

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

WELDED CONSTRUCTION, L.P., *et al.*,¹

Debtors.

)
) Chapter 11

)
) Case No. 18-12378 (KG)

)
) (Jointly Administered)

)
) **Hearing Date:**
) May 8, 2019 at 10:00 a.m. (ET)

)
) **Objection Deadline:**
) April 29, 2019 at 4:00 p.m. (ET)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER, PURSUANT TO SECTIONS
105(a) AND 365(a) OF THE BANKRUPTCY CODE, AUTHORIZING THE DEBTORS
TO REJECT A CERTAIN UNEXPIRED LEASE OR EXECUTORY CONTRACT
NUNC PRO TUNC TO THE REJECTION EFFECTIVE DATE**

***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 that certain unexpired lease or executory contract set forth on Schedule 1 to the Order (the “**Rejected Agreement**”),² effective as of April 15, 2019 (the “**Rejection Effective Date**”). In support of this Motion, the Debtors respectfully state as follows:

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Welded Construction, L.P. (5008) and Welded Construction Michigan, LLC (9830). The mailing address for each of the Debtors is 26933 Eckel Road, Perrysburg, OH 43551.

² 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 Agreement under section 365 of the Bankruptcy Code, applicable non-bankruptcy law, or otherwise, including, without limitation, any and all rights to argue that it does not constitute an executory contract or unexpired lease.



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.

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 *Declaration of Frank Pometti in Support of Debtors’ Chapter 11 Petitions and First-Day Motions* [Docket No. 4].

II. Rejection of the Rejected Agreement

5. The Debtors have evaluated the Rejected Agreement and determined that the Rejected Agreement is no longer necessary to the Debtors' operations or beneficial to their estates. Thus, the Debtors submit that rejecting the Rejected Agreement is appropriate and, importantly, will avoid further risks or costs that may be associated with the Rejected Agreement 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 Agreement, 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 Agreement is in the best interests of the Debtors and their estates, the Court should approve the proposed rejection 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 Agreement is not integral to the Debtors' chapter 11 efforts, is not otherwise beneficial to the Debtors' estates, and presents burdensome contingent liabilities. Accordingly, the Debtors' decision to reject the Rejected Agreement is an exercise of sound business judgment, and rejection should be approved.

11. To avoid paying any unnecessary administrative expenses related to the Rejected Agreement, the Debtors seek to reject the Rejected Agreement effective as of the Rejection Effective Date. Where requested, a court may permit retroactive rejection to avoid unduly exposing a debtor's estate to unwarranted postpetition administrative or other expenses. *See Thinking Machs. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995) ("In the section 365 context . . . bankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such remediation."); *In re DBSI, Inc.*, 409 B.R. 720, 734 n.4 (Bankr. D. Del. 2009) ("Under appropriate circumstances, [a] Court may enter a lease rejection order with an effective date earlier than the date the order is entered."); *In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (finding that "the court's power to grant retroactive relief is derived from the bankruptcy court's equitable powers so long as it promotes the purposes of §365(a)" and granting retroactive relief to the date on which the debtors surrendered the premises to their

landlords); *In re Fleming Cos., Inc.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003) (noting rejection *nunc pro tunc* was permitted to the date of the motion or the date the premises was surrendered).

12. When principles of equity so dictate, courts may permit *nunc pro tunc* rejection to the date on which the counterparty to the lease was given definitive notice of the debtor's intent to reject. *See In re KDA Grp., Inc.*, No. 16-21821-GLT, 2017 WL 4216563, at *4 (Bankr. W.D. Pa. Sept. 20, 2017) (“[M]any courts within the Third Circuit have adopted the notion that a lease may be retroactively rejected when principles of equity so dictate.”); *In re Fleming Cos. Inc.*, 304 B.R. at 96 (“[T]o grant *nunc pro tunc* rejection, the Debtors must have stated an unequivocal intent to reject the leases.”). Courts in this jurisdiction have previously considered the question of retroactive rejection of unexpired leases. *See In re Namco Cybertainment, Inc.*, Case No. 98-00173 (PJW) (Bankr. D. Del. Feb. 6, 1998). In *Namco*, the court permitted retroactive rejection on the conditions that (a) the property (and the keys thereto) subject to a lease were surrendered with an unequivocal statement of abandonment to the landlord or lessor, (b) the motion was filed and served on the landlord or lessor, (c) the official committee consented to the relief requested in the motion, and (d) the debtor acknowledged that it would not have the right to withdraw the motion prior to the hearing.

13. Here, the Debtors submit that the Court should authorize the rejection of the Rejected Agreement effective as of the Rejection Effective Date. *First*, the Rejected Agreement provides no benefit to the Debtors' estates because it is no longer necessary to the Debtors. On the other hand, requiring the Debtors to continue to perform under the Rejected Agreement 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 Agreement, which does not provide a benefit to the Debtors' estates that is equal to or greater than the cost to the estates.

14. *Second*, the Debtors believe that the filing and service of this Motion fulfills the purpose of the *Namco* factors under the circumstances here—establishing an unequivocal relinquishment. The filing of this Motion serves to underscore and reiterate the Debtors' unequivocal intent to abandon their interest in the Rejected Agreement effective as of the Rejection Effective Date. Additionally, the counterparty under the Rejected Agreement will not be unduly prejudiced if the Rejected Agreement is rejected as of the Rejection Effective Date because, on the date hereof, the Debtors have served this Motion on the counterparty to the Rejected Agreement and/or its agents or representatives (the “**Counterparty**”) by overnight delivery, electronic mail, and/or facsimile, thereby advising the Counterparty that the Debtors intend to reject the Rejected Agreement effective as of the Rejection Effective Date.

15. In light of the foregoing facts and circumstances, the Debtors respectfully submit that their rejection of the Rejected Agreement 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

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

NOTICE

17. 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 Counterparty; 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: April 15, 2019
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Betsy L. Feldman

Sean M. Beach (No. 4070)
Robert F. Poppiti, Jr. (No. 5052)
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.*,¹

Debtors.

) Chapter 11

) Case No. 18-12378 (KG)

) (Jointly Administered)

) **Hearing Date:**

) **May 8, 2019 at 10:00 a.m. (ET)**

) **Objection Deadline:**

) **April 29, 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 COUNTERPARTY; 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' Motion For Entry of an Order, Pursuant to Sections 105(a) and 365(a) of the Bankruptcy Code, Authorizing the Debtors to Reject a Certain Unexpired Lease or Executory Contract Nunc Pro Tunc to the Rejection Effective Date* (the "**Motion**").

PLEASE TAKE FURTHER NOTICE that any objections or responses to the relief requested in the Motion must be filed on or before **April 29, 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, 3rd 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,

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Welded Construction, L.P. (5008) and Welded Construction Michigan, LLC (9830). The mailing address for each of the Debtors is 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 MAY 8, 2019 AT 10:00 A.M. (ET) 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: April 15, 2019
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Betsy L. Feldman

Sean M. Beach (No. 4070)

Robert F. Poppiti, Jr. (No. 5052)

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Counsel to the Debtors

EXHIBIT A

Proposed Order

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

In re:

WELDED CONSTRUCTION, L.P., *et al.*,¹

Debtors.

)
) 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 A CERTAIN UNEXPIRED
LEASE OR EXECUTORY CONTRACT *NUNC PRO TUNC*
TO THE REJECTION EFFECTIVE DATE**

Upon consideration of the motion (the “**Motion**”)² 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 that certain unexpired lease or executory contract set forth on Schedule 1 to this Order (the “**Rejected Agreement**”), effective as of April 15, 2019 (the “**Rejection Effective Date**”); and upon consideration of 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

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

given; and it appearing that the relief requested in the 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 Agreement, to the extent not previously terminated in accordance with its applicable terms or upon agreement of the parties, is 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 Agreement (i) was terminated prior to the Rejection Effective Date, or (ii) is not an executory contract or unexpired lease under 365 of the Bankruptcy Code or otherwise valid contractual agreement; (b) assert that any claim for damages arising from the rejection of the Rejected Agreement is limited to the remedies available under any applicable termination provision of the Rejected Agreement; (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 Agreement.
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 Agreement 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 Counterparty 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 Agreement

<u>Counterparty</u>	<u>Counterparty Address</u>	<u>Rejected Agreement</u>
Modular Space Corporation (d/b/a “ModSpace”)	1200 Swedesford Road Berwyn, PA 19312	20-foot Connex Box Rental Contract Number: 689612 Serial Number: GLDU225024-7