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. 94

PLAINTIFFS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE FILING OF PORTIONS OF THE OBJECTION UNDER SEAL

The debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors" or "Plaintiffs") hereby submit this motion (the "Motion"), pursuant to sections 105(a) and 107(b) of title 11 of the United States Code (the "Bankruptcy Code"), Rule 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 9018-1(d) of the Local Rules of Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), for entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), authorizing the Debtors to file under seal certain portions of *Plaintiffs' Objection to Prime NDT Services, Inc.'s Motion* in Limine *to*

[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.

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Preclude Debtors from Presenting Evidence of Subcontractor Expenses They Did Not Incur (the "Objection"),[2] filed concurrently herewith. In support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and pursuant to Local Rule 9013-1(f), the Debtors consent to entry of a final order by the Court in connection with this Motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper in the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory and legal predicates for the relief requested herein are sections 105(a) and 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 9018-1(d).

BACKGROUND

4. On October 22, 2018, each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code (the "Petition Date"). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Official Committee of Unsecured Creditors (the "Committee") was appointed on October 30, 2018.

[2] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Objection.

5. On March 27, 2019, the Debtors commenced an adversary proceeding by filing a *Complaint* [Adv. Docket No. 1] alleging breach of contract and breach of warranty claims against defendant Prime NDT Services, Inc. ("Prime").

6. 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 following day, the Debtors filed the *Motion of the Debtors to Seal 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. 362] (the "Seal Motion"), requesting the Court seal confidential information related to the 9019 Motion. The Court entered an order approving the Seal Motion on January 3, 2019 [*see* Docket No. 393].

7. Contemporaneously herewith, the Debtors filed the Objection, which contains references to confidential settlement information as set forth in the 9019 Motion. The information that the Debtors wish to seal in the Objection is limited to the amount of settlement, the number of claims resolved, and certain details pertaining to the implementation of the Settlement Agreement.

RELIEF REQUESTED

8. By this Motion, the Debtors request entry of the Proposed Order authorizing the Debtors to file certain portions of the Objection under seal (the "Sealed Material"). In addition, the Debtors request that the Objection not be made available to anyone other than the Court, the

Office of the United States Trustee for the District of Delaware (the "U.S. Trustee"), Prime, and the Committee, except as ordered by the Court.

BASIS FOR RELIEF REQUESTED

9. Section 107(b) of the Bankruptcy Code provides bankruptcy courts with the authority to issue orders to protect entities from potential harm that may result from the disclosure of certain confidential information. Specifically, it provides in part that:

> On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may –
>
> (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
>
> (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

11 U.S.C. § 107(b). In addition, under section 105(a) of the Bankruptcy Code, the Court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a).

10. Bankruptcy Rule 9018 sets forth the procedures by which a party may move for relief under section 107(b) of the Bankruptcy Code, and provides that "[o]n motion, or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information . . . ." Fed. R. Bankr. P. 9018.

11. Unlike its counterpart in Rule 26(c) of the Federal Rules of Civil Procedure, section 107(b) of the Bankruptcy Code does not require an entity seeking such protection to demonstrate "good cause." *See, e.g.*, *Video Software Dealers Ass'n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 28 (2d Cir. 1994); *Phar-Mor, Inc. v. Defendants Named Under Seal (In re Phar-Mor, Inc.)*, 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995). Rather, if the

material sought to be protected satisfies one of the categories identified in section 107(b), "the court is required to protect a requesting party and has no discretion to deny the application." *Orion Pictures*, 21 F.3d at 27; *see also In re Altegrity, Inc.*, No. 15-10226, 2015 WL 10963572, at *3 (Bankr. D. Del. July 6, 2015) ("[I]f it is established that the documents sought to be sealed fall within the enumerated statutory exception, the court *must* grant the requested relief (or such other relief that protects the moving party)." (emphasis added)).

12. Significantly, commercial information need not rise to the level of a trade secret to be entitled to protection. *Altegrity*, 2015 WL 10963572, at *3; *see also Orion*, 21 F.3d at 28 (finding that the use of the disjunctive in section 107(b)(1) "neither equates 'trade secret' with 'commercial information' nor requires the latter to reflect the same level of confidentiality as the former"). Nor is the term "commercial information" limited to information that will give an entity's competitors an unfair advantage. *See In re Borders Grp., Inc.*, 462 B.R. 42, 47 (Bankr. S.D.N.Y. 2011). Indeed, "the term includes situations where a bankruptcy court may reasonably determine that allowing [] disclosure would have a chilling effect on business negotiations, ultimately affecting the viability of Debtors." *Id* (internal quotation marks). Instead, a party seeking the protection of section 107(b) need only demonstrate that the information is "confidential" and "commercial" in nature. *Orion*, 21 F.3d at 28; *see also Altegrity*, 2015 WL 10963572, at *3.

13. The Debtors submit that the Sealed Material in the Objection satisfies one of the categories in section 107(b) of the Bankruptcy Code because it contains non-public, confidential "commercial information" related to settlement that merits protection under section 107(b). Specifically, the Sealed Information relates in large part to the same information contained in the 9019 Motion: the amount of the settlement; the number of claims resolved; and certain details

pertaining to the implementation of the Settlement Agreement. This information is confidential "commercial information" that has not been made public. Indeed, the Court has previously entered an order in these chapter 11 cases authorizing the Debtors to seal such information. *See* Docket Nos. 362 & 393. The Debtors submit that filing the Sealed Material under seal will not cause undue prejudice to any parties in interest. To ensure that the key constituencies in these chapter 11 cases receive adequate disclosure, the Debtors have provided copies of the Objection to the Court, the U.S. Trustee, Prime, and the Committee on a confidential basis, and will provide copies of the Objection to such other parties as may be ordered or required by the Court.

14. For the reasons set forth above, the Debtors submit that good cause exists for the Court to grant the relief requested herein and that approval of this Motion is necessary and appropriate.

NOTICE

15. The Debtors will provide notice of this Motion to: (i) the U.S. Trustee; (ii) counsel to the Committee; (iii) counsel to Prime; and (iv) all parties who, as of the filing of this Motion, have requested notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

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CONCLUSION

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court (a) enter the Proposed Order authorizing the Debtors to file certain portions of the Objection under seal, and (b) grant the Debtors such other and further relief as is just.

Dated: January 14, 2020
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Tara C. Pakrouh

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EXHIBIT A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
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In re:	Chapter 11
WELDED CONSTRUCTION, L.P., *et al.*,[1] Debtors and Debtors In Possession.	Case No. 18-12378 (KG)
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	Adv. Docket No. ____

ORDER AUTHORIZING THE FILING OF PORTIONS OF THE OBJECTION UNDER SEAL

Upon the motion (the "Motion")[2] of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order, pursuant to sections 105(a) and 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 9018-1(d), authorizing the Debtors to file certain portions of the Objection under seal; and it appearing that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District

[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] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Motion.

Court for the District of Delaware, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that it may issue a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this District is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided under the particular circumstances, and it appearing that no other or further notice need be provided; and after due deliberation; and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED as set forth herein.

2. The Debtors are authorized to file the Objection under seal.

3. The Objection shall not be made available to anyone, except to the Court, the U.S. Trustee, Prime, the Committee, and other parties in interest as may be ordered or otherwise required by the Court, and all parties receiving the Objection shall maintain its confidentiality and the confidentiality of its subject matter, including in connection with any pleadings filed with this Court.

4. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

5. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

6. This Court shall retain jurisdiction with respect to all matters arising from or relating to the interpretation or implementation of this Order.