Max and Schmid, the "Re-Work Subcontractors") to assist in remediating the damage Prime caused when it provided faulty work on the Project.

15. The Re-Work Subcontractors participated in the Certification Process. They submitted pre-petition invoices to the Debtors for their work on the Project, which covered both re-work and, in some cases, base contract work. With respect to the re-work only, the Debtors' damages expert Ankura Consulting Group LLC ("Ankura") determined in its *Supplemental Expert Report*, dated December 18, 2019, (the "Expert Report") that: (1) Maxx cost the Debtors [redacted] for horizontal directional drilling work and pipe extraction at Linden Road; (2) Mears cost the Debtors [redacted] for horizontal directional drilling work and pipe extraction at Highway 43; and (3) Schmid cost the Debtors [redacted] for earthwork, including dig-ups, padding and backfill. Ankura further determined that the Debtors incurred [redacted] in costs related to the Re-Work Subcontractors' remedial work. Excluding evidence for this remedial work

will provide a windfall for Prime, while preventing the Debtors from recovering damages caused by Prime's breach.

16. The Re-Work Subcontractors were paid with the Debtors' assets under the Settlement Agreement. But for Prime's faulty x-ray work, the residual amount of the Subcontractor Settlement Fund returned to the Debtors' estates would have been over [redacted] higher. Consequently, I believe the Debtors were damaged for having to settle costs incurred in connection with the Re-Work Subcontractors' remedial work and have not been otherwise compensated for those costs. If not paid to the Re-Work Subcontractors under the Settlement Agreement, the money would have reverted to Debtors' estate for general use.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my information, knowledge, and belief.

Executed this 14th day of January, 2020.

Frank A. Pometti
Chief Restructuring Officer

Sworn to and subscribed to before me this
14th day of January 2020.

Notary Public

SARAH E LARIVIERE
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01LA6370533
Qualified in NASSAU County
Commission Expires February 05. 2022

EXHIBIT B

Excerpts of the Hawkins Transcript

VERITEXT
LEGAL SOLUTIONS

Deposition of:

Stephen D. Hawkins

November 7, 2019

In the Matter of:

Welded Construction, L.P., Et Al. Vs. Prime NDT Services, Inc.

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800.808.4958 | calendar-de@veritext.com |

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:	)	CHAPTER 11
	)	CASE NO.
WELDED CONSTRUCTION,	)	18-12378 (KG)
L.P., et al.,	)	
	)	
Debtors and	)	(Jointly
Debtor in Possession	)	Administered)
WELDED CONSTRUCTION,	)	ADVERSARY
L.P.,	)	PROCEEDING
Plaintiff,	)	
v.	)	
PRIME NDT SERVICES, INC.,	)	ADV. PRO. NO.
Defendant.	)	19-50180 (KG)

- - -

C O N F I D E N T I A L

Thursday, November 7, 2019

- - -

Oral deposition of STEPHEN D. HAWKINS, taken at the law offices of Young Conaway Stargatt & Taylor LLP, 1000 North King Street, Wilmington, Delaware 19801, beginning at 10:06 a.m., before Cheryl L. Goldfarb, a Registered Professional Reporter, Notary Public, and an approved reporter of the United States District Court.

- - -

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
1801 Market Street - Suite 1800
Philadelphia, Pennsylvania 19103

workers on the PPP1 spread.

Q. Do you know if it would have included workers who were working in July and August --

A. It should have, yeah.

Q. -- of 2018?

A. It should have, yeah.

Q. Speaking of agreements with Sunoco, are you familiar with a direct pay agreement entered into between Sunoco and Welded?

A. Generally.

Q. And my understanding of that document -- and you can correct me if I am wrong -- is that Sunoco created a pool of funds to pay the subcontractors on the Mariner East 2 project so that it wouldn't become part of the bankruptcy; is that right?

A. No. I think the settlement was part of the bankruptcy. We were in bankruptcy at the time, right? So it wasn't before that. And it included a quantum of money to pay off subcontractors. Right?

Q. Sure. So I stated that

inartfully.

So what Sunoco did was that they created a pool of money where the subcontractors in the Mariner East 2 project could be directly paid from for what was due to them, right?

A. Correct. Yeah.

Q. Was Prime involved in determining what sums were due under that direct pay agreement?

A. For them, they were. I think -- I would believe that Prime was part of the negotiation for theirs, nobody else's, yeah.

Q. Was Welded involved --

A. Oh.

Q. -- in determining which subcontractors had amounts due and owing under the direct pay agreement?

A. Welded, per se, did not. That was handled through Young Conaway and Alix Partners. The negotiations were handled outside of Welded.

But the money was paid. It was in a Welded bank account. Right? So the

mechanics of it was, it was the estate's account. And then payments flowed out of our bank to people. Right? I think that's the way it worked.

Again, we can -- I'll verify all of this. I'll be glad to verify it for you. But, you know, that's generally the way it worked.

Q. Do you know what a subcontractor would have to submit in order to become entitled to funds from this pool under the direct pay agreement?

A. It was -- there was a certification agreement that everybody had to sign. I don't know the detailed language of all of that or all the detailed requirements.

But, yeah, each vendor, call it, subcontractor or vendor, would need to make certain certifications that they satisfied that there were no liens, was the general gist of it, and that they, in fact, you know, received the money.

And then once we got that certification, then we had to provide that --

EXHIBIT C

Notice of Termination

SUNOCO PIPELINE
An ENERGY TRANSFER Partnership

October 19, 2018

Welded Construction, L.P.
ATTN: Steve Hawkins, President
26933 Eckel Road
Perrysburg, OH 43551

Via Hand Delivery
Via CM/RRR: 9414810898765020264460
Via Email: shawkins@welded.com

Welded Construction, L.P.
ATTN: Alex Epstein
26933 Eckel Road
Perrysburg, OH 43551

Via CM/RRR: 9414810898765020264590
Via Email: aepstein@welded.com

RE: Notice of Termination for Cause
Master Construction Services Agreement No. 4600000999
Project: Mariner East 2 Pipeline

Sunoco Partners Marketing & Terminals L.P. and Sunoco Pipeline L.P. (collectively "Sunoco") and Welded Construction, L.P. ("Welded") entered into the above referenced Master Construction Services Agreement effective September 8, 2015. Thereafter, Sunoco issued to Welded Service Purchase Orders Numbered 4800034231, 4800034242, and 480034243 as well as certain Change Purchase Orders for construction and installation of 20" and 16" pipelines (collectively the "Agreement") commonly known as Ohio Spread 1, Pennsylvania Spread 1, and Pennsylvania Spread 5 of Sunoco's Mariner East 2 Pipeline Project (the "Projects"). Additionally, Sunoco and Welded entered into a Completion Agreement on May 23, 2018 addressing completion of the Projects ("Completion Agreement") (Agreement and Completion Agreement are collectively referred to herein as the "Contract Documents").

This letter serves as a follow up to our October 19, 2018 meeting between Steve Hawkins on behalf of Welded and Rick Smith, and myself on behalf of Sunoco. As you know, Sunoco has repeatedly expressed to Welded its concerns regarding Welded's ongoing ability to perform in accordance with the Contract Documents. Welded's ongoing and continued performance of non-conforming and defective work, defaults and breaches of the Agreement, failure or inability to perform its work in a workmanlike manner, and failure to timely compensate subcontractors, suppliers, or laborers has jeopardized successful completion of the Projects and caused Sunoco to incur substantial financial harm. These issues include (but certainly are not limited to) frequent and repeated deviations from construction plans and specifications (some resulting in critical environmental issues and monetary penalties); ongoing and continuous welding and x-ray issues; frequent and repeated deviations from permit requirements, Sunoco's approved practices and industry standards, and frequent and ongoing calls and correspondence to Sunoco from Welded subcontractors demanding payment.

Sunoco can no longer "hurry up and wait" for its Projects to be performed in full conformity with the requirements of the Contract Documents through ultimate completion.

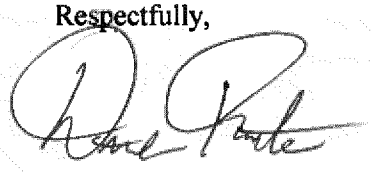
Therefore, effective immediately, Sunoco is terminating Welded for cause in accordance with Article XII, Sections 12.1 and 12.2 of the Agreement and Section 14 of the Completion Agreement.

Section 14 of the Completion Agreement obligates Welded to abide by Sunoco's instructions related to this termination. Accordingly, please immediately discontinue work, secure the Projects sites and ensure all material will remain and is secured at the Project Sites. Pursuant to Section 12.2 of the Agreement, effective immediately, Sunoco now takes over the Work, which includes ownership of all plans, drawings, project information and other property. Sunoco also immediately takes use of all tools, equipment, and supplies being used in connection with the Work.

Please note Sunoco disputes the amount and content of any outstanding invoice submitted by Welded and is not responsible for payment of such invoices until the dispute is resolved.

Sunoco desires an orderly transition of the Projects to a supplemental completion contractor and expects the same from Welded.

Respectfully,

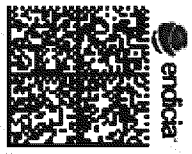


Dave Runte
Senior Director, Engineering

Cc: rbisnett@welded.com ***Via Email***

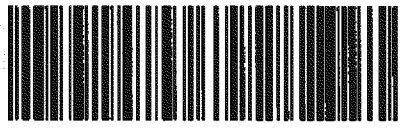
Kylie Kroschel
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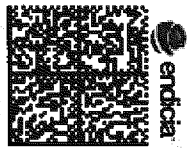
Welded Construction LP
Steve Hawkins
PO BOX 470
26933 ECKEL ROAD
PERRYSBURG OH 43552-0470



FOLD ALONG THIS LINE

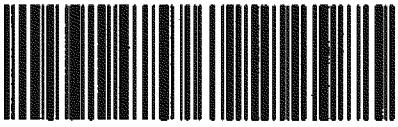
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Alex Epstein
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