

**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 Nos. 590 and _____**

**ORDER APPROVING (I) KEY EMPLOYEE INCENTIVE
PLAN AND (II) KEY EMPLOYEE RETENTION PLAN**

Upon consideration of the motion [Docket No. 590] (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), 363(b) and, to the extent applicable, 503(c) of the Bankruptcy Code, authorizing and approving the Debtors’ implementation of their *Key Employee Incentive and Retention Plans* attached hereto as Exhibit 1 (the “**Employee Plans**”), approving the terms thereof, and granting related relief; and upon consideration of the Motion, the Pometti Declaration, and all pleadings related thereto; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion and the relief provided for herein is required; and it appearing that the Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that the Court may enter a final order herewith consistent with Article III of the U.S. Constitution; and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and

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



it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and creditors 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. The Debtors are authorized to implement the Employee Plans, including to make the payments provided for therein, and the terms of the Employee Plans are approved.
3. In the event that any KERP Participant forfeits or otherwise becomes ineligible to receive the KERP Participant's KERP Payment under the terms set forth in the KERP, in consultation with the Committee, the Debtors are authorized, in their discretion, without the need for further notice to or approval of this Court, to reallocate any KERP amounts associated with such participant to other non-insider members of the Debtors' workforce.
4. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.
5. Neither the Employee Plans, nor any individual's participation in the Employee Plans: (i) is intended to constitute, or shall be interpreted as, a promise of employment for any period of time; or (ii) is intended or shall be deemed to change a Plan Participant's status, if applicable, as an at will employee of the Debtors, subject to termination at any time for any reason.
6. All amounts earned and payable under the Employee Plans shall have administrative expense priority under sections 503(a) and 507(a)(2) of the Bankruptcy Code for all purposes in these chapter 11 cases and in any other cases under the Bankruptcy Code to which these cases may be converted.

7. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

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

A handwritten signature in black ink, appearing to read "Kevin Gross", is written over a horizontal line.

KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1

Employee Plans

**KEY EMPLOYEE INCENTIVE AND RETENTION PLANS OF WELDED
CONSTRUCTION, L.P. AND WELDED CONSTRUCTION MICHIGAN, LLC**

EMPLOYEE PLAN OBJECTIVES

The Key Employee Incentive Plan (the “KEIP”) and the Key Employee Retention Plan (the “KERP,” and together with the KEIP, the “Employee Plans”) of Welded Construction, L.P. and Welded Construction Michigan, LLC (together, the “Debtors”) described herein are designed to provide performance incentives to certain insider members of the Debtors’ workforce identified herein (collectively, the “KEIP Participants”), and to encourage the retention of certain valuable non-insider members of the Debtors’ workforce identified herein (collectively, the “KERP Participants,” and together with the KEIP Participants, the “Plan Participants”), to maximize the recovery to the Debtors’ stakeholders in connection with the Debtors’ pending chapter 11 cases (the “Cases”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

A list of the KEIP Participants and their respective KEIP Payments (as defined below) is set forth below. A list of the KERP Participants and their respective KERP Payments (as defined below) is attached hereto as **Schedule 1**.

THE KEIP

The KEIP is designed to incentivize the KEIP Participants, who hold critical corporate management and operational leadership positions within the Debtors, to maximize the value generated in connection with the monetization of the remaining assets of the Debtors and their estates, so as to help maximize value for the benefit of the Debtors’ stakeholders in connection with the Cases. Such individuals are responsible for, among other things, running the Debtors’ business operations and affairs on a day-to-day basis, maintaining the Debtors’ books and records, assisting the Debtors’ professionals in the preparation of essential reporting and

bankruptcy-related documents, facilitating the sale of substantially all of the Debtors' assets (the "Sale"), assisting with the Debtors' anticipated prosecution of (or otherwise resolving) certain litigation and collection of accounts receivable, and otherwise participating in the Debtors' efforts to successfully prosecute the Cases and receive maximum value from the monetization of the Debtors' assets. Given their essential role in the Debtors' enterprise as officers, these individuals have taken on substantial additional tasks and responsibilities to help effectuate and further the Debtors' chapter 11 efforts, in addition to their existing responsibilities. These individuals play a critical role in generating the highest and best value for the Debtors' assets.

KEIP METRICS

The KEIP provides cash incentive payments (each, a "KEIP Payment," and collectively, the "KEIP Payments") to the KEIP Participants based on the level of gross proceeds (collectively, the "Proceeds") generated from the monetization of the remaining assets of the Debtors and their estates as of March 27, 2019, including, without limitation, their: (i) real and personal property; (ii) executory contracts and unexpired leases; (iii) accounts receivable; and (iv) causes of action.

Notwithstanding the foregoing, (a) the Proceeds shall not include (i) the Guaranteed Amount or any Additional Guaranteed Amount, as defined and provided for in that certain *Agency Agreement*, dated as of March 22, 2019, by and between the Debtors, Gordon Brothers Commercial & Industrial, LLC, and Ritchie Bros. Auctioneers (America) Inc. (the "Agency Agreement"),¹ and (ii) the proceeds of any of the Debtors' causes of action under chapter 5 of the

¹ For the avoidance of doubt, except as otherwise set forth herein, with respect to the Agency Agreement the Proceeds shall include all other gross proceeds received by the Debtors and their estates under the Agency Agreement. Further, and also for the avoidance of doubt, if it is assumed for illustrative purposes (the Additional Guaranteed Amount and the "buyout" amount in respect of certain of the Debtors' leases and related equipment are

Bankruptcy Code; and (b) to the extent that the Debtors sell (under the Agency Agreement or otherwise) any of the Leased Equipment (as defined in the Agency Agreement), the Proceeds shall be net of the “buyout” amounts for such Leased Equipment.

The KEIP Participants shall be entitled to receive a percentage of their “Maximum KEIP Payment” (as set forth below) based on the level of the Proceeds, as follows:

<u>Proceeds</u>	<u>Percentage of Maximum KEIP Payment</u>
\$10,000,000	25%
\$20,000,000	50%
\$30,000,000	70%
\$40,000,000	90%
\$50,000,000	100%

KEIP PARTICIPANTS AND KEIP PAYMENTS

Identified below are the KEIP Participants and the maximum KEIP Payment (exclusive of the Debtors’ portion of the anticipated associated payroll taxes, provided, however, the KEIP Participants are responsible for their applicable share of payroll taxes and other required withholdings) for each KEIP Participant:

to be determined, and the Additional Guaranteed Amount and the “buyout” amount could ultimately be one and the same) only that (x) the Guaranteed Amount is \$20 million, (y) the Additional Guaranteed Amount is \$10 million, and (z) the “buyout” amount is \$30 million, then, in respect of sale Proceeds from equipment attributable to the Agency Agreement, KEIP Proceed levels shall be calculated only after: (i) in respect of sale Proceeds from Debtor-owned equipment, \$20 million in Proceeds from the sale of Debtor-owned equipment (as well as the funding of the Guaranteed Amount) have been received and accomplished by the Debtors, and no KEIP Payment shall be earned on the first \$20 million of sale Proceeds so collected and/or on the Guaranteed Amount; and (ii) in respect of sale Proceeds from “buyout” equipment, \$40 million from the sale of “buyout” equipment (as well as the funding of the “buyout” and the Additional Guaranteed Amount) have been received and accomplished by the Debtors, and no KEIP Payment shall be earned on the first \$40 million of sale Proceeds so collected and/or on the “buyout” amount or the Additional Guaranteed Amount.

<u>KEIP Participant</u>	<u>Maximum KEIP Payment</u>
S. Hawkins (Chief Executive Officer)	
D. McDowell (Chief Financial Officer)	
<i>TOTAL</i>	<i>\$350,000</i>

THE KERP

The KERP is designed to help ensure that valuable non-insider members of the Debtors' workforce, who are essential to the orderly wind down of the Debtors' business operations and affairs, the Debtors' ongoing chapter 11 efforts, including the Sale and the anticipated prosecution (or otherwise resolving) of certain litigation, and the Cases generally, are properly motivated to maximize the value of the Debtors and their estates for the benefit of the Debtors' stakeholders. The Sale process that the Debtors have undertaken to preserve and maximize value, in addition to the chapter 11 process in general, has a necessary byproduct of creating a great deal of uncertainty for the Debtors' workforce. As a result, the Debtors believe that it is appropriate to provide certain benefits to essential workforce members to counterbalance the distraction that such uncertainty necessarily engenders. The KERP will incentivize certain members of the Debtors' non-insider workforce, whom the Debtors have identified as critical to the success of their chapter 11 efforts, to remain with the Debtors during the chapter 11 process, so as to help manage the orderly wind down of the Debtors' business operations and affairs and the administration of the Debtors' estates during the Cases.

KERP PARTICIPANTS AND KERP PAYMENTS

The KERP Participants are nine (9) important, hard to replace, non-insider members of the Debtors' workforce. Under the KERP, if earned, the aggregate amount of the cash payments

(the “KERP Payments,” and together with the KEIP Payments, the “Plan Payments”) to the KERP Participants is approximately \$359,000 (exclusive of the Debtors’ portion of the anticipated associated payroll taxes, provided, however, the KERP Participants are responsible for their applicable share of payroll taxes and other required withholdings).

CONDITIONS TO PAYMENT OF PLAN PAYMENTS

The Employee Plans are subject to Bankruptcy Court approval. The KEIP Payments are earned on a continuing basis as and when each level of Proceeds set forth above is achieved. The KERP Payments are earned if the KERP Participants remain a member of the Debtors’ workforce through and including September 27, 2019 (such date, the “KERP Effective Date”).

The Plan Payments, if earned, shall be in lieu of any severance and retention benefits or the like applicable to a Plan Participant under any existing agreements, plans or applicable law. To receive a Plan Payment, a Plan Participant must acknowledge these terms in writing in a form satisfactory to the Debtors, which may be execution of a form prepared by or at the direction of the Debtors. Each Plan Participant retains the right to decline to participate in the applicable Employee Plan until such time as such written acknowledgment has been provided to the Debtors.

TIMING OF PLAN PAYMENTS

If earned, a particular KEIP Payment will be paid in cash within seven (7) business days after achieving the level of Proceeds as a result of which such KEIP Payment was earned. If earned, the KERP Payments will be paid in cash within seven (7) business days after the KERP Effective Date (such date, the “KERP Payment Date”).

REALLOCATION OF KERP AMOUNTS

In the event that any KERP Participant forfeits or otherwise becomes ineligible to receive the KERP Participant's KERP Payment under the terms set forth herein, the Debtors, in consultation with the Official Committee of Unsecured Creditors of the Debtors, reserve the right to reallocate any KERP amounts associated with such participant to other valuable non-insider members of the Debtors' workforce, to the extent and in the manner authorized by the Bankruptcy Court in any order approving the KERP.

TERMINATION OF EMPLOYMENT

Awards under the Employee Plans are offered as discretionary incentive amounts.

If any KEIP Participant voluntarily leaves or is terminated for cause prior to earning any or all of the particular KEIP Payments, such KEIP Participant shall forfeit any such unearned KEIP Payments. If a KEIP Participant is terminated without cause prior to earning any or all of the particular KEIP Payments, such KEIP Participant shall be deemed to have earned his KEIP Payments at the same time and in the same amount had he not been terminated without cause.

If any KERP Participant voluntarily leaves or is terminated for cause prior to the KERP Effective Date, such KERP Participant shall forfeit his or her KERP Payment. If a KERP Participant is terminated without cause prior to the KERP Effective Date, unless otherwise agreed to by the Debtors in writing, such KERP Participant shall receive his or her KERP Payment on the KERP Payment Date.

"CAUSE" DEFINED

For purposes of the Employee Plans, the term "for cause" means, either before or after adoption of the Employee Plans:

- Refusal to follow the lawful instructions of a direct supervisor;
- A finding by a legal or administrative court or tribunal that the Plan Participant engaged in willful misconduct, or was grossly negligent, in the performance of his or her duties;
- A material and direct conflict of interest, not specifically waived in advance by the Debtors;
- Unauthorized use or disclosure of confidential information that belongs to the Debtors, their customers or workforce;
- Repeated absences from work that the Debtors reasonably determined, in the Debtors' discretion, to be adverse to the best interests of the Debtors;
- Repeated failure of a Plan Participant to perform the Plan Participant's job duties in a satisfactory manner, provided that such failure continues for more than fourteen (14) days after written notice from the Debtors thereof, which notice specifically identifies the manner in which the Plan Participant is believed to have materially failed to perform said duties;
- Refusal to follow the instructions of a direct supervisor or the Debtors' Chief Restructuring Officer or his additional personnel; or
- Other material misconduct including, but not limited to, falsification of the Debtors' records, theft, sexual harassment, or possession of firearms, controlled substances or illegal drugs on the Debtors' premises or while performing the Debtors' business.

FURTHER ACTIONS

As a condition to each Plan Participant's eligibility to participate in the Employee Plans, such Plan Participant shall agree to take such further actions as are reasonably requested by the Debtors, including such actions as the Debtors may request subsequent to the termination of such Plan Participant's employment, as the case may be, to assist the Debtors in the conduct of the Cases.

CHANGE OF ADDRESS

The Employee Participants shall be responsible for notifying the Debtors of any change of address before payment is made by mail notification to the Debtors at 26933 Eckel Road, Perrysburg, OH 43551.

NO PROMISE OF CONTINUED EMPLOYMENT

Neither the Employee Plans, nor any individual's participation in the Employee Plans: (i) is intended to constitute, or shall be interpreted as, a promise of employment for any period of time; or (ii) is intended or shall be deemed to change a Plan Participant's status, if applicable, as an at will employee of the Debtors, subject to termination at any time for any reason.

TAXES

All Plan Payments shall be subject to standard withholding and deductions. Plan Payments may not be withheld as a contribution to any Plan Participant's 401(k). Neither the Debtors nor their officers or agents make or have made any representation about the tax consequences of any Plan Payments.

SEVERABILITY

If any provision of the Employee Plans is determined to be invalid or unenforceable, in whole or in part, this determination shall not affect any other provision of the Employee Plans, and the provision in question shall be modified as to be rendered enforceable in a manner consistent with the intent of the Employee Plans insofar as possible. Any waiver of or breach of any of the terms of the Employee Plans shall not operate or be construed as a waiver of any other breach of such terms or conditions or of any other terms and conditions, nor shall any failure to

enforce any provision hereof operate or be construed as a waiver of such provision or of any other provision.

CHOICE OF LAW AND VENUE

The Employee Plans shall both be governed by the laws of the State of Delaware, notwithstanding that State's conflict of law provisions. The Debtors and each of the Plan Participants shall irrevocably and unconditionally consent to the exclusive jurisdiction of the Bankruptcy Court. The Debtors and each of the Plan Participants shall irrevocably and unconditionally waive any objection to the laying of venue of any action, suit, or proceeding arising out of or related to the Employee Plans in the Bankruptcy Court, and shall further irrevocably and unconditionally waive and agree not to plead or claim that any such action, suit, or proceeding brought in the Bankruptcy Court has been brought in an inconvenient forum.

ENTIRE AGREEMENT AND AMENDMENT

This document constitutes the complete, final and exclusive embodiment of the terms and conditions of the Employee Plans and may only be modified in a writing signed by an authorized officer of the Debtors or by an order of the Bankruptcy Court approving the Employee Plans. Unless otherwise agreed by the parties in writing, any agreement between any Plan Participant and the Debtors with regard to the Employee Plans and its subject matter is superseded in its entirety by this document.

NO ASSIGNMENT

The rights of a Plan Participant or any other person to any Plan Payment may not be assigned, transferred, pledged, or encumbered except by will or the laws of descent and

distribution. For the avoidance of doubt, nothing in the preceding sentence shall impair the Debtors' right to reallocate any KERP amounts as provided for herein.

Schedule 1

<u>KERP Participant</u>	<u>Title</u>	<u>KERP Payment</u>