

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

In re:

WELDED CONSTRUCTION, L.P., *et al.*,

Debtors.¹

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)

Related Docket No. 455

**OBJECTION OF GOPHER MATS, LLC TO 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**

Gopher Mats, LLC d/b/a Viking Mat Company (“**Gopher**”), by and through its attorneys, hereby submits this objection (the “**Objection**”) to 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* [Docket No. 455] (the “**Motion**”). In support of this Objection, Gopher respectfully states as follows:

BACKGROUND

A. CHAPTER 11 CASES.

1. On October 22, 2018 (the “**Petition Date**”), Welded filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “**Court**”).

¹ The debtors in these chapter 11 cases (the “**Debtors**”), 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, Perr



2. 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.

B. GOPHER EQUIPMENT LEASES.

3. Gopher is a lessor to and a creditor of Debtor Welded Construction, L.P. (“**Welded**”). Prepetition, Gopher, operating under the trade name “Viking Mat Company,” leased timber mats (“**Mats**”) to Welded pursuant to written lease agreements (collectively, the “**Equipment Leases**”).²

4. Mats are used to facilitate the efficient and safe transport of heavy machinery and construction site equipment to locations in rugged terrain. Due to the nature of their use, Mats often sustain significant damage and may be rendered unusable during a lease term. As a result, the Equipment Leases include both rental and damage provisions.

5. In addition to a specified rental rate for the Mats (the “**Rental Fees**”), the Equipment Leases obligate Welded to pay a per-Mat damage rate for any Mats classified as destroyed and/or non-useable over and above a permitted rate of attrition, in addition to transportation and disposal costs of damaged Mats (the “**Mat Damages**”).

6. Each Equipment Lease specifies the number and type of Mats leased pursuant to that agreement and the designated project for which their use is permitted. Pursuant to the Equipment Leases (and in each case, in accordance with the terms thereof), Gopher contracted to supply Mats for three of Debtors’ projects. Under six of the Equipment Leases, Gopher agreed to supply a total of 7,297 mats to the Debtors’ segment of work on the Leach Xpress Pipeline

² A summary chart of the Equipment Leases is attached hereto as Exhibit A. Copies of the Equipment Leases are in the possession of the Debtors, and will be provided to a party-in-interest upon appropriate request, subject to reasonable confidentiality requirements of Gopher.

(the “**Leach Leases**”). Under five of the Equipment Leases, Gopher agreed to supply a total of 7,010 mats to the Debtors’ segment of work on the Mountaineer Xpress Pipeline (the “**Mountaineer Leases**”).³

7. The Equipment Leases also specify a designated lease term. Seven of the Equipment Leases would have expired in accordance with their own terms before the Petition Date, and the remaining four Equipment Leases have expiration dates in early 2019. However, each of the Equipment Leases incorporates Gopher’s standard “General Conditions of Lease.” The general conditions provide, in relevant part, that “[s]hould Lessee retain the Mats beyond the specified term, the term shall be extended at the rental rate prorated for the extension period, *provided that notice at least ten (10) days prior to expiration of the minimum term is provided to the Lessor.* In the event of any such extension, Lessee will provide a minimum of ten (10) days written notification of intent to return Mats to Lessor.”

8. No notice of extension was ever provided by the Debtors to Gopher and no extension period has been specified for any of the Equipment Leases. Nonetheless, Welded has continued its use and possession of the Mats, even after the relevant Equipment Lease would have expired.⁴ Therefore, by their own terms, each of the Equipment Leases has been extended through Welded’s continued use and possession of the leased Mats, and the failure to provide any notice of intent to return the Mats to Gopher, not even in the Debtors’ Motion before the Court seeking to reject the Equipment Leases.

³ Additionally, under a single lease agreement Gopher agreed to supply 1,000 mats to the Debtors’ segment of work on the Atlantic Sunrise Pipeline (the “**Atlantic Sunrise Lease**”). The Atlantic Sunrise Lease was not included in the Debtors’ Motion, and is therefore not included in the term “Equipment Leases” as used in this Objection.

⁴ In addition, on information and belief, certain Mats subject to the Leach Leases have been repurposed by the Debtors and are presently being used on the Mountaineer Xpress Pipeline project, in violation of the underlying Equipment Leases.

OBJECTIONS

I. IF THE REJECTION MOTION IS APPROVED, THE EFFECTIVE DATE OF REJECTION SHOULD BE THE DATE UPON WHICH GOPHER RECEIVES THE MATS FROM THE DEBTORS PURSUANT TO THE TERMS OF THE EQUIPMENT LEASES

9. The Motion is silent as to the return of the Mats owned by Gopher currently in Welded's possession. As of the filing of this Objection, there are currently 8,635 Mats still in use by Welded under the Equipment Leases and therefore unavailable for Gopher to take immediate possession.⁵

10. Pursuant to the terms of the Equipment Leases, among other things, Welded is obligated to return all of the Mats to Gopher at Gopher's designated receiving point of origin within ten days of the conclusion of the Term.⁶ Welded's continued use of Gopher's property causes continuous damage as the Mats depreciate on a day to day basis due to the heavy-duty wear and tear they sustain in construction use. The Debtors should not be allowed to reject the Equipment Leases unless and until all of the Mats are returned, simply to try and avoid administrative claim liability. *See In re Muma Servs.*, 279 B.R. 478, 486-9 (Bankr. D. Del. 2002) (rejection would be deemed when each container was actually returned to lessor and lessor was entitled to administrative claims for post-petition usage); *In re Fleming Cos.*, 308 B.R. 689, 692 (Bankr. D. Del. 2004) (assumption of a

⁵ This amount includes 6,533 Mats leased to Welded under the Mountaineer Leases and 2,102 Mats leased to Welded under the Leach Leases. There are an additional 888 Mats currently being used by Welded under the Atlantic Sunrise Lease, that are not addressed in the Debtors' Motion or this Objection.

⁶ The Equipment Leases all contain language substantially similar to the following:

RETURN OF MATS: Lessee agrees to return the Mats to Lessor at Lessor's designated receiving point of origin unencumbered and in the same condition as when received by Lessee, excepting reasonable wear and tear resulting from normal and proper use. If Lessee fails to return Mats within ten (10) days of the termination date of this Agreement, Lessor shall have the right to enter upon the premises where the Mats may be and take possession of and remove the Mats at Lessee's expense, with or without legal process, without liability to Lessor. Lessee hereby waives any claims for damages which it might otherwise have by reason of any such entry, taking or removal, including claims for trespass. If the Mats, when returned to or recovered by Lessor, are not in good condition and repair, Lessor may, at Lessee's expense payable on demand as additional rent, make all repairs and replacements necessary to place the Mats in as good condition as they were at the date of commencement of the original term hereof, reasonable wear and tear excepted. In the event that Lessee fails to return the Mats to Lessor upon the expiration of the term, then Lessee shall be deemed to be "overholding" and rent shall continue to accrue.

contract is not required for the enforcement of a lease obligation triggered by a debtors' post-petition conduct.) Accordingly, rejection of the Equipment Leases should not be effective until the Debtors have ceased their use of the Mats and have returned each of the Mats to Gopher according to their obligations under the Equipment Leases.

11. Additionally, until the Debtors stop using the Mats and the Mats are returned, Gopher is entitled to payment of administrative Rental Fees and Mat Damages for the Debtors' ongoing post-petition use of the Mats.⁷ A lessor is generally entitled to an administrative claim under section 503(b) for the fair rental value of the lessor's property actually used by the debtor. *See, e.g., Zagata Fabricators, Inc. v. Superior Air Products*, 893 F.2d 624, 627 (3d Cir. 1990); *In re Cornwall Paper Mills Co.*, 169 B.R. 844, 851 (Bankr. D.N.J. 1994). The fair rental value is not necessarily the rent provided in the lease. However, "the rental value fixed in the lease will control, unless there is convincing evidence that such rental rate is unreasonable." *In re F.A. Potts & Co., Inc.*, 137 B.R. 13, 18 (E.D. Pa. 1992).

12. Therefore, Gopher is entitled to payment of administrative Rental Fees and Mat Damages for Welded's ongoing post-petition use of the Mats until they are returned in accordance with Welded's obligations under each of the Equipment Leases.

II. CAUSE EXISTS TO GRANT GOPHER ADEQUATE PROTECTION FOR ITS PROPERTY CURRENTLY IN POSSESSION AND USE OF THE DEBTORS UNDER THE EQUIPMENT LEASES

13. Section 363(e) of the Bankruptcy Code provides that "on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased . . . the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."

⁷ Gopher intends to file a separate motion seeking allowance and payment of its administrative expense claims once it has had an opportunity to calculate any unpaid amounts due for administrative Rental Fees and Mat Damages.

14. The Equipment Leases represent precisely the type of use of property that warrants adequate protection. *See In re Elder-Beerman Stores, Corp.*, 201 B.R. 759, 763 (Bankr. S.D. Ohio 1996) (explaining that section 363(e) was amended in 1994 to include “property that is subject to any unexpired lease of personal property”). Due to the nature of Welded’s continued use of the Mats, the Mats will continue to sustain damage that ultimately can render the Mats non-useable. Adequate protection is necessary and essential to protect Gopher from the diminution of its property’s value through Welded’s continued use.

15. The Debtors have refused to commit to any payment of Mat Damages and they are likely to argue that Mat Damages incurred from post-petition use are prepetition general unsecured claims. Furthermore, it is clear that the Debtors, standing alone, have insufficient funds to pay obligations incurred under the Equipment Leases post-petition. In the absence of confirmation that the Debtors will pay for all post-petition Mat Damages, Gopher runs the risk that its post-petition damages will be converted to general unsecured claims that will never be paid or only satisfied by pennies on the dollar.

16. To be clear, Gopher is not asking the Court to elevate any of its rights under the Equipment Leases, which explicitly entitle Gopher to both Rental Fees and Mat Damages. Indeed, adequate protection for a lessor is often “the performance for which it has contracted.” *See Dallas-Fort Worth regional Airport Board v. Braniff Airways, Inc.*, 26 B.R. 628 (Bankr. N.D. Tx. 1982) (quoting *In re Lafayette Radio Electronics Corp.*, 9 B.R. 993, 998 (Bankr. E.D.N.Y.1981)). However, if the Debtors ceased to use Gopher’s property today, the value of property returned to Gopher would be far greater than the value of property it will recover after the Debtors have continued their use and damage. As a result, Gopher seeks only adequate assurance that the depreciation of its property value caused by Debtors’ continued use, calculated in accordance with the Equipment Leases, will be paid.

17. Section 361 of the Bankruptcy Code specifies methods of providing adequate protection when such protection is warranted under Section 363. These include (i) requiring the debtor to make periodic cash payments, (ii) providing additional or replacement liens, in each case to the extent the Debtor's use results in a decrease to the value of the subject property, or (iii) granting such other relief as will result in the realization by such entity of the "indubitable equivalent" of such entity's interest in such property. 11 U.S.C. § 361.

18. Similar to relief granted in comparable cases, the Court should order the Debtors to make periodic payments of those amounts that would become due under the Equipment Leases, including Mat Damages, in each case to the extent provided by the Equipment Leases, until all of the Mats are returned. *Cf. In re Dabney*, 45 B.R. 312, 313 (Bankr. E.D. Pa. 1985) (requiring debtor to provide adequate protection by payment of amounts provided for in the unexpired lease, and therefore denying lessor's motion for relief from the stay); *In re Elder-Beerman*, 201 B.R. 759, 761 (Bankr. S.D. Ohio 1996) (requiring debtor to perform fully all obligations arising under unexpired commercial personal property leases until relieved of such obligation by the bankruptcy court). Such payments will only provide adequate protection if they are made on a periodic and ongoing basis throughout Welded's continued use, damage and destruction of Gopher's property, as such costs are incurred. As a result, the Court should order the Debtors to make periodic payments with respect to Rental Fees and Mat Damages as such costs are identified and incurred by Welded's post-petition use of Gopher's Mats.

RESERVATION OF RIGHTS

19. Gopher reserves its right to supplement this Objection (whether before or at the hearing on the Motion) to address additional issues raised in the Motion. Gopher further reserves all of its rights, claims, defenses, and remedies, including, without limitation, the right to amend, modify, or supplement this Objection, to seek discovery, and to raise additional objections during the hearing on the Motion.

CONCLUSION

WHEREFORE, for the reasons set forth above, Gopher respectfully requests that the Court (i) deny the Debtors' Motion until the Debtors have returned the Mats to Gopher in accordance with the terms of the Equipment Leases; (ii) grant Gopher adequate protection payments for Rental Fees and Mat Damages being incurred through Welded's continued use and possession of the Mats; and (iii) grant such other and further relief as is just and proper under the circumstances.

Dated: February 15, 2019
Wilmington, Delaware

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EXHIBIT A

Welded Leases													
as of 10/22/2018													
Count	Reload Location Description	Rental City	State	Contract Date	Contract Start Date	Contract Term	Contract End Date	Contract Days	Mat Type	# of Mats	Project Owner	Invoiced Cust #	# of Unsold Mats
55	VP - Welded Construction	Proctor	WV	3/2/2017	3/9/2017	240 days	11/9/2017	245 days	88-12x4x24; 42-12x4x30; 20-12x4x36; 10-12x4x40	160	Columbia Pipeline Group - Leach Xpress Job	926255	160
67	VW - Welded Construction	Proctor	WV	3/2/2017	3/16/2017	240 days	11/15/2017	244 days	8x4x18	5,987	Columbia Pipeline Group - Leach Xpress Job	926255	4,993
73	TY - Welded	Proctor	WV	3/25/2017	4/1/2017	244 days	12/1/2017	244 days	12x4x30-(30); 12x4x40-(10)	40	Columbia Pipeline Group - Leach Xpress Job	926255	40
93	TY2 - Welded Construction	Proctor	WV	4/24/2017	4/28/2017	243 days	12/27/2017	243 days	12" x 4' x 30'	36	Columbia Pipeline Group - Leach Xpress Job	926255	36
94	VP2 - Welded Construction	Proctor	WV	5/15/2017	5/20/2017	245 days	1/20/2018	245 days	12" x 4' x 24' (38); 30' (20); 36' (8)	66	Columbia Pipeline Group - Leach Xpress Job	926255	66
104	VD - Welded Lease TH	Proctor	WV	6/21/2017	7/18/2017	243 days	3/17/2018	242 days	8" x 4' x 18'	1,008	Columbia Pipeline Group - Leach Xpress Job	926255	1,008
216	YG - Welded	Moundsville	WV	4/13/2018	3/15/2018	213 days	10/14/2018	213 days	Used 8" 4' X 18'	1,841	Columbia Pipeline Group - Mountaineer Xpress Job	926255	0
237	YV - Welded	Moundsville	WV	4/13/2018	5/3/2018	244 days	1/2/2019	244 days	Used 8" 4' x 18'	1,566	Columbia Pipeline Group - Mountaineer Xpress Job	926255	1,494
233	YF - Welded	Hannibal	OH	4/13/2018	5/9/2018	244 days	1/8/2019	244 days	New 8" 4' x 18'	2,981	Columbia Pipeline Group - Mountaineer Xpress Job	926255	2,927
249	TJ - Welded	Clarington	OH	6/25/2018	7/1/2018	242 days	2/28/2019	242 days	8" 4' X 18'	550	Columbia Pipeline Group - Mountaineer Xpress Job	926255	154
255	TJ2 - Welded	Clarington	OH	8/9/2018	8/10/2018	242 days	4/9/2019	242 days	Used 8" 4' X 18'	72	Columbia Pipeline Group - Mountaineer Xpress Job	926255	72
	SubTotals									14,307			10,950