

**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

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

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Veriforce, LLC (“Veriforce”) files the following Reply Memorandum in Further Support of Motion to Re-Open Adversary Proceeding, Vacate Default Judgment, and Incorporated Memorandum in Support (the “Motion”).

PRELIMINARY STATEMENT

1. In its Motion, Veriforce set forth in extensive detail why this case should be re-opened and the default judgment set aside based on the three-factor test set forth in *United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192 (3d Cir.1984). In particular, Veriforce established, through an unsworn declaration of its CFO, Carl Foto (“Veriforce Declaration”), that it has an extremely meritorious ordinary course defense to the preference claim asserted by Welded Construction, L.P. (“Welded Construction” or “Plaintiff”). Veriforce further demonstrated that setting aside the default judgment would pose no prejudice to the Plaintiff. Finally, Veriforce established that its conduct in allowing the default judgment could not be deemed “culpable” because Veriforce’s failure to timely answer the lawsuit was the unfortunate result of significant workplace disruptions caused by COVID-19 and a company merger.

2. The arguments raised by Welded Construction against re-opening this case are unavailing and fail to rebut the points raised by Veriforce. Stated simply, Veriforce submits that this case presents the precise type of scenario where courts have found it appropriate to set aside a default judgment in accordance with the strong presumption in this Circuit that cases should generally be resolved on the merits. The Motion should be granted.

LAW AND ARGUMENT

I. Veriforce Made a Sufficient Showing of a Meritorious Defense.

3. Plaintiff first attempts to argue that Veriforce has failed to establish a meritorious ordinary course defense under either the subjective standard or the objective standard.

4. Regarding the subjective ordinary course defense under 11 U.S.C. § 547(c)(2)(A), the Plaintiff, citing *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), states that courts consider a multitude a factors in this analysis, 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.

5. Though these factors are generally considered by courts in the subjective ordinary course defense, Plaintiff then misapplies them to the facts of this matter (and to which party shoulders the burden of proof regarding these factors) to reach the erroneous conclusion that Veriforce has failed to establish a meritorious defense.

6. First, Plaintiff overlooks the fact that the ***timing*** of preference period payments when compared to payments made during the historical period is the paramount consideration in the subjective ordinary course analysis – such that if the timing of the preference payments were consistent with the payments during the historical period, the creditor is generally entitled to ordinary course protection. As explained by the bankruptcy court in the *FBI Wind* bankruptcy:

In determining the ordinary course of dealings between parties,
[c]ourts place particular importance on the timing of payments. It

is well settled in many jurisdictions that payments made beyond the parties' payment terms are considered as falling outside the ordinary course of business between the parties and presumed to be non-ordinary. ***As a result, Transfers made in the Preference Period should be deemed in the ordinary course of business when made within range of the Historical Period.*** *In re FBI Wind Down, Inc.*, 581 B.R. 387, 409 (Bankr. D. Del. 2018) (emphasis added) (internal citations and quotation marks omitted).

7. Here, the Veriforce Declaration unequivocally establishes that this crucial timing requirement is satisfied in this case because the payment during the Preference Period was made 30 days after the invoice, and thus falls squarely within the payment range during the Historical Period where payments were made between 13 and 39 days after the issuance of the invoice.

8. Welded Construction further argues that the first factor – the length of time the parties engaged in the type of dealings at issue – is not satisfied in this case because of the purportedly small sample size of payments (thirteen) made during the Historical Period, which Plaintiff states is “[a]rguably” not a significant enough sample to determine a baseline of the parties’ course of dealings.

9. Contrary to the Plaintiff’s assertions, this first factor focuses not on the number of historical period transactions, but rather, on the “**length** of the business relationship between Debtors and Defendant.” *FBI Wind Down, Inc.*, 2020 WL 1900454 at *17 (emphasis added). Courts look at the length of the commercial relationship in order “to determine if their relationship was of recent origin,” as opposed to being “cemented long before the onset of insolvency.” *Id.*

10. In *FBI Wind Down*, the court held that the approximate three-year period of dealings between the parties was sufficient to establish an ordinary course of dealings. *Id.* Other courts have likewise held that commercial dealings existing over years or even months to be of sufficient length to establish a baseline for the parties’ course of dealings. In fact, in *In re Conex Holdings, LLC*, 522 B.R. 480, 488 (Bankr. D. Del. 2014), this Court held: “Here, the Debtor and

Defendant *had been doing business for approximately 16 months*, which is of sufficient duration for the Court to determine the ordinary course of business between them” (emphasis added). *See also, Troisio v. E.B. Eddy Forrest Prods. Ltd., (In re Global Tissue, L.L.C.)*, 302 B.R. 808, 814 (D. Del. 2003) (holding that the parties' relationship of 15 months was sufficient); *Unsecured Creditors' Comm. v. CBA Indus., Inc. (In re Color Title, Inc.)*, 239 B.R. 872, 875 (Bankr. D. Del. 1999) (holding that a relationship that existed for nearly three years was long enough).

11. Stated simply, the key focus in the first factor is the length of the parties' commercial relationship. The Veriforce Declaration, which is undisputed on this issue, confirms that Welded Construction and Veriforce's commercial relationship goes back to at least 2012. The multi-year commercial relationship established in the Veriforce Declaration is certainly sufficient to establish an ordinary course of dealings between the parties.

12. Welded Construction also argues that the second factor (whether the subject transfers were in an amount more than usually paid) favors the Plaintiff because the amount of the preference payment (\$251,255.00) was \$100,000.00 greater than the next largest payment. Welded Construction ignores that the preference payment was the payment of a single invoice, and therefore completely consistent with the Debtor's pattern and practice of paying the applicable invoice amount. Should this case be re-opened, Veriforce will demonstrate that this larger payment amount was the result of a confluence of several ordinary business factors – namely, a substantial number of new hires by Welded Construction in 2018 due to a large project that year, as well as an increase in the bi-annual fees charged by Veriforce for the services it provided to the Plaintiff.

13. Further, Welded Construction asserts that the Veriforce Declaration is silent on the remaining factors (manner of payment, unusual collection activity by the creditor, and whether the creditor applied pressure against the debtor to gain an advantage), and thus argues that

Veriforce has failed to demonstrate that these other factors favor Veriforce. Crucially, however, Welded Construction fails to put forth any evidence that demonstrates that *these factors should weigh against Veriforce* (even though such documents, if they existed, would presumably be at its disposal in this Chapter 11 proceeding).

14. Welded Construction's failure to put forth any such evidence further demonstrates that Veriforce has established a meritorious defense. Indeed, this Court has granted *summary judgment* in favor of a preference defendant where there was no evidence to suggest these factors weighed against the defendant. *See In re Conex Holdings, LLC*, 522 B.R. 480, 491 (Bankr. D. Del. 2014) (granting summary judgment in favor of preference defendant and noting that there was "no evidence... that the payments were tendered in a different manner from previous payments; nor that Defendant took any unusual action to collect such debts from the Debtor; nor that Defendant did anything to gain an advantage as a result of the Debtor's deteriorating financial condition.").

15. In addition, Welded Construction argues that Veriforce has provided no evidence to support an objective ordinary course defense under 11 U.S.C. § 547(c)(2)(B) which requires a showing that the transfer was consistent with "ordinary business terms" in the creditor's industry. While this argument is rendered moot by the fact that Veriforce would prevail on its subjective ordinary course defense, it is also simply nonsensical. The Veriforce Declaration establishes that the preference payment was consistent with the *payment terms of the invoice* of Net 30 days. It is axiomatic that a payment made in accordance with the relevant invoice is consistent with "ordinary business terms," and entitled to protection under Section 547(c)(2)(B).

16. In sum, the meritorious defense inquiry in *US Currency* asks whether a defendant has alleged "specific facts that, if established at trial, would constitute a complete defense." *In re USN Commc'ns, Inc.*, 288 B.R. 391, 395 (Bankr. D. Del. 2003) (citing *United States v. \$55,518.05*

in *U.S. Currency*, 728 F.2d 192, 195 (3d Cir.1984)). Veriforce's pleadings and accompanying Declaration easily satisfy this standard with regard to both the subjective and objective ordinary course defenses.

II. Plaintiff Has Failed to Establish That Veriforce Was Culpable in the Rendering of the Default Judgment Against It.

17. Welded Construction also argues that Veriforce was culpable in connection with the default judgment being rendered because it exhibited a "reckless disregard" for the repeated communications sent to Veriforce regarding the preference claim. To support this assertion, Welded Construction relies primarily on two cases, *Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.*, 175 Fed. Appx. 519 (3d Cir. 2006) and *North Cent. Illinois Laborers' Dist. Council v. S.J. Groves & Sons Co.*, 842 F.2d 164 (7th Cir. 1988).

18. Both *Nationwide* and *S.J. Groves* are completely inapplicable to the facts and circumstances here. The reasons for Veriforce's failure to timely respond to the lawsuit are largely predicated on the global COVID-19 pandemic, an event completely outside of Veriforce's control, and the pandemic's resulting effect on conventional office operations.¹

19. Moreover, the Third Circuit's decision to affirm the district court in *Nationwide* was based, in significant part, on the fact that the defendant had failed to demonstrate a defense on the merits. *See Nationwide Mut. Ins. Co.*, 175 Fed. Appx. at 524.

20. Significantly, numerous federal courts have predictably concluded that the COVID-19 pandemic can provide grounds for a party's excusable neglect in missing a deadline where the party sets forth specifically **how** COVID-19 caused or contributed to the failure to meet the

¹ The other cases cited by Welded Construction, *Insurance Co. of North America v. Morrison*, 154 F.R.D. 278, 280 (M.D. Fla. 1994) and *Gibbs v. Air Canada* 810 F.2d 1529 (11th Cir. 1987) were also pre-COVID cases and involved a breakdown in company procedure which was within the defendant's control.

pertinent deadlines. For instance, in *Satco Prod., Inc. v. Seoul Semiconductor Co.*, 2021 WL 3233480, at *2 (N.D. Ga. July 27, 2021), the court set aside a default judgment where the defendant’s failure to answer was based on its lead counsel’s transition to a new law firm where “the COVID-19 pandemic compounded the difficulties of the remote transition process.” Other courts have likewise found that the resulting difficulties caused by COVID-19 can provide the requisite excusable neglect necessary to allow relief from a missed deadline. *See, e.g., White v. Mancini’s Sleepworld, Inc.*, 2020 WL 5258252, at *2 (N.D. Cal. Sept. 3, 2020) (setting aside default judgment against defendant company where “company had ‘completely shut down’ due to COVID-19, and had only a fraction of its ordinary workforce at the time th[e] action was filed, with the result that its processes for handling litigation were diminished.”); *Bramhall v. Cyprus Credit Union*, No. 219CV00477RJSDAO, 2020 WL 4596933, at *3 (D. Utah Aug. 11, 2020) (finding that excusable neglect justified extension of deadline to file motion to dismiss where COVID-19 caused a drastic reduction in “the number of staff reporting to work each day” to counsel’s offices which significantly disrupted their work routine).

21. Like the parties in the above cases, the Veriforce Declaration specifically sets forth how and why the COVID-19 pandemic contributed to its failure to timely respond to the lawsuit – namely, the disruptive impact on company operations and the adoption of work-from-home policies prevented the pleadings sent by conventional US mailings from reaching the appropriate persons. These circumstances constitute the excusable neglect and lack of culpability that should permit this proceeding to be re-opened and decided on the merits (particularly where Veriforce has established such a strong ordinary course defense).

III. Welded Construction Fails to Demonstrate that it Would Suffer the Necessary Type or Level of Prejudice that Should Preclude a Default Judgment from Being Set Aside.

22. Finally, Welded Construction attempts to argue that it would be prejudiced if the default judgment is set aside. Plaintiff claims that, if Veriforce is permitted to proceed and defend itself on the merits, the Court will need to establish new deadlines for pleadings and discovery specifically for this Adversary Proceeding, which will cause additional expenses to be incurred. This position is entirely unavailing.

23. The prejudice cited by Plaintiff – which it admits is not “egregious” – does not remotely approach the level of severity needed for this factor to weigh against setting aside the default. As this Court has recognized, the plaintiff must demonstrate “a loss of evidence, the increased potential for collusion or a substantial reliance on the judgment.” *In re Advanced Mktg. Servs., Inc.*, 448 B.R. 321, 328 (Bankr. D. Del. 2011) (citations omitted). “[T]he delay in realizing satisfaction on a claim,” which is Welded Construction’s chief complaint here, “rarely serves to establish the degree of prejudice sufficient to prevent the opening of a default judgment.” *Id.* Simply setting new deadlines and then proceeding on the merits can hardly be deemed prejudicial.

24. Lastly, Welded Construction’s prejudice argument is further weakened by the posture of these Chapter 11 proceedings. The Amended Chapter 11 Plan confirmed in June of 2020 continues to be administered, and there is no indication that these cases will be closed any time soon. Indeed, Welded Construction continues to file omnibus exceptions to creditor claims in this case, which are scheduled to be heard in 2022.

CONCLUSION

25. For the reasons set forth above, and those in the Motion and Memorandum, 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).

Dated: November 12, 2021

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