IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Welded Construction, L.P., *et al.,* Debtors.[1]	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
Welded Construction, L.P., Plaintiff, vs. Veriforce, LLC, Defendant.	Adv. No. 20-50955-CSS **Re: Adv. Dkt. No. 18**

PLAINTIFF'S OBJECTION AND MEMORANDUM OF LAW IN OPPOSITION TO VERIFORCE, LLC'S MOTION TO REOPEN ADVERSARY PROCEEDING, VACATE DEFAULT JUDGMENT, AND MEMORANDUM IN SUPPORT

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Date: November 5, 2021

[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).

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Welded Construction, L.P. (the "Plaintiff"), by and through its undersigned counsel, objects and submits this memorandum of law in opposition to Defendant Veriforce, LLC (the "Defendant")'s *Motion to Reopen Adversary Proceeding, Vacate Default Judgment, and Memorandum in Support* [D.I. 18][2] (the "Motion to Reopen").

I. SUMMARY OF ARGUMENT

There is no cause to set aside the default judgment in this case, as Defendant has not established excusable neglect. The entry of default was directly related to Defendant's culpable conduct, as Defendant ignored repeated notices concerning deadlines and pending motions prior to the entry of default. Defendant was properly served with the summons and complaint pursuant to Federal Rule of Bankruptcy Procedure 7004(b)(3) and admits it received mail at the address served. It was not until more than 5 months after default judgment was entered – and approximately one year after Plaintiff made a demand on Defendant – that Defendant first responded to any legal notices in this Adversary Proceeding. Such neglect is not excusable and does not warrant setting aside the properly entered default judgment. Additionally, Defendant has not established that is has a meritorious defense to this action.

II. FACTUAL AND PROCEDURAL BACKGROUND

1. On September 10, 2020, Plaintiff sent a *Notice of Intended Litigation and Settlement Offer* to Defendant (the "Demand Letter"), which among other things gave notice to Defendant of Plaintiff's claims and intent to pursue litigation. *See Declaration of Nicholas C.*

[2] Plaintiff shall refer to docket entries in Adversary Proceeding No. 20-50955-CSS as "D.I. ___."

Brown, Ex. 1, attached hereto as **Exhibit A**. The Demand Letter expressly states in boldfaced type:

> **Litigation Will Be Commenced Unless This Matter Is Resolved By September 30, 2020**.

See id.

2. On October 20, 2020, Plaintiff filed 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* [D.I. 1] (the "Complaint"). [D.I. 1]. In the Complaint, Plaintiff asserted certain claims and causes of action, including those under sections 544, 547, and 548 of title 11 of the United States Code (the "Bankruptcy Code"), against Defendant. The filing of the Complaint commenced Adversary Proceeding No. 20-50955-CSS (the "Adversary Proceeding").

3. On November 10, 2020, this Court issued a *Summons and Notice of Pretrial Conference in an Adversary Proceeding* (the "Summons"). [D.I. 4]. The Summons provided that Defendant was required to submit an answer or responsive pleading to the Complaint on or before December 10, 2020. The Summons states in part:

> **IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.**

4. On November 10, 2020, pursuant to Federal Rule of Bankruptcy Procedure 7004, a copy of the Summons and Complaint was served upon the Defendant via United States Certified Mail, return receipt requested, postage pre-paid [D.I. 3, 4], as follows:

> Colby Lane, CEO
> Veriforce, LLC
> 1575 Sawdust Road
> Suite 600

The Woodlands, Texas 77380

5. According to the *Unsworn Declaration in Support of Veriforce, LLC's Motion to Reopen Adversary Proceeding, Vacate Default Judgment, and Memorandum in Support* [D.I. 18-1], Defendant received the Summons and Complaint on November 13, 2020. *Foto Declaration* at ¶ 11.

6. On December 23, 2020, Plaintiff filed and served on Defendant a copy of the *Notice of Rescheduled Pretrial Conference* via First Class Mail. [D.I. 5].

7. On December 29, 2020, Plaintiff filed and served on Defendant a copy of the *Certification of Counsel Regarding Proposed Scheduling Order* via First Class Mail. [D.I. 6].

8. On December 29, 2020, the Court entered the Scheduling Order in effect in this Adversary Proceeding on December 29, 2020. [D.I. 7]. On December 30, 2020, Plaintiff served a copy of the Scheduling Order on Defendant via First Class Mail. [D.I. 9].

9. On March 1, 2021, Plaintiff served on Defendant via First Class Mail a copy of *Plaintiff's Written Discovery Requests and Initial Disclosures*. [D.I. 10].

10. On March 24, 2021, Plaintiff filed and served on Defendant via First Class Mail a *Request for Entry of Default* and *Request for Default Judgment*. [D.I. 11, 12, 13].

11. On March 25, 2021, the Clerk entered default against Defendant. [D.I. 14].

12. On March 25, 2021, the Clerk entered a Judgment by Default against Defendant in the sum of $251,255.00 plus court filing costs in the amount of $350.00. [D.I. 15].

13. On April 9, 2021, the Adversary Proceeding was closed.

14. On October 22, 2021, more than six (6) months after the Judgment by Default was entered, and more than a year after Plaintiff first made its demand, Defendant took its first action and filed the Motion to Reopen.

III. ARGUMENT

A. Legal Standard For Setting Aside a Default Judgment.

Under Federal Rule of Civil Procedure 55(c), a default judgment may be set aside pursuant to the procedures outlined in Federal Rule of Civil Procedure 60(b). FED. R. BANKR. P. 7055. Under Rule 60(b), any final judgment may be set aside, *inter alia*, when the party in default establishes "mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b); Fed. R. Bankr. P. 9024.

The decision to set aside default judgment pursuant to Rule 55(c) is within the discretion of the court. *Bailey v. United Airlines*, 279 F.3d 194, 204 (3d Cir. 2002). In the Third Circuit, a court considers three factors when determining whether a motion for default judgment can be set aside:1) whether the plaintiff will be prejudiced by setting aside the default; 2) whether the defendant has a meritorious defense; and 3) whether the default was the result of the defendant's culpable conduct. *In re Advanced Marketing Services, Inc.*, 448 B.R. 321, 238 (Bankr. D. Del. 2011). These three factors apply regardless of whether the motion to vacate is brought under Civil Procedure Rule 55(c) or Rule 60(b). *Peltz, v. Commc'n Serv., Inc. (In re USN Commc'n, Inc.)*, 288 B.R. 391, 395 (Bankr. D. Del. 2003). As detailed below, the facts and circumstances related to all three factors favor denying Defendant's motion.

B. Defendant Has Not Shown a Meritorious Defense to the Adversary Proceeding.

Before a default judgment can be set aside, the defendant must meet the "threshold issue" of establishing a meritorious defense. *Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.*, 175 Fed. Appx. at 522. A defendant successfully shows a meritorious defense when '"allegations of defendant's answer, if established on trial, would constitute a complete defense to the action.'" *Plan Adm'r of Advanced Mktg. Serv., Inc. v. PAC Int'l Logistics Co. (In re Advanced*

Mktg. Serv., Inc.), 448 B.R. 321, 329 (Bankr. D. Del. 2011) (quoting *United States v. $55,518.05 in U.S. Currency,* 728 F.2d 192, 195 (3d Cir.1984)). However, the court "need not decide the legal issue" at this stage of review. *Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.*, 175 Fed. Appx. at 522.

Defendant asserts that the ordinary course of business defense will defeat the Plaintiff's claims. In support of this assertion, Defendant relies solely on a Declaration from Carl Foto, its VP of Finance (the "Foto Declaration"). The Foto Declaration contains a summary table listing 13 invoices and corresponding payments dating back to 2012. *Foto Declaration* at ¶ 6. The table includes invoice dates and amounts as well as payment dates, and shows a range in timing of payments between 15 and 39 days past invoice. The Foto Declaration also provides a separate summary table with similar information for the Transfer at issue in this case, in the sum of $251,255.00 paid 30 days past invoice date (the "Transfer").

The Bankruptcy Court for the District of Delaware has instructed that no one factor is determinative in the subjective ordinary course of business analysis. *FBI Wind Down, Inc. Liquidating Trust v. Careers USA, Inc. (In re FBI Wind Down, Inc.)*, 2020 WL 1900454 (Bankr. D. Del. Apr. 17, 2020) (citing *Burtch v. Revchem Composites, Inc. (In re Sierra Concrete Design, Inc.)*, 463. B.R. 302, 306 (Bankr. D. Del. 2012)). Instead, courts "have considered a multitude of factors including: (1) the length of time the parties engaged in the type of dealings at issue; (2) whether the subject transfers were in an amount more than usually paid; (3) whether payments at issue were tendered in a manner different from previous payments; (4) whether there appears to have been an unusual action by the debtor or creditor to collect on or pay the debt; and (5) whether the creditor did anything to gain an advantage (such as additional security) in light of the debtor's

deteriorating condition." *Id.* at *17 (citing *Sass v. Vector Consulting, Inc. (In re American Home Mortgage Holdings, Inc.*), 476 B.R. 124 (Bankr. D. Del. 2012)).

As to the first factor under *FBI Wind Down*, the Foto Declaration shows that, while the parties have engaged in business since at least 2012, the representative sample of invoices and payments from which to compare the Transfer is small, consisting of just 13 invoices and payments. Arguably, 13 invoices are not a large enough sample size from which to determine a baseline course of dealing against which the Transfer could be compared. It is therefore questionable whether Defendant can establish this factor in its favor. *See, e.g., FBI Wind Down, Inc. Liquidating Trust v. Careers USA, Inc.*, 2020 WL 1900454, at *17 (considering both the length of the business relationship and the number of transactions).

The second factor under *FBI Wind Down* clearly favors the Plaintiff. The amount of the Transfer was $251,255.00, or more than $100,000.00 greater than any previous payment in the parties' history. In fact, only 2 out of 13 historical payments were greater than $16,000.00. *Foto Declaration* at ¶ 6. This factor favors Plaintiff.

The third factor under *FBI Wind Down* compares the manner in which payments were tendered. The Foto Declaration shows that the timing of the Transfer was not unusual as compared to past payments. However, it is not clear whether all payments were tendered using the same method, such as check or wire, or if the Transfer was paid in a different manner from past payments. While Defendant has introduced evidence in support of consistent timing of payment, there are other indicia which could weigh in favor of Plaintiff depending on what further evidence would show. Defendant has therefore not satisfied the third factor.

The fourth and fifth factors under *FBI Wind Down* focus on the conduct of Defendant and whether it took any unusual actions to apply pressure against the Debtors or gain an advantage.

The Foto Declaration is silent on these factors. As of the date of this Response, Plaintiff has not determined whether Defendant engaged in any conduct that would qualify under these factors, which subject matter would have been explored through discovery had Defendant bothered to respond to the Summons and Complaint.

Furthermore, Defendant has provided no evidence to support an objective defense, which requires a showing that the Transfer was consistent with transactions of firms in the Defendant's industry. *See, e.g., Sass v. Vector Consulting, Inc. (In re Am. Home Mortgage Holdings, Inc.)*, 476 B.R. 124, 140-41 (Bankr. D. Del. 2012) (discussing that creditor must establish range of terms on which firms similar to the creditor operate); *Hechinger Liquidation Trust v. James Austin Co. (In re Hechinger Inv. Co. of Delaware, Inc.)*, 320 B.R. 541, 550 (Bankr. D. Del. 2004) (citing *In re Molded Acoustical Prod.*, 18 F.3d 217, 224 (3d Cir. 1994) for proposition that ordinary business terms encompass the range of terms engaged by firms similar to the creditor)).

In summary, Defendant has failed to sufficiently address the factors typically considered by this Court in analyzing the subjective ordinary course of business defense as articulated in *FBI Wind Down*. In addition, Defendant has offered no evidence in support of the objective ordinary course of business defense. Therefore, Defendant has failed to show a meritorious defense and its motion to vacate default judgment should be denied.

C. The Defendant Was Reckless in Disregarding Repeated Notices Regarding the Adversary Proceeding.

The standard for culpable conduct is willfulness or bad faith on the part of a non-responding defendant. *In re Advanced Mktg. Serv., Inc.*, 448 B.R. at 329. While the Third Circuit requires conduct beyond mere negligence, "'[r]eckless disregard for repeated communications from

plaintiffs and the court ... can satisfy the culpable conduct standard." *Id. (*quoting *Hritz v. Woma Corp.,* 732 F.2d 1178, 1183 (3d Cir.1984)).

For example, in *Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.,* 175 Fed. Appx. 519, 523 (3d Cir. 2006), the Third Circuit affirmed the District Court's finding of culpable conduct on the following facts:

> Starlight does not dispute that it received all key correspondence in this case. It did not reply to Nationwide's May 2004 letter. It also did not, as the District Court found, "answer, appear, or plead in response to the July 20, 2004 summons and complaint; the August 11, 2004 motion for default; the August 12, 2004 entry of default; or the September 16, 2004 motion for default judgment. At no time during this entire proceeding did [Starlight] contact either [the District] Court or Nationwide." *Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.,* 2004 WL 2609119, at *2–3, 2004 U.S. Dist. LEXIS 23297, No. 04–3393, mem. op. at 6–7 (E.D.Pa. Nov. 16, 2004). Instead, Starlight simply gave all the paperwork to its insurance broker. This is the kind of reckless disregard for repeated communications regarding a suit that establishes a defendant's culpability.

Other courts have denied motions to vacate default judgments where the defendant claims its deficiency arose from office mistakes, clerical errors or insufficient internal procedures. For example, the Seventh Circuit affirmed an order denying motion to vacate default judgment for failure to establish excusable neglect under facts similar to the case at bar. In *S.J. Groves & Sons*, the defendant submitted evidence that it was operating short-handed at the time the complaint and summons were served, leading to a breakdown in its internal procedures that caused it to inadvertently overlook the complaint. *North Cent. Illinois Laborers' Dist. Council v. S.J. Groves & Sons Co.*, 842 F.2d 164, 167 (7th Cir. 1988). The evidence established that the company received the notice, but because of a filing or clerical error failed to notify its outside counsel. *Id.* at 167-68. The district court denied the motion for relief from default judgment under Rules 55(c) and 60(b), finding that defendant's "failure to discover a properly executed service of process for

a period of *seven weeks* may have been inadvertent, but it is not excusable." *Id.* at 166-67 (citing *North Central Illinois Laborers' District Council, Local 1203 v. S.J. Groves & Sons Co.,* No. 86-1133, slip op. at 6 (C.D. Ill. May 18, 1987) (emphasis in original).

Defendant's failure to file an answer is simply not excusable in this case. Just like in *Starlight Ballroom Dance Club, Inc.*, Defendant received numerous notices of the Plaintiff's claims and the Adversary Proceeding, including but not limited to the Summons and Complaint, but failed to respond:[3]

- Defendant received but failed to respond to the Demand Letter mailed on September 10, 2020 and notifying Defendant of Plaintiff's intent to commence litigation;
- Defendant received but failed to respond to the Summons and Complaint mailed on November 10, 2020, which included a warning in boldfaced letters that the failure to respond would result in entry of default;
- Defendant received the *Notice of Rescheduled Pretrial Hearing* mailed on December 20, 2020;
- Defendant received the *Certification of Counsel Regarding Proposed Scheduling Order* mailed on December 29, 2020;
- Defendant received the *Notice of Agenda of Matters Scheduled for Telephonic and Videoconference Hearing on January 4, 2021 at 2:00 p.m. (ET)* and the *Scheduling*

[3] Defendant admits receiving the Summons and Complaint, which was mailed to its office location at The Woodlands, Texas. Because the Demand Letter and filings in the Adversary Proceeding were all mailed to the same address, and Defendant does not dispute receiving these notices, it must be the case that Defendant received each and every communication outlined herein.

Order, mailed on December 30, 2020 but failed to appear or participate in the hearing; and

- Defendant received but failed to respond to the Plaintiff's *Written Discovery Requests and Initial Disclosures* mailed on March 1, 2021.

In addition to the above filings and communications, all of which were sent to the same address to which Defendant has acknowledged receiving the Summons and Complaint, Defendant failed to respond to the *Request for Entry of Default* and *Request for Entry of Default Judgment*, filed and served on Defendant on March 24, 2021.

Following entries of default and default judgment, the Adversary Proceeding was closed. It was not until September 1, 2021, nearly *an entire year* after the demand letter was sent and more than 5 months after default was entered – and more than six months after the Adversary Proceeding was closed – that Defendant first attempted any communication to Plaintiff in a belated attempt to overturn a properly obtained default judgment. *Foto Declaration*, Ex. A.

In its Motion to Reconsider, Defendant states that it failed to answer "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." *Motion to Reconsider* at ¶ 40. Defendant further explains that "the lack of on-site employees, together with the transitioning of key company operations, unfortunately resulted in communications received by conventional U.S. Mail not always reaching their intended recipients." *Motion to Reconsider* at ¶ 15. However, these are precisely the type of internal failures in procedural safeguards which courts have been loath to excuse. *See, e.g., Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.,* 175 Fed. Appx. 519, 523 (3d Cir. 2006); *North Cent. Illinois Laborers' Dist. Council v. S.J. Groves & Sons Co.*, 842 F.2d 164, 167 (7th Cir. 1988); *Insurance Co. of North America v. Morrison*, 154

F.R.D. 278, 280 (M.D. Fla. 1994) (defendant who misrouted complaint to the wrong internal department and lacked procedural safeguards to avoid such a problem did not establish excusable neglect); *Gibbs v. Air Canada* 810 F.2d 1529 (11th Cir. 1987) ("default that is caused by the movant's failure to establish minimum procedural safeguards for determining that action in response to a summons and complaint is being taken does not constitute default through excusable neglect").

Defendant's defense is not that its office was completely closed or that there were no employees available to check mail. In fact, Defendant admits that it had internal procedures in place including the periodic collection of mail and the forwarding of "anything outside the norm including legal notices" to its office in Louisiana. *Foto Declaration* ¶ 12. These are precisely the type of procedures that all corporate offices would presumably have adopted during the Covid-19 pandemic to ensure important mail is processed, including legal pleadings and notices. Yet there was an absolute failure by Defendant to follow its own procedures in this case. Alternatively, Defendant lacked sufficient safeguards to ensure important mailings were reviewed and complied with, and these simply did not reach the appropriate persons.[4] In either case, Defendant's failure to process and respond to repeated legal notices mailed between September 2020 and March 2021 is nothing short of reckless.

Defendant also contends that its failings were the result of its acquisition by another company, and it was in a transitional phase at the time of the Adversary Proceeding. However,

[4] Not only were these notices mailed to the correct address, but the majority specifically named Defendant's CEO as the intended recipient.

the acquisition occurred in May of 2019. *Foto Declaration at* ¶ 12. Certainly, Defendant would have, and indeed should have, addressed any issues with processing important mail by the time of the Complaint, which was more than one year after the acquisition and more than 6 months following its transition to almost 100% remote working.

For all of the above reasons, this factor weighs in favor of the Court granting default judgment against Defendant. In the event Defendant were to seek to supplement its evidence in the form of additional declarations or affidavits in an effort to address the issues highlighted by Plaintiff, Plaintiff requests leave to conduct Defendant's deposition regarding the issue of culpable negligence.

D. Reopening the Adversary Proceeding at This Late Stage Would Prejudice Plaintiff.

The Scheduling Order in this case governs no less than 33 adversary proceedings and was formulated to avoid the very circumstances presented here by Defendant's failure to participate in this Adversary Proceeding: missing and overdue pleadings, incomplete or absent discovery, and the need to schedule and attend scattered hearings. The Defendant's decision to finally appear one year after the Complaint was filed will not ameliorate the prejudice suffered by the Debtors if default judgment is not upheld. The Debtors have been orderly proceeding with their preference program, and the majority of the cases in the program have been consensually resolved. Relevant pleading and discovery periods have already elapsed. If Defendant is now entitled to defend itself in this Adversary Proceeding, this Court and the Debtors will need to establish new deadlines for pleadings and discovery specifically for this Adversary Proceeding. This will not only cause the Debtors to incur more delay and expense; it also defeats the purpose of the Scheduling Order.

While the prejudice to the Debtors may not be egregious, the combination of costs and delays incurred by the estate in this Adversary Proceeding is already material. If the Adversary Proceeding were reopening, Plaintiff would be further prejudiced.

IV. CONCLUSION

Defendant has failed to establish any excusable basis for disregarding the numerous legal notices it received in connection with this Adversary Proceeding. If the Court were to find this recklessness forgivable, it is hard to imagine the circumstances when a defendant would not be excused from failing to comply with the response deadlines associated with a summons and complaint. Whereas the misplacement of a single mailing may be both understandable and forgivable, Defendant has offered no justification for failing to confront eight separate legal notices over six month period, including the summons and complaint. Moreover, Defendant has failed to provide sufficient facts to support a meritorious defense, and Plaintiff would be prejudiced if the Adversary Proceeding were reopened since this Adversary Proceeding was initiated over a year ago, closed more than six months ago and Plaintiff would incur material delays and costs associated with reopening the case at this late stage.

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WHEREFORE, for the reasons set forth above, Plaintiff respectfully requests that the Court DENY Defendant's Motion to Reopen.

Date: November 5, 2021

BLANK ROME LLP

By: */s/ Josef W. Mintz*

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Welded Construction, L.P., *et al.*, Debtors.[1]	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
Welded Construction, L.P., Plaintiff, vs. Veriforce, LLC, Defendant.	Adv. No. 20-50955-CSS

DECLARATION OF NICHOLAS C. BROWN IN SUPPORT OF PLAINTIFF'S OBJECTION AND MEMORANDUM OF LAW IN OPPOSITION TO VERIFORCE LLC'S MOTION TO REOPEN ADVERSARY PROCEEDING, VACATE DEFAULT JUDGMENT, AND MEMORANDUM IN SUPPORT

I, Nicholas C. Brown, hereby declare:

1. I am an individual over the age of eighteen, and if called as a witness, I could and would competently testify to the facts set forth below.

2. I am an attorney at ASK, LLP (the "Firm"). The Firm and I are engaged as counsel for Welded Construction, L.P., *et al.* (the "Debtors" or "Plaintiff"), in the above-captioned adversary proceeding (the "Adversary Proceeding").

3. I make this declaration in support of Plaintiff's memorandum of law in opposition to *Defendant's Motion to Reopen Adversary Proceeding, Vacate Default Judgment, and Memorandum in Support* (the "Motion to Reopen"). I am familiar with the documents and files in this adversary proceeding and make this declaration of my own personal

[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).

knowledge based thereon. If called as a witness to testify as to matters stated herein, I would be willing and competent to do so.

4. On September 10, 2020, I mailed a *Notice of Intended Litigation and Settlement Offer* to Veriforce, LLC, the defendant in this Adversary Proceeding. A redacted copy of this letter (the "Demand Letter") is attached hereto as Exhibit 1.

5. I have reviewed the factual and procedural background as set forth in the *Plaintiff's Memorandum of Law in Opposition to Veriforce, LLC's Motion to Reopen Adversary Proceeding, Vacate Default Judgment, and Memorandum of Law* filed on November 5, 2021 in this Adversary Proceeding, and such factual and procedural allegations are true and accurate to the best of my knowledge.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 5th day of November, 2021.

Nicholas C. Brown

EXHIBIT 1

ask LLP | ATTORNEYS AT LAW

Nicholas C. Brown, Esq.
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September 10, 2020

NOTE: ANY PORTIONS OF THIS LETTER DISCUSSING DEFENDANT'S POTENTIAL DEFENSES AND SETTLEMENT BASED ON THOSE DEFENSES ARE PROTECTED SETTLEMENT COMMUNICATIONS PURSUANT TO RULE 408 OF THE FEDERAL RULES OF EVIDENCE AND ARE NOT ADMISSIBLE FOR ANY PURPOSE.

VERIFORCE, LLC
1575 Sawdust Rd, Ste #600
The Woodlands, Texas 77380

Re: NOTICE OF INTENDED LITIGATION AND SETTLEMENT OFFER
In re: Welded Construction, L.P., *et al.*,[1] Bankr. Case No. 18-12378(CSS)
Chapter 11, Filed October 22, 2018

Payments Received in Preference Period from the Debtors:	$251,255.00
Less Allowed New Value:	$ .00
Net Preference Claim:	$251,255.00
Settlement Percent:	[redacted]

File No: 2194258

Litigation Will Be Commenced Unless This Matter Is Resolved By September 30, 2020

Dear Sir or Madam:

This firm has been retained by Welded Construction, L.P. ("Welded") and Welded Construction Michigan, LLC (together with Welded, collectively, the "Debtors") through Cullen Speckhart, solely in her capacity as Plan Administrator (the "Plan Administrator") under the Amended Chapter 11 Plan (the "Plan") of the Debtors. The Debtors filed voluntary chapter 11 bankruptcy petitions on October 22, 2018 (the "Petition Date") in the U.S. Bankruptcy Court for the District of Delaware (the "Court"), which cases are being jointly administered in case number 18-12378 (CSS) (the "Bankruptcy Case"). On June 25, 2020, the Court entered an order (the "Order") confirming the Plan and all Plan supplements. A copy of the Order, Plan, and additional information about the Debtors' bankruptcy cases can be obtained by visiting: https://www.kccllc.net/welded.

Pursuant to the Order and Plan, Welded retained the ability to investigate, commence, prosecute, appeal, settle, abandon, or compromise certain Retained Causes of Action (as defined in the Plan), including Preference Actions (as defined in the Plan) under section 547 of the Bankruptcy Code to avoid and recover payments made to the Debtors' creditors prior to the Petition Date. Even though

[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).

these payments may have been proper when made by the Debtors, under the Bankruptcy Code, Welded may seek the return of such funds for the benefit of the Debtors' creditors.

Specifically, Section 547(b) of the Bankruptcy Code provides for the avoidance of transfers ("Preferential Transfers") made to creditors during the ninety (90) day period prior to the bankruptcy (the "Preference Period"), which in this case covers transfers that cleared between July 24, 2018 through and including the Petition Date.

The Basis of the Claim(s)

According to our records, VERIFORCE, LLC received not less than $251,255.00 (the "Transfers") during the Preference Period from the Debtors. Please review the enclosed Statement of Account listing checks, ACHs, and/or wire transfers issued to you by the Debtors within the Preference Period. If you did not receive one or more of these checks and/or wire transfers, please notify us immediately.

The Court May Disallow Your Claim Unless the Transfers are Returned to the Estate

Section 502(d) of the Bankruptcy Code provides that the Court shall disallow any claims of a party who fails to return an avoidable transfer. This means that if you assert an existing claim against the Debtors, you may not receive a distribution on account of that claim unless your liability for the Transfers is resolved. The Debtors reserve all applicable rights to object to your proof of claim and seek its disallowance, which may preclude you from receiving any distributions at all on account of your claim.

Potential Defenses to The Preference Claim

Subsequent New Value: Certain defenses are set forth in Section 547(c) of the Bankruptcy Code. We have reviewed the Debtors' records and considered whether you may have a defense to this action under one of these exceptions – the "*new value*" defense codified in subsection 547(c)(4). If the Debtors' books and records indicate that you provided goods or services to the Debtors after the Transfer(s) were made, we have reduced your liability by the value of such goods and services. We refer to this amount as your "new value credit." In this case, that amount is $ .00.

If the amount of the new value credit does not reflect all unpaid goods and services you provided to the Debtors *after receipt of the first Transfer* and prior to the Petition Date, please contact us within fourteen (14) days hereof with invoices and delivery receipts (or comparable evidence) for our review.

Ordinary Course of Business: A second common exception is the ordinary course of business defense under subsection 547(c)(2) of the Bankruptcy Code. If you believe you qualify for this defense, please send us your analysis (in Excel format, if possible), and your vendor historical ledger of invoices and payments between the Debtors and you for the Preference Period and the 15-month period prior to the Petition Date. Please include the following fields in your spreadsheet: InvNo, InvDate, Term, InvAmt, AmtPaid, CheckNo, and Check Receive Date.

Please provide the requested documentation ***within fourteen (14) days hereof (the "Response Date")*** so that Welded may evaluate any impact on your potential liability.

Demand for Payment

BY THIS LETTER, WELDED DEMANDS PAYMENT OF THE TOTAL AMOUNT OF THE NET PREFERENCE CLAIM SHOWN ABOVE ON OR BEFORE THE RESPONSE DATE.

Settlement Offer

Our firm specializes in avoidance recovery work, and we appreciate the difficulty of accepting the notion that the bankruptcy laws require the return of payments made during the Preference Period. It is no doubt a "bitter pill" to swallow that the law requires the return of payments received on account of legitimate obligations owed to your company. However, pursuant to the Bankruptcy Code, the Plan and the Order, Welded, as directed by the Plan Administrator, is exercising the authority to seek to avoid and recover such funds for equal redistribution to all holders of allowed general unsecured claims in the Debtors' bankruptcy cases. It is not relevant to the preference liability issue whether the Debtors intentionally preferred you or whether you knew the Debtors were insolvent.

To encourage settlement before a lawsuit is filed, our client has authorized a settlement offer based on the following calculation:

Transfers From the Debtors During The Preference Period	$251,255.00
Less Subsequent New Value (if any):	$ .00
Net Preference Claim:	$251,255.00
Less Settlement Discount:	[redacted]
[redacted]	[redacted]

[redacted] Please complete and return the **enclosed settlement form** and your payment made payable to Welded Construction, L.P. by the Response Date. (Detailed instructions are set forth on the enclosed Settlement Offer and Acceptance Form).

The Debtors do not waive and hereby expressly reserve all rights and remedies with respect to the matters set forth herein, including the right to pursue litigation to recover the full value of the Transfers unless this matter is otherwise resolved by agreement of the parties. Therefore, unless the matter is resolved or you provide us with the requested payment and invoice records, a complaint will be filed in the week following the deadline for acceptance of this offer. We encourage you to give this matter your early attention so that you can make an informed decision without the added burden of time pressure. Please contact me at 651-289-3867, or via email at nbrown@askllp.com.

Sincerely,

ASK LLP

/s/ Nicholas C. Brown, Esq.

Counsel for the Debtors

Encl: Statement of Account
Settlement Offer and Acceptance Form
Additional Instructions Re: Defenses

In re: Welded Construction, L.P., *et. al.*
Bankr. Case No. 18-12378 (CSS)

Welded Construction, L.P.
vs.
VERIFORCE, LLC

SETTLEMENT OFFER AND ACCEPTANCE FORM File No: 2194258

[redacted]

Executed on this ___ day of _____, 202___.
Defendant: VERIFORCE, LLC
Our File No.: 2194258

By: _____
Print: _____ Title: _____
Phone Number: _____

RETURN WITH CHECK FOR [redacted]
PAYABLE TO: Welded Construction, L.P.
PRIOR TO: September 30, 2020
MAIL TO: ASK LLP
2600 Eagan Woods Drive, Suite 400
St. Paul, MN 55121

Additional Instructions Re: Defenses

You should make a copy of this letter and all enclosures to send to your attorney should you choose to defend this matter rather than settle and return the payments.

Under certain circumstances you may have a defense warranting settlement of this action at less than the settlement offer extended. We will be happy to consider your defenses and explore settlement. The two most common defenses are set forth below, with instructions on how to proceed with settlement discussions as to each.

1. New Value Defense

If you believe that you have a defense pursuant to Section 547(c)(4) of the Bankruptcy Code, *i.e.*, that you extended additional credit **after receipt of the first transfer** made to you during the preference period that we have not credited, please send proof of supporting invoices and invoices and delivery receipts along with an excel spreadsheet to substantiate your new value defense.

For case support on new value and how Section 547(c)(4) applies, *see*

In re Wadsworth Building Components, Inc., 711 F.2d 122 (9th Cir. 1983) ("If the creditor and the Debtors have more than one exchange during the 90-day period, the exchanges are netted out according to the formula in paragraph 4 [of 547(c)]");

In re Meredith Manor, Inc., 902 F.2d 257, 258 (4th Cir. 1990) (Garland allows the creditor to calculate the difference between the total preferential transfers and the total advances, providing that "each advance issued to offset only prior (although not necessarily immediately prior) preference…[This] permits preference to be carried forward until exhausted by subsequent advance.")

2. Ordinary Course of Business Defense

11 U.S.C. § 547(c)(2) provides a limited defense for transfers that were in payment of debts incurred and paid in the ordinary course of business of the Debtors and the transferee, or that were made according to ordinary business terms. To qualify for the ordinary course of business defense under Section 547(c)(2), a creditor must prove by a preponderance of the evidence that either 1) the debt and its payment are ordinary in relation to past practices between the Debtors and the creditor; or 2) the payment was made according to ordinary business terms in your respective industries.

Please send any analysis supporting your ordinary course of business defense in excel format. Please include the following documents to support your assertions.

A. Your vendor historical ledger of invoices and payments between your company and the Debtors for the Preference Period and the 15 month period prior to the Petition Date. An example of the fields that should be included in a spreadsheet containing this information is as follows:

InvNo, InvDate, Term, InvAmt, AmtPaid, CheckNo, Check Receive Date
This data should be supported by paper copies of the invoices.

B. Should you claim the payments were made according to ordinary business terms for your industry, provide your analysis to support this defense, *i.e.*, that the number of days and manner of payment between your invoices and payment thereof was customary for your industry.

CERTIFICATE OF SERVICE

I, Josef W. Mintz, hereby certify that on November 5, 2021, I caused to be served the foregoing *Plaintiff's Objection and Memorandum of Law in Opposition to Veriforce, LLC's Motion to Reopen Adversary Proceeding, Vacate Default Judgment, and Memorandum in Support* upon the following parties by CM/ECF (where available) and electronic mail:

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