IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WELDED CONSTRUCTION, L.P., *et al.*,[1]	Case No. 18-12378 (KG)
Debtors and Debtors In Possession.	(Jointly Administered)
WELDED CONSTRUCTION, L.P. AND WELDED CONSTRUCTION MICHIGAN, LLC,	Adv. Pro. No. 19-50180 (CSS)
Plaintiffs, vs.	**Ref. Adv. Docket Nos. 84 & 97**
PRIME NDT SERVICES, INC.,	**WELDED'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO AMEND THE COMPLAINT**
Defendant.	

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January 28, 2019
Wilmington, Delaware

[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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Welded Construction L.P. and Welded Construction Michigan, LLC (collectively, "Welded"), the plaintiffs in the above-captioned adversary proceeding (the "Adversary Proceeding") and the debtors in possession in the above-captioned chapter 11 cases, by their undersigned attorneys, hereby submits this reply brief (the "Reply") in support of *Plaintiffs' Motion for Leave to File an Amended Complaint* [Adv. Docket No. 84] (the "Motion").[2] In further support of the Motion, Welded respectfully states as follows:

PRELIMINARY STATEMENT

Prime's objection to the Motion is primarily based on the faulty premise that the indemnity provision of the Subcontract is limited to coverage of third-party claims. The Subcontract provides no such limitation. Moreover, even if it did, Prime has failed to indemnify Welded for the losses it incurred as a result of a third-party claim—Sunoco's demand to remediate Prime's work. The terms of the Subcontract entitle Welded to reimbursement of the attorneys' fees and costs it incurs to enforce the Subcontract. Subcontract, at Art. 14.0. Thus, contrary to Prime's assertion, there is a colorable—indeed, a meritorious—basis for seeking attorneys' fees and costs.

In addition, Prime's claim that it is prejudiced because discovery has closed is belied by its simultaneous assertion that the indemnity provision should be interpreted purely as a matter of law. Prime cannot have it both ways. As Prime tacitly concedes, Welded's entitlement to attorneys' fees is an issue of contract interpretation that does not require additional discovery. Motion, at ¶¶ 13–14. Thus, Prime is not prejudiced by granting Welded leave to amend the Complaint.

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

Finally, good cause exists to permit Welded to amend the Complaint. Welded could seek attorneys' fees by way of a post-judgment motion under Rule 54(d)(2) of the Rules of Civil Procedure. However, a request for attorneys' fees under Rule 54(d)(2) is susceptible to dispute regarding whether such fees should be proven as an element of damages at trial. Given that Prime will suffer no prejudice and has been on notice of the contract provision that entitles Welded to reimbursement of attorney's fees and costs from the outset of the Adversary Proceeding, it is more efficient to grant leave to amend the Complaint and avoid the issue of timing entirely. Moreover, granting Welded leave to amend the Complaint is appropriate and fair. Amendment of the Complaint will provide the Parties with the opportunity to address the merits of damages at trial and avoids the delay and additional expense that would inevitably ensue as a result of a contentious post-judgment motion for fees. Prime has not disputed that its work was faulty, and every dollar spent to recoup the costs and expenses associated with remediating such work is one less dollar in the pockets of Welded's creditors. Thus, good cause exists to grant Welded leave to amend the Complaint.

REPLY

A. WELDED IS ENTITLED TO ATTORNEYS' FEES UNDER THE SUBCONTRACT

A motion to amend should be freely granted unless it would be futile or unfairly prejudicial. *In re LG.Phillips Displays USA, Inc.*, 395 B.R. 864, 868 (Bankr. D. Del. 2008). Such a policy "facilitate[s] determination of claims on the merits and . . . prevent[s] litigation from becoming a technical exercise in the fine points of pleading." *Id.* Amendment of a complaint is futile if it "will not cure a deficiency in the original complaint or if the amended complaint cannot withstand a motion to dismiss." *Id.* at 870. Under the standard for a motion to dismiss, amendment would be futile only if it is "certain that no relief could be granted under any

set of facts which could be proven." *In re Mortg. Lenders Network, USA, Inc.*, 395 B.R. 871, 879 (Bankr. D. Del. 2008).

1. The Indemnity Provision Covers First-Party Claims

Prime claims that amendment would be futile because the "clear language" of the Subcontract "does not provide for the recovery of attorneys' fees to enforce the Subcontract." Motion, at ¶ 13. Prime reads a limitation into the Subcontract's indemnity provision that does not exist. The indemnity provision at issue, Article 14 of the Subcontract (the "Indemnity Provision"), could hardly be drafted in broader terms. The Subcontract provides:

> **14.0 Subcontractors Obligation and Indemnification**
>
> ***TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR AGREES TO INDEMNIFY, DEFEND, RELEASE AND HOLD HARMLESS CONTRACTOR . . . FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS LOSSES, DAMAGES, CAUSES OF ACTION, SUITS AND LIABILITIES OF EVERY KIND,*** INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS, AND ATTORNEY'S FEES FOR INJURY TO OR DEATH OF ANY PERSON, OR FOR LOSS OF DAMAGES (EXCLUDING PUNITIVE AND EXEMPLARY) TO ANY PROPERTY (INCLUDING WITHOUT LIMITATION, CLAIMS FOR POLLUTION AND ENVIRONMENTAL DAMAGE), PRODUCT LIABILITY AND STRICT LIABILITY AND CIVIL OR CRIMINAL FINES OR PENALTIES, DISCOVERED OR UNDISCOVERED, DIRECTLY OR INDIRECTLY ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY INCIDENTAL TO (I) ANY BREACH OR NON-COMPLIANCE WITH ANY TERM OR PROVISION OF THIS AGREEMENT, BY THE SUBCONTRACTOR, ITS EMPLOYEES, ITS SUBCONTRACTORS, VENDORS, AGENTS REPRESENTATIVES, ASSIGNS, SUCCESSORS, AFFILIATED COMPANIES, OR ANY OTHER PERSON FOR WHOM THE SUBCONTRACTOR IS RESPONSIBLE IN THE LAW, RELATED TO THIS AGREEMENT OR THE PERFORMANCE OF NON-PERFORMANCE OF THE WORK HEREUNDER (COLLECTIVELY "CONTRACTOR'S LIABILITIES"). **THIS INDEMNITY INCLUDES SUBCONTRACTORS [SIC] AGREEMENT TO PAY ALL COSTS AND EXPENSES OF DEFENSE, INCLUDING WITHOUT LIMITATION**

> **REASONABLE ATTORNEY'S FEES INCURRED BY ANY CONTRACTOR** OR COMPANY INDEMNITEE.
>
> ***
>
> Contractor shall notify Subcontractor of any claim that has given or could give rise to a right of indemnification hereunder or that may be presented to it by any party. Subcontractor shall, at its sole cost and expense, investigate, handle, respond to, and provide defense for any claim for which it gives indemnity herein; provided that Contractor shall have the right and opportunity to participate in any such investigation and defense. **At Contractor's sole discretion and option, exercisable at any time, Contractor may itself undertake the defense, litigation, settlement or satisfaction of any such claim**, reserving the right to seek indemnification against Subcontractor until after the claim is resolved, or Contractor may direct Subcontractor to contest, defend, litigate, settle or satisfy any claim made against Contractor provided that Subcontractor shall not settle any claim without Contractor's prior written consent, such consent not to be unreasonably withheld. **In the event the Subcontractor, after receipt of notice of a Claim, fails to furnish a defense and indemnity as provided for under this provision, the Contractor shall be entitled to receive from the Subcontractor its attorney's fees, costs, expenses and any amounts paid in the enforcement of this Agreement.**

Subcontract, at Art. 14.0 (emphasis added).

Prime concedes that Pennsylvania recognizes the enforceability of "first-party" indemnity provisions where the parties to an agreement have contractually provided for such relief. *See* Motion, at ¶ 15; *see also Dansko Holdings, Inc. v. Benefit Tr. Co.*, No. CV 16-324, 2019 WL 5893264, at *6 (E.D. Pa. Nov. 8, 2019) ("A first-party-indemnity claim is a claim for indemnification by one contractual party against the other, in a suit between the parties. To obtain such indemnity from an adverse party under Pennsylvania law, there must be a 'clear agreement of the parties.'").

Pennsylvania and other courts have interpreted language similar to the Indemnity Provision and concluded that such language provides for first-party indemnity. *See Keystone*

Care Admin. Servs., Inc. v. Grossinger, D.O., No. CV 1051 EDA 2015, 2016 WL 6875923, at *9 (Pa. Super. Nov. 21, 2016) (holding that indemnity language was not expressly limited to third party claims); *Skanksa USA Building, Inc. v. J.D. Long Masonry, Inc.*, 2019 WL 3323210, at *6 (D. Md. July 24, 2019); *Optiv Secs., Inc. v. Definition 6, LLC*, No. 19-cv-00335-RM-KLM, 2019 WL 5095699, at *7 (D. Colo. June 7, 2019) ("Additionally, the language used . . . [in the indemnity provision] is not so narrowly defined as to only contemplate third-party indemnification claims."); *Thornburg v. Open Dealer Exchange*, No. 17-06056-CV-SJ-ODS, 2018 WL 3596048, at *3 (W.D. Mo. July 27, 2018) ("The 'any and all claims, losses and damages, liability, and costs…' language is broad enough to cover the first-party claim between contracting parties presented here."). For example, in *Keystone Care Administrative Services, Inc. v. Grossinger, D.O.*, a Pennsylvania court held that the following, similar indemnity provision was not "expressly" limited to third party claims:

> Each party agrees to fully, completely and unconditionally indemnify, defend, and hold the other party harmless from an against any and all claims, actions, liabilities, losses, costs and expenses (including without limitations, costs of judgments, settlements, court costs and attorney's fees) arising out of or relating to, or alleged to arise out of or relate to, negligent or intentional acts or omissions of the indemnifying party or any breach by the indemnifying party of any . . . obligation or covenant under this Agreement.

2016 WL 6875923, at *9. Similarly, the District Court of Maryland recently interpreted an indemnity provision to encompass first party claims where it included "broad language" for "any losses, expenses, and costs [the indemnitee] incurs (typically first-party claims), in addition to reimbursement for claims and liabilities (typically arising in a third-party context)" resulting from the subcontractor's performance under a subcontract. *Skanksa USA Building, Inc. v. J.D. Long Masonry, Inc.*, 2019 WL 3323210, at *6 (D. Md. July 24, 2019).

The Indemnity Provision contains language similar to that identified in both *Keystone Care* and *Skanksa*. For example, the Indemnity Provision is broadly drafted and covers, to the greatest extent of the law, "any and all claims, demands, losses, damages, causes of action, suits and liabilities of every kind" including various specifically listed liabilities directly or indirectly related to Prime's breach and/or its performance. Subcontract, at Art. 14.0. Thus, the Indemnification Provision provides Welded with indemnification for a broad host of liabilities, including first-party claims related to Prime's performance.

Prime focuses its argument on a single Pennsylvania case, *Dansko Holdings, Inc. v. Benefit Trust Co.*, No. CV 16-324, 2019 WL 5893264, at *7 (E.D. Pa. Nov. 8, 2019), which is currently pending on appeal. In *Dansko*, the court held that an indemnity provision did not apply to first-party claims because the contract included a notice mechanism and gave the indemnitor rights to assume the indemnitee's defense and employ its own counsel. *Id*. at *7–8. The court determined that such provisions would be inapplicable in the case of a first-party claim where the indemnitee was seeking to enforce the indemnity agreement against the indemnitor. *Id*. Therefore, to avoid rendering portions of the indemnity provision superfluous, the court interpreted the indemnity provision to apply only to third party claims. *Id*.

First, unlike in *Dansko*, the Indemnity Provision contains express language that it is to be interpreted to "the fullest extent permitted by law." Indemnity Provision, at Art. 14.0. In addition, the Indemnity Provision expressly covers "all claims, demands, losses, damages, causes of action, suits and ***liability of every kind***." *Id*. The Indemnity Provision could hardly have been drafted more broadly. The language of the Indemnity Provision specifically encompasses all claims, provides for reimbursement of attorney's fees for enforcement of the Subcontract, and does not carve out first-party claims from coverage. Second, Prime, relying on *Dankso*, asserts

that the inclusion of a notice requirement evidences the Parties' intent to indemnify only third-party claims. However, as a practical matter, notice would likely be a requirement of either a first- or a third-party request for indemnity and has been recognized as a critical component to indemnification. *See Jacobs Constructors*, 264 F.3d at 372 (discussing the necessity of notice in the context of shifting contractual liability). Thus, the inclusion of a notice provision is not determinative—or even indicative—of the scope of the indemnity obligation. Finally, while the Indemnity Provision includes language that gives Prime rights to defend an indemnification claim, Welded reserved the right to itself undertake defense and litigation of any claim. Thus, the application of the Indemnity Provision does not, as in *Dankso*, yield "absurd results" because to the extent that the indemnification claim is a first-party claim against Prime, Welded could undertake the defense and litigation without Prime's involvement. Indemnity Provision, at Art. 14.0.

As indicated above, the Indemnity Provision plausibly covers losses and damages (including attorney's fees and litigation costs) related to Prime's performance. Thus, Welded has alleged a plausible—indeed, meritorious—claim for relief, and granting leave to amend the Complaint would not be futile.

2. Welded is Entitled to Attorneys' Fees and Costs for Enforcement of the Subcontract

Even if, as Prime claims, the Indemnity Provision covers only third-party claims, Welded is entitled to attorneys' fees and costs. Article 14 of the Indemnity Provision provides that

> [i]n the event the Subcontractor, after receipt of notice of a Claim, fails to furnish a defense and indemnity as provided for under this provision, ***Contractor shall be entitled to receive from the Subcontractor its attorney's fees, costs, expenses and any amounts paid in the enforcement of this Agreement***.

Subcontract, at Art. 14.0. Upon discovery of Prime's faulty work, Sunoco demanded that Welded remediate the pipeline. *See generally*, Complaint. On July 2, 2018, Welded sent Prime notice of Sunoco's demand and Prime's obligation to indemnify Welded for the costs. *See* July 2, 2018 Letter from Andrew Mack to Prime NDT Services, LLC, Subject: Notice of Obligation to Indemnify, attached hereto as Exhibit A. Subsequently, Welded sent invoices to Prime for payment of such costs, which have never been paid. *See generally*, Complaint. Welded initiated the Adversary Proceeding to enforce the Subcontract and recoup its costs. *See generally*, Complaint. Prime is obligated to indemnify, defend, and hold harmless Welded for, among others, claims, demands, losses, and damages. Subcontract, at Art. 14.0. Welded incurred losses and damages as a result of Sunoco's demand for remediation of Prime's work. *See generally*, Complaint. Given that Prime forced Welded to initiate the Adversary Proceeding to recoup its costs, Welded is entitled to "receive from the Subcontractor its attorney's fees costs, expenses and any amounts paid in the enforcement of [the Subcontract]." Welded has established more than a plausible inference that it is entitled to such fees and costs; thus, its claim is not frivolous or legally insufficient, and leave should be granted to amend the Complaint.

B. PRIME IS NOT PREJUDICED BY AMENDING THE COMPLAINT

Courts have "granted leave to amend when the non-moving party would suffer no prejudice because no new facts or additional discovery was required." *In re EP Liquidation, LLC*, 583 B.R. 304, 316 (Bankr. D. Del. 2018). Even if a party is prejudiced, leave to amend should be denied only where the non-moving party is "overly" prejudiced or where a party would suffer "severe, irremediable prejudice." *Id*. at 316–17; *In re Fleming Cos., Inc.*, 323 B.R. 144, 148 (Bankr. D. Del. 2005) ("The amount of prejudice needed to justify the denial of leave to amend is significant; it must be 'substantial or undue.'"). Courts have held that the close of factual discovery and the scheduling of a trial date does not warrant denial of a motion to amend.

See e.g., In re Mortg. Lenders Network, USA, Inc., 395 B.R. 871, 877–79 (Bankr. D. Del. 2008) (granting leave to amend after the close of discovery and after a trial date had been set).

Prime will not be prejudiced by this Court granting Welded leave to amend the Complaint. *See e.g., Promotion in Motion Inc. v. Ferrara Candy Co.*, No. CV 15-212-RGA, 2016 WL 5929215, at *1 (D. Del. Oct. 11, 2016) (holding that defendant was not significantly prejudiced by amending the complaint because such amendment would require only minimal amounts of additional discovery); *Pettinaro Enters., LLC v. Cont'l Cas. Co.*, No. CIV.A. 09-139-GMS, 2010 WL 4274658, at *3 (D. Del. Oct. 29, 2010) (holding that there was insufficient prejudice to warrant denying leave to amend a complaint where further discovery was already in the possession of the non-moving party). Prime has conceded that the issue of Welded's entitlement to attorneys' fees under the Subcontract is one of contract interpretation. Motion, at ¶¶ 13–14. While Prime argues that it is deprived of the opportunity to depose witnesses on the meaning of the Subcontract (Motion, at ¶ 23), it simultaneously argues that the Subcontract's indemnity provision contains "clear language" governing the issue. Motion, at ¶ 13. A disagreement regarding the interpretation of a contract provision does not render a contract ambiguous. *Jacobs Constructors, Inc. v. NPS Energy Servs. Inc.*, 264 F.3d 365, 371 (3d Cir. 2001). The Parties do not require additional discovery on the issue, and Prime has not been, nor will it be, prevented from presenting the merits of its argument at trial. Accordingly, nothing about amending the Complaint prejudices Prime to such a degree as to warrant denial of the Motion.

Even if Prime needed to conduct discovery on the issue, which it should not, it would not be prejudiced. *In re Worldwide Direct, Inc.*, No. 99-108 (MFW), 2003 WL 22000600, at *3 (Bankr. D. Del. Aug. 15, 2003) ("The need for additional discovery does not conclusively

establish prejudice.") (internal citations omitted); *Fleming*, 323 B.R. at 149 ("Although we recognize that the Defendant may be required to conduct further discovery in order to adequately present its case, that by itself does not establish substantial prejudice."); *Cuffy v. Getty Ref. & Mktg. Co.*, 648 F. Supp. 802, 806 (D. Del. 1986) (stating that the need to conduct further discovery is not sufficient to establish prejudice). "[I]nconvenience to a party or the strengthening of the movant's legal position does not provide sufficient prejudice." *Fleming*, 323 B.R. at 148. Consistent with this Court's holding in *In re Fleming*, in which the Court granted leave to amend a complaint to include an assertion of additional damages, Welded's Motion to specify its right to attorneys' fees does not cause substantial or undue prejudice. *Id*.

C. GOOD CAUSE EXISTS TO GRANT WELDED LEAVE TO AMEND

Welded requests leave to amend the Complaint in advance of trial to avoid a post-judgment fight about attorney's fees. Rule 54(d)(2) of the Rules of Civil Procedure permits a party to move for an award of attorney's fees and costs following the presentation of evidence and the entry of a judgment, unless the applicable substantive law requires that attorney's fees be pled as an element of damages. *See Medtronic, Inc. v. Bos. Sci. Corp.*, No. CV 07-823-SLR, 2015 WL 3430123, at *2 (D. Del. May 27, 2015).

Here, the case law is equivocal as to whether the substantive law requires Welded to prove attorneys' fees as an element of damages. For example, at least one Pennsylvania court has permitted a litigant to request an award of attorney's fees by motion under Rule 54(d)(2). *Telecom S. Am., Inc. v. Presto Telecommunications, Inc.*, No. CIV.A. 01-CV-0680, 2003 WL 22462236, at *3 (E.D. Pa. Oct. 28, 2003). In that case, the court was persuaded, in part, by a Seventh Circuit decision that distinguished attorney's fees that were incurred as damages prior to the start of litigation from the attorney's fees incurred to prosecute an action. *Id*. The former would need to be presented to a jury, the latter could be sought by a post-trial motion once the

prevailing party had been identified and the magnitude of the award quantified. *Id*. Likewise, the District Court has held that a request for attorney's fees was timely raised by a motion under Rule 54(d)(2) because, under the contract at issue, the only fact to be determined was the identity of the prevailing party, which did not need to be submitted to the jury. *Medtronic*, 2015 WL 3430123, at *3. However, one New Jersey court has stated in dicta that, under Pennsylvania law, it was unclear whether the recovery of attorney's fees under a contract could be raised by post-trial motion. *Sokoloff v. Gen. Nutrition Companies, Inc.*, No. CIV. A. 00-641 (JBS), 2001 WL 536072, at *6 (D.N.J. May 21, 2001) ("Pennsylvania law does not clearly support recovery of contractual fees by motion, so, even if Pennsylvania law were to be applied in this case, it is not clear that defendants' Rule 54(d) motion would suffice.").

Rather than wait until the time proscribed by Rule 54(d)(2)—within 14 days of a judgment—Welded seeks to avoid a needless fight about the timing of its request for attorneys' fees. Thus, there is no intentional delay or manipulation under these circumstances. Indeed, it is quite the opposite situation. Despite that Welded may procedurally request attorneys' fees and costs at a later point in time, it seeks leave to amend at this juncture to ensure that the Parties can fully and fairly put the issue before the Court at trial. *See e.g.*, *In re Mortg. Lenders Network, USA, Inc.*, 395 B.R. 871, 879 (Bankr. D. Del. 2008) ("Further, MLN seeks to amend its complaint "to make explicit the theories underlying the claims for relief." (Adv.Doc. # 68, ¶ 17.) If amendment is not allowed now, MLN may seek to amend the complaint during the trial, which it likely will be allowed to do pursuant to Fed. R. Civ. P. 15(b)(1), which provides that the Court "should freely permit an amendment when doing so will aid in presenting the merits" during trial. By seeking to amend now, MLN is attempting to avert disruption during the trial process

and to clarify its arguments."). Granting Welded leave to amend simply provides an opportunity for the Parties to present evidence and argument about the magnitude of Welded's damages.

Finally, Prime has not disputed that its work was faulty. *See Defendant, Prime NDT Services, Inc.'s Partial Motion for Summary Judgment on the Issues of Breach of Warranty and Consequential Damages*, at ¶ 18 [Adv. Docket No. 85]. Yet, it has refused to compensate Welded for the costs and expenses that Welded incurred to remediate such work. Thus, Welded is entitled to recover its attorneys' fees and costs under the Subcontract. Subcontract, at Art. 14.0. Welded's effort to raise the issue of attorneys' fees now will avoid unnecessary battles, mitigate litigation costs, and ensure a prompt recovery and resolution of the matter for Welded's creditor constituency—all of which constitutes good cause to grant Welded leave to amend the Complaint.

CONCLUSION

For the foregoing reasons, Welded respectfully requests that the Court grant the Motion and permit Welded to amend the Complaint.

Dated: January 28, 2020
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Erin D. Edwards

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