

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

In re: WELDED CONSTRUCTION, <i>et al.</i> , Debtors.
Welded Construction, L.P. Plaintiff, vs. Veriforce, LLC, Defendant.

Chapter 11

Case No. 18-12378-CSS

(Jointly Administered)

Adv. Proc. No. 20-50955-CSS

**MOTION TO REOPEN ADVERSARY PROCEEDING,
VACATE DEFAULT JUDGMENT, AND MEMORANDUM IN SUPPORT**

Veriforce, LLC (“Veriforce”) files the following Motion to Re-Open Adversary Proceeding, Vacate Default Judgment, and Incorporated Memorandum in Support (the “Motion”). In support of this Motion, Veriforce avers as follows:

INTRODUCTION

1. Welded Construction, L.P. (“Welded Construction” or “Plaintiff”) commenced this Adversary Proceeding on October 20, 2020 by filing its *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”) (D.I. 1).

2. On November 10, 2020, Plaintiff attempted to serve the Complaint and Summons via certified mail on both (a) Veriforce’s registered agent for service of process at 19221 I-45 South, Shenandoah, Texas, 77385, and (b) Veriforce Chief Executive Officer, Colby Lane, at 1575 Sawdust Road, Suite 600, The Woodlands, Texas, 77380. (D.I. 3).



3. Thereafter, on March 24, 2021, Plaintiff filed simultaneously a *Request for Entry of Default* (D.I. 11) and a *Request for Default Judgment* (D.I. 12). Plaintiff filed a certification that the pleadings had been mailed via First Class Mail to Veriforce (this time only to Mr. Lane) (D.I. 13).

4. On March 25, 2021, the Clerk entered the Entry of Default against Veriforce. (D.I. 14). That same day, this Court entered a Default Judgment in the amount of \$251,255.00 plus filing costs in the amount of \$350.00 against Veriforce (D.I. 15).

5. Veriforce files this Motion and respectfully requests that the Court re-open this Adversary Proceeding and set aside the default judgment entered against it. Based on the facts and circumstances presented, and under the applicable legal authority, Veriforce submits that the default judgment should be set aside and vacated pursuant to Fed. R. Civ. P. 60(b) so that this action may be decided on the merits.

FACTUAL BACKGROUND

6. Veriforce offers an array of worker certification, compliance and training services to energy industry participants, including pipeline companies and their service contractors.¹ Veriforce's services include operator qualification ("OQ") compliance management software, which allows Veriforce's clients to keep up-to-date and readily accessible data on training certifications of their employees and contractors.² In exchange for these services, Veriforce charges its customers bi-annual fees based on the number of employees that are registered in the OQ compliance management system during the applicable billing cycle.³

¹ See Declaration of Carl Foto, Veriforce's VP of Finance, which is attached hereto as Exhibit 1, at par. 3. Hereafter, this declaration is referred to as "Veriforce Decl."

² Veriforce Decl. at par. 3.

³ Veriforce Decl. at par. 3.

7. Both before its bankruptcy and following its emergence from bankruptcy, Welded Construction has operated as a mainline pipeline construction contractor. (R. Doc. 1 at par. 18). To ensure Welded Construction's compliance with federal regulatory requirements governing contractors engaged in servicing and maintaining interstate pipelines, Veriforce provided OQ compliance management services to Welded Construction, charging it semi-annual fees based on the number of Welded Construction employees that were registered in Veriforce's software and system.⁴

8. In the ordinary course of business, Veriforce would issue bi-annual invoices to Welded Construction to cover these OQ compliance management services, charging Welded Construction a fee for each employee that was registered in the system during the billing cycle.⁵

9. In the years preceding Welded Construction's bankruptcy filing on October 22, 2018, Welded Construction paid these invoices often within the invoice's payment terms of Net 30 days (or in one case, shortly after the 30-day payment terms).⁶ The following table sets forth the payment information for payments made by Welded Construction to Veriforce for OQ compliance management services in the years of 2012 to the first half of 2018:⁷

Payments for OQ Compliance Management During the "Historical Period"

Invoice	Invoice Date	Invoice Amount	Service Dates	Payment Date	Payment Amount	Payment Range
27933	3/1/2012	\$6,600.00	9/1/11 to 2/29/12	3/19/2012	\$6,600.00	18
41792	9/1/2012	\$4,680.00	3/1/12 to 8/31/12	10/1/2012	\$4,680.00	30
50425	3/1/2013	\$5,280.00	9/1/12 to 2/28/13	4/1/2013	\$5,280.00	31

⁴ Veriforce Decl. at par. 4.

⁵ Veriforce Decl. at par. 5.

⁶ Veriforce Decl. at par. 6.

⁷ Veriforce Decl. at par. 6.

70465	9/1/2013	\$8,610.00	3/1/13 to 8/31/13	9/16/2013	\$8,610.00	15
79404	3/1/2014	\$9,510.00	9/1/13 to 2/28/24	3/24/2014	\$9,510.00	23
114500	9/1/2014	\$10,080.00	3/1/14 to 8/31/14	10/1/2014	\$10,080.00	30
135589	3/1/2015	\$8,417.50	9/1/14 to 2/28/15	3/30/2015	\$8,417.50	29
154885	9/1/2015	\$9,912.50	3/1/15 to 8/31/15	9/14/2015	\$9,912.50	13
178639	3/1/2016	\$13,469.00	9/1/15 to 2/29/16	3/23/2016	\$13,469.00	22
202398	9/1/2016	\$15,067.00	3/1/16 to 8/31/16	9/30/2016	\$15,067.00	29
226606	3/1/2017	\$6,670.00	9/1/16 to 2/28/17	3/28/2017	\$6,670.00	27
263240	9/1/2017	\$41,030.00	3/1/17 to 8/31/17	10/2/2017	\$41,030.00	31
283042	3/1/2018	\$147,255.00	9/1/17 to 2/28/18	4/9/2018	\$147,255.00	39

10. As reflected in the above table, Welded Construction made OQ bi-annual fee payments during this pre-bankruptcy/pre-preference period (the “Historical Period”) within a payment range **13 to 39 days** from the issuance of the invoice.⁸

11. Welded Construction also made one OQ bi-annual fee payment to Veriforce during the three-month period that preceded the bankruptcy (the “Preference Period”).⁹ It is this payment which is the subject of Plaintiff’s Complaint in this proceeding. The payment information for the payment made during the Preference Period is as follows:

Payment for OQ Compliance Management During the “Preference Period”¹⁰

Invoice	Invoice Date	Invoice Amount	Service Dates	Payment Date	Payment Amount	Payment Range
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⁸ Veriforce Decl. at par. 7.

⁹ Veriforce Decl. at par. 8.

¹⁰ Veriforce Decl. at par. 8.

314101	9/1/2018	\$251,255.00	3/1/18 to 8/1/18	10/1/2018	\$251,255.00	30
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12. As reflected in the above table, Welded Construction made the OQ bi-annual fee payment during the Preference Period **30 days** after the issuance of the invoice.¹¹ Therefore, the payment range during the preference payment was 30 days and falls squarely within the payment range for Welded Construction payments during the Historical Period of **13 to 39 days**.¹²

13. As noted above, Welded Construction's Complaint was filed on October 20, 2020. The Plaintiff attempted service of the Complaint and Summons via certified mailing on Veriforce's CEO in The Woodlands, Texas. The Complaint and Summons were delivered to Veriforce's registered mailing address and office headquarters located at 1575 Sawdust Road, Suite 600, The Woodlands, Texas on November 13, 2020.

14. In May of 2019, Veriforce was acquired by another company, PEC Premier Safety Operations, LLC ("PEC"). As a result of the acquisition, certain critical company functions, including accounting, finance, and legal were moved to PEC's Covington, Louisiana headquarters for handling.¹³ The company was still in the process of completing this transition when the COVID-19 pandemic spread to the United States, and the teams moved almost 100% to a remote working policy in order to lessen the risk of community spread of COVID-19.¹⁴ From March 2020 to present, the mail was collected periodically from The Woodlands office and either handled locally for HR and payment related matters, or forwarded to the Covington, Louisiana office for anything that was outside the norm including legal notices.¹⁵

¹¹ Veriforce Decl. at par. 9.

¹² Veriforce Decl. at par. 9.

¹³ Veriforce Decl. at par. 12.

¹⁴ Veriforce Decl. at par. 12.

¹⁵ Veriforce Decl. at par. 12.

15. The lack of on-site employees, together with the transitioning of key company functions, unfortunately resulted in communications received by conventional U.S. Mail not always reaching their intended recipients.¹⁶ As a result, the service copies of the Complaint and Summons were not brought to the attention of Veriforce's counsel or officers as they would have been had these legal pleadings been received during normal company operations.¹⁷

16. Notice of the entry of default was mailed to Veriforce on March 27, 2021 (Doc. 16), by which time the actual judgment of default had already been entered against Veriforce. Subsequently, Veriforce became aware of the entry of the judgement of default and sought the advice of its outside counsel.

17. Thereafter, outside counsel reviewed the Complaint and the factual and procedural circumstances involved and also conducted an analysis of the availability of affirmative defenses to Plaintiff's claim seeking the return of allegedly voidable transfers pursuant to 11 U.S.C. Section 547.

18. Based upon that review and having determined that Veriforce had meritorious defenses to the Plaintiff's claims, Veriforce, through its counsel, contacted counsel for Plaintiff, asking that it agree to voluntarily set aside the default judgment based on the facts and circumstances surrounding service on Veriforce, explaining the reasons why Veriforce did not respond to the Complaint, and the fact that Veriforce had an absolute defense to the preference action and that, due to the extreme nature of the COVID 19 pandemic and its disruptive effect on

¹⁶ Veriforce Decl. at par. 13.

¹⁷ Veriforce Decl. at par. 13.

Veriforce's operations, fundamental fairness dictated that Welded Construction's adversary proceeding be litigated on its merits.¹⁸

19. Plaintiff has refused to voluntarily withdraw the default judgment, requiring the filing of the instant Motion.

LAW AND ARGUMENT

I. Standard for Setting Aside a Default Judgment.

20. The appropriate procedure for setting aside a default judgment is to file a motion to vacate the default judgment pursuant to Fed. R. Civ. P. 60(b) (made applicable to his proceeding by Fed. R. Bankr. P. 9024). *See* Fed. R. Civ. P. 55(c) ("The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)."). When applying Fed. R. Civ. P. 60, courts generally are lenient in setting aside default judgments, citing the preference for resolving disputes on the merits. *See United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192, 194–95 (3d Cir. 1984) ("We require doubtful cases to be resolved in favor of the party moving to set aside the default judgment so that cases may be decided on their merits."). Thus, the Third Circuit instructs that "*in a close case* doubts should be resolved in favor of setting aside the default and obtaining a decision on the merits." *Farnese v. Bagnasco*, 687 F.2d 761, 764 (3d Cir.1982) (emphasis added).

21. The Third Circuit has set forth the following factors when determining whether to set aside a default judgment: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether the default was the result of the defendant's culpable conduct. *U.S. Currency*, 728 F.2d at 195. For the reasons set forth below, each of these factors

¹⁸ Veriforce Decl. at par. 15 and correspondence of Robert J. Burvant dated September 3, 2021 and September 7, 2021, attached thereto as Exhibits A and B.

clearly weighs in favor of reopening this Adversary Proceeding and setting aside the default judgment so that this matter may be decided on the merits in accordance with well established Third Circuit law.

II. Good Cause Exists to Reopen These Proceedings and Set Aside the Default Judgment so that this Matter Can Be Decided on the Merits.

1. Veriforce has a meritorious defense because it can establish that the preference payment was made in the ordinary course of business.

22. “The Third Circuit has determined that the second factor, whether the defendant has a meritorious defense, is the threshold question for this analysis.” *In re USN Commc’ns, Inc.*, 288 B.R. 391, 395 (Bankr. D. Del. 2003). This is because the existence of a meritorious defense “is the critical issue because without a meritorious defense [defendant] could not win at trial...[and] there would be no point in setting aside the default judgment...if [defendant] could not demonstrate the possibility of his winning.” *Id* (quoting *U.S. Currency*, 728 F.2d at 195).

23. The primary relief sought in the Complaint is the avoidance of the \$251,255.00 payment made to Veriforce during the Preference Period pursuant to 11 U.S.C. § 547. (Doc. 1 at pars. 31-40).¹⁹

24. As the Plaintiff acknowledges in its Complaint (Doc. 1 at par. 30), its claim for the Preferential Period transfer may be subject to certain defenses under 11 U.S.C. § 547(c). The defenses available to a creditor/defendant under 11 U.S.C. § 547(c) include the ordinary course of business defense under 547(c)(2) which “protects payments that do not result from unusual or extraordinary debt collection practices.” *In re Managed Storage Int’l, Inc.*, 09-10368 (MWF), 2020

¹⁹ Plaintiff also asserts an alternative claim for relief under the fraudulent transfer statute 11 U.S.C. § 548, which is not applicable to the payment at issue which was made within the Preference Period. (Doc. 1 at par. 40-43). Plaintiff also asserts a non-substantive claim under 11 U.S.C. § 550, which simply allows for recovery of any preferential payments or fraudulent transfers from either the initial transferee or any mediate transferees of such initial transferee. *See* 11 U.S.C. § 550(a).

WL 1532390, at *5 (D. Del. Mar. 31, 2020). Accordingly, a creditor faced with a preference claim may avoid liability on the claim by establishing that the debt was incurred in the ordinary course of business or financial affairs of the parties; and either: (A) the transfer was made in the ordinary course of business or financial affairs of the parties or (B) the transfer was made according to ordinary business terms. *Id.*; *see also* 11 U.S.C. § 547(c)(2)(A)-(B).

25. Regarding the ordinary course defense as it relates to the business dealings of the particular debtor and creditor parties pursuant to 11 U.S.C. § 547(c)(2)(A), “[c]ourts place particular importance on the timing of payment.” *In re Archway Cookies*, 435 B.R. 234, 243 (Bankr. D. Del. 2010), *aff’d sub nom. In re Archway Cookies LLC*, 511 B.R. 726 (D. Del. 2013). When assessing timing, courts generally compare “the actual payment after invoice range during the pre-preference period,” frequently referred to as the historical period, “with the actual payment after invoice range during the preference period and assess[es] whether the payments in each period were sufficiently similar.” *In re Managed Storage Int’l., Inc.*, 2020 WL 1532390, at *5.

26. When comparing timing of payments in the historical and preference periods, courts have concluded that a comparison of the payment ranges is a useful measure of whether payments fall within the ordinary course of dealings. *In re Managed Storage Int’l., Inc.*, 2020 WL 1532390, at *5 (affirming use of payment range of 0 to 55 days when comparing the timeliness of payments made in the historical and preference periods); *In re Felt Mfg. Co., Inc.*, 2009 WL 3348300 (Bankr. D.N.H.) (using payment range of 60 to 95 days). For example, in *In re American Home Mortgage Holdings, Inc.*, 476 B.R. 124, 138 (Bankr. D. Del. 2012), the court found that, where payments made during the historical period were received between 7 and 67 days after invoice and the payments made during the preference period were received between 34 and 62

days, the preference period payments fell squarely within the historical range, which was sufficient for the defendant to successfully assert an ordinary course of business defense.

27. The payment at issue in this proceeding is a \$251,255.00 bi-annual payment made for OQ compliance management services. It is noteworthy that these compliance requirements are mandated by federal law and essential for Welded Construction to conduct its business as a pipeline service contractor. The payment was made 30 days after issuance of the invoice, and in compliance with the invoice's payment terms of Net 30.²⁰ Accordingly, the payment range for the Preference Period payment to Veriforce was **30 days**.

28. As set forth above and established by the Declaration of Carl Foto, Welded Construction contracted with Veriforce for OQ compliance management services in the years that preceded its bankruptcy.²¹ During the Historical Period from 2012 to the early part of 2018, Welded Construction made thirteen (13) bi-annual payments to Veriforce, which were paid within **13 to 39 days** from issuance of the invoice.²² Accordingly, the payment range for the Historical Period payments was **13 to 39 days**.²³

29. Based on the foregoing, the payment made by Welded Construction during the Preference Period 30 days from the invoice falls squarely within the 13- to 39-day payment range for the Historical Period. Accordingly, as in *American Home Mortgage*, “the evidence of the range of payments is adequate for [Veriforce] to carry its burden that the payments made during the Preference Period were similar to those made during the Historical Period.” *See In re Am. Home Mortg. Holdings, Inc.*, 476 B.R. at 138.

²⁰ Veriforce Decl. at par. 9.

²¹ Veriforce Decl. at par. 4.

²² Veriforce Decl. at pars. 6-7.

²³ Veriforce Decl. at par. 7.

30. Moreover, Veriforce can establish that the alleged preferential payment was consistent with “ordinary business terms” in accordance with 11 U.S.C. § 547(c)(2)(B). The Bankruptcy Court for the District of Delaware and other courts within the Third Circuit have frequently characterized “ordinary business terms” as embracing a “broad range” of credit practices that are “in harmony with the range of terms prevailing as some relevant industry norms.” *See, e.g., Forklift Liquidating Trust v. Custom Tool & Mfg. Co. (In re Forklift LP Corp.)*, 340 B.R. 735, 739 (Bankr. D. Del.2006) (quoting *Molded Acoustical Prods.*, 18 F.3d at 226); *Big Wheel Holding Co. v. Federal Wholesale Co. East (In re Big Wheel Holding Co., Inc.)*, 223 B.R. 669, 674 (Bankr. D. Del.1998) (only dealings so unusual as to fall outside of broad range should be deemed extraordinary).

31. In this case, there is no doubt that the Preference Period payment was consistent with “ordinary business terms” because it was paid in accordance with the Net 30 payment terms on the invoice.²⁴ As such, Veriforce will be able to establish that the payment is subject to the objective ordinary course defense under 11 U.S.C. § 547(c)(2)(B).

32. To summarize, it cannot be genuinely disputed that Veriforce will be able to establish the existence of a meritorious ordinary course defense to Plaintiff’s claims. Accordingly, the threshold issue under *U.S. Currency* analysis is clearly satisfied in this case.

2. Setting aside the default judgment presents no conceivable prejudice to Plaintiff.

33. The first factor in *U.S. Currency* analyzes whether the plaintiff would be prejudiced in the event the default judgment is set aside and the matter proceeds on the merits. As this Court has previously recognized: “the Third Circuit has stated that the cost of enforcing a judgment later

²⁴ Veriforce Decl. at par. 10.

vacated and the delay in realizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to prevent the opening of a default judgment.” *In re Advanced Mktg. Servs., Inc.*, 448 B.R. 321, 328 (Bankr. D. Del. 2011) (Sontchi, J.) (citations omitted). Further, the “loss of an advantageous position cannot be used to establish prejudice.” *Id.* Rather, to establish the level of prejudice sufficient to satisfy this first factor, the plaintiff must show “a loss of evidence, the increased potential for collusion or a substantial reliance on the judgment.” *Id.* See also *Manus v. NRG Energy, Inc. (In re O’Brien Environmental Energy, Inc.)*, 188 F.3d 116, 127 (3d Cir. 1999). In *Advanced Marketing*, this Court held that the plaintiff failed to establish that it would “be materially prejudiced if the default judgment is vacated,” where it simply alleged that it had incurred time and expense to perfect and enforce the default judgment. *Id.* at 328-29.²⁵ In this case, Veriforce has already offered to reimburse Welded Construction the fees and costs incurred in obtaining the entry of default and the default judgment.

34. Welded Construction cannot meet the required showing of prejudice. Plaintiff’s claim for preferential period transfers (and Veriforce’s defenses to the claim) are straightforward and chiefly depend on indisputable documentary evidence, including the records detailing the parties’ payment history during the Historical Period and Preference Period, which remain readily available. Moreover, the bankruptcy case remains open and there is no indication that it will be closed and concluded any time soon. Accordingly, the first factor weighs in favor of setting aside the default judgment.

²⁵ Although the fees and costs incurred by a party to file and obtain the default judgment do not rise to the level of prejudice necessary to set aside a default, it should be noted that Veriforce, when requesting that Plaintiff voluntarily set aside the default, nonetheless offered to compensate the Plaintiff for any expenses incurred with preparing and filing the Complaint and Summons and default pleadings.

3. Veriforce was not culpable in the rendering of the default judgment against it.

35. Finally, Veriforce was not culpable in the rendering of the default judgment against it.

36. For a defendant to be considered “culpable” in this context, it must exhibit “bad faith” or “willfulness,” such as engaging in “acts intentionally designed to avoid compliance with court notices.” *Hritz v. Woma Corp.*, 732 F.2d 1178, 1182 (3d Cir. 1984). Therefore, in order for a defendant to be culpable for a default, more than mere negligence must be present. *See id.*

37. Veriforce’s failure to timely answer and respond to the Complaint and Summons was not because of any “bad faith” or “willfulness” on the part of Veriforce. Rather, the failure to timely answer was caused by a number of changes in the normal work flow resulting from the COVID 19 pandemic, including, among other things, the movement of most employees out of the office to work remotely at home. This Court and Plaintiff are keenly aware of the disruptive effects of the COVID 19 pandemic on all businesses. Veriforce does not seek to relieve itself of its responsibility to timely respond to legal pleadings which it clearly recognizes, but only to establish that in this case its failure to do so was in no way motivated by bad faith or willfulness on its part.

38. As noted above, at the time of the mailing of process, Veriforce was in the process of completing a transition of critical functions to its facility in Covington, Louisiana and, at the same time, had adopted a work-from-home policy due to COVID-19.²⁶ As a result, the service copies of the Complaint and Summons were not brought to the attention of Veriforce’s counsel or officers as they would have been had these legal pleadings been received during normal company operations.²⁷

²⁶ Veriforce Decl. at par. 12.

²⁷ Veriforce Decl. at par. 13.

39. In *In re USN Communications, Inc.*, 288 B.R. 391 (Bankr. D. Del. 2003), the Delaware Bankruptcy Court concluded that a defendant's failure to answer a lawsuit did not rise to the level of culpable conduct under somewhat analogous factual circumstances to those presented here. The stated reasons for the *USN* defendant's failure to respond to the complaint was that the defendant failed to update the New York Secretary of State of the address of its registered agent and there was a delay in gathering information due to the defendant's termination of its business operations. *See id.* at 396-97. The court concluded that, although the defendant's actions "may be negligent," the failure to file an answer could not "be traced to any willful or culpable conduct of Defendant." *Id.* at 397.

40. Like the defendant in *USN*, Veriforce's failure to answer was due to a shift to remote working operations for most of Veriforce's employees, which made it more difficult to properly route and timely handle incoming conventional U.S. Mail.

41. For these reasons, Veriforce's conduct was clearly not culpable or designed to intentionally avoid or ignore Welded Construction's adversary complaint. Indeed, Veriforce had no reason to engage in bad faith, willfulness or evasive conduct where it had a valid and complete defense to the lawsuit based on the ordinary course defense.

CONCLUSION

42. For the reasons set forth above, Veriforce submits that each of the *U.S. Currency* factors strongly weighs in favor of setting aside the default judgment so that this matter can be decided on the merits in accordance with the Third Circuit's preference. Accordingly, Veriforce requests that this Court grant this Motion, reopen the Adversary Proceeding, and set aside the default judgment pursuant to Fed. R. Civ. P. 60(b).

HALLORAN FARKAS + KITTLA LLP

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

In re: WELDED CONSTRUCTION, <i>et al.</i> , Debtors.	Chapter 11 Case No. 18-12378-CSS (Jointly Administered)
Welded Construction, L.P. Plaintiff, vs. Veriforce, LLC, Defendant.	Adv. Proc. No. 20-50955-CSS

**UNSWORN DECLARATION IN SUPPORT OF
VERIFORCE, LLC'S MOTION TO REOPEN ADVERSARY
PROCEEDING, VACATE DEFAULT JUDGMENT,
AND MEMORANDUM IN SUPPORT**

1. I, Carl Foto, am over eighteen years old, and if called as a witness, I could and would testify to the facts set forth below. The following facts are personally known to me, and are based upon my review of the documents regarding these matters and the pleadings that have been filed in this Adversary Proceeding.

2. I am currently employed by Veriforce, LLC ("Veriforce") as VP of Finance, and have been employed in this capacity since 6/2/2017. My employment responsibilities as VP of Finance include the general oversight of Veriforce's day-to-day financial operations, including the administration of customer accounts receivable.

3. Veriforce offers an array of worker certification, compliance and training services to energy industry participants, including pipeline companies and their service contractors. Veriforce's services include operator qualification ("OQ") compliance management software,

which allows Veriforce's clients to keep up-to-date and readily accessible data on training certifications of their employees and contractors. In exchange for these services, Veriforce charges its customers bi-annual fees based on the number of employees that are registered in the OQ compliance management system during the applicable billing cycle.

4. Both before its bankruptcy and following its emergence from bankruptcy, Welded Construction has operated as a mainline pipeline construction contractor, and was a regular customer of Veriforce before its bankruptcy. To ensure Welded Construction's compliance with federal regulatory requirements governing contractors engaged in servicing and maintaining interstate pipelines, Veriforce provided OQ compliance management services to Welded Construction, charging it semi-annual fees based on the number of Welded Construction employees that were registered in Veriforce's system.

5. In the ordinary course of business, Veriforce would issue bi-annual invoices to Welded Construction to cover these OQ compliance management services, charging Welded Construction a fee for each employee that was registered in the system during the billing cycle.

6. In the years preceding Welded Construction's bankruptcy filing on October 22, 2018, Welded Construction paid these invoices often within the invoice's payment terms of Net 30 days (or in one case, shortly after the 30-day payment terms). The following table sets forth the payment information for payments made by Welded Construction to Veriforce for OQ compliance management services in the years of 2012 to the first half of 2018:

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178639	3/1/2016	\$13,469.00	9/1/15 to 2/29/16	3/23/2016	\$13,469.00	22
202398	9/1/2016	\$15,067.00	3/1/16 to 8/31/16	9/30/2016	\$15,067.00	29
226606	3/1/2017	\$6,670.00	9/1/16 to 2/28/17	3/28/2017	\$6,670.00	27
263240	9/1/2017	\$41,030.00	3/1/17 to 8/31/17	10/2/2017	\$41,030.00	31
283042	3/1/2018	\$147,255.00	9/1/17 to 2/28/18	4/9/2018	\$147,255.00	39

7. As reflected in the above table, Welded Construction made OQ bi-annual fee payments during this pre-bankruptcy/pre-preference period (the “Historical Period”) within a payment range **13 to 39 days** from the issuance of the invoice.

8. Welded Construction also made one OQ bi-annual fee payment to Veriforce during the three-month period that preceded the bankruptcy (the “Preference Period”). The payment information for the payment made during the Preference Period is as follows:

Payment for OQ Compliance Management During the “Preference Period”

Invoice	Invoice Date	Invoice Amount	Service Dates	Payment Date	Payment Amount	Payment Range
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314101	9/1/2018	\$251,255.00	3/1/18 to 8/1/18	10/1/2018	\$251,255.00	30
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9. Welded Construction made the OQ bi-annual fee payment during the Preference Period **30 days** after the issuance of the invoice. Therefore, the payment range during the preference payment was 30 days and falls squarely within the payment range for Welded Construction payments during the Historical Period of **13 to 39 days**.

10. The payment made during the Preference Period was also consistent with the “ordinary business terms” of the transaction because it was paid in accordance with the Net 30 payment terms on the invoice.

11. Plaintiff attempted service of the Complaint and Summons via certified mailing both on Veriforce’s CEO in The Woodlands, Texas and on its registered agent for service of process in Shenandoah, Texas. The Complaint and Summons were delivered to Veriforce’s registered mailing address and office located at 1575 Sawdust Road, Suite 600, The Woodlands, Texas on November 13, 2020.

12. In May of 2019, Veriforce was acquired by another company, PEC Premiere Safety Operations, LLC (“PEC”). As a result of the acquisition, certain critical company functions, including accounting, finance, and legal were moved to PEC’s Covington, Louisiana headquarters for handling. The company was still in the process of completing this transition when the COVID-19 pandemic spread to the United States, and the teams moved almost 100% to a remote working policy in order to lessen the risk of community spread of COVID-19. From March 2020 to present, the mail was collected periodically from The Woodlands office and either handled locally for HR and payment related matters, or forwarded to the Covington, Louisiana office for anything that was outside the norm including legal notices.

13. The lack of on-site employees, together with the transitioning of key company functions, unfortunately resulted in communications received by conventional U.S. Mail not always reaching their intended recipients. As a result, the service copies of the Complaint and Summons were not brought to the attention of Veriforce's counsel or officers as they would have been had these legal pleadings been received during normal company operations.

14. Notice of the entry of default and judgment by default were mailed to Veriforce on March 27, 2021. Subsequently, Veriforce became aware of the entry of the judgement of default and sought the advice of its outside counsel. Thereafter, outside counsel reviewed the Complaint and the factual and procedural circumstances involved and conducted an analysis of the availability of affirmative defenses to Plaintiff's claim seeking the return of allegedly voidable transfers pursuant to 11 U.S.C. Section. 547.

15. Based upon Veriforce's counsel review and determination that Veriforce had meritorious defenses to the Plaintiff's claims, Veriforce, through its counsel, contacted counsel for Plaintiff, asking that it agree to voluntarily set-aside the default judgment based on the facts and circumstances surrounding service on Veriforce, explaining the reasons why Veriforce did not respond to the Complaint, and the fact that Veriforce had a valid defense to the preference action and that, due to the extreme nature of the COVID 19 pandemic and its disruptive effect on Veriforce's operations, fundamental fairness dictated that Welded Construction's adversary proceeding be litigated on its merits.¹ I am advised that Welded Construction's legal counsel refused the request to voluntarily set aside the default judgment.

16. I declare under penalty of perjury that the foregoing is true and correct.



¹ Veriforce's counsel conveyed these issues to Plaintiff's counsel by letter dated September 3, 2021 and email dated September 7, 2021, which are attached hereto as Exhibits A and B respectively.

Executed on:

10/19/21



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Robert J. Burvant
Attorney at Law
rburvant@kingjurgens.com
504.582.3811 Direct

September 3, 2021

VIA EMAIL

Mr. Josef W. Mintz
BLANK ROME LLP
1201 Market Street, Suite 800
Wilmington, Delaware 19801

**Re: In re: Welded Construction, L.P., et al., Debtors,
USBC, District of Delaware, Case No. 1812378 (CSS);
Welded Construction L.P. v. Veriforce, LLC, Adv. No. 20-50955**

Dear Mr. Mintz:

Our firm has been retained by Veriforce, LLC ("Veriforce") to represent its interests in connection with a default judgment rendered against it in the above-referenced adversary proceeding. As set forth below, good cause exists for Plaintiff, Welded Construction L.P., to agree to set aside its default judgment, so that Veriforce may file an answer to the proceeding and this matter can be resolved on the merits. Accordingly, this letter constitutes our request that Plaintiff voluntarily set aside its default judgment so that legal action is not required to do so.

Standard for Setting Aside Default Judgments under Fed. R. Civ. P. 60(b).

The appropriate procedure for setting aside a default judgment is to file a motion to vacate the default judgment pursuant to Fed. R. Civ. P. 60(b). *See* Fed. R. Civ. P. 55(c) ("The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)."). When applying FRCP Rule 60, courts generally are lenient in setting aside default judgments, citing the preference for resolving disputes on the merits. The Third Circuit has stated that: "We require doubtful cases to be resolved in favor of the party moving to set aside the default judgment so that cases may be decided on their merits." *United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192, 194–95 (3d Cir. 1984). The Third Circuit

Mr. Josef W. Mintz
 September 3, 2021
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has set forth the following factors when determining whether to set aside a default judgment: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; (3) whether the default was the result of the defendant's culpable conduct. *Id.* at 195.

Third Circuit case law addressing Rule 60(b) motions focuses on the second factor in the *US Currency* case – whether the defendant has a meritorious defense, such that a default judgment will normally be set aside when the defendant is able to establish a meritorious defense. *See In re USN Commc'ns, Inc.*, 288 B.R. 391, 395 (Bankr. D. Del. 2003). The information provided below establishes that Veriforce has a meritorious ordinary course of business defense to the Plaintiff's underlying preference action.

Veriforce Can Establish an Ordinary Course Defense under 11 U.S.C. § 547(c)(2)(A) and (B).

In determining ordinary course of dealings between parties under 547(c)(2)(A), “[c]ourts place particular importance on the timing of payment.” *In re Archway Cookies*, 435 B.R. 234, 243 (Bankr. D. Del. 2010), *aff'd sub nom. In re Archway Cookies LLC*, 511 B.R. 726 (D. Del. 2013). When assessing timing, courts generally compare “the actual payment after invoice range during the pre-preference period,” which is frequently referred to as the historical period, “with the actual payment after invoice range during the preference period and assess[es] whether the payments in each period were sufficiently similar.” *In re Managed Storage Intl., Inc.*, 2020 WL 1532390, at *5.

Here, the payment that is the subject of the Plaintiff's preference claim is a single payment made on October 1, 2018 in the amount of \$251,255.00 to cover the OQ bi-annual fee for thousands of Welded Construction's employees. The payment details of this payment are as follows:

Invoice	Invoice Date	Invoice Amount	Service Dates	Payment Date	Payment Amount	Payment Range
314101	9/1/2018	\$251,255.00	3/1/18 to 8/1/18	10/1/2018	\$251,255.00	30

As there was only one payment at issue, the “payment range” during the preference period is **30 days**.

For purposes of comparison, set forth below are the payment details for the OQ bi-annual fee payments made by Welded Construction from the period of 2012 to early-2018 (the “Historical Period.”).

Invoice	Invoice Date	Invoice Amount	Service Dates	Payment Date	Payment Amount	Payment Range
27933	3/1/2012	\$6,600.00	9/1/11 to 2/29/12	3/19/2012	\$6,600.00	18
41792	9/1/2012	\$4,680.00	3/1/12 to	10/1/2012	\$4,680.00	30

Mr. Josef W. Mintz
 September 3, 2021
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			8/31/12			
50425	3/1/2013	\$5,280.00	9/1/12 to 2/28/13	4/1/2013	\$5,280.00	31
70465	9/1/2013	\$8,610.00	3/1/13 to 8/31/13	9/16/2013	\$8,610.00	15
79404	3/1/2014	\$9,510.00	9/1/13 to 2/28/24	3/24/2014	\$9,510.00	23
114500	9/1/2014	\$10,080.00	3/1/14 to 8/31/14	10/1/2014	\$10,080.00	30
135589	3/1/2015	\$8,417.50	9/1/14 to 2/28/15	3/30/2015	\$8,417.50	29
154885	9/1/2015	\$9,912.50	3/1/15 to 8/31/15	9/14/2015	\$9,912.50	13
178639	3/1/2016	\$13,469.00	9/1/15 to 2/29/16	3/23/2016	\$13,469.00	22
202398	9/1/2016	\$15,067.00	3/1/16 to 8/31/16	9/30/2016	\$15,067.00	29
226606	3/1/2017	\$6,670.00	9/1/16 to 2/28/17	3/28/2017	\$6,670.00	27
263240	9/1/2017	\$41,030.00	3/1/17 to 8/31/17	10/2/2017	\$41,030.00	31
283042	3/1/2018	\$147,255.00	9/1/17 to 2/28/18	4/9/2018	\$147,255.00	39

The payment range for OQ bi-annual fee payments made by Welded Construction during the Historical Period was **13 to 39 days**. Therefore, the payment range for the preference payment of **30 days** is clearly within the payment range for the Historical Period.

Based on the foregoing, Veriforce will have a strong basis to argue that the “preference” payment was made within the ordinary course of business or financial affairs of the parties and thus protected from claw-back pursuant to 547(c)(2)(A). Further, the payment is also objectively ordinary pursuant to 547(c)(2)(B), because it was made within “ordinary business terms.” Specifically, the applicable invoice provided payment terms of “Net 30,” and the invoice was paid within this time period.

We submit that the analysis here is very straightforward, and that if necessary, Veriforce will be able to easily demonstrate that it has a meritorious ordinary course defense to payment. Given the Third Circuit’s penchant for setting aside defaults and resolving cases on the merits when the defendant is able to establish a viable defense, we believe that Veriforce will prevail in setting aside the default, should the Plaintiff not voluntarily agree to this relief.

Accordingly, Veriforce asks that Plaintiff agree to set aside the default judgment so that Veriforce may file an answer and this matter may be resolved on the merits. We further

Mr. Josef W. Mintz

September 3, 2021

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request that you provide an affirmative response within fourteen (14) days of this letter's date. If we have not received a response by that time, Veriforce has instructed us to file a motion to set aside the default judgment.

Please do not hesitate to contact Henry King or me if you would like to discuss the foregoing.

Very truly yours,

/s/ Robert J. Burvant

Robert J. Burvant

cc: Mr. Henry A. King (via email)

Spencer King

From: Robert Burvant
Sent: Tuesday, September 7, 2021 2:20 PM
To: Nicholas C. Brown
Cc: Henry King
Subject: RE: Welded Construction/Veriforce LLC

Nick:

At the time the complaint was served, Veriforce was working from two different locations in LA and TX as a result of a recent merger with most of its personnel still working remotely because of Covid 19. These unusual circumstances resulted in certain matters not being forwarded to the proper persons for action. Veriforce would have certainly responded in this circumstance as it has a very meritorious defense to this preference claim. Veriforce believes that this preference claim should be decided on its merits.

In addition, Veriforce had recently hired a new CEO who was also appointed its agent for service. He believed that the pleadings he was receiving were informational in nature once he was informed by his accounts receivable group that Welded Construction did not owe Veriforce any money. Veriforce is agreeable to reimbursing Plaintiff for the attorney's fees and costs incurred in connection with the default judgment.

Naturally, Veriforce reserves all rights and defenses in connection with this matter and this email should be considered a settlement communication and subject to all available protections and privileges. Thanks.

Bob

From: Nicholas C. Brown <nbrown@askllp.com>
Sent: Friday, September 3, 2021 10:32 AM
To: Robert Burvant <RBurvant@kingjurgens.com>
Cc: Henry King <hking@kingjurgens.com>
Subject: [EXTERNAL] RE: Welded Construction/Veriforce LLC

Bob,

I reviewed your letter. What's the excuse for failing to answer?

Thanks,

Nick

From: Robert Burvant <RBurvant@kingjurgens.com>
Sent: Friday, September 3, 2021 10:55 AM
To: Mintz, Josef <Mintz@BlankRome.com>
Cc: Henry King <hking@kingjurgens.com>; Nicholas C. Brown <nbrown@askllp.com>
Subject: Re: Welded Construction/Veriforce LLC

Thanks Joe.

From: Mintz, Josef <Mintz@BlankRome.com>
Sent: Friday, September 3, 2021 9:53:47 AM
To: Robert Burvant <RBurvant@kingjurgens.com>
Cc: Henry King <hking@kingjurgens.com>; Nicholas C. Brown <nbrown@askllp.com>
Subject: [EXTERNAL] RE: Welded Construction/Veriforce LLC

Bob, received your letter and thanks. I've copied my co-counsel Nicholas Brown who will be attending to this matter as well. We will be back in touch.

Best,
Joe

Josef W. Mintz | BLANKROME
One Logan Square | 130 North 18th Street | Philadelphia, PA 19103
1201 N. Market Street | Wilmington, DE 19801
Mobile: 202.329.8356 | O: 215.569.5528 | O: 302.425.6478 | F: 215.832.5528 | mintz@blankrome.com

From: Robert Burvant <RBurvant@kingjurgens.com>
Sent: Friday, September 3, 2021 10:22 AM
To: Mintz, Josef <Mintz@BlankRome.com>
Cc: Henry King <hking@kingjurgens.com>
Subject: Welded Construction/Veriforce LLC

Joe:

I am following up on our call earlier this week. I hope you did not suffer any damage when Ida came through your area. As discussed, our firm represents Veriforce, LLC, and we are requesting that the default judgment entered against Veriforce be set aside so that the Plaintiff's preference action can be addressed on the merits. The attached letter provides pertinent facts and some caselaw for your consideration.

My contact information is below, but our office remains uninhabitable for the time being. I am generally reachable by email, and if you would like to reach me by phone any time soon, my cell is 504 908-7912. Thanks very much.

Bob Burvant

Robert J. Burvant
Member
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