

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

WELDED CONSTRUCTION, L.P., *et al.*,<sup>1</sup>  
  
Debtors.

Chapter 11

Case No. 18-12378 (KG)  
(Jointly Administered)

Hearing Date: February 13, 2019, at 10:00 a.m. (Eastern)  
Objection Deadline: February 6, 2019, at 4:00 p.m. (Eastern)

**MOTION OF CLEVELAND BROTHERS EQUIPMENT CO., INC. FOR AN ORDER  
(I) COMPELLING DEBTORS TO PERFORM THEIR OBLIGATIONS UNDER THEIR  
INSURANCE POLICIES TO OBTAIN COVERAGE AND TURN OVER PROCEEDS;  
(II) DETERMINING THAT CERTAIN INSURANCE PROCEEDS ARE NOT  
PROPERTY OF DEBTORS' ESTATES; (III) GRANTING RELIEF FROM THE  
AUTOMATIC STAY AS TO INSURERS; AND (IV) ALLOWING ADMINISTRATIVE  
CLAIMS AND DIRECTING IMMEDIATE PAYMENT THEREOF**

Cleveland Brothers Equipment Co., Inc. (“**Cleveland Brothers**”) respectfully moves this Court for entry of an order substantially in the form attached as Exhibit A, (i) compelling the Debtors pursuant to section 105 of title 11 of the United States Code (the “**Bankruptcy Code**”) to take any and all action necessary to perform their obligations under the Policies (as defined below) and to obtain coverage of the Repair Liability (as defined below) and to turn over any related insurance proceeds to Cleveland Brothers; (ii) determining that proceeds under the Policies with regard to the Repair Liability are not property of the Debtors’ bankruptcy estates; and (iii) to the extent necessary, granting relief from the automatic stay to allow Cleveland Brothers to recover the Repair Liability directly against the Insurers (as defined below) under the Policies and applicable state law, and (iv) allowing, and directing the Debtors to pay, administrative claims (the “Motion”). In support of this Motion, Cleveland Brothers states as follows:

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<sup>1</sup> 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 26933 Eckel Road, Perrysburg, OH 43551.



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## **JURISDICTION AND VENUE**

1. On October 22, 2018 (the “**Petition Date**”), Welded Construction Michigan, LLC (the “**Debtor**”) and Welded Construction, L.P. (collectively with the Debtor, the “**Debtors**”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (the “**Bankruptcy Case**”). Since the Petition Date, the Debtors have managed their affairs and remained in possession of their assets as debtors in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

2. The Court has jurisdiction to consider 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 February 29, 2012. This is a “core” proceeding according to 28 U.S.C. § 157(b), and venue in this Court is proper under 28 U.S.C. §§ 1408 and 1409.

3. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware, Cleveland Brothers consents to the entry of a final judgment or order with respect to the Motion if it is determined that the Bankruptcy Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

## **BACKGROUND**

4. Prior to and after the Petition Date, Cleveland Brothers provided the Debtors with rental equipment, materials, parts, repair and support services in connection with certain pipeline construction projects managed or worked by the Debtors, including, but not limited to, the Williams/ASR Project, the ETP Project and the Columbia Gas Project, as each are defined and further described in the *Declaration of Frank Pometti in Support of Debtors’ Chapter 11 Petitions and First-Day Motions* [Dkt. No. 4] (collectively, the “**Projects**”).

5. In their Schedules E/F filed on December 17, 2018 [Dkt. No. 333], the Debtors listed Cleveland Brothers as the holder of a claim in excess of \$16.4 million, which relates to rental

equipment, materials, parts, repair and support services furnished to the Debtors in connection with the Projects. The Debtors further listed in their Schedule G [Dkt. No. 333] more than 200 executory contracts or unexpired leases between the Debtors and Cleveland Brothers, which primarily relate to rental agreements (the “**Rental Agreements**”) for the Debtors’ lease of certain equipment (the “**Equipment**”) owned by Cleveland Brothers. Certain terms and conditions (the “**Terms and Conditions**”) accompany the Rental Agreements. Examples of such Rental Agreements, with the Terms and Conditions, are attached hereto as Exhibit B.

6. Pursuant to the Rental Agreements, the Debtors are obligated to maintain the Equipment. The Debtors are liable under the Rental Agreements for damages to or destruction of the Equipment, including any and all repairs thereto and the retail replacement value thereof. For example, the Terms and Conditions provide as follows:

Customer shall maintain Equipment in accordance with machine operating and maintenance guide. Customer shall pay for all repairs due to fault of Customer, maintain unit in proper condition, providing fuel, oil, filters, lube, ground engaging tools, anti-freeze, replace broken glass, make adjustments for damaged tires, make adjustments for pre-mature undercarriage wear, and all other repairs beyond the normal wear and tear determined by the Owner.

7. The Rental Agreements require the Debtor to provide continuous all risk insurance with loss payable to Cleveland Brothers to cover, among other things, any damage or destruction to the Equipment. Specifically the Terms and Conditions provide as follows:

Customer shall obtain and maintain property insurance, insuring all Equipment against “all risk,” for an amount not less than the replacement cost of all Equipment, and commercial general liability insurance in amounts satisfactory to Owner, naming Owner, its successors and/or assigns additional insured and loss payee as its interest may appear, and requiring 30 days’ notice to Owner of any cancellation, non-renewal, or material change in coverage. All insurance policies shall be with carriers acceptable to Owner. Customer shall comply with all terms of any insurance policy and shall notify Owner in writing immediately upon the occurrence of any loss, theft, destruction or damage of any Equipment.

WHEN RENTING LICENSED VEHICLES, CUSTOMER SHALL NAME OWNER AS ADDITIONAL INSURED UNDER CUSTOMER'S AUTOMOBILE LIABILITY INSURANCE AND LOSS PAYEE UNDER THE CUSTOMER'S AUTOMOBILE PHYSICAL DAMAGE INSURANCE FOR RENTED VEHICLES AND CERTIFICATE WILL BE PROVIDED TO OWNER.

8. In the normal course of business, the Debtors provided Cleveland Brothers with certificates of insurance, which would be updated from time to time. A true and correct copy of the most recently provided certificate of insurance is attached hereto as Exhibit C (the “**Certificate of Insurance**”), which names certain insurers (the “**Insurers**”) providing insurance policies (the “**Policies**”) covering damage, disrepair and destruction of the Equipment while in the Debtors’ possession and use. According to the Certificate of Insurance, Cleveland Brothers is named as an additional insured with respect to general liability and as loss payee with respect to the Equipment.

9. Since the Petition Date, the Debtors have returned several pieces of the Equipment to Cleveland Brothers in varying states of damage or disrepair. Pursuant to the Rental Agreements, and upon inspection of such returned equipment, Cleveland Brothers provided the Debtors with informational invoices for the cost of repairing the damage or disrepair.

10. The Debtors have neither tendered payment for the invoiced repairs nor submitted claims against the Policies to cover related damages. As of the filing of this Motion, the total amount outstanding on post-petition repair invoices is yet to be determined, as not all Equipment has been returned and not all returned Equipment has been inspected/repared for damages. (the “**Repair Liability**”).<sup>2</sup> The amount of the Repair Liability increases with the return of each piece of damaged Equipment.<sup>3</sup> The Debtors’ failure to observe their obligations under the Rental

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<sup>2</sup> As of the date of this Motion, Cleveland Brothers has invoiced approximately \$293,958.33 to the Debtors for repair damages and estimates, at least, another \$425,211.52.

<sup>3</sup> As of the date of this Motion, three units on the Columbia Gas Project have not been returned to Cleveland Brothers.

Agreements or mitigate the Repair Liability by seeking satisfaction thereof under their existing insurance coverage justifies and necessitates the relief sought herein.

### **RELIEF REQUESTED**

11. For the reasons set forth below, Cleveland Brothers respectfully moves this Court for entry of an order substantially in the form attached hereto as Exhibit A, (i) compelling the Debtors pursuant to Bankruptcy Code § 105 to take any and all action necessary to perform their obligations under the Policies and to obtain coverage of the Repair Liability and to turn over any related insurance proceeds to Cleveland Brothers; (ii) determining that any insurance proceeds paid under the Policies with regard to the Repair Liability are not property of the Debtors' bankruptcy estates; (iii) to the extent necessary, granting relief from the automatic stay so that Cleveland Brothers may recover the Repair Liability directly from the Insurers under the Policies and applicable state law; and (iv) determining that Cleveland Brothers is entitled to an allowed administrative claim for the Repair Liability and directing the Debtors to make immediate payment thereof.

### **BASIS FOR RELIEF**

#### **I. Cleveland Brothers is Entitled to Recover the Repair Liability from the Insurers under the Policies.**

12. The three key parties affected by a lessee's insurance policy can be generally understood as follows:

- **Named insured.** The named insured is the party that pays the premium for the property or liability policy. The insurance company underwrites the policy and the premium based on the claims history and risk posed by the named insured. . . .
- **Additional insured.** An insurer can add a third party to a named insured's policy as an additional insured. The additional insured party can recover only if it has an insurable interest in the insured's property. When a party is added as an additional insured, the negligent actions of the insured party will not defeat coverage of the additional insured under the policy. The additional insured has the

independent right, regardless of the actions of the primary insured, to a defense under the insured's policy.

- **Loss payee.** An insurer can add a party to the named insured's policy as a loss payee instead of as an additional insured. This gives the loss payee a mutual claim to the insurance proceeds. Just as an additional insured must have an insurable interest, so much as loss payee.

*See In re Amiel Rest. Partners, LLC*, 510 B.R. 744, 749 (Bankr. D. N.J. 2014) (citing Ann Peldo Cargile, *The Basics of Insurance in Leases*, 14 A.B.A. Sec. Probate & Property 19 (Nov./Dec. 2000)). As a further general matter, Ballentine's Law Dictionary defines an "insurable interest in property" as "[a]n interest in property to the extent that the owner of the interest derives a benefit from the existence of the property and will suffer a loss from its destruction."

13. Since Cleveland Brothers is the owner of the Equipment, both an additional insured and a loss payee under the Policies, and has suffered a covered loss, it holds a proper insurable interest in the Equipment under the Policies and maintains a right to insurance proceeds covering the Repair Liability. As a loss payee, Cleveland Brothers has the right to receive direct payments from the Insurers on any covered loss to the Equipment, including the Repair Liability.

**II. Debtors Should Be Compelled to Perform on the Policies to Obtain Coverage of the Repair Liability and Turn Over any Proceeds to Cleveland Brothers.**

14. While entitled to coverage, Cleveland Brothers still requires the intervention of the Court to ensure it is able to timely collect on the Repair Liability from the Insurers.

15. The Debtors are likely obligated under the Policies to perform certain acts in the event of a covered loss, including, but not limited to notifying the Insurers of the loss; taking reasonable steps to protect the covered property from further damage; providing the Insurers with signed, sworn proofs of loss upon request; and cooperating with the Insurers in any investigation or settlement of associated claims. Failure of the Debtors to perform any or all of these obligations

may delay or adversely affect Cleveland Brothers' ability to recover the Repair Liability under the Policies.

16. Other provisions in the Policies may require action by the Debtors in order for Cleveland Brothers to receive recoveries in the form of insurance proceeds. For instance, given Cleveland Brothers' status as a loss payee, any claim payments on the Repair Liability may be issued jointly to the Debtors and Cleveland Brothers. Failure of the Debtors to turn over such payments to Cleveland Brothers would both deprive Cleveland Brothers of its rightful recoveries under the Policies in addition to effectuating a gross injustice.

17. Any of the foregoing failures by the Debtors would also constitute a breach of duties owed to estate creditors, including Cleveland Brothers. Under Chapter 11 of the Bankruptcy Code, a debtor is generally permitted to remain in control of its operations because existing management is often best positioned to guide a business through the rehabilitation process. *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 471 (3d Cir. 1998) (citing *In re V. Savino Oil & Heating Co.*, 99 B.R. 518, 524 (Bankr. E.D.N.Y. 1989)). In exchange for such authority, a debtor-in-possession owes fiduciary duties to its creditors and the estate. *Marvel Entm't.*, 140 F.3d at 471.

18. The Debtors' failure to provide Cleveland Brothers the benefit of insurance proceeds to which it is entitled would violate the Debtors' fiduciary duties by needlessly exposing estate creditors to dilution of recoveries on their claims. This is of particular significance given the existing option of having the Repair Liability satisfied via non-estate, third-party funds at no cost to the Debtors or their estates.

19. Using its powers under Bankruptcy Code § 105(a), this Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title,"

including taking any action or making any determination needed to implement court orders or rules, or to prevent an abuse of process.

20. Cleveland Brothers submits that the instant circumstances warrant an order of this Court compelling the Debtors to take any and all actions necessary and appropriate to perform their obligations under the terms of the Policies and to obtain coverage of the Repair Liability and turn over to Cleveland Brothers any related insurance proceeds that the Debtors may receive from the Insurers. Based upon the foregoing, such relief is in the best interests of the Debtors, their bankruptcy estates, and all creditors and parties in interest, and would prevent irreparable harm to Cleveland Brothers.

### **III. The Proceeds of the Policies Covering the Repair Liability Are Not Property of the Debtors' Bankruptcy Estates.**

21. While debtors' insurance *policies* are generally considered estate property, it does not necessarily follow that insurance *proceeds* are property of the bankruptcy estate. *First Fidelity Bank v. McAteer*, 985 F.2d 114, 117 (3d Cir. 1992) ("Ownership of a life insurance policy, such as involved here, does not necessarily entail ownership of the proceeds of that policy. Several different parties may have a property interest in such a policy or its proceeds, including the owner, the insured, and the beneficiary, all of whom may be different persons."); *In re Downey Fin. Corp.*, 428 B.R. 595, 602 (Bankr. D. Del 2010) ("When a debtor's liability insurance policy only provides direct coverage to the debtor, courts generally hold that the proceeds are property of the estate. Conversely, when the liability insurance policy only provides direct coverage to the directors and officers, courts generally hold that the proceeds are not property of the estate.").

22. As a general matter, the estate's interest in insurance proceeds is limited by and to the extent of the debtor's interest therein. If the owner of an insurance policy does "not have an



interest in its proceeds, the filing of the petition in bankruptcy cannot create one.” *First Fidelity Bank*, 985 F.2d at 117.

23. A number of considerations factor into whether such proceeds are property of the estate under section 541(a), including, but not limited to, the controlling terms of the applicable insurance policy and the pecuniary value of each parties’ insurable interest in the subject property loss. *See generally, In re Amiel Rest. Partners, LLC*, 510 B.R. 744 (Bankr. D. N.J. 2014). The Policies here likely limit recoveries to the amount of the “financial interest” of either the Debtors or the owner of the damaged property, and such recoveries are likely further restricted to either the “costs” of restoration or the “value” of replacement.

24. In the context of liability insurance proceeds, “[t]he overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim.” *Matter of Edgeworth*, 993 F.2d 51, 55-56 (5th Cir. 1993). “When a payment by the insurer cannot inure to the debtor’s pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.” *Id.* This Court recognized that “under the typical liability policy, the debtor will not have a cognizable interest in the proceeds of the policy. Those proceeds will normally be payable only for the benefit of those harmed by the debtor under the terms of the insurance contract.” *Id.* at 56.

25. Since Cleveland Brothers is the owner of the Equipment and the party having suffered the Repair Liability, and as an additional insured and loss payee under the Policies, it is the only party with a direct financial interest in the “costs” or “value” covered under the Policies. The Debtors, on the other hand, having incurred neither “costs” of repair nor loss of “value,” have

no financial interest entitled to direct payment of the insurance proceeds. Consequently, such proceeds are not property of the Debtor's bankruptcy estate, and instead, rightly belong to Cleveland Brothers.

26. Any other interpretation whereby the Debtors lay claim to the subject insurance proceeds without the funds being directed to the satisfaction of the Repair Liability results in a windfall for the Debtors in contradiction of the likely terms of the Policies, their obligations under the Rental Agreements, the reasonable expectations of the parties, and the principles of equity.

27. Based upon the foregoing, any and all insurance proceeds issued under the Policies to cover the Repair Liability are not property of the Debtors' bankruptcy estates under Bankruptcy Code § 541. Furthermore, Cleveland Brothers is thereby permitted to take any and all action necessary to seek, recover and accept such insurance proceeds from either the Debtors or the Insurers.

**IV. To the Extent Necessary, Relief from the Automatic Stay Should be Granted to Allow Cleveland Brothers to Take Any and All Action Necessary to Obtain the Insurance Proceeds from the Insurers.**

28. Section 362(d)(1) of the Bankruptcy Code authorizes the Court to grant relief from the stay "for cause, including the lack of adequate protection of an interest in property of such property in interest[.]" 11 U.S.C. § 362(d)(1). "Cause is a flexible concept and courts often conduct a fact intensive, case-by case balancing test, examining the totality of the circumstances to determine whether sufficient cause exists to lift the stay." *In re Downey Financial Corp.*, 428 B.R. 595, 608-09 (Bankr. D. Del. 2010). In determining "cause," courts typically consider: (1) "[w]hether any great prejudice to either the bankrupt estate or the debtor" will result from a lifting of the stay; (2) "[w]hether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor;" and (3) "[t]he probability of the creditors

prevailing on the merits.” *In re SCO Grp., Inc.*, 395 B.R. 852, 857 (Bankr. D. Del. 2007) (citing *Izzarelli v. Rexene (In re Rexene Prods. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992)).

29. As an additional insured under the Policies, Cleveland Brothers holds direct and independent contractual rights against the Insurers that are not implicated by the automatic stay. *Overton’s, Inc. v. Interstate Fire & Cas. Inc. Co. (In re Sportstuff, Inc.)*, 430 B.R. 170, 178 (8th Cir. 2010) (deciding that a bankruptcy court did “not have the jurisdiction or authority to impair or extinguish” the independent contractual rights of additional insureds when it approved a settlement agreement between the debtor and certain insurers); *see also In re SelectBuild Ill., LLC*, 2015 WL 3452542, at \*11 (Bankr. D. Del. May 28, 2015). To the extent the automatic stay could be implicated by Cleveland Brothers’ actions as an additional insured, Cleveland Brothers seeks modification of the automatic stay to allow it to proceed in accord with any rights and remedies available to it under the Policies and applicable law, including, but not limited to, recovery of the insurance proceeds in satisfaction of the Repair Liability.

30. Cleveland Brothers may hold similar direct and independent contractual rights against the Insurers as a loss payee under the Policies and as determined by applicable contracts and state law. *See e.g. Sierra Equip., Inc. v. Lexington Ins. Co.*, 890 F.3d 555, 556 (5th Cir. 2018) (recognizing that an equitable lien may lie in favor of an equipment lessor that is indicated as a loss payee under an insurance policy). To the extent these rights are also implicated by the automatic stay, Cleveland Brothers likewise seeks modification of the automatic stay to allow it to proceed in accord with any rights and remedies available to it under the Policies or applicable law, including, but not limited to, recovery of the insurance proceeds in satisfaction of the Repair Liability.

31. Assuming, *arguendo*, that the automatic stay applies to any action brought by Cleveland Brothers against the Insurers, no hardship would inure to the Debtors from granting the requested relief. In fact, satisfaction of the Repair Liability from a non-estate resource such as the Policies benefits the Debtors' estates as it prevents dilution of the recovery to other creditors, avoids unnecessary administrative expense, and does so without impacting estate property. Conversely, Cleveland Brothers will suffer significant harm as denial of the requested relief will deprive Cleveland Brothers of the ability to recover insurance proceeds to which it is otherwise entitled.

**V. Cleveland Brothers is Entitled to an Administrative Claim Under Section 503(b)(1)(A).<sup>4</sup>**

32. The Repair Liability, in the absence of satisfaction under the Policies, is entitled to immediate payment from the Debtors as a priority, administrative claim pursuant to Bankruptcy Code § 503(b)(1)(A).

33. Cleveland Brothers has invoiced the Debtors \$293,958.33 for damages on Equipment that was returned post-petition. As of the date of the Motion, this amount remains unpaid.

34. Section 503(b) provides that administrative expenses include "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). "For a claim in its entirety to be entitled to first priority under [section 503(b)(1)(A)], the debt must arise from a transaction with the debtor-in-possession. . . . [and] the consideration supporting the claimant's right to payment [must be] beneficial to the debtor-in-possession in the operation of the business." *Cramer*

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<sup>4</sup> Cleveland Brothers reserves its right to seek allowance and payment of administrative expenses claims for, *inter alia*, (i) any other damage, disrepair or destruction of Equipment that is not covered by this Motion and (ii) any unpaid post-petition amounts due for monthly rental under the Rental Agreements. Cleveland Brothers is working with the Debtors to obtain payment of post-petition monthly rental under the Rental Agreements.

*v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976); *see also Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 532-33 (3d Cir. 1999).

35. “When third parties are induced to supply goods or services to the debtor-in- possession . . . the purposes of [§503] plainly require that their claims be afforded priority.” *In re Jartran, Inc.*, 732 F.2d 584, 586 (7th Cir. 1984). *See also In re Goody’s Family Clothing, Inc.*, 610 F.3d 812, 818 (3d Cir. 2010) (quoting *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976)).

36. Cleveland Brothers has been induced to continue providing rental equipment, materials, parts, repair and support services to the Debtors. Supply of these goods, services and leases has been necessary and beneficial to the Debtors and their bankruptcy estates, as each have been essential to the Debtors’ continued construction operations and work towards completion of the Projects. Any and all damage or loss to the Equipment that likewise arises from the Debtors’ continued use thereof should accordingly be allowed as an administrative expense under Section 503(b)(1)(A) and entitled to immediate payment by the Debtors.

**VI. Cleveland Brothers Is Entitled to an Administrative Claim Under Section 365(d)(5).**

37. The Repair Liability is further entitled to treatment and immediate payment as a priority, administrative expense under Bankruptcy Code § 365(d)(5). *In re Goody’s Family Clothing, Inc.*, 610 F.3d 812, 818 (3d Cir. 2010) (holding that landlord could assert a priority, administrative claim under both 11 U.S.C. §§ 365(d)(3) and 503(b)(1)).

38. Section 365(d)(5) provides that:

The trustee shall timely perform all of the obligations of the debtor . . . first arising from or after 60 days after the order for relief . . . under an unexpired lease of personal property . . . until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice

and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof.

39. Section 365(d)(5) evinces Congress's intention to afford special protection to personal property lessors such as Cleveland Brothers. *In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) (interpreting and applying former section 365(d)(10), which was renumbered without revision to section 365(d)(5) as part of the Bankruptcy Code's 2005 BAPCPA amendments). Thereunder, a debtor must pay all sums and perform all obligations due under a personal property lease without necessitating any action of the lessor. *In re Hayes Lemmerz Int'l, Inc.* 340 B.R. at 472; *In re Eastern Agri-Systems, Inc.*, 258 B.R. 352, 355 (Bankr. E.D.N.C. 2000) ("§§ 365(d)(3) and (10) elevate rent claims above § 503(b) by creating an entitlement, not just to payment, but to actual performance under the lease. This interpretation is consistent with the legislative history of § 365(d)(10), which clearly states Congress's intent to give special protection to qualified lessors."); *In re Brennick*, 178 B.R. 305, 307-08 (Bankr. D. Mass. 1995) (noting that sections 365(d)(3) and (5) are the only provisions in the Code "requiring the estate to perform the debtor's obligations at all, much less in a timely manner. Legislative history gives the reason for the command -- the coercive nature of a lessor's extension of credit"). Furthermore, the qualifying creditor has no burden of proving either benefit or necessity for related claims to be deemed administrative expenses, as otherwise required under Section 503(b)(1). *In re Hayes Lemmerz Int'l, Inc.* 340 B.R. at 472. The only conditions precedent to this special status is the existence of a personal property lease, the passage of fifty-nine (59) days from the Petition Date, or the presence of equities dictating adjustments to the foregoing deadline.

40. Cleveland Brothers is entitled to an administrative claim under Section 365(d)(5) in the amount of all sums outstanding under the Rental Agreements arising on or after December 21, 2018, including all qualifying amounts with respect to the Repair Liability. Cleveland Brothers

has estimated, but not repaired or invoiced the Debtors for, approximately \$425,211.52 of repair damages.

41. Based upon the circumstances of the Repair Liability, this Court should determine that any and all amounts of the Repair Liability arising from the Debtors' continued use of the Equipment, regardless of and prior to December 20, 2018, likewise are entitled to immediate payment as an administrative claim under Section 365(d)(5).

42. Lastly, in the context of a Debtors' failure to observe maintenance obligations as to the Equipment, this Court has provided administrative expenses under *both* Bankruptcy Code §§ 503(b) and 365(d)(5). In *In re Hayes Lemmerz Int'l, Inc.*, Judge Mary F. Walrath held that such maintenance obligations arose on a daily basis. *In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. at 477-78. As a consequence, the Court awarded administrative expense priority pursuant to section 365(d)(5) for every day following the fifty-ninth day of the case until rejection. *Id.* In addition, this Court found that the debtors' breach of a maintenance obligation benefitted the estate by saving it the cost of performing maintenance on machines, thus also providing administrative expense priority for the first fifty-nine days of the case. *Id.*

43. Similarly here, the Debtors' breach of its maintenance obligations under the Rental Agreements with respect to the Equipment occurred each day required maintenance was not performed, and the Repair Liability related thereto should be accorded priority, administrative treatment from the date of breach and continuing until rejection. For purposes of Section 503(b)(1), the Debtors' breach benefitted the estate by saving it the cost of performing maintenance on the damaged Equipment. Cleveland Brothers is therefore entitled to an administrative expense in the amount of the Repair Liability pursuant to both Bankruptcy Code §§ 503(b) and 365(d)(5).

**WAIVER OF BANKRUPTCY RULE 4001(a)(3)**

44. Bankruptcy Rule 4001(a)(3) provides that “[a]n order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 4001(a)(3).

45. The Debtor has not obtained from the Insurers and turned over to Cleveland Brothers the amount necessary to satisfy its Repair Liability. Accordingly, Cleveland Brothers requests that, to the extent relief from the automatic stay is necessary, this Court grant such relief effective immediately.

**NOTICE**

46. Notice of this Motion will be provided to: (i) counsel to the Debtors (ii) the Office of the United States Trustee for the District of Delaware; (iii) counsel to the Official Committee of Unsecured Creditors; (iv) counsel to the DIP Lender; (v) counsel to Federal Insurance; and (vii) those parties entitled to receive notice pursuant to Bankruptcy Rule 2002.



WHEREFORE, Cleveland Brothers respectfully requests that the Court (i) enter the proposed order, substantially in the form attached hereto as Exhibit A, and (ii) grant such further relief to Cleveland Brothers as is appropriate.

Dated: January 23, 2019  
Wilmington, Delaware

Respectfully submitted,

**REED SMITH LLP**

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Equipment Co., Inc.*

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

WELDED CONSTRUCTION, L.P., *et al.*,<sup>1</sup>  
  
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PLEASE TAKE NOTICE that on January 23, 2019, Cleveland Brothers Equipment Co., Inc. ("Cleveland Brothers"), by and through its counsel, filed with the United States Bankruptcy Court for the District of Delaware its Motion For An Order (I) Compelling Debtors To Perform Their Obligation Under Their Insurance Policies To Obtain Coverage And Turn Over Proceeds; (II) Determining That Certain Insurance Proceeds Are Not Property Of Debtors' Estates; (III) Granting Relief From The Automatic Stay As To Insurers; And (IV) Allowing Administrative Claims And Directing Immediate Payment Thereof (the "Motion").

**A HEARING ON THE MOTION WILL BE HELD ON FEBRUARY 13, 2019, AT 10:00 A.M.** before the Honorable Kevin Gross, United States Bankruptcy Judge, at the United States Bankruptcy Court for the District of Delaware, Marine Midland Plaza, 824 Market Street, Sixth Floor, Courtroom No. 3, Wilmington, DE 19801.

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<sup>1</sup> 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 26933 Eckel Road, Perrysburg, OH 43551.

You are required to file a response (and the supporting documentation required by Local Rule 4001-1(d) to the Motion on or before **February 6, 2019, at 4:00 p.m. (Eastern)** with the Clerk of the United States Bankruptcy Court for the District of Delaware, Marine Midland Plaza, 824 Market Street, 3rd Floor, Wilmington, DE 19801.

At the same time, you must also serve a copy of the response so as to be received by that time by Cleveland Brothers' counsel: Kurt F. Gwynne, Esquire and Jason D. Angelo, Esquire; Reed Smith LLP; 1201 Market Street, Suite 1500; Wilmington, DE 19801; Email: kgwynne@reedsmith.com and jangelo@reedsmith.com.

The hearing date specified above may be a preliminary hearing or may be consolidated with the final hearing, as determined by the Court.

The attorneys for the parties shall confer with respect to the issues raised by the Motion in advance for the purpose of determining whether a consent judgment may be entered and/or for the purpose of stipulating to relevant facts such as value of the property, and the extent and validity of any security instrument.

*[Remainder of Page Intentionally Left Blank]*

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT  
MAY GRANT THE RELIEF REQUESTED BY THE MOTION WITHOUT FURTHER  
NOTICE OF HEARING.

Dated: January 23, 2019  
Wilmington, Delaware

Respectfully submitted,

**REED SMITH LLP**

By: /s/ Kurt F. Gwynne  
Kurt F. Gwynne (No. 3951)  
Jason D. Angelo (No. 6009)  
1201 Market Street, Suite 1500  
Wilmington, Delaware 19801  
Telephone: (302) 778-7500  
Facsimile: (302) 778-7575  
Email: kgwynne@reedsmith.com  
Email: jangelo@reedsmith.com

*Counsel to Cleveland Brothers  
Equipment Co., Inc.*

**EXHIBIT A**

**Proposed Order**

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

WELDED CONSTRUCTION, L.P., *et al.*,<sup>1</sup>  
  
Debtors.

Chapter 11

Case No. 18-12378 (KG)  
(Jointly Administered)

Re: Docket No. \_\_\_\_\_

ORDER GRANTING

MOTION OF CLEVELAND BROTHERS EQUIPMENT CO., INC. FOR AN ORDER  
(I) COMPELLING DEBTORS TO PERFORM THEIR OBLIGATIONS UNDER THEIR  
INSURANCE POLICIES TO OBTAIN COVERAGE AND TURN OVER PROCEEDS;  
(II) DETERMINING THAT CERTAIN INSURANCE PROCEEDS ARE NOT  
PROPERTY OF DEBTORS' ESTATES; (III) GRANTING RELIEF FROM THE  
AUTOMATIC STAY AS TO INSURERS; AND (IV) ALLOWING ADMINISTRATIVE  
CLAIMS AND DIRECTING IMMEDIATE PAYMENT THEREOF

Upon the motion (the "**Motion**")<sup>2</sup> of Cleveland Brothers Equipment Co., Inc. ("**Cleveland Brothers**") for entry of an order (i) compelling the Debtors pursuant to section 105 of title 11 of the United States Code (the "**Bankruptcy Code**") to take any and all action necessary to perform their obligations under the Policies and to obtain coverage of the Repair Liability and to turn over any related insurance proceeds to Cleveland Brothers; (ii) determining that proceeds under the Policies with regard to the Repair Liability are not property of the Debtors' bankruptcy estates; and (iii) to the extent necessary, granting relief from the automatic stay to allow Cleveland Brothers to recover the Repair Liability directly against the Insurers under the Policies and applicable state law, and (iv) allowing, and directing the Debtors to pay, administrative claims; all as more fully set forth in the Motion; and this Court having jurisdiction to consider the Motion and the relief

<sup>1</sup> 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 26933 Eckel Road, Perrysburg, OH 43551.

<sup>2</sup> Capitalized terms not defined in this Order have the meanings ascribed to such terms in the Motion.

requested therein 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 February 29, 2012; and in consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the parties listed therein, and it appearing that no other or further notice need be provided; and this Court having reviewed the Motion; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates, creditors, and all parties in interests; and after notice and an opportunity for a hearing pursuant to 11 U.S.C. § 102(1), and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY FOUND THAT:

A. Any and all insurance proceeds under the Policies to cover the Repair Liability are not and shall not be property of the Debtors' bankruptcy estates under 11 U.S.C. § 541.

B. The automatic stay under 11 U.S.C. § 362(a) does not apply to any action that Cleveland Brothers may take to proceed in accordance with and enforce any rights and remedies available to it under the Policies or applicable law, including, but not limited to, as an additional insured or loss payee under the Policies, and may take any and all direct action against the Insurers necessary to seek, recover and obtain coverage of the Repair Liability (and any other claims relating to damage to, failure to repair, or destruction of, the Equipment) under such Policies, including any and all action necessary to seek, recover and accept any insurance proceeds.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.

2. The Debtors shall take any and all action necessary to perform their obligations under the Policies and to obtain coverage of the Repair Liability, including, but not limited to, submitting a claim to the Insurers for the Repair Liability, and the Debtors shall further take any and all action necessary to and are hereby directed to turn over to Cleveland Brothers any and all insurance proceeds related to coverage of the Repair Liability.

3. To the extent necessary, Cleveland Brothers is hereby granted relief from the automatic stay under 11 U.S.C. § 362(d) to proceed in accordance with and enforce any rights and remedies available to it under the Policies or applicable law, including, but not limited to, as an additional insured or loss payee under the Policies, and may take any and all direct action against the Insurers necessary to seek, recover and obtain coverage of the Repair Liability (and any other claims relating to damage to, failure to repair, or destruction of, the Equipment) under such Policies, including any and all action necessary to seek, recover and accept any insurance proceeds.

4. The Debtors are likewise authorized take any such action as may be necessary or appropriate to perform their obligations under the relief granted by this Order, including, but not limited to, executing and delivering all instruments and documents that might arise in connection with the Policies, the Repair Liability or insurance proceeds or payments.

5. The Repair Liability shall be and hereby is allowed in its entirety as a priority, administrative claim pursuant to 11 U.S.C. §§ 365(d)(5) and 503(b)(1) in the amount of \$\_\_\_\_\_ (the “**Administrative Claim**”).

6. Within two (2) business days after entry of this Order, the Debtors shall pay to the Administrative Claim to Cleveland Brothers.

7. Notwithstanding any provision in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure to the contrary: (a) this Order shall be effective and enforceable



immediately upon its entry; (b) any stay imposed by Federal Rule of Bankruptcy Procedure 4001(a)(3) or otherwise, to the extent applicable, is hereby waived; and (c) Cleveland Brothers is authorized and empowered, and may in its discretion and without further delay, take any and all action necessary or appropriate to implement the relief granted in this Order.

8. The Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

**EXHIBIT B**

**Sample Rental Agreement  
With Terms and Conditions**

**RENTAL AGREEMENT**  
**AGREEMENT #: T61359**

ONE CALL RENTALS

CRANBERRY 724-776-1400  
11 PROGRESS AVE.  
CRANBERRY TWP, PA 16066**DOC DATE:** 09/05/2018 WED**ACCOUNT #:** 0110589  
**BILL TO CUSTOMER:** CLEVELAND BROTHERS EQUIPMENT  
**ADDRESS:** CB MINING USE ONLY  
4565 WILLIAM PENN HIGHWAY  
MURRYSVILLE, PA 15668**SHIP TO/JOBSITE:** CUSTOMER PICKUP  
**CONTACT NAME:** CHRIS ROSKO  
**CONTACT PHONE:** 412-477-4163  
**SHIP TO ADDRESS:** WASHINGTON BRANCH  
35 BROWNLEE ROAD  
EIGHTY FOUR, PA, 15330**ORDERED BY:** CHRIS ROSKO  
**PHONE:** 412-477-4163  
**PO #:****CREATED BY:** GREGORY J. BEAVERS  
**SALES REP:** GENERAL LINE HOUSE ACCT  
**SALESMAN:** 20**DATE OUT:** 09/05/2018 WED  
**CAT RENTAL STORE:** CRANBERRY  
**STORE:** 42

QTY	DESCRIPTION	MACHINE ID	SERIAL NUMBER	DAY	WEEK	4WEEK
		160249	0LJ800615			

**RENTAL ITEMS****ORDER NOTES**ENV'T FEE OF \$20 WILL BE CHARGED ON EACH INVOICE  
FUEL WILL BE CHARGED AT \$6.50 PER GALLON  
HOURS ALLOWED: 8/DAY, 40/WEEK, 160/ 4 WEEK PERIOD  
UPON END OF RENTAL, CALL FOR RELEASE NUMBER**COURTESY NOTIFICATION. DOES NOT RELIEVE CUSTOMER'S OBLIGATION TO IMMEDIATELY NOTIFY ITS CARRIER.**

\_\_\_\_\_ Yes, I will accept Cleveland Brothers Equipment Co., Inc. (Owner) Loss Damage Waiver (LDW) for physical damage at a cost of 14% of the rental plus sales tax.  
This protection is subject to a deductible amount of 2% of dollar value of Unit with a minimum of \$1,500 and a maximum of \$5,000.

\_\_\_\_\_ No, I decline Cleveland Brothers Equipment Co., Inc. Loss Damage Waiver (LDW). I will provide a certificate of insurance providing physical damage coverage. If a certificate is not received upon delivery of the rental unit, I agree to accept Owner's Loss Damage Waiver. See below Insurance Value.

See Owner's web-site, [www.clevelandbrothers.com](http://www.clevelandbrothers.com), for LDW Terms & Conditions.**LDW will not be credited after one month from invoice date.**

This is your authorization to immediately bind all risk insurance coverage on the Equipment for its full insurance value stated in this agreement naming Cleveland Brothers Equipment Co., Inc. and/or its assigns loss payee with a 30-day cancellation notice. General Liability with limits of at least \$1,000,000.00 per occurrence with Owner listed as the additional insured and with a waiver of subrogation in favor of the Owner. Please send certificate(s) of insurance as evidence of coverage to Cleveland Brothers Equipment Co., Inc. - Insurance Department, 4565 William Penn Highway, Murrysville PA 15668-2016. Phone: 724-327-1300.

INSURER: \_\_\_\_\_

**X**

CUSTOMER SIGNATURE

NAME PRINTED

TERMS AND CONDITIONS are located on the back of the customer copy.

1. Customer is responsible for all terms and conditions of this Agreement, including the front and back of this page. Rentals will be invoiced on a 28 day cycle.
2. Contract includes each piece of equipment described above and all attachments, accessories, replacement parts and safety items, whether installed by or at the expense of Cleveland Brothers (Owner) or Customer, and all proceeds thereof.
3. Customer shall maintain Equipment in accordance with machine operating and maintenance guide. Customer shall pay for all repairs due to fault of Customer, maintain unit in proper condition, providing fuel, oil, filters, lube, ground engaging tools, anti-freeze, replace broken glass, make adjustments for damaged tires, make adjustments for pre-mature undercarriage wear, and all other repairs beyond the normal wear and tear determined by the Owner. Customer has read and agrees to the undercarriage/tire excessive wear and damage agreement - please see Owner's web-site, [www.clevelandbrothers.com](http://www.clevelandbrothers.com).
4. Customer is responsible for all transportation costs, assembly, and disassembly.
5. Unless Customer provides Owner with a certificate of insurance or other evidence acceptable to Owner of the insurance coverage required by Owner, Customer shall pay Owner for a Loss Damage Waiver (LDW) at the rate indicated on the front of the contract. LDW is subject to the terms and conditions of Owner's commercial inland marine insurance. Even if Customer pays for the LDW, Customer will be responsible to pay for all damage not covered by the LDW and CUSTOMER WILL BE RESPONSIBLE TO PAY FOR ANY DAMAGE UP TO THE AMOUNT OF THE LDW DEDUCTIBLE. See Cleveland Brothers website, [www.clevelandbrothers.com](http://www.clevelandbrothers.com), for Loss Damage Waiver Terms & Conditions. If Customer damages Unit, resulting in significant down time (longer than 1 month), Customer will continue to be invoiced for rental.
6. CUSTOMER SHALL NOT USE EQUIPMENT AT A JOB SITE OR OTHER SITE AT WHICH HAZARDOUS SUBSTANCES ARE PRESENT, UNLESS OWNER IS NOTIFIED. IN THE EVENT THAT CUSTOMER USES ANY EQUIPMENT AT A JOB SITE WHICH HAZARDOUS SUBSTANCES ARE PRESENT, CUSTOMER SHALL CERTIFY THAT THE EQUIPMENT IS RETURNED TO OWNER IN A CLEAN AND UNCONTAMINATED CONDITION.
7. An environmental fee will be added (\$20 - construction, 1% of rental - engine) for each piece of equipment rented. Refueling fee is currently 7.50 per gallon, however, may change without notice based on Owner's standard rate. Lost key charge is \$10.00.
8. Customer must call to terminate rental - a release number will be issued. Customer is responsible for released equipment until it is returned to or picked up by Cleveland Brothers.
9. This machine will not be available for purchase unless a new RPO contract or sale contract is installed. Cleveland Brothers reserves the right to swap this machine with a like kind unit without notice.
10. OWNER DISCLAIMS ALL WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE. No agent, employee or representative of Owner has any authority to bind Owner to any warranty concerning any Equipment transferred under this section. Customer acknowledges that Owner is not the manufacturer of the Equipment.
11. Standard Demonstration terms are two days or 10 hours use. Any hours used during a demonstration beyond 10 hours will result in an hourly or daily charge at book rental rates.
12. Equipment may be rented daily (a day is 24 hours, or any portion thereof), weekly (a week is 7 calendar days from the Delivery Date), or 4 week period, and may be operated for a corresponding number of hours (Allocated Hours). Equipment rented daily may be operated for up to 8 hours per day; Equipment rented weekly, up to 40 hours per week; and Equipment rented 4 week period, up to 160 hours per 4 week period. Customer shall pay Rent from the date Equipment is shipped by Owner (Start Date) to the End Date and CUSTOMER WILL PAY THE FULL RENT FOR THE PERIOD EVEN IF CUSTOMER OPERATES ANY EQUIPMENT FOR LESS THAN THE FULL NUMBER OF ALLOCATED HOURS. Customer shall notify Owner on the date that Customer desires the rental period to terminate. Owner shall issue a release number during its normal business hours. The date on which Customer receives such release number is referred to as the End Date. In the event that any Equipment is operated for more than its Allocated Hours (as indicated by the Equipment's HOUR service meter), Customer shall pay, in addition to the Rent, an hourly overtime charge equal to: (a) if rented daily, 1/8 of the daily Rent; (b) if rented weekly, 1/40 of the weekly Rent; and (c) if rented 4 week period, 1/160 of the monthly Rent.
13. Customer shall not make any modifications, additions, or changes in any Equipment except with Owner's written consent. Owner shall perform any and all repairs to Equipment. Customer shall pay for all repairs to Equipment at Owner's prevailing rates unless repairs are necessitated by normal wear and tear as determined by Owner.
14. Customer shall immediately notify OWNEN of all mechanical failures, damage to Equipment and other conditions requiring repair. FAILURE TO NOTIFY OWNER OF THESE CONDITIONS WILL OBLIGATE CUSTOMER FOR ALL REPAIR COSTS INCLUDING WEAR AND TEAR.
15. Customer shall obtain and maintain property insurance, insuring all Equipment against "all risk," for an amount not less than the replacement cost of all Equipment, and commercial general liability insurance in amounts satisfactory to Owner, naming Owner, its successors and/or assigns additional insured and loss payee at its interest may appear, and requiring 30 days notice to Owner of any cancellation, non-renewal, or material change in coverage. All insurance policies shall be with carriers acceptable to Owner. Customer shall comply with all terms of any insurance policy and shall notify Owner in writing immediately upon the occurrence of any loss, theft, destruction or damage of any Equipment. WHEN RENTING LICENSED VEHICLES, CUSTOMER SHALL NAME OWNER AS ADDITIONAL INSURED UNDER CUSTOMER'S AUTOMOBILE LIABILITY INSURANCE AND LOSS PAYEE UNDER THE CUSTOMER'S AUTOMOBILE PHYSICAL DAMAGE INSURANCE FOR RENTED VEHICLES AND CERTIFICATE WILL BE PROVIDED TO OWNER.
16. Customer assumes all responsibility for the selection of the Equipment as appropriate to achieve the results intended by Customer. ALL EQUIPMENT SHALL BE RENTED BY CUSTOMER "AS IS."
17. Owner's sole liability and Customer's sole remedies in any cause of action based on contract, tort or otherwise in connection with the Equipment, shall be: (i) if EQUIPMENT is not operational during any rental period for more than 24 hours, to issue a credit, prorated on an hourly basis based on the applicable rental rate, to Customer for any time during a rental period that EQUIPMENT is not operational, provided that OWNER is timely notified that such EQUIPMENT is not operational; (ii) replace EQUIPMENT with similar EQUIPMENT, subject to availability; or (iii) terminate the rental of SUCH EQUIPMENT. In no event shall OWNER be liable to Customer or any third party for any claims, losses or damages arising from or related to this Agreement or the rental of EQUIPMENT. OWNER shall not be liable for any special, indirect, consequential, punitive or incidental damages (including without limitation lost profits, loss of goodwill and business interruption) arising out of or related to this Agreement or the rental of EQUIPMENT. Customer waives and releases OWNER from all other claims and damages arising out of any inability to operate any EQUIPMENT (including compensatory, anticipatory, consequential, exemplary and punitive damages) and all claims and damages sounding in tort.
18. Customer shall provide a skilled, or if required by law or regulation, licensed and/or certified operator for the Equipment, who shall be an employee of Customer or, if Customer is an individual, may be Customer (Customer shall be solely responsible for all wages, taxes, insurance, and benefits related to Customer's employment of operators);
19. Customer shall indemnify, defend and hold Owner and its successors and assigns, and their shareholders, directors, officers, employees, agents, and representatives (collectively, the "Indemnified Parties") harmless against loss, claims, liabilities, costs and expenses, including reasonable attorneys' fees, arising out of, in connection with, or resulting from: (i) the use or possession of Equipment by Customer; (ii) personal injuries and property damage whether caused by Customer, Owner or third parties, including, without limited to personal injuries to Owner's employees resulting from exposure to hazardous substances; (iii) Customer's negligence, gross negligence or willful misconduct; (iv) product defect (including latent defect) and product liability; (v) employees or their legal representatives, spouses, parents, dependents, next of kin and anyone otherwise entitled to receive damages for the injury or death of an employee of Customer, in accordance with Section 481(b) of the Pennsylvania Workmen's Compensation Act; (vi) any breach of any representation or warranty made by Customer in this Agreement or in any other agreement between Owner and Customer or any applicable term or condition indicated on the Web Site; (vii) the breach by Customer of any covenant or agreement of Customer contained in this Agreement or in any other agreement between Owner and Customer; and/or (viii) the enforcement of this Section; and Customer shall reimburse Owner for any legal or other expenses reasonably incurred by it, when incurred, in connection with investigating or defending any such claims, demands, causes of action, fines, penalties, judgments, appeals, settlements, losses, liabilities or obligations. Customer shall provide Owner with prompt notice of any proceeding involving this indemnity and with any documents related to such proceedings.
20. Customer shall not: (i) assign, encumber, sublet, or otherwise transfer any Equipment; (ii) assign or delegate any of its obligations under this Agreement; or (iii) lend or otherwise permit any Equipment to be used by anyone other than Customer or its employees. Location of Equipment: Customer is not to part with Possession of the Equipment, either voluntarily or involuntarily, or remove from the original job-site location as stated on front page or assign any right hereunder without the prior consent of the Owner.
21. No credit shall be issued and Customer shall be solely responsible for Customer's inability to operate any Equipment caused by any act or omission of any nature, including, but not limited to, fire or other casualty, delay in transportation of materials, weather conditions, delay in governmental approvals, labor disputes or any other cause beyond Customer's control.
22. Owner shall have the right to inspect any Equipment at any time and, if necessary, Customer shall provide Owner with access to any Job Site for such purpose.
23. Customer shall provide additional safety guards or devices not included with any Equipment, which may be required by federal or state law, and any rule or regulation.
24. Customer assumes and shall bear the risk of loss of and damage to Equipment from any cause whatsoever (including, without limitation, theft), regardless of whether the risk is insured, from the moment that Equipment is delivered to a common carrier at Owner's location and Customer shall bear the risk of loss until Equipment is redelivered to Owner's location, notwithstanding that the End Date may occur prior to the date Equipment is redelivered to Owner's location.
25. Equipment shall be returned to Owner full of fuel, in clean condition, and free of hazardous substances, with all attachments, accessories, replacement parts, and safety items, except for ordinary wear and tear from normal use and operation, as determined by Owner. If Equipment is not returned in such condition, Customer shall pay all costs for repairing, refueling and/or cleaning the Equipment.
26. If Customer has been approved for credit by Owner, Owner shall invoice Customer for all Rent and other charges in arrears. Payment shall be due upon Customer's receipt of Owner's invoice. If Customer has not been approved for credit by Owner, Customer shall pay the entire estimated Rent, Security Deposit, and all other charges in cash prior to delivery of Equipment. Customer shall pay interest at 3% per month on any amount due under this Agreement and unpaid from the date such amount is due until the date it is paid. Payment Terms: Due the last day of the rental period. Subject to Credit Approval
27. This Agreement shall be effective on the Contract Date and shall continue until all Equipment is returned to Owner or it is terminated in accordance with this section. Owner may terminate this Agreement, for any reason or for no reason, by delivering written notice to the other party ten (10) days prior to such termination, provided, that if such termination is as a result of the breach of Customer, such termination shall be effective immediately. Customer's obligations shall survive termination of this Agreement and the return of all Equipment.
28. Title to Equipment shall remain in Owner at all times. Customer shall, at its own expense, protect and defend Owner's title against all liens, claims and encumbrances asserted by or through Customer and its creditors. Equipment shall remain personal property and shall not become a fixture or accession to real property, regardless of any attachment to real property.
29. Customer's obligation to pay Rent and other charges is absolute and unconditional, regardless of any set-off, counterclaim, defense or other right which Customer may have or claim against Owner, or any interruption or cessation of Customer's use or possession of any Equipment.
30. Default by Customer shall occur: (i) if there is any misrepresentation made by, or breach of any warranty of, Customer contained in this Agreement or any other agreement between Owner and Customer; (ii) upon the breach by Customer of any covenant or agreement of Customer contained in this Agreement or any applicable term or condition indicated on the Web Site; (iii) if bankruptcy, insolvency, receivership, liquidation or dissolution proceedings are instituted by or against Customer. Customer makes any assignment for the benefit of creditors, Customer is unable to pay its obligations as they become due, or Owner, in good faith, believes that the prospect of payment of Rent or other charges due under this Agreement is impaired or Owner deems itself insecure; or (iv) if any Equipment is seized under legal process or becomes subject to a lien, claim or encumbrance asserted by or through Customer or any of its creditors. (b) Upon a Default by Customer, Owner, at its discretion, may take one or more of the following actions: (i) terminate this Agreement; or (ii) exercise any and all remedies available at law or in equity, including, without limitation those described on the Web Site ([www.clevelandbrothers.com](http://www.clevelandbrothers.com)). Customer shall reimburse Owner for all costs, including reasonable attorneys' fees, incurred by Owner as a result of any Default by Customer or otherwise enforcing this Agreement. In any proceeding by Owner to recover possession of Equipment, Owner shall not be required to post a bond or other security or undertaking, and Customer hereby waives any right to require, and any requirement for, any such bond or other security or undertaking.
31. The undersigned represents (i) that he or she is an officer, employee, agent or representative of Customer, authorized to enter this Agreement on behalf of Customer, (ii) that Customer has the requisite company, corporate, or partnership power and authority to enter into and perform its obligations under this Agreement, and (iii) the execution and delivery of this Agreement, and performance of Customer's obligations hereunder, have been authorized by all necessary company, corporate, or partnership action and constitute valid and binding obligations of Customer, enforceable in accordance with their terms.
32. All notices hereunder shall be in writing; delivered by electronic mail, facsimile, commercial overnight or same-day delivery service with all delivery costs paid by sender, or by registered or certified mail with postage prepaid, return receipt requested; and addressed to Customer or Owner at its respective address indicated on the Front.
33. No provision of this Agreement and no right or obligation of either party under this Agreement may be waived except by an instrument in writing signed by the waiving party. No waiver of any default, remedy or course of conduct shall operate as a waiver of any other prior or subsequent default, whether of the same or a different nature. This Agreement shall be governed by the laws of Pennsylvania. Customer agrees that any claims made by Customer shall be filed in the Court of Common Pleas of Dauphin County, PA or the U.S. District Court for the Middle District of Pennsylvania, which Courts shall have nonexclusive jurisdiction of all such claims. Customer shall not assert that either of such Courts lacks personal jurisdiction over the Customer or request a transfer of venue from either of such Courts on the basis of improper venue or inconvenience. Customer consents to the transfer to either of such Courts, at Owner's request, of any claim, action or proceeding brought in any other court, forum or arbitral tribunal. If any provision of this Agreement is held invalid, the remainder of this Agreement will not be invalidated or affected thereby. This writing (including the incorporated Web Site terms and conditions) is intended by the parties as a final, complete and exclusive expression of their agreement. This Agreement may be amended only by an instrument in writing signed by Owner and Customer.
34. CUSTOMER HEREBY EMPOWERS THE PROTHONOTARY OR ANY ATTORNEY OF ANY COURT OF RECORD WITHIN THE UNITED STATES OR ELSEWHERE TO APPEAR FOR DEBTOR AND, WITH OR WITHOUT ONE OR MORE DECLARATIONS FILED, CONFESS A JUDGMENT OR JUDGMENTS AGAINST DEBTOR IN FAVOR OF THE HOLDER HEREOF, AS OF ANY TERM, FOR THE UNPAID BALANCE, INCLUDING LATE CHARGES, FINANCE CHARGES, SERVICE CHARGES OR INTEREST AS WELL AS DAMAGE INVOICES AND THE SERVICE CHARGE OR LATE CHARGE OR OVERDUE RENTAL PAYMENT CHARGE BY WHATEVER NAME USED AND WHETHER INVOICED OR NOT, TOGETHER WITH COSTS OF COLLECTION AND REASONABLE ATTORNEY'S FEES FOR COLLECTION, WITH RELEASE OF ALL ERRORS AND WITHOUT STAY OF EXECUTION, AND INQUISITION AND EXTENSION UPON ANY LEVY OR REAL ESTATE IS HEREBY WAIVED AND CONDEMNATION AGREED TO AND THE EXEMPTION OF ALL PROPERTY FROM LEVY AND SALE ON ANY EXECUTION THEREON AND EXEMPTION OF WAGES FROM ATTACHMENT, ARE ALSO HEREBY EXPRESSLY WAIVED, AND NO BENEFIT OF EXEMPTION SHALL BE CLAIMED UNDER OR BY VIRTUE OF ANY EXEMPTION LAW NOW IN FORCE OR WHICH MAY HEREAFTER BE ENACTED.
35. In the event this machine is equipped with Product Link, I understand data concerning this machine, its condition, and its operation is being transmitted by Product Link to Caterpillar Inc., its affiliates (Caterpillar), and/or its dealers to better serve me and to improve upon Caterpillar products and services. The information transmitted may include: machine serial number, machine location, and operational data, including but not limited to: fault codes, emissions data, fuel usage, service meter hours, software and hardware version numbers, and installed attachments. Caterpillar will not sell or rent collected information to any other third party and will exercise reasonable efforts to keep the information secure. Caterpillar Inc. recognizes and respects customer privacy. I agree to allow this data to be accessed by Caterpillar and/or its dealers.

1. Customer is responsible for all terms and conditions of this Agreement, including the front and back of this page. Rentals will be invoiced on a 28 day cycle.
2. Contract includes each piece of equipment described above and all attachments, accessories, replacement parts and safety items, whether installed by or at the expense of Cleveland Brothers (Owner) or Customer, and all proceeds thereof.
3. Customer shall maintain Equipment in accordance with machine operating and maintenance guide. Customer shall pay for all repairs due to fault of Customer, maintain unit in proper condition, providing fuel, oil, filters, lube, ground engaging tools, anti-freeze, replace broken glass, make adjustments for damaged tires, make adjustments for pre-mature undercarriage wear, and all other repairs beyond the normal wear and tear determined by the Owner. Customer has read and agrees to the undercarriage/tire excessive wear and damage agreement - please see Owner's web-site, [www.clevelandbrothers.com](http://www.clevelandbrothers.com).
4. Customer is responsible for all transportation costs, assembly, and disassembly.
5. Unless Customer provides Owner with a certificate of insurance or other evidence acceptable to Owner of the insurance coverage required by Owner, Customer shall pay Owner for a Loss Damage Waiver (LDW) at the rate indicated on the front of the contract. LDW is subject to the terms and conditions of Owner's commercial inland marine insurance. Even if Customer pays for the LDW, Customer will be responsible to pay for all damage not covered by the LDW and CUSTOMER WILL BE RESPONSIBLE TO PAY FOR ANY DAMAGE UP TO THE AMOUNT OF THE LDW DEDUCTIBLE. See [Cleveland Brothers website, www.clevelandbrothers.com](http://www.clevelandbrothers.com), for Loss Damage Waiver Terms & Conditions. If Customer damages Unit, resulting in significant down time (longer than 1 month), Customer will continue to be invoiced for rental.
6. CUSTOMER SHALL NOT USE EQUIPMENT AT A JOB SITE OR OTHER SITE AT WHICH HAZARDOUS SUBSTANCES ARE PRESENT, UNLESS OWNER IS NOTIFIED. IN THE EVENT THAT CUSTOMER USES ANY EQUIPMENT AT A JOB SITE WHICH HAZARDOUS SUBSTANCES ARE PRESENT, CUSTOMER SHALL CERTIFY THAT THE EQUIPMENT IS RETURNED TO OWNER IN A CLEAN AND UNCONTAMINATED CONDITION.
7. An environmental fee will be added (\$20 - construction, 1% of rental - engine) for each piece of equipment rented. Refueling fee is currently 7.50 per gallon, however, may change without notice based on Owner's standard rate. Lost key charge is \$10.00.
8. Customer must call to terminate rental - a release number will be issued. Customer is responsible for released equipment until it is returned to or picked up by Cleveland Brothers.
9. This machine will not be available for purchase unless a new RPO contract or sale contract is installed. Cleveland Brothers reserves the right to swap this machine with a like kind unit without notice.
10. OWNER DISCLAIMS ALL WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE. No agent, employee or representative of Owner has any authority to bind Owner to any warranty concerning any Equipment transferred under this section. Customer acknowledges that Owner is not the manufacturer of the Equipment.
11. Standard Demonstration terms are two days or 10 hours use. Any hours used during a demonstration beyond 10 hours will result in an hourly or daily charge at book rental rates.
12. Equipment may be rented daily (a day is 24 hours, or any portion thereof), weekly (a week is 7 calendar days from the Delivery Date), or 4 week period, and may be operated for a corresponding number of hours (Allocated Hours). Equipment rented daily maybe operated for up to 8 hours per day; Equipment rented weekly, up to 40 hours per week; and Equipment rented 4 week period, up to 160 hours per 4 week period. Customer shall pay Rent from the date Equipment is shipped by Owner (Start Date) to the End Date and CUSTOMER WILL PAY THE FULL RENT FOR THE PERIOD EVEN IF CUSTOMER OPERATES ANY EQUIPMENT FOR LESS THAN THE FULL NUMBER OF ALLOCATED HOURS. Customer shall notify Owner on the date that Customer desires the rental period to terminate. Owner shall issue a release number during its normal business hours. The date on which Customer receives such release number is referred to as the End Date. In the event that any Equipment is operated for more than its Allocated Hours (as indicated by the Equipment's HOUR service meter), Customer shall pay, in addition to the Rent, an hourly overtime charge equal to: (a) if rented daily, 1/8 of the daily Rent; (b) if rented weekly, 1/40 of the weekly Rent; and (c) if rented 4 week period, 1/160 of the monthly Rent.
13. Customer shall not make any modifications, additions, or changes in any Equipment except with Owner's written consent. Owner shall perform any and all repairs to Equipment. Customer shall pay for all repairs to Equipment at Owner's prevailing rates unless repairs are necessitated by normal wear and tear as determined by Owner.
14. Customer shall immediately notify OWNIN of all mechanical failures, damage to Equipment and other conditions requiring repair. FAILURE TO NOTIFY OWNER OF THESE CONDITIONS WILL OBLIGATE CUSTOMER FOR ALL REPAIR COSTS INCLUDING WEAR AND TEAR.
15. Customer shall obtain and maintain property insurance, insuring all Equipment against "all risk," for an amount not less than the replacement cost of all Equipment, and commercial general liability insurance in amounts satisfactory to Owner, naming Owner, its successors and/or assigns additional insured and loss payee at its interest may appear, and requiring 30 days notice to Owner of any cancellation, non-renewal, or material change in coverage. All insurance policies shall be with carriers acceptable to Owner. Customer shall comply with all terms of any insurance policy and shall notify Owner in writing immediately upon the occurrence of any loss, theft, destruction or damage of any Equipment. WHEN RENTING LICENSED VEHICLES, CUSTOMER SHALL NAME OWNER AS ADDITIONAL INSURED UNDER CUSTOMER'S AUTOMOBILE LIABILITY INSURANCE AND LOSS PAYEE UNDER THE CUSTOMER'S AUTOMOBILE PHYSICAL DAMAGE INSURANCE FOR RENTED VEHICLES AND CERTIFICATE WILL BE PROVIDED TO OWNER.
16. Customer assumes all responsibility for the selection of the Equipment as appropriate to achieve the results intended by Customer. ALL EQUIPMENT SHALL BE RENTED BY CUSTOMER "AS IS."
17. Owner's sole liability and Customer's sole remedies in any cause of action based on contract, tort or otherwise in connection with the Equipment, shall be: (i) if EQUIPMENT is not operational during any rental period for more than 24 hours, to issue a credit, prorated on an hourly basis based on the applicable rental rate, to Customer for any time during a rental period that EQUIPMENT is not operational, provided that OWNER is timely notified that such EQUIPMENT is not operational; (ii) replace EQUIPMENT with similar EQUIPMENT, subject to availability; or (iii) terminate the rental of SUCH EQUIPMENT. In no event shall OWNER be liable to Customer or any third party for any claims, losses or damages arising from or related to this Agreement or the rental of EQUIPMENT. OWNER shall not be liable for any special, indirect, consequential, punitive or incidental damages (including without limitation lost profits, loss of goodwill and business interruption) arising out of or related to this Agreement or the rental of EQUIPMENT. Customer waives and releases OWNER from all other claims and damages arising out of any inability to operate any EQUIPMENT (including compensatory, anticipatory, consequential, exemplary and punitive damages) and all claims and damages sounding in tort.
18. Customer shall provide a skilled, or if required by law or regulation, licensed and/or certified operator for the Equipment, who shall be an employee of Customer or, if Customer is an individual, may be Customer (Customer shall be solely responsible for all wages, taxes, insurance, and benefits related to Customer's employment of operators);
19. Customer shall indemnify, defend and hold Owner and its successors and assigns, and their shareholders, directors, officers, employees, agents, and representatives (collectively, the "Indemnified Parties") harmless against loss, claims, liabilities, costs and expenses, including reasonable attorneys' fees, arising out of, in connection with, or resulting from: (i) the use or possession of Equipment by Customer; (ii) personal injuries and property damage whether caused by Customer, Owner or third parties, including, without limited to personal injuries to Owner's employees resulting from exposure to hazardous substances; (iii) Customer's negligence, gross negligence or willful misconduct, (iv) product defect (including latent defect) and product liability, (v) employees or their legal representatives, spouses, parents, dependents, next of kin and anyone otherwise entitled to receive damages for the injury or death of an employee of Customer, in accordance with Section 481(b) of the Pennsylvania Workmen's Compensation Act; (vi) any breach of any representation or warranty made by Customer in this Agreement or in any other agreement between Owner and Customer or any applicable term or condition indicated on the Web Site; (vii) the breach by Customer of any covenant or agreement of Customer contained in this Agreement or in any other agreement between Owner and Customer; and/or (viii) the enforcement of this Section; and Customer shall reimburse Owner for any legal or other expenses reasonably incurred by it, when incurred, in connection with investigating or defending any such claims, demands, causes of action, fines, penalties, judgments, appeals, settlements, losses, liabilities or obligations. Customer shall provide Owner with prompt notice of any proceeding involving this indemnity and with any documents related to such proceedings.
20. Customer shall not: (i) assign, encumber, sublet, or otherwise transfer any Equipment; (ii) assign or delegate any of its obligations under this Agreement; or (iii) lend or otherwise permit any Equipment to be used by anyone other than Customer or its employees. Location of Equipment: Customer is not to part with Possession of the Equipment, either voluntarily or involuntarily, or remove from the original job-site location as stated on front page or assign any right hereunder without the prior consent of the Owner.
21. No credit shall be issued and Customer shall be solely responsible for Customer's inability to operate any Equipment caused by any act or omission of any nature, including, but not limited to, fire or other casualty, delay in transportation of materials, weather conditions, delay in governmental approvals, labor disputes or any other cause beyond Customer's control.
22. Owner shall have the right to inspect any Equipment at any time and, if necessary, Customer shall provide Owner with access to any Job Site for such purpose.
23. Customer shall provide additional safety guards or devices not included with any Equipment, which may be required by federal or state law, and any rule or regulation.
24. Customer assumes and shall bear the risk of loss of and damage to Equipment from any cause whatsoever (including, without limitation, theft), regardless of whether the risk is insured, from the moment that Equipment is delivered to a common carrier at Owner's location and Customer shall bear the risk of loss until Equipment is redelivered to Owner's location, notwithstanding that the End Date may occur prior to the date Equipment is redelivered to Owner's location.
25. Equipment shall be returned to Owner full of fuel, in clean condition, and free of hazardous substances, with all attachments, accessories, replacement parts, and safety items, except for ordinary wear and tear from normal use and operation, as determined by Owner. If Equipment is not returned in such condition, Customer shall pay all costs for repairing, refueling and/or cleaning the Equipment.
26. If Customer has been approved for credit by Owner, Owner shall invoice Customer for all Rent and other charges in arrears. Payment shall be due upon Customer's receipt of Owner's invoice. If Customer has not been approved for credit by Owner, Customer shall pay the entire estimated Rent, Security Deposit, and all other charges in cash prior to delivery of Equipment. Customer shall pay interest at 3% per month on any amount due under this Agreement and unpaid from the date such amount is due until the date it is paid. Payment Terms: Due the last day of the rental period. Subject to Credit Approval
27. This Agreement shall be effective on the Contract Date and shall continue until all Equipment is returned to Owner or it is terminated in accordance with this section. Owner may terminate this Agreement, for any reason or for no reason, by delivering written notice to the other party ten (10) days prior to such termination, provided that if such termination is as a result of the breach of Customer, such termination shall be effective immediately. Customer's obligations shall survive termination of this Agreement and the return of all Equipment.
28. Title to Equipment shall remain in Owner at all times. Customer shall, at its own expense, protect and defend Owner's title against all liens, claims and encumbrances asserted by or through Customer and its creditors. Equipment shall remain personal property and shall not become a fixture or accession to real property, regardless of any attachment to real property.
29. Customer's obligation to pay Rent and other charges is absolute and unconditional, regardless of any set-off, counterclaim, defense or other right which Customer may have or claim against Owner, or any interruption or cessation of Customer's use or possession of any Equipment.
30. Default by Customer shall occur: (i) if there is any misrepresentation made by, or breach of any warranty of, Customer contained in this Agreement or any other agreement between Owner and Customer; (ii) upon the breach by Customer of any covenant or agreement of Customer contained in this Agreement or any applicable term or condition indicated on the Web Site; (iii) if bankruptcy, insolvency, receivership, liquidation or dissolution proceedings are instituted by or against Customer, Customer makes any assignment for the benefit of creditors, Customer is unable to pay its obligations as they become due, or Owner, in good faith, believes that the prospect of payment of Rent or other charges due under this Agreement is impaired or Owner deems itself insecure; or (iv) if any Equipment is seized under legal process or becomes subject to a lien, claim or encumbrance asserted by or through Customer or any of its creditors. (b) Upon a Default by Customer, Owner, at its discretion, may take one or more of the following actions: (i) terminate this Agreement; or (ii) exercise any and all remedies available at law or in equity, including, without limitation those described on the Web Site ([www.clevelandbrothers.com](http://www.clevelandbrothers.com)). Customer shall reimburse Owner for all costs, including reasonable attorneys' fees, incurred by Owner as a result of any Default by Customer or otherwise enforcing this Agreement. In any proceeding by Owner to recover possession of Equipment, Owner shall not be required to post a bond or other security or undertaking, and Customer hereby waives any right to require, and any requirement for, any such bond or other security or undertaking.
31. The undersigned represents (i) that he or she is an officer, employee, agent or representative of Customer, authorized to enter this Agreement on behalf of Customer, (ii) that Customer has the requisite company, corporate, or partnership power and authority to enter into and perform its obligations under this Agreement, and (iii) the execution and delivery of this Agreement, and performance of Customer's obligations hereunder, have been authorized by all necessary company, corporate, or partnership action and constitute valid and binding obligations of Customer, enforceable in accordance with their terms.
32. All notices hereunder shall be in writing; delivered by electronic mail, facsimile, commercial overnight or same-day delivery service with all delivery costs paid by sender, or by registered or certified mail with postage prepaid, return receipt requested; and addressed to Customer or Owner at its respective address indicated on the Front.
33. No provision of this Agreement and no right or obligation of either party under this Agreement may be waived except by an instrument in writing signed by the waiving party. No waiver of any default, remedy or course of conduct shall operate as a waiver of any other prior or subsequent default, whether of the same or a different nature. This Agreement shall be governed by the laws of Pennsylvania. Customer agrees that any claims made by Customer shall be filed in the Court of Common Pleas of Dauphin County, PA or the U.S. District Court for the Middle District of Pennsylvania, which Courts shall have nonexclusive jurisdiction of all such claims. Customer shall not assert that either of such Courts lacks personal jurisdiction over the Customer or request a transfer of venue from either of such Courts on the basis of improper venue or inconvenience. Customer consents to the transfer to either of such Courts, at Owner's request, of any claim, action or proceeding brought in any other court, forum or arbitral tribunal. If any provision of this Agreement is held invalid, the remainder of this Agreement will not be invalidated or affected thereby. This writing (including the incorporated Web Site terms and conditions) is intended by the parties as a final, complete and exclusive expression of their agreement. This Agreement may be amended only by an instrument in writing signed by Owner and Customer.
34. CUSTOMER HEREBY EMPOWERS THE PROTHONOTARY OR ANY ATTORNEY OF ANY COURT OF RECORD WITHIN THE UNITED STATES OR ELSEWHERE TO APPEAR FOR DEBTOR AND, WITH OR WITHOUT ONE OR MORE DECLARATIONS FILED, CONFESS A JUDGMENT OR JUDGMENTS AGAINST DEBTOR IN FAVOR OF THE HOLDER HEREOF, AS OF ANY TERM, FOR THE UNPAID BALANCE, INCLUDING LATE CHARGES, FINANCE CHARGES, SERVICE CHARGES OR INTEREST AS WELL AS DAMAGE INVOICES AND THE SERVICE CHARGE OR LATE CHARGE OR OVERDUE RENTAL PAYMENT CHARGE BY WHATEVER NAME USED AND WHETHER INVOICED OR NOT, TOGETHER WITH COSTS OF COLLECTION AND REASONABLE ATTORNEY'S FEES FOR COLLECTION, WITH RELEASE OF ALL ERRORS AND WITHOUT STAY OF EXECUTION, AND INQUISITION AND EXTENSION UPON ANY LEVY OR REAL ESTATE IS HEREBY WAIVED AND CONDEMNATION AGREED TO AND THE EXEMPTION OF ALL PROPERTY FROM LEVY AND SALE ON ANY EXECUTION THEREON AND EXEMPTION OF WAGES FROM ATTACHMENT, ARE ALSO HEREBY EXPRESSLY WAIVED, AND NO BENEFIT OF EXEMPTION SHALL BE CLAIMED UNDER OR BY VIRTUE OF ANY EXEMPTION LAW NOW IN FORCE OR WHICH MAY HEREAFTER BE ENACTED.
35. In the event this machine is equipped with Product Link, I understand data concerning this machine, its condition, and its operation is being transmitted by Product Link to Caterpillar Inc., its affiliates (Caterpillar), and/or its dealers to better serve me and to improve upon Caterpillar products and services. The information transmitted may include: machine serial number, machine location, and operational data, including but not limited to: fault codes, emissions data, fuel usage, service meter hours, software and hardware version numbers, and installed attachments. Caterpillar will not sell or rent collected information to any other third party and will exercise reasonable efforts to keep the information secure. Caterpillar Inc. recognizes and respects customer privacy. I agree to allow this data to be accessed by Caterpillar and/or its dealers.

**EXHIBIT C**

**Certificate of Insurance**



# CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)  
05/01/2018

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

**IMPORTANT:** If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

**PRODUCER**  
MCGRUFF, SEIBELS & WILLIAMS, INC.  
P.O. Box 10265  
Birmingham, AL 35202

**CONTACT NAME:** Shanna Sibley  
**PHONE (A/C, No, Ext):** 800-476-2211  
**E-MAIL ADDRESS:** ssibley@mcgriff.com

**FAX (A/C, No):**

## INSURER(S) AFFORDING COVERAGE

NAIC #

**INSURER A:** Zurich American Insurance Company

16535

**INSURER B:**

**INSURER C:**

**INSURER D:**

**INSURER E:**

**INSURER F:**

**INSURED**  
Welded Construction, L.P.  
Ohio Welded Company  
P.O. Box 470  
Perrysburg, OH 43552

## COVERAGES

**CERTIFICATE NUMBER:** 22ZDFYZK

**REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC OTHER:			GLO948243307	05/01/2018	05/01/2019	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 300,000 MED EXP (Any one person) \$ 5,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMP/OP AGG \$ 2,000,000 \$
	<b>AUTOMOBILE LIABILITY</b> <input type="checkbox"/> ANY AUTO <input type="checkbox"/> OWNED AUTOS ONLY <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS ONLY <input type="checkbox"/> NON-OWNED AUTOS ONLY						COMBINED SINGLE LIMIT (Ea accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$ \$
	<b>UMBRELLA LIAB</b> <input type="checkbox"/> OCCUR <b>EXCESS LIAB</b> <input type="checkbox"/> CLAIMS-MADE DED <input type="checkbox"/> RETENTION \$						EACH OCCURRENCE \$ AGGREGATE \$ \$
	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N	N/A				PER STATUTE <input type="checkbox"/> OTH-ER <input type="checkbox"/> E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$ \$ \$ \$ \$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

RE: Subject to Leased/Rented Equipment Below

Cleveland Brothers Equipment Co., Inc. and/or its assigns are Additional Insured under General Liability (Lessor of Leased Equipment) and Loss Payee with respect to Leased/Rented Equipment under Contractors Equipment coverage as required by written contract. A Waiver of Subrogation applies with respect to General Liability as required by written contract. A 30 day Notice of Cancellation is included by the General Liability policy in favor of the Certificate Holder if required by written contract.

## CERTIFICATE HOLDER

## CANCELLATION

Cleveland Brothers Equipment Co., Inc.  
Insurance Department  
4565 William Penn Highway  
Murrysville, PA 15668

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

AGENCY CUSTOMER ID: \_\_\_\_\_

LOC #: \_\_\_\_\_

**ADDITIONAL REMARKS SCHEDULE****Page 2 of 2**

<b>PRODUCER</b> MCGRUFF, SEIBELS & WILLIAMS, INC.		<b>INSURED</b> Welded Construction, L.P. Ohio Welded Company
<b>POLICY NUMBER</b>		
<b>CARRIER</b>	<b>NAIC CODE</b>	<b>ISSUE DATE:</b> 05/01/2018

**ADDITIONAL REMARKS****THIS ADDITIONAL REMARKS FORM IS A SCHEDULE TO ACORD FORM,****FORM NUMBER:** \_\_\_\_\_ **FORM TITLE:** \_\_\_\_\_**Contractors Equipment & Installation:**

Carrier: Charter Oak Fire Insurance Company  
 Policy No.: QT6608733M872COF18  
 Effective Date: 05/01/2018  
 Expiration Date: 05/01/2019

**Equipment Limits:**

Scheduled Items on file with Company: \$66,787,630  
 Maximum any one item - Owned Equipment \$1,000,000  
 Parts & Inventory - in trailers at job sites \$100,000  
 Tank Truck Contents - \$10,000  
 Leased or Rented Any one Item: \$1,000,000  
 Leased, Rented or Loaned To Others - \$1,000,000  
 Earth Movement \$25,000,000  
 Flood \$25,000,000

**Valuation:**

Actual Cash Value except Replacement Cost on Items 5 years old or newer

**Equipment Deductibles:**

Basic Deductible - \$10,000  
 Miscellaneous Unlisted Items: \$1,000  
 Parts & Inventory (trailers at job sites): \$5,000  
 Tank Truck Contents: \$500  
 Earthquake/Flood/Windstorm Deductible \$10,000

**Installation:**

Basic Limit of Insurance - \$5,000,000  
 Temporary Storage: \$1,000,000  
 Transit: \$1,000,000  
 Earth Movement Annual Aggregate - \$5,000,000  
 Flood Annual Aggregate - \$5,000,000

**Installation Deductibles:**

Basic Deductible - \$2,500 except  
 Earth Movement Deductible - \$25,000  
 Flood Deductible - \$25,000



**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

WELDED CONSTRUCTION, L.P., *et al.*,<sup>1</sup>  
  
Debtors.

Chapter 11

Case No. 18-12378 (KG)  
(Jointly Administered)

**CERTIFICATE OF SERVICE**

I, John B. Lord, an employee of Reed Smith LLP, do hereby certify that, on this 23rd day of January, 2019, a true and correct copy of the **MOTION OF CLEVELAND BROTHERS EQUIPMENT CO., INC. FOR AN ORDER (I) COMPELLING DEBTORS TO PERFORM THEIR OBLIGATION UNDER THEIR INSURANCE POLICIES TO OBTAIN COVERAGE AND TURN OVER PROCEEDS; (II) DETERMINING THAT CERTAIN INSURANCE PROCEEDS ARE NOT PROPERTY OF DEBTORS' ESTATES; (III) GRANTING RELIEF FROM THE AUTOMATIC STAY AS TO INSURERS; AND (IV) ALLOWING ADMINISTRATIVE CLAIMS AND DIRECTING IMMEDIATE PAYMENT THEREOF** was electronically filed via the Court's CM/ECF system and thereby served on those parties having consented to electronic service and was also served separately on the parties on the attached service list via First Class United States Mail.

---

<sup>1</sup> 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 26933 Eckel Road, Perrysburg, OH 43551.

Dated: January 23, 2019

By: /s/ John B. Lord  
John B. Lord  
Bankruptcy Paralegal  
**REED SMITH LLP**  
1201 Market Street, Suite 1500  
Wilmington, DE 19801  
E-mail: [jlord@reedsmith.com](mailto:jlord@reedsmith.com)

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Murrysville, PA 15668

**Commonwealth of Pennsylvania, Department  
of Labor and Industry**

Deb Secrest, Collections Support Unit  
651 Boas St Room 702  
Harrisburg, PA 17121

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Dover, DE 19903

**Delaware State Treasury**

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**Internal Revenue Service**

Centralized Insolvency Operation  
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Philadelphia, PA 19101-7346

**Internal Revenue Service**

Centralized Insolvency Operation  
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Philadelphia, PA 19104

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**PipeLine Machinery International, LP**

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