IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Welded Construction, L.P., *et al.*, Debtors.	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
Welded Construction, L.P., Plaintiff, vs. Industrial Fabrics, Inc., Defendant.	Adv. No. 20-50932 (CSS) NO HEARING WILL BE HELD UNLESS REQUESTED OR ORDERED BY THE COURT Objection deadline: October 25, 2021 @ 4:00 PM

MEMORANDUM OF LAW IN SUPPORT OF INDUSTRIAL FABRICS INC.'S SECOND MOTION TO EXTEND DEADLINE FOR NON-EXPERT FACT DISCOVERY

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Industrial Fabrics, Inc. (the "Defendant"), by and through undersigned counsel, moves to extend the time period allowed for non-expert fact discovery in the *Scheduling Order* [Docket #9], and in support thereof, states as follows:

BACKGROUND

1. On October 22, 2018 (the "Petition Date"), Welded Construction, L.P., et al. (the "Debtors") commenced a case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

2. On on October 20, 2020, Welded Construction, L.P. (the "Plaintiff") filed a complaint against the Defendant seeking to recover the amounts of $280,349.42 (the "Transfers") from the Defendant as alleged preferential transfers and fraudulent conveyances under 11 U.S.C. §§ 547 and 548 of the Bankruptcy Code. [Docket #1]

3. On December 29, 2020, the Court entered the Scheduling Order.

4. On January 7, 2021, the Defendant filed its Answer and Affirmative Defenses. [Docket #13].

5. Paragraph 3 of the Scheduling Order states that "All fact discovery shall be completed by August 31, 2021."

6. Paragraph 11 of the Scheduling Order further states that, "Deadlines contained in this Scheduling Order may be extended only by the Court and only upon written motion for good cause shown."

7. On July 23, 2021, the Defendant served upon the Plaintiff its Second Set of Requests for Admission, Third Set of Interrogatories, and Second Set of Requests for Production of Documents. A Certificate of Service for the foregoing was subsequently filed by the Defendant [Dkt. 25].

8. On August 19, 2021, the Plaintiff served its Responses to the Second Set of Requests for Admission. A Certificate of Service for the foregoing was subsequently filed by the Plaintiff [Dkt. 26]. To date, however, the Defendant has not received the Plaintiff's responses to the Third Set of Interrogatories and Second Set of Requests for Production of Documents.

9. On August 23, 2021, the Defendant filed its Motion to Extend Deadline for Non-Expert Fact Discovery (the "First Motion to Extend") [Dkt. 27].

10. On September 14, 2021, the Court granted the First Motion to Extend, amending paragraph 3 of the Scheduling Order to state that, "All fact discovery shall be completed by October 30, 2021." [Dkt. 30].

11. On September 14, 2021, the Defendant filed its Notice of Intent to Serve a Subpoena upon Columbia Gas Transmission, LLC ("Columbia Gas") [Dkt. 31] and Sunoco Pipeline L.P. ("Sunoco Pipeline") [Dkt. 32]. The said subpoenas require Columbia Gas and

Sunoco Pipeline to respond on or before September 30, 2021 at 1:00 PM EST.

12. On September 14, 2021, the subpoena was served upon Columbia Gas through its registered agent. A copy of the Affidavit of the Process Server attesting to its service is hereto attached as Exhibit A.

13. On September 15, 2021, the subpoena was served upon Sunoco Pipeline through its registered agent. A copy of the Affidavit of the Process Server attesting to its service is hereto attached as Exhibit B

14. Subsequently, the Defendant was able to speak with representatives of both Columbia Gas and Sunoco Pipeline in relation to their obligations under the respective subpoenas.

15. The representative of Columbia Gas requested an extension of the response deadline to October 15, 2021 and the Defendant agreed to the said request.

16. The representative of Sunoco Pipeline did not request an extension. Hence, Sunoco Pipeline's deadline to respond remained to be September 30, 2021 at 1:00 PM EST. To date, however, the Defendant has not received Sunoco Pipeline's response to the subpoena.

RELIEF REQUESTED

17. The relevant Scheduling Order deadlines are as currently follows:

- All fact discovery shall be completed by October 30, 2021.

18. The Defendant requests that the Court modify the Scheduling Order deadlines to read as follows:

- All fact discovery shall be completed by December 29, 2021.

BASIS FOR RELIEF REQUESTED

I. STATEMENT OF LAW

19. Fed.R.Civ.P. 16(b), made applicable to this adversary proceeding by Fed.R.Bankr.P. 7016(a), provides that "[a] schedule may be modified only for good cause and with the judge's consent." The only formal limitation on this discretion with respect to consideration of motions to amend scheduling orders is that the moving party demonstrate good cause. Fed.R.Civ.P. 16(b)(4).

20. "Good cause" under Fed. R. Civ. P. 16(b) focuses on the diligence of the party seeking the modification of the scheduling order. Thus, if the party was not diligent, there is no good cause for modifying the scheduling order and allowing the party to file a motion to amend its pleading. *Price v. Trans Union, LLC*, 737 F. Supp. 2d 276 (E.D. Pa. 2010)

21. The existence of "good cause" turns on a variety of factors, including: (1) whether the moving party's lack of diligence or the opposing party's conduct contributed to the delay; (2) potential prejudice caused by the discovery extension; and (3) any other factors the trial court, in its discretion, determines to be relevant. *Trask v. Olin Corp.*, 298 F.R.D. 244, 267 (W.D. Pa. 2014) citing 6A Federal Practice and Procedure, § 15222.2, 313-16.

II GOOD CAUSE EXISTS TO GRANT THE RELIEF REQUESTED

A. No lack of diligence on the part of the Defendant

22. One of the Defendant’s affirmative defenses is that the alleged Transfers were made in exchange for new value received by the Debtors. More particularly, the Defendant avers that it held certain inchoate liens against the properties that were improved by the supplies and materials that it provided to the Debtors; that its waiver of these inchoate liens constitutes new value received by the Debtors; and that, based on the foregoing, the Transfers are unavoidable pursuant to §547(c)(1) and §547(b)(5).

23. On June 24, 2021, certain issues regarding the above defense came to light during

the parties' mediation conference.

24. On July 23, 2021, the Defendant served its Second Set of Requests for Admission; Third Set of Interrogatories; and Second Set of Requests for Production of Documents, which all relate to the issues discovered during the mediation conference.

25. On August 19, 2021, the Plaintiff served its responses to the Second Set of Requests for Admission. To date, however, the Plaintiff has failed to respond to the Third Set of Interrogatories and Second Set of Requests for Production of Documents.

26. The Plaintiff has informally produced certain documents in response to the Second Set of Requests for Production of Documents which allowed the Defendant to identify and issue subpoenas to Columbia Gas and Sunoco Pipeline. However, the Defendant still requires the Plaintiff's full set of responses to the Third Set of Interrogatories and Second Set of Requests for Production of Documents to fully clarify the issues surrounding the Defendant's inchoate lien defense and to determine whether it still needs to conduct depositions or issue additional subpoenas.

27. Shortly after receiving the informally produced documents and immediately after the entry of the order granting the First Motion to Extend, the Defendant issued subpoenas on Columbia Gas and Sunoco Pipeline. The Defendant is currently working with Columbia Gas and Sunoco Pipeline to lessen the potential burden of the subpoenas and to encourage their willingness to respond without the Defendant having to resort to threats of sanctions.

28. Finally, the Defendant will require the proposed extension if it should need to file a motion for sanctions in order to compel responses to its discovery requests or subpoenas.

29. Considering the foregoing, the Defendant submits that it exercised due diligence during the discovery process and that it did not contribute to the delay. Rather, the delay was

primarily caused by: (1) the fact that the issues relating to the Defendant's inchoate lien defense only came to light during the parties' mediation conference; and (2) the delayed responses to the Defendant's discovery requests and subpoenas.

B. Granting the extension will not prejudice the Plaintiff, while denying the extension will prejudice the Defendant

30. As a preliminary matter, the Defendant submits that there appears to be a lack of consensus in the Third Circuit as to whether or not the degree of prejudice on the part of the Plaintiff is relevant to the proposed extension. On one hand, cases such as *Trask v. Olin Corp*., 298 F.R.D. 244, includes "potential prejudice caused by the discovery extension" to be one of the relevant factors. Bu on the other hand, *Chancellor v. Pottsgrove Sch. Dist*., 501 F. Supp. 2d 695 (E.D. Pa. 2010), also noted that:

> It is unclear whether the existence or degree of prejudice to the opposing party plays a role in a Rule 16(b) "good cause" calculus. The Ninth Circuit has held that it does not, although prejudice to the opposing party might "supply [an] additional reason to deny a motion [to amend]." The Sixth Circuit, on the other hand, has held that while the "good cause" analysis focuses primarily on whether the party was diligent in seeking the amendment, it also factors in whether the opposing party will suffer prejudice by virtue of the amendment. Here, Plaintiff's counsel conceded that to allow the amendment would not work any prejudice on the Plaintiff. However, **the Court concludes that examining the prejudice to the opposing party would shift the inquiry from the conduct of the moving party to the burden on the non-moving party, thus**

> **eviscerating the requirement that the moving party show "good cause."** (citations omitted)

31. Hence, the Defendant submits that the potential prejudice that may be caused by the extension is not a relevant factor since it would eviscerate the need to show "good cause."

32. However, if the Court considers the potential prejudice to be relevant, the Defendant also submits that the Plaintiff will not be prejudiced by the proposed extension. There is no trial date set and the other deadlines in the Scheduling Order will remain unaffected.

33. Furthermore, the Plaintiff has already agreed to the Defendant's proposed extension.

34. On the other hand, denying the Defendant a little additional time during which it may search for and produce relevant and responsive evidence in its favor will be inequitable and unjust.

[continued on next page]

CONCLUSION

WHEREFORE, the Defendant respectfully requests that this Court enter an order substantially in the form of the Proposed Order filed concurrently with the Motion and such other and further relief as is appropriate.

Dated: October 11, 2021

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