

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re

Welded Construction, L.P., *et al.*,¹

Debtors.

Chapter 11

Case No. 18-12378 (CSS)

(Jointly Administered)

Welded Construction, L.P.,

Plaintiff,

v.

Kirk Excavating & Construction Inc.,

Defendant.

Adv. Proc. No. 20-50934 (CSS)

**ANSWER OF KIRK EXCAVATING & CONSTRUCTION INC. TO COMPLAINT TO
AVOID AND RECOVER TRANSFERS PURSUANT TO 11 U.S.C. §§ 547, 548, AND 550
AND TO DISALLOW CLAIMS PURSUANT TO 11 U.S.C. § 502**

Defendant Kirk Excavating & Construction Inc. (the “Defendant”), by its undersigned attorneys and pursuant to Fed. R. Civ. P. 12 and Fed. R. Bankr. P. 7012, answers the allegations contained in the *Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548, and 550 and to Disallow Claims Pursuant to 11 U.S.C. § 502* (the “Complaint”),² filed by Welded Construction, L.P. (the “Plaintiff”) as follows:

1. Defendant admits that Plaintiff seeks to avoid and recover from Defendant a purported avoidable transfer of property made by one or more of the Debtors to Defendant in the ninety (90) day period preceding the commencement of the Debtors’ bankruptcy cases pursuant to sections 547 and 550 of the Bankruptcy Code but denies that any preferential transfers occurred.

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).

² Capitalized terms not otherwise defined shall have the meanings ascribed to them in the Complaint.



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In addition, Defendant admits that Plaintiff seeks to avoid any transfers pursuant to sections 548 and 550 of the Bankruptcy Code but denies any fraudulent transfers occurred and any remaining allegations set forth in paragraph 1 of the Complaint.

2. Defendant admits that Plaintiff seeks to disallow any claim filed or asserted by Defendant against the Debtors but denies that Plaintiff is entitled to any such judgment and any remaining allegations contained in paragraph 2 of the Complaint.

JURISDICTION AND VENUE

3. Defendant does not contest that this Court has jurisdiction over this adversary proceeding.

4. Paragraph 4 of the Complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendant admits the relevant sections of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure set forth in Plaintiff's Complaint authorize actions to avoid and recover preferential and/or fraudulent transfers, to preserve property, and to disallow claims but denies any implication the relief sought is justified herein and any remaining allegations contained in paragraph 4.

5. Defendant admits that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that the Court may enter final orders.

6. Defendant admits that 28 U.S.C. §§ 1408 and 1409 allows for venue in this District.

7. Defendant affirmatively states that they consent to the entry of final orders or judgments by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

PROCEDURAL BACKGROUND

8. Defendant admits the allegations set forth in paragraph 8 of the Complaint.

9. Defendant admits the allegations set forth in paragraph 9 of the Complaint.
10. Defendant admits the allegations set forth in paragraph 10 of the Complaint.
11. Defendant admits the allegations set forth in paragraph 11 of the Complaint.
12. Defendant admits the allegations set forth in paragraph 12 of the Complaint.
13. Defendant is without sufficient information to admit or deny the allegations contained in paragraph 13 and, therefore, denies the allegations.

THE PARTIES

14. Defendant admits the allegations set forth in paragraph 14 of the Complaint.
15. Defendant admits in part the allegations set forth in paragraph 15 of the Complaint. Defendant denies the accuracy of the address asserted in the Complaint; Defendant's address is in fact 1399 Stimmel Road Columbus, OH 43223.

FACTUAL BACKGROUND

16. Defendant admits the allegations set forth in paragraph 16 of the Complaint.
17. Defendant is without sufficient information to admit or deny the allegations contained in paragraph 17 and, therefore, denies the allegations.
18. Defendant is without sufficient information to admit or deny the allegations contained in paragraph 18 and, therefore, denies the allegations.
19. Defendant is without sufficient information to admit or deny the allegations contained in paragraph 19 and, therefore, denies the allegations.
20. Defendant is without sufficient information to admit or deny the allegations contained in paragraph 20 and, therefore, denies the allegations.
21. Defendant is without sufficient information to admit or deny the allegations contained in paragraph 21 and, therefore, denies the allegations.

22. Defendant admits that it entered into agreements with one or more of the Debtors which are evidenced by invoices and other documents, pursuant to which the parties conducted business. Defendant further admits that Exhibit A to the Complaint has details of a transfer but denies the remaining allegations contained in paragraph 22 of the Complaint.

23. Defendant admits the allegations set forth in paragraph 23 of the Complaint.

24. Defendant admits the allegations set forth in paragraph 24 of the Complaint.

25. Defendant is without sufficient information to admit or deny the allegations contained in paragraph 25 and, therefore, denies the allegations.

26. Defendant admits that it received a payment of \$460,000.00 during the Preference Period. Defendant admits that Plaintiffs included an “Exhibit A” as described in paragraph 26. Defendant denies the remaining allegations contained in paragraph 26 of the Complaint.

27. Defendant admits that it was sent a demand letter. However, Defendant denies that it received the demand letter as it was sent to an old, incorrect address. Defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph 27 and, therefore, denies the allegations.

28. Paragraph 28 of the Complaint consists of allegations to which no response is required. To the extent a response is required, Defendant denies the allegations contained in paragraph 28 of the Complaint.

29. Paragraph 29 of the Complaint consists of allegations to which no response is required. To the extent a response is required, Defendant denies the allegations contained in paragraph 29 of the Complaint.

30. Defendant admits the transfers are subject to defenses under Bankruptcy Code section 547(c) and that it may bear a burden of proof as set forth in 547(g) as interpreted by this

Court. Defendant denies the remaining allegations contained in paragraph 30 of the Complaint. Defendant affirmatively states that Debtors bear the burden of proof under § 547(b).

CLAIMS FOR RELIEF

COUNT 1

(Avoidance of Preference Period Transfers – 11 U.S.C. § 547)

31. Defendant incorporates its previous responses to all previous allegations as though fully set forth herein.

32. Defendant admits that it received a transfer in the cumulative amount as set forth in Exhibit A to the Complaint. Defendant denies the remaining allegations contained in paragraph 32 of the Complaint.

33. Defendants are without sufficient information to admit or deny Paragraph 33 of the Complaint and, therefore, denies the allegations.

34. Defendant admits the allegations set forth in paragraph 34 of the Complaint.

35. Defendant admits the allegations set forth in paragraph 35 of the Complaint.

36. Defendant admits the allegations in paragraph 36 of the Complaint.

37. Defendant denies that the Debtors were insolvent at the time of the transfer but admits that Plaintiff is entitled to the presumption of insolvency pursuant to 11 U.S.C. § 547(f).

38. Defendant admits the allegations contained in paragraph 38 of the Complaint.

39. Defendant denies the allegations contained in paragraph 39 of the Complaint.

40. Defendant denies the allegations contained in paragraph 40 of the Complaint.

COUNT II

(Avoidance of Fraudulent Conveyances – 11 U.S.C. § 548(a)(1)(B))

41. Defendant incorporates its previous responses to all previous allegations as though fully set forth herein.

- 42. Defendant denies the allegations as set forth in paragraph 42 of the Complaint.
 - A. Defendant denies the allegations as set forth in paragraph 42(A) of the Complaint.
 - B. Defendant denies the allegations as set forth in paragraph 42(B) of the Complaint.
 - C. Defendant denies the allegations as set forth in paragraph 42(C) of the Complaint.
- 43. Defendant denies the allegations as set forth in paragraph 43 of the Complaint.

COUNT III
(Recovery of Avoided Transfers – 11 U.S.C. § 550)

- 44. Defendant incorporates its previous responses to all previous allegations as though fully set forth herein.
- 45. The allegations in paragraph 45 of the Complaint are legal conclusions to which no responsive pleading is required. To the extent a response is required, Defendant denies the allegations contained in paragraph 45 of the Complaint.

- 46. Defendant denies the allegation as set forth in paragraph 46 of the Complaint.
- 47. Defendant denies the allegation as set forth in paragraph 47 of the Complaint.

COUNT IV
(Disallowance of all Claims – 11 U.S.C. § 502(d) and (j))

- 48. Defendant incorporates its previous responses to all previous allegations as though fully set forth herein.
- 49. Defendant denies the allegation as set forth in paragraph 49 of the Complaint.
- 50. Defendant denies the allegations contained in paragraph 50 of the Complaint.
- 51. Defendant denies the allegations contained in paragraph 51 of the Complaint.
- 52. Defendant denies the allegations contained in paragraph 52 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

Ordinary Course of Business
11 U.S.C. § 547(c)(2)

If Defendant received any Avoidable Transfer (as defined in the Complaint), the Avoidable Transfer Defendant received from the Debtors is not avoidable under Section 547(b) of the Bankruptcy Code because the Avoidable Transfer was in payment of debts incurred by the Debtors in the ordinary course of business or financial affairs of the Debtors and such Avoidable Transfer was (a) made in the ordinary course of business or financial affairs of the Debtors; or (b) made according to ordinary business terms. Accordingly, pursuant to Section 547(c)(2) of the Bankruptcy Code, judgment should be entered in favor of Defendant.

SECOND AFFIRMATIVE DEFENSE

Subsequent New Value
11 U.S.C. § 547(c)(4)

If Defendant received any Avoidable Transfer (as defined in the Complaint), the Avoidable Transfer Defendant received from the Debtors is not avoidable under Section 547(b) of the Bankruptcy Code because after such transfer, Defendant gave new value to or for the benefit of the Debtors (a) not secured by an otherwise unavoidable security interest, and (b) on account of which new value Debtors did not make an otherwise unavoidable transfer to or for the benefit of Defendant. Accordingly, pursuant to Section 547(c)(4) of the Bankruptcy Code, judgment should be entered in favor of Defendant.

THIRD AFFIRMATIVE DEFENSE

Failure to State a Claim upon which Relief May be Granted

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

Defendant reserves its right to alter, amend, and/or supplement its affirmative defenses up to and continuing to trial of this matter, if the evidence indicates that such further defenses are available. The inclusion of the foregoing affirmative defenses is not an admission that Defendant

bears the burden of proof as to any such defenses and Defendant reserves the right to assert that Plaintiff bears all or a portion of the burden of proof in regard to any of the foregoing defenses.

WHEREFORE, having fully answered the Complaint, Defendant Kirk Excavating & Construction Inc. respectfully requests that the Court: (i) dismiss the Complaint in its entirety or enter judgment in its favor; (ii) award Defendant Kirk Excavating & Construction Inc. its attorneys' fees and costs; and (iii) grant such other and further relief as is just and equitable.

Dated: February 5, 2021

BAYARD, P.A.

/s/ Evan T. Miller

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*Attorneys for Kirk Excavating &
Construction Inc.*

CERTIFICATE OF SERVICE

I, Evan T. Miller, hereby certify that on this 5th day of February 2021, I caused copies of the **Answer of Kirk Excavating & Construction Inc. to Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548, and 550 and to Disallow Claims Pursuant to 11 U.S.C. § 502** to be served on the parties listed on Exhibit A attached hereto in the manner indicated.

/s/ Evan T. Miller

Evan T. Miller (No. 5364)

EXHIBIT A

By First-Class U.S. Mail and Email:

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