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 (CSS)
	(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. 1

JOINT PRE-TRIAL MEMORANDUM

Pursuant to the Court's Pre-Trial Procedures in Adversary Proceedings, the parties submit their Joint Pre-Trial Memorandum and state as follows:

BASIS OF JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This adversary proceeding is not a core proceeding; however, it was brought pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure. The above-captioned debtors (the "Debtors," "Plaintiffs, or "Welded") consent to the entry of a final order by the Court pursuant to 28 U.S.C. § 157(c)(2). Prime NDT Services, Inc. ("Prime" or "Defendant") does not.

[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.

STATEMENT OF UNCONTESTED FACTS

1. Welded operated as a mainline pipeline construction contractor headquartered in Perrysburg, Ohio. In early summer 2018, Welded oversaw the construction of three (3) separate pipeline "spreads" within the Mariner East Pipeline (the "Project") owned by Sunoco Marketing Partners & Terminals L.P. and Sunoco Pipeline L.P. (collectively, "Sunoco"), totaling approximately 152.6 miles of high pressure liquefied natural gas pipeline.

2. Welded and Prime entered into the *Construction Subcontract*, dated January 6, 2016 (the "Subcontract").

3. Prime was retained by Welded to perform non-destructive examinations ("NDE") x-rays of the completed welds on the PPP 1 spread of the pipeline to determine whether the welds connecting each length of pipeline were of an acceptable quality and free from imperfections which would render the weld non-conforming.

4. After Welded performed a weld on a piece of pipe, Prime would perform a 360-degree x-ray of the weld by exposing three (3) films per weld. Prime would then read the films and report to Welded whether the weld was conforming or needed repair.

5. In June 2018, certain x-rays films were determined by Sunoco to be non-conforming. As a result of the non-conforming x-ray films, some additional work was required on Welded's behalf.

6. In order to confirm the quality of the affected welds, Welded dug up portions of the pipeline and re-imaged each of the affected welds.

7. 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. On January 3, 2019, the Bankruptcy Court entered the Settlement Order (together with the 9019 Motion and the Settlement Agreement, the "Settlement Documents").

8. Pursuant to the Settlement Documents, Welded and Sunoco entered into settlements with Maxx HDD LLC ("Maxx"), Schmid Pipeline Construction, Inc. ("Schmid"), and Mears Group, Inc. ("Mears" and collectively with Maxx and Schmid, the "Re-Work Subcontractors").

9. On January 29, 2019, Welded and Sunoco entered into the *Subcontractor Direct Pay Agreement and Authorization* and *Subcontractor's Release of Liens and Claims* with Maxx.

10. On February 13, 2019, Welded and Sunoco entered into the *Subcontractor Direct Pay Agreement and Authorization* and *Subcontractor's Release of Liens and Claims* with Schmid.

11. On February 21, 2019, Welded and Sunoco entered into the *Subcontractor Direct Pay Agreement and Authorization* and *Subcontractor's Release of Liens and Claims* with Mears.

STATEMENT OF DISPUTED FACTS

14. Whether the Debtors were required to re-examine a total of seventy-three (73) welds.

15. Whether the Debtors were required to engage in the extent of remediation that they did.

16. Whether the Debtors incurred costs claimed in connection with the remediation.

17. Whether Prime had a project manager/superintendent on the Project and whether that project manager or superintendent acted in a grossly negligent manner or with willful misconduct.

18. Whether Prime submitted falsified x-ray films while working on the Project.

19. Whether Welded has shown it is entitled to consequential damages, and, if so, whether the Subcontract's limitation on the recovery of consequential damages provision precludes that recovery. The Subcontract prohibits the collection of consequential damages except in situations involving the gross negligence and willful misconduct of Prime's "project manager, project engineering manager, construction manager, and superintendent," which misconduct is defined in the Subcontract "as the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." Subcontract, Ex. G., at Art. 15.0.

20. Whether the Debtors were terminated from the Project, in part, because of Prime's faulty work.

21. Whether the remedial work caused delays such that they caused the damages Welded claims.

22. The amount of Debtors' damages as set forth in the *Supplemental Expert Report*, dated December 18, 2019, (the "Supplemental Expert Report") authored by Mr. Scott D. Gray of Ankura Consulting Group LLC ("Ankura").

DAMAGES

Direct Damages

23. Ankura determined that Welded incurred total damages of $7,012,743.18. Specifically, Welded incurred $5,727,270.98 for the cost of remedial work performed from June

30, 2018 to August 5, 2018, and Welded incurred $1,285,472.20 for the cost to complete remedial work from August 6, 2018 to August 31, 2018. Prime contends that certain of these damages were consequential in nature.

Consequential Damages

24. Welded incurred total consequential damages of $389,736.70 for the cost of storm floor repair and restoration in September 2018.

Attorneys' Fees, Interest, and Costs

25. Welded also seeks attorneys' fees, interest, and costs.

LEGAL ISSUES AND AUTHORITY

The Debtors shall have the burden of proof on the following legal issues:

Legal Issues

A. Whether Prime failed to perform NDE inspections according to the Subcontract.

B. Whether Welded is entitled to recover consequential damages, and, if so, whether any such recover is precluded by the Subcontract's limitation on the recovery of consequential damages.

C. Whether Welded is entitled to recover payments it made to the Re-Work Subcontractors that were paid to the Re-Work Subcontractors pursuant to the Settlement Documents.

D. Whether a warranty was in place between Prime and Welded, and, if so, whether it was breached.

Debtors' Authority

- 28 U.S.C. §§ 157, 1334, 1408, and 1409;
- Fed. R. Civ. P. 56 and 401;
- Fed. R. Bankr. P. 7001;
- *Air Line Stewards & Stewardesses Assoc., Local 550, TWU, AFL-CIO v. Trans World Airlines, Inc.*, 713 F.2d 319, 322 (7th Cir. 1983);
- *Arthrocare Corp. v. Smith & Nephew, Inc.*, No. CIV.A. 01-504-SLR, 2003 WL 1856436, at *1 (D. Del. Apr. 9, 2003;
- *Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 96 (3d Cir. 2001);
- *Chale v. Allstate Life Ins. Co.*, 353 F.3d 742, 749 (9th Cir. 2003);
- *Collins v. Cottrell Contracting Corp.*, 733 F.Supp.2d 690, 702 (E.D.N.C. 2010);

- *Great Am. Ins. Co. v. Norwin Sch. Dist.*, 544 F.3d 229, 254 (3d Cir. 2008);
- *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004);
- *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 227 n. 8 (3d Cir. 2008);
- *In re Doctors Hosp. of Hyde Park, Inc.*, 463 B.R. 93, 112 (Bankr. N.D. Ill. 2011);
- *In re Glob. Envtl. Servs. Grp., LLC*, No. 04-00748, 2006 WL 980582, at *2 (Bankr. D. Haw. Mar. 16, 2006);
- *In re NewStarcom Holdings, Inc.*, 547 B.R. 106, 112–13 (Bankr. D. Del. 2016);
- *In re Nova Tool & Eng'g, Inc.,* 228 B.R. 678, 685 (Bankr. N.D. Ind. 1998);
- *Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 218 (3d Cir. 2006);
- *Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984);
- *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1013 (3d Cir. 1980);
- *Nigra v. Walsh*, 797 A.2d 353, 360 (Pa. Super. 2002);
- *Ocasio v. Ollson*, 596 F. Supp. 2d 890, 904 (E.D. Pa. 2009);
- *Pohl v. Agave Dentistry, LLC,* No. CV-14-01037-PHX-SRB, 2014 WL 12575867, at *2 (D. Ariz. Oct. 14, 2014);
- *Wechsler v. Hunt Health Sys., Ltd.*, 381 F.Supp.2d 135, 140 (S.D.N.Y. 2003);
- BLACK'S LAW DICTIONARY (11th ed. 2019); and
- BLACK'S LAW DICTIONARY (2d ed. 1910).

Prime's Authority

- *National Cash Register Co. v. Modern Transfer Co.*, 302 A.2d 486 (Pa.Super. 1973)
- *Valhal Corp. v. Sullivan Associates, Inc.*, 44 F.3d 195 (3d Cir. 1995)
- *New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp*, 564 A.2d 919, 924 (Pa.Super. 1989)
- *LoBianco v. Property Protection, Inc.*, 437 A.2d 417 (Pa.Super. 1985)
- *Eimco Corp. v. Joseph Lombardi & Sons*, 162 A.2d 263, 266 (Pa.Super. 1960)
- *The Birth Ctr. v. The St. Paul Cos.*, 567 Pa. 386, 408 n. 1, 787 A.2d 376, 390 n. 1 (2001)
- BLACK'S LAW DICTIONARY 390 (6th ed. 1990)
- *Atlantic Paper Box Co. v. Whitman's Chocolates*, 844 F. Supp. 1038, 1046 (E.D. Pa. 1994
- *McDermott v. Party City Corp.*, 11 F. Supp. 2d 612, 624 (E.D. Pa. 1998)
- *Fort Washington Resources v. Tannen*, 901 F. Supp. 932, 943 (E.D.Pa.1995)
- *Davis v. Fid. Nat'l Ins. Co.*, 37 Pa. D. & C.5th 491, 505 (C.P. 2014)
- *Cornell & Co. v. PKF-Mark III, Inc.*, 2009 Phila. Ct. Com. Pl. LEXIS 223, at *1 (C.P. June 30, 2009)
- *Windsor Constructors v. Higgins*, No. 2001-C-2449, 2003 Pa. Dist. & Cnty. Dec. LEXIS 553, at *23 (C.P. Dec. 31, 2003)
- *Klipper Constr. Assocs. v. Warwick Twp. Water & Sewer Auth.*, 105 A.3d 856 (Pa. Commw. Ct. 2014)
- *Jarl Investments, L.P. v. Fleck*, 937 A.2d 1113, 1122 (Pa. Super. 2007)
- *Village Beer & Beverage, Inc. v. Vernon D. Cox & Co*., 475 A.2d 117, 121 (Pa. Super. 1984)
- Restatement (Second) of Contracts

- *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 220 (3d. Cir. 2009)
- *Sunbeam Corp. v. Liberty Mutual Ins. Co*., 566 Pa. 494 (Pa. 2001)
- 13 California Real Estate Law & Practice Scope (2019)
- *Sun Co., Inc. v. Penn. Turnpike Com'n*, 708 A.2d 875, 878-79 (Pa. Commw. Ct. 1998)
- *Durrell v. Parachutes Are Fun, Inc.*, C.A. No. 85C-AU-82, 1987 Del. Super. LEXIS 1321, at *9 (Super. Ct. Oct. 8, 1987)
- *Liscombe v. Potomac Edison Co.*, Md. Supr., 495 A.2d 838 (1985)
- *Ferrer v. Trs. of the Univ. of Pa.*, 825 A.2d 591, 609, 573 Pa. 310 (Pa. 2002)
- *Great Am. Ins. Co. v. Norwin Sch. Dist.*, 544 F.3d 229, 252 (3d Cir. 2008)
- *Trosky v. Civil Serv. Comm'n*, 652 A.2d 813, 817 (Pa. 1995)
- *Hayfield v. Home Depot USA, Inc.*, 168 F. Supp. 2d 436, 453 (E.D. Pa. 2001)

WITNESSES

26. Prime and the Debtors each reserve the right to (a) withdraw any of the witnesses identified below from testifying as part of their case-in-chief, (b) present their witnesses in the order they deem appropriate,[2] (c) rely upon the testimony of any witnesses called by the other party at the hearing, (d) call any witness identified by the other party, and (e) call any witnesses necessary for rebuttal purposes, whether or not previously identified. Therefore, Prime and the Debtors each reserve the right to call additional witnesses on rebuttal and/or the other parties' witnesses:

A. The Debtors intend to call the following witnesses at trial:

- Steven D. Hawkins: Mr. Hawkins may testify generally about the background facts and circumstances concerning Debtors' pipeline construction business, including but not limited to labor, management, staffing, and payroll; their work on the Project; Prime's work on the Project; the Subcontract; and all matters related to the remedial work performed in connection with Prime's breach of contract.

[2] The witnesses listed herein are not listed in any particular order, and the Debtors reserve the right to change the order of the witnesses listed herein at the time of trial.

- Andrew Mack: Mr. Mack may testify generally about, among other things, the facts and circumstances related to the Debtors' damage claims and the remedial work performed in connection with Prime's breach of contract.
- Frank A. Pometti: Mr. Pometti may testify generally about the facts and circumstances concerning Debtors' pre- and post-petition pipeline construction business, the administration of the Debtors' bankruptcy estates, and the Sunoco settlement. Prime objects to Mr. Pometti's testimony at trial because he was not previously disclosed.
- Joshua Bell: Mr. Bell may testify regarding applicable standards, causation, and liability as outlined in the *Expert Report*, dated December 16, 2019.
- Scott D. Gray: Mr. Gray may testify regarding his opinions on damages as outlined in the Supplemental Expert Report.

B. Prime intends to call the following witnesses at trial:

- Scott Elliott: Mr. Elliott may testify about Prime's business, its work on the Project, its hiring, training, and oversight of its employees, the circumstances underlying the non-conforming x-rays, the Subcontract, the Remedial work.
- Don Schumway: Mr. Schumway may testify about Prime's business, its training, its oversight of its employees, the negotiations of the subcontract, and facts underlying the noncoforming x-rays and the re-work.
- Tim Rapp: Mr. Rapp may testify about Prime's business, its recordkeeping and human resources, its hiring, training, and oversight of its employees.
- Gary Wieland: Mr. Wieland will testify as to the facts and opinions set forth in his expert report.

- Dave Runte: Mr. Runte may testify as to Welded's performance on the Project, the Remedial Work, and Welded's termination from the Project. Welded objects to Mr. Runte's testimony at trial because he was not previously disclosed.
- Renee Bisnett: Ms. Bisnett's videotaped deposition may be played during trial on Prime's behalf.
- Blaine Cote: Mr. Cote's videotaped deposition may be played during trial on Prime's behalf.

LIST OF EXHIBITS

27. The parties are continuing to negotiate the contents of their respective exhibit lists, and additional exhibits may be added and/or removed upon further negotiation, by stipulation of the parties, or as ordered by the Court. The parties intend to submit their respective exhibit lists at the time of trial.

LIST OF DISCOVERY ITEMS

28. Prime and the Debtors will designate those discovery items and portions of deposition transcripts and videos to be submitted as evidence in accordance with a mutually agreed upon schedule. The mutually agreed upon schedule will provide an opportunity to identify counter-designations and to object to any discovery items, designations, or counter-designations.

ESTIMATED LENGTH OF TRIAL

27. The parties anticipate that the trial will take no more than three and one-half (3 ½) days.

Dated: February 3, 2020

Respectfully Submitted,

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