

**IN THE 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:**  
) **To be determined**  
)  
) **Objection Deadline:**  
) **February 15, 2019 at 4:00 p.m. (ET)**

**DEBTORS' FIFTH OMNIBUS MOTION FOR ENTRY OF AN ORDER, PURSUANT TO  
SECTIONS 105(a) AND 365(a) OF THE BANKRUPTCY CODE, AUTHORIZING THE  
DEBTORS TO REJECT CERTAIN UNEXPIRED LEASES AND EXECUTORY  
CONTRACTS**

**\*ANY PARTY RECEIVING THIS MOTION SHOULD LOCATE ITS  
NAME AND ITS REJECTED AGREEMENT IDENTIFIED ON  
SCHEDULE 1 TO THE PROPOSED ORDER.**

The above-captioned debtors and debtors in possession (together, the “**Debtors**”) hereby file this motion (this “**Motion**”) for entry of an order (the “**Proposed Order**”), substantially in the form attached hereto as Exhibit A, authorizing, but not directing, the Debtors to reject those certain unexpired leases and executory contracts set forth on Schedule 1 to this Order (collectively, the “**Rejected Agreements**”),<sup>2</sup> effective as of the date of the entry of the Proposed Order (the “**Rejection Effective Date**”). In support of this Motion, the Debtors rely

<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> The inclusion of any contract, lease, or agreement on Schedule 1 to the Proposed Order is not intended as, nor shall be deemed to constitute, an admission by the Debtors or their estates that such contract, lease, or agreement is or is not an executory contract or unexpired lease. The Debtors and their estates reserve any and all rights, claims, and defenses with respect to the characterization of the Rejected Agreements under section 365 of the Bankruptcy Code, applicable non-bankruptcy law, or otherwise, including, without limitation, any and all rights to argue that they do not constitute executory contracts or unexpired leases.



upon and incorporate by reference the *Declaration of Frank Pometti in Support of Debtors' Chapter 11 Petitions and First-Day Motions* [Docket No. 4] (the “**First Day Declaration**”).<sup>3</sup> In further support of this Motion, the Debtors respectfully state as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over these chapter 11 cases and this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012 (the “**Amended Standing Order**”). This is a core proceeding pursuant to 28 U.S.C. § 157(b) and this is a proceeding for which the Court may enter a final order under Article III of the U.S. Constitution. Venue of these chapter 11 cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a) and 365 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “**Bankruptcy Code**”), and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

### **BACKGROUND**

#### **I. General**

3. On October 22, 2018 (the “**Petition Date**”), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner. An official committee of unsecured creditors (the “**Committee**”) was appointed on October 30, 2018.

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<sup>3</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the First Day Declaration.

4. Additional information regarding the Debtors' businesses, capital structure, and the circumstances leading to the filing of these chapter 11 cases is set forth in the First Day Declaration.

## **II. Rejection of the Rejected Agreements**

5. The Debtors have evaluated the Rejected Agreements and determined that the Rejected Agreements are no longer necessary to the Debtors' operations or beneficial to their estates. Thus, the Debtors submit that rejecting the Rejected Agreements is appropriate and, importantly, will avoid further risks or costs that may be associated with the Rejected Agreements on a postpetition basis, if any.

### **RELIEF REQUESTED**

6. By this Motion, to preserve and maximize the value of their estates, the Debtors seek to reject the Rejected Agreements, effective as of the Rejection Effective Date.

### **BASIS FOR RELIEF**

7. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor-in-possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). As courts have held, "[t]he purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to 'renounce title to and abandon burdensome property.'" *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) (quoting 2 *Collier on Bankruptcy* ¶ 365.01[1] (15th ed. 1993)).

8. The standard applied to determining whether the rejection of an unexpired lease or executory contract should be authorized is the "business judgment" standard. *Sharon Steel Corp. v. Nat'l Fuel Gas Distr. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *In re HQ Global*

*Holdings, Inc.*, 290 B.R. 507, 511 (Bankr. D. Del. 2003) (stating that a debtor’s decision to reject an executory contract is governed by the business judgment standard and can only be overturned if the decision was the “product of bad faith, whim, or caprice”); *see also In re Tayfur*, 599 Fed. Appx. 44, 49–50 (3d Cir. 2015) (extending the standard articulated in *Sharon Steel* to unexpired leases). Once a debtor states a valid business justification, “[t]he business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

9. The business judgment rule is crucial in chapter 11 cases and shields a debtor’s management from judicial second-guessing. *See Comm. of Asbestos Related Litigants and/or Creditors v. Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) (“The Code favors the continued operation of a business by a debtor and a presumption of reasonableness attached to a debtor’s management decisions.”). Generally, courts defer to a debtor-in-possession’s business judgment to reject a lease or an executory contract. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984), *superseded by statute on other grounds*, Bankruptcy Amendments and Federal Judgeship Act of 1984, sec. 541, § 1113, Pub. L. No. 98-353, 98 Stat. 333 (codified at 11 U.S.C. § 1113); *In re Minges*, 602 F.2d 38, 43 (2d Cir. 1979); *In re Riodizio*, 204 B.R. 417, 424–25 (Bankr. S.D.N.Y. 1997); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994).

10. Upon finding that the Debtors have exercised their sound business judgment in determining that the rejection of the Rejected Agreements is in the best interests of

the Debtors and their estates, the Court should approve the proposed rejections under section 365(a) of the Bankruptcy Code. *See, e.g., Westbury Real Estate Ventures, Inc. v. Bradlees, Inc. (In re Bradlees Stores, Inc.)*, 194 B.R. 555, 558, n.1 (Bankr. S.D.N.Y. 1996); *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (holding that, absent extraordinary circumstances, court approval of a debtor's decision to assume or reject an executory contract "should be granted as a matter of course"). If a debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. *See, e.g., Sharon Steel Corp.*, 872 F.2d at 39–40. The Debtors have determined that the Rejected Agreements are not integral to the Debtors' chapter 11 efforts, are not otherwise beneficial to the Debtors' estates, and present burdensome contingent liabilities. Accordingly, the Debtors' decision to reject the Rejected Agreements is an exercise of sound business judgment, and rejection should be approved.

11. Here, the Debtors submit that the Court should authorize the rejection of each of the Rejected Agreements effective as of the Rejection Effective Date. The Rejected Agreements provide no benefit to the Debtors' estates because they are no longer necessary to the Debtors. On the other hand, requiring the Debtors to continue to perform under the Rejected Agreements after the Rejection Effective Date could impose onerous obligations on the Debtors and their estates, potentially forcing the Debtors to incur unnecessary administrative charges for the Rejected Agreements that do not provide a benefit to the estate that is equal to or greater than the cost to the estate.

12. In light of the foregoing facts and circumstances, the Debtors respectfully submit that their rejection of each of the Rejected Agreements under section 365 of the Bankruptcy Code, effective as of the Rejection Effective Date, is a sound exercise of their

business judgment, and is necessary, prudent, and in the best interests of the Debtors, their estates, and their creditors.

**RESERVATION OF RIGHTS**

13. Nothing contained herein should be construed as a waiver of any of the Debtors' rights, defenses, or counterclaims with respect to the Rejected Agreements, nor does anything contained herein constitute an acknowledgement that any of the Rejected Agreements constitute an unexpired lease or an executory contract under section 365 of the Bankruptcy Code, and have not otherwise expired by its own terms or upon agreement of the parties.

**NOTICE**

14. Notice of this Motion has been provided to: (i) the Office of the United States Trustee for the District of Delaware; (ii) counsel to the Committee; (iii) counsel to the Debtors' post-petition lenders; (iv) the counterparties to the Rejected Agreements; and (v) all parties who, as of the filing of this Motion, have filed a notice of appearance and request for service of papers in these chapter 11 cases pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Order, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: February 1, 2019  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Betsy L. Feldman

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M. Blake Cleary (No. 3614)  
Sean M. Beach (No. 4070)  
Allison S. Mielke (No. 5934)  
Betsy L. Feldman (No. 6410)  
Rodney Square, 1000 North King Street  
Wilmington, DE 19801  
Telephone: (302) 571-6600  
Facsimile: (302) 571-1253

*Counsel to the Debtors*

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

In re:

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

Debtors.

)  
) Chapter 11

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) Case No. 18-12378 (KG)

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) (Jointly Administered)

)  
) **Hearing Date:**  
) To be determined

)  
) **Objection Deadline:**  
) February 15, 2019 at 4:00 p.m. (ET)

**NOTICE OF MOTION**

**\*ANY PARTY RECEIVING THE MOTION SHOULD LOCATE ITS  
NAME AND ITS REJECTED AGREEMENT IDENTIFIED ON  
SCHEDULE 1 TO THE PROPOSED ORDER.**

TO: (I) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (II) COUNSEL TO THE COMMITTEE; (III) COUNSEL TO THE DEBTORS' POST-PETITION LENDERS; (IV) THE COUNTERPARTIES TO THE REJECTED AGREEMENTS; AND (V) ALL PARTIES WHO, AS OF THE FILING OF THE MOTION, HAVE FILED A NOTICE OF APPEARANCE AND REQUEST FOR SERVICE OF PAPERS IN THESE CHAPTER 11 CASES PURSUANT TO BANKRUPTCY RULE 2002.

**PLEASE TAKE NOTICE** that the above captioned debtors and debtors in possession (collectively, the "Debtors") have filed the *Debtors' Fifth Omnibus Motion For Entry Of An Order, Pursuant To Sections 105(a) and 365(a) of the Bankruptcy Code, Authorizing the Debtors to Reject Certain Unexpired Leases and Executory Contracts* (the "Motion").

**PLEASE TAKE FURTHER NOTICE** that any objections or responses to the relief requested in the Motion must be filed on or before **February 15, 2019 at 4:00 p.m. (ET)** (the "Objection Deadline") with the United States Bankruptcy Court for the District of Delaware, 824 N. Market Street, 3<sup>rd</sup> Floor, Wilmington, Delaware 19801. At the same time, copies of any responses or objections to the Motion must be served upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline. Questions about the Motion or Schedule 1 to the Proposed Order should be directed to Young Conaway Stargatt & Taylor, LLP,

<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.



Rodney Square, 1000 North King Street, Wilmington, Delaware 19801 (Attn: Betsy L. Feldman, Esq.).

**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON A DATE AND TIME TO BE DETERMINED BEFORE THE HONORABLE KEVIN GROSS IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 N. MARKET STREET, 6TH FLOOR, COURTROOM NO. 3, WILMINGTON, DELAWARE 19801.**

**PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS OR RESPONSES TO THE MOTION ARE TIMELY FILED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED THEREIN WITHOUT FURTHER NOTICE OR A HEARING.**

Dated: February 1, 2019  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Betsy L. Feldman

M. Blake Cleary (No. 3614)  
Sean M. Beach (No. 4070)  
Allison S. Mielke (No. 5934)  
Betsy L. Feldman (No. 6410)  
Rodney Square  
1000 North King Street  
Wilmington, DE 19801  
Telephone: (302) 571-6600  
Facsimile: (302) 571-1253

*Counsel to the Debtors*

**EXHIBIT A**

**Proposed Order**

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

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In re:

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

Debtors.

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)  
) Chapter 11  
)  
) Case No. 18-12378 (KG)  
)  
) (Jointly Administered)  
)  
) **Ref. Docket No.** \_\_\_\_\_

**ORDER, PURSUANT TO SECTIONS 105(a) AND 365(a) OF THE BANKRUPTCY  
CODE, AUTHORIZING THE DEBTORS TO REJECT CERTAIN UNEXPIRED  
LEASES AND EXECUTORY CONTRACTS**

Upon the motion [Docket No. \_\_\_\_] (the “**Motion**”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) for the entry of an order, pursuant to sections 105(a) and 365 of the Bankruptcy Code, authorizing the Debtors to reject those certain unexpired leases and executory contracts set forth on Schedule 1 to this Order (collectively, the “**Rejected Agreements**”), effective as of the date of the entry of this Order (the “**Rejection Effective Date**”); and upon consideration of the First Day Declaration and the record of these chapter 11 cases; and it appearing that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 1334 and 157, and the Amended Standing Order; and it appearing that this is a core matter pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order consistent with Article III of the United States Constitution; and it appearing that venue of these chapter 11 cases and of the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that due and adequate notice of the Motion has been given under the circumstances, and that no other or further notice need be given; and it appearing that the relief requested in the

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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.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest, and an appropriate exercise of the Debtors' business judgment; and after due deliberation and sufficient cause appearing therefor; it is hereby

**ORDERED THAT:**

1. The Motion is GRANTED as set forth herein.
2. Pursuant to sections 105(a) and 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006, the Rejected Agreements, to the extent not previously terminated in accordance with their applicable terms or upon agreement of the parties, are hereby rejected by the Debtors, with such rejection being effective as of the Rejection Effective Date.
3. Nothing herein shall prejudice the rights of the Debtors to: (a) assert that the Rejected Agreements (i) were terminated prior to the Rejection Effective Date, or (ii) are not executory contracts or unexpired leases under 365 of the Bankruptcy Code or otherwise valid contractual agreements; (b) assert that any claim for damages arising from the rejection of the Rejected Agreements is limited to the remedies available under any applicable termination provision of the Rejected Agreements; (c) assert that any such claim is an obligation of a third party and not that of the Debtors or their estates; or (d) otherwise contest any claims that may be asserted in connection with the Rejected Agreements.
4. Pursuant to that certain *Order Establishing Deadlines for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof* [Docket No. 403], any claims arising out of the rejection of the Rejected Agreements must be filed on or before 5:00 p.m. (prevailing Eastern Time) on the date that is thirty-five (35) days after the entry of this Order. This Order shall be served on the counterparties to the Rejected Agreements no later than the date that is five (5) days after the entry of this Order.

5. The Debtors are authorized to execute and deliver all instruments and documents, and take such other actions as may be necessary or appropriate, to implement and effectuate the relief granted by this Order.

6. This Order is immediately effective and enforceable, notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or otherwise.

7. The requirements in Bankruptcy Rule 6006 are satisfied.

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

**Schedule 1**

**Rejected Agreements**

<b><u>Counterparty</u></b>	<b><u>Counterparty Address</u></b>	<b><u>Rejected Agreement</u></b>
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 3/2/2017, for 160 mats on Leach Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 3/2/2017, for 6,000 mats on Leach Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 3/25/2017, for 40 mats on Leach Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 4/24/2017, for 36 mats on Leach Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 5/15/2017, for 64 mats on Leach Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 6/21/2017, for 1,000 mats on Leach Xpress Pipeline.

Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 4/13/2018, for 1,500 mats on Mountaineer Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 4/13/2018, for 1,841 mats on Mountaineer Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 4/13/2018, for 3,000 mats on Mountaineer Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 6/25/2018, for 504 mats on Mountaineer Xpress Pipeline.
Viking Mat Company, a division of Gopher Mats, LLC	7615 Smetana Lane Eden Prairie, MN 55344  Email: Tom.Hamilton@fctg.com Fax: 952-941-4633	Viking Mat Company Lease Agreement, entered into as of 8/9/2018, for 72 mats on Mountaineer Xpress Pipeline.