

**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

**DEFENDANT'S OPENING BRIEF IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

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Defendant Veriforce, LLC (“Veriforce”) files the following Brief in Support of its Motion for Summary Judgment (the “Motion”), seeking dismissal of all claims asserted against it in this Adversary Proceeding, with prejudice, as a matter of law.

STATEMENT OF NATURE AND STAGE OF THE PROCEEDING

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. In the Complaint, Welded Construction seeks recovery of a payment in the amount of \$251,255.00 made by Plaintiff to Veriforce on or about October 1, 2018 (the “Transfer”). Plaintiff asserts the following substantive theories as potential means to recover the Transfer from Veriforce: (1) avoidance of the Transfer as a preferential payment under 11 U.S.C. § 547 – Count I; and (2) alternatively, avoidance of the Transfer as a fraudulent conveyance pursuant to 11 U.S.C. § 548(a)(1)(B) – Count II. Plaintiff also asserts Counts III and IV, which afford the Plaintiff certain additional rights, if it is able to establish a right of avoidance under 11 U.S.C. § 547 or 548, namely, recovery of the Transfer from immediate or mediate transferees pursuant to 11 U.S.C. § 550 and disallowance of claims under 11 U.S.C. § 502.

3. On November 10, 2020, Plaintiff purportedly served the Complaint and Summons on representatives of Veriforce (D.I. 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).

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. On October 18, 2021, Veriforce filed a *Motion to Reopen Adversary Proceeding, Vacate Default Judgment, and Memorandum in Support* (D.I. 18), requesting that the Court reopen the Adversary Proceeding to set aside the Default and Default Judgment that had been entered against Veriforce pursuant to Fed. R. Civ. P. 60(b).

6. On November 18, 2021, the Court, over the Plaintiff's Objection, granted Veriforce's Motion to Reopen, having determined that the "legal and factual bases set forth in the Motion establish just cause" to reopen the Adversary Proceeding. (D.I. 30).

7. On December 17, 2021, Veriforce answered the Complaint and specifically asserted the ordinary course of business defense under Section 547(c)(2). (D.I. 31 at ¶59).

SUMMARY OF THE ARGUMENT

8. There is no genuine issue of material fact in this Adversary Proceeding as to whether Veriforce has a valid ordinary course of business defense to the Plaintiff's claims. Because the existence of a valid ordinary course defense is case-dispositive, summary judgment dismissing the Plaintiff's claims is appropriate.

9. A comparison of the Transfer made during the Preference Period with the payments made by the Plaintiff to Veriforce for the same services in the six years prior to the Preference Period (this pre-preference period hereafter the "Historical Period") confirms that the Transfer was made 30 days after the issuance of the invoice, while the payments made by Plaintiff to Veriforce during the Historical Period were made in the range of 13 to 39 days after the issuance of the relevant invoice. There is no genuine dispute of material fact regarding these payment ranges in

the Preference Period and Historical Period because the records supporting same are incontrovertible. Based on the foregoing, Veriforce has a subjective ordinary course defense to the recovery of the Transfer pursuant to 11 U.S.C. § 547(c)(2)(A) because the Transfer during the Preference Period was consistent with the parties' payment practices during the Historical Period.

10. Moreover, the Transfer was also consistent with the payment terms of the applicable invoice (Net 30), which terms are standard for the relevant industry. Therefore, the Transfer is also subject to the objective ordinary course defense set forth in 11 U.S.C. § 547(c)(2)(B).

11. In addition, the Plaintiff has no basis to seek recovery under the alternative theory of constructive fraudulent transfer under 11 U.S.C. § 548(a)(1)(B) because it is an undisputed fact that the Transfer was made on account of an antecedent debt, thereby rendering 11 U.S.C. § 548(a)(1)(B) inapplicable.

12. Counts III and IV must also be dismissed on the basis that those Counts are not substantive causes of action, but simply provide Plaintiff with additional remedies for an otherwise viable preference action under 11 U.S.C. § 547 or fraudulent conveyance claim under 11 U.S.C. § 548. Because Plaintiff's substantive claims fail, its claims under Counts III and IV must also be dismissed.

13. For these reasons, Veriforce is entitled to summary judgment in its favor as a matter of law, dismissing Plaintiff's claims in the Adversary Proceeding in their entirety.

STATEMENT OF FACTS

14. 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

15. As of the time of its bankruptcy filing, Welded Construction had been a client of Veriforce for a number of years. Throughout that time, 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

16. In the ordinary course of its business, Veriforce issued 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 The payment terms of the invoices issued to Welded Construction were "Net 30" which were the same payment terms that Veriforce generally has with other customers.⁶ These payment terms are

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

² Veriforce Decl. at ¶3.

³ Veriforce Decl. at ¶3.

⁴ Veriforce Decl. at ¶4.

⁵ Veriforce Decl. at ¶5.

⁶ Veriforce Decl. at ¶10.

also consistent with the relevant industry (employee compliance and certification in the energy sector).⁷

17. 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).⁸ 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 2018:⁹

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
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 2/28/14	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

⁷ Veriforce Decl. at ¶10.

⁸ Veriforce Decl. at ¶6.

⁹ Veriforce Decl. at ¶6.

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

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

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

Payment for OQ Compliance Management During the "Preference Period"¹²

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

20. 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.¹³ Therefore, the

¹⁰ Veriforce Decl. at ¶7. Attached as Exhibit A to the Veriforce Decl. are copies of printouts for the payments made during the Historical Period which confirm the 13 to 39 payment range for the Historical Period.

¹¹ Veriforce Decl. at ¶8.

¹² Veriforce Decl. at ¶8.

¹³ Veriforce Decl. at ¶9. Attached as Exhibit B to the Veriforce Decl. is a copy of a printout reflecting payment information for the Transfer made during the Preference Period which confirms the Transfer was made 30 days after the issuance of the invoice.

payment range of the Transfer was 30 days and falls squarely within the payment range for Welded Construction's payments during the Historical Period of **13 to 39 days**.¹⁴

LAW AND ARGUMENT

I. Legal Standard for Summary Judgment.

21. Federal Rule of Civil Procedure 56, made applicable to these proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment should be granted if the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," after considering the material cited in or attached to the motion, including "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials..." *See* Fed. R. Civ. P. 56.

22. Summary judgment under Fed. R. Bankr. P. 7056, "is designed 'to avoid trial or extensive discovery if facts are settled and dispute turns on issue of law.'" *In re Archway Cookies*, 435 B.R. 234, 238 (Bankr. D. Del. 2010) (citation omitted) (Sontchi, J.). Stated differently, the purpose of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Id.* (citation omitted).

23. Although disputes concerning the "ordinary course" defense to preference actions can be fact-intensive, bankruptcy courts, including this Court, have not hesitated to grant motions for summary judgment in matters such as this one where there are no genuine issues of material fact, and the defense is clearly established. *See, e.g., In re Conex Holdings, LLC*, 522 B.R. 480 (Bankr. D. Del. 2014); *In re Archway Cookies*, 435 B.R. at 245 ("For the foregoing reasons, the Court grants summary judgment by finding that the Transfers are not voidable as they are protected

¹⁴ Veriforce Decl. at ¶9.

by the ordinary course defense set forth in § 547(c)(2)(A).”); *In re Graham Gulf, Inc.*, No. 15-3065, 2019 WL 7667624 (Bankr. S.D. Ala. Mar. 14, 2019).

II. Veriforce is Entitled to Summary Judgment on Plaintiff’s Preference Claim Because the Alleged Transfer Was Made in the Ordinary Course of Business.

24. As Plaintiff acknowledges in its Complaint (D.I. 1 at ¶ 30), its claim in Count I may be subject to certain defenses under 11 U.S.C. § 547(c), including 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 WL 1532390, at *5 (D. Del. Mar. 31, 2020).

25. Pursuant to 11 U.S.C. § 547(c)(2), a transfer may not be avoided under Section 547 if the transfer was made for a debt 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. *In re Managed Storage Int’l, Inc.*, 2020 WL 1532390, at *5. *See also* 11 U.S.C. § 547(c)(2)(A)-(B). Here, there is no dispute that the first requirement of 547(c)(2) is satisfied because the Transfer was made to discharge an antecedent debt owed by Welded Construction to Veriforce for OQ compliance management services provided in the preceding bi-annual service period.¹⁵ Moreover, both subsections (A) and (B) of 547(c)(2) apply in this case to exempt the Transfer from recovery in this Adversary Proceeding.

A. Summary Judgment is Warranted Under 11 U.S.C. § 547(c)(2)(A) Because the Transfer Was Consistent with the Past Business Practices of Welded Construction and Veriforce.

¹⁵ *See* Veriforce Decl. at ¶8 (noting that the Transfer was made for services provided from March 1, 2018 to August 1, 2018).

26. Under 11 U.S.C. § 547(c)(2)(A), a transfer may not be avoided if “such transfer was...(A) made in the ordinary course of business or financial affairs of the debtor and the transferee....” To make the determination as to whether a transfer is subject to protection under 547(c)(2)(A), courts consider factors such as: (1) the length of time the parties engaged in the type of dealing at issue; (2) whether the subject transfers were in an amount more than usually paid; (3) whether the 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 gain additional security) in light of the debtor's deteriorating financial condition. *See In re Archway Cookies*, 435 B.R. at 241-42.

27. Importantly, 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. at 243. 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 whether the payments in each period were sufficiently similar.” *In re Managed Storage Int’l., Inc.*, 2020 WL 1532390, at *5.

28. 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), this 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. This Court applied the same rationale in *Conex* to grant summary judgment in favor of the defendant where the defendant established that the range of preference period payments was consistent with the range of the historical period payments. *See Conex*, 522 B.R. at 491 (“The Court finds that the evidence of the range of payments is adequate for Defendant to carry its burden that the payments made during the Preference Period were similar to those made during the Historical Period.”).

29. The Transfer 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 Transfer was made 30 days after issuance of the invoice, and in compliance with the invoice’s payment terms of Net 30.¹⁶ Accordingly, the payment range for the Transfer to Veriforce was **30 days**.

30. 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.¹⁷ 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

¹⁶ Veriforce Decl. at ¶¶9-10.

¹⁷ Veriforce Decl. at ¶¶4-5.

13 to 39 days from issuance of the invoice.¹⁸ Accordingly, the payment range for the Historical Period payments was **13 to 39 days**.¹⁹

31. Based on the foregoing, the Transfer 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* and *Conex*, “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.

32. Though Veriforce submits that the timing of the Transfer is alone sufficient to establish that the payment should be subject to ordinary course protection under 547(c)(2)(A), it is noteworthy that certain of the other factors addressed by this Court in *Archway Cookies* also clearly weigh in favor of finding a viable defense under 547(c)(2)(A).

33. Regarding the first factor – the length of time the parties engaged in the type of dealings at issue – courts look to the “length of the business relationship between Debtors and Defendant to determine if their relationship was of recent origin,” as opposed to being “cemented long before the onset of insolvency.” *In re FBI Wind Down, Inc.*, 614 B.R. 460, 487 (Bankr. D. Del. 2020). The courts have found that relationships spanning from a few months to a few years are sufficient to establish an ordinary course of dealings between the parties so as to satisfy this first factor. *See id.* (holding that the approximate three-year period of dealings between the parties was sufficient to establish an ordinary course of dealings); *In re Conex Holdings, LLC*, 522 B.R. at 488 (“Here, the Debtor and Defendant *had been doing business for approximately 16 months*,

¹⁸ Veriforce Decl. at ¶¶6-7.

¹⁹ Veriforce Decl. at ¶7.

which is of sufficient duration for the Court to determine the ordinary course of business between them”) (emphasis added); *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); *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).

34. Here, the Veriforce Declaration and the payment records attached thereto confirm that Welded Construction and Veriforce’s commercial relationship goes back to at least 2011, which is certainly a sufficient period of time to establish an ordinary course of dealings between the parties.

35. Further, although the second factor (whether the subject transfers were in an amount more than usually paid) may appear at first glance to weigh against Veriforce, there are perfectly valid reasons why the Transfer was larger than previous payments made to Veriforce during the Historical Period for the same OQ compliance management services. Specifically, the larger payment amount of \$251,255.00 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 its customers.²⁰ The Transfer was, just like the others before it, a payment made on a single invoice for services rendered over the previous bi-annual period.

36. Finally, Veriforce notes that the Complaint fails to allege that any of the remaining *Archway Cookies* factors – manner of payment, unusual collection activity by the creditor, and whether the creditor applied pressure against the debtor to gain an advantage – were present in connection with the Transfer. Given that the undisputed summary judgment evidence establishes

²⁰ Veriforce Decl. at ¶11.

that at least three factors (including the crucial timing requirement) weigh in favor of Veriforce, and the Plaintiff cannot put forth evidence that any of the remaining factors support the Plaintiff, summary judgment on the ordinary course of business defense under 547(c)(2)(A) is appropriate. *See Conex*, 522 B.R. at 491 (granting summary judgment for defendant where defendant had satisfied the timing requirement, and where “there [wa]s no evidence of change in the amount of the subject transfers such that payments in the Preference Period were in an amount more than usually paid; nor 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.”).

B. Summary Judgment is also Warranted Under 11 U.S.C. § 547(c)(2)(B) Because the Transfer Was Consistent With the Payment Terms of the Applicable Invoice.

37. Further, the Transfer was also consistent with “ordinary business terms” in accordance with 11 U.S.C. § 547(c)(2)(B). The Bankruptcy Court for the District of Delaware has 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., In re Forklift LP Corp.*, 340 B.R. 735, 739 (Bankr. D. Del. 2006) (quoting *Molded Acoustical Prods.*, 18 F.3d at 226); *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).

38. Veriforce generally employs Net 30 payment terms in the invoices issued to its compliance customers, which are standard credit terms in the industry for employee compliance

and certification in the energy sector.²¹ Here, there is no doubt that the Transfer was consistent with “ordinary business terms” because it was paid in accordance with the standard Net 30 payment terms on the invoice.²² Accordingly, the Transfer is also shielded from avoidance based on 547(c)(2)(B).

III. Veriforce is Entitled to Summary Judgment on Plaintiff’s Alternative Claim Under Count II for Avoidance of Fraudulent Conveyance Because the Alleged Transfer Was Made on Account of an Antecedent Debt of the Plaintiff.

39. In Count II, the Plaintiff asserts an alternative claim for avoidance of a fraudulent conveyance pursuant to 11 U.S.C. § 548(a)(1)(B). Plaintiff makes clear that it asserts this alternative theory for avoidance of the Transfer only “to the extent that the Transfers identified on Exhibit A *was not made on account of an antecedent debt...*”²³

40. Count II must be dismissed because the Transfer was made by Welded Construction to discharge an invoice issued by Veriforce to cover the OQ compliance management services provided during the preceding billing period of March 1, 2018 to August 1, 2018.²⁴ The invoice clearly constituted an antecedent debt owed by Plaintiff to Veriforce for past services. *See In re NewPage Corp.*, 569 B.R. 593, 599 (D. Del. 2017) (“[A]n antecedent debt owed by the debtor occurs when a right to payment arises—even if the claim is not fixed, liquidated, or matured...The right to payment generally arises when the debtor obtains the goods or services.”) (citations omitted). Further, payment to satisfy an antecedent debt cannot give rise to a claim for fraudulent transfer under Section 548(a)(1)(B). *See, e.g., In re APF Co.*, 308 B.R. 183, 187 (Bankr. D. Del. 2004) (finding that the trustee could not state a 548 fraudulent transfer claim because the payment

²¹ Veriforce Decl. at ¶10.

²² Veriforce Decl. at ¶¶9-10.

²³ Complaint (D.I. 1) at ¶42 (emphasis added).

²⁴ Veriforce Decl. at ¶8.

was in satisfaction of an antecedent debt); *In re Direct Response Media, Inc.*, 466 B.R. 626, 660 (Bankr. D. Del. 2012) (same).

41. In fact, the “Exhibit A” to the Plaintiff’s Complaint which reflects the payment details for the Transfer, including the invoice and the payment date, correctly refers to Welded Construction as the “Debtor(s) incurring Antecedent Debt.” *See* D.I. 1-1.

42. Accordingly, as Plaintiff’s own Complaint acknowledges, the undisputed fact that the Transfer was in payment of an antecedent debt requires that Count II of this Adversary Proceeding be dismissed as a matter of law.

IV. Counts III and IV Fail as Those Theories Simply Give a Plaintiff Additional Rights in Connection with a Viable Preference or Fraudulent Transfer Claim.

43. Lastly, Counts III and IV must be dismissed.

44. Count III asserts a right of recovery under 11 U.S.C. § 550, which simply allows a plaintiff that asserts an otherwise viable avoidance claim under 547 or 548 to recover from the initial, immediate, and mediate transferees of such transfer. *See* 11 U.S.C. § 550(a). The provision has no application here where Welded Construction’s claims under § 547 and § 548 must be dismissed as a matter of law.

45. Likewise, Count IV asserts a right to disallowance of creditor claims pursuant to 11 U.S.C. § 502(d) and (j). That provision operates to disallow creditor claims where the creditor/defendant has failed to pay back any amounts for which it is liable under 11 U.S.C. §§ 547, 548, and 550, and as such has no application in this case.

46. Accordingly, Veriforce is entitled to summary judgment dismissing the Count III and IV claims as well.

CONCLUSION

For the reasons set forth herein, this Court should grant Veriforce's motion for summary judgment and dismiss all claims asserted in Welded Construction's Complaint, with prejudice.

Dated: January 26, 2022

/s/ James G. McMillan, III

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Counsel to Defendant, Veriforce, LLC

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

In re:

WELDED CONSTRUCTION, *et al.*,

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

**UNSWORN DECLARATION IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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 June 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 clients bi-annual fees based on the number of employees that are registered in the OQ compliance management system during the applicable billing cycle.

4. As of the time of its bankruptcy filing, Welded Construction had been a client of Veriforce for a number of years. Throughout that time, 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 provided during the previous billing cycle, charging Welded Construction a fee for each employee that was registered in the system during the previous 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:

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
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 2/28/14	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

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.¹

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”) for services provided from March 1, 2018 to August 1, 2018. 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
314101	9/1/2018	\$251,255.00	3/1/18 to 8/1/18	10/1/2018	\$251,255.00	30

¹ Printouts reflecting the payment information for each of the Historical Period payments attached *in globo* hereto as Exhibit A.

9. Welded Construction made the OQ bi-annual fee payment during the Preference Period **30 days** after the issuance of the invoice.² 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. The Net 30 payment terms for the invoices that Veriforce issued to Welded Construction are the same payment terms that Veriforce generally has with other customers. These payment terms are also consistent with the relevant industry (employee compliance and certification in the energy sector).

11. There were several ordinary business factors for why the payment made by Welded Construction during the Preference Period for OQ compliance management services in the amount of \$251,255.00 was significantly larger than the prior payments made for the same services – 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 Welded Construction.

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

Executed on: January 18, 2022.





CARL FOTO



² A printout reflecting the payment information for the payment made during the Preference Period is attached hereto as Exhibit B.

Cash Receipts Inquiry Zoom Case 20-50955-CSS Doc 33-1 Filed 01/26/22 Page 6 of 19
M.Soderman Veriforce, LLC 7/19/2021

File Edit Tools View Help

✓ OK

Receipt	PYMNT000000008792		Batch ID	03192012CHECKSM
Date	3/19/2012	→	Date Voided	0/0/0000
Customer ID	WEL003			
Name	Welded Construction LP			
Currency ID				
Payment Method	Check	<input type="checkbox"/> EFT		
Amount	\$6,600.00			
Credit Card ID				
Check/Card Number	291182			
Comment	27933			

Apply

Distribution


Applied To Debits M.Soderman Veriforce, LLC 7/19/2021

File Edit Tools Help

Document No.	PYMNT000000008792	Amount	\$6,600.00
Type	Payments		

<u>Document No.</u>	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
27933	SLS	3/1/2012	3/19/2012	\$0.00	\$0.00	\$6,600.00

Exhibit A

 **OK**

OK

Receipt PYMNT000000012457

Date 10/1/2012

Batch ID CKSDEP100112

Date Voided 0/0/0000

Customer ID WEL003

Name Welded Construction LP

Currency ID

Payment Method Check

☐ EFT

Amount \$4,680.00

Credit Card ID

Check/Card Number 295381

Comment

Apply

Distribution

Applied To Debits

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M.Soderman Veriforce, LLC 7/19/2021

Document No. PYMNT000000012457

Amount \$4,680.00

Type Payments

Document No.	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
41792	SLS	9/1/2012	10/1/2012	\$0.00	\$0.00	\$4,680.00

OK

OK

Receipt PYMNT000000015709

Date 4/1/2013

Batch ID kthurman

Date Voided 0/0/0000

Customer ID WEL003

Name Welded Construction LP

Currency ID

Payment Method Check

Amount \$5,280.00

Credit Card ID

Check/Card Number 298198

Comment

☐ EFT

Apply

Distribution

Applied To Debits

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M.Soderman Veriforce, LLC 7/19/2021

Document No. PYMNT000000015709




Amount \$5,280.00

Type Payments

Document No.	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
50425	SLS	3/1/2013	4/1/2013	\$0.00	\$0.00	\$5,280.00

OK

OK

Receipt	PYMNT000000018206		Batch ID	kthuman
Date	9/16/2013		Date Voided	0/0/0000
Customer ID	WEL003			
Name	Welded Construction LP			
Currency ID				
Payment Method	Check <input type="checkbox"/> EFT			
Amount	\$8,610.00			
Credit Card ID				
Check/Card Number	302378			
Comment				

Applied To Debits

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M.Soderman Veriforce, LLC 7/19/2021

Document No.	PYMNT000000018206	Amount	\$8,610.00
Type	Payments		

[illegible]

OK

OK

Receipt	PYMNT000000022594		Batch ID	kthurman
Date	3/24/2014		Date Voided	0/0/0000
Customer ID	WEL003			
Name	Welded Construction LP			
Currency ID				
Payment Method	Check			<input type="checkbox"/> EFT
Amount				\$9,510.00
Credit Card ID				
Check/Card Number	305383			
Comment				

Apply

Distribution

Applied To Debits

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M.Soderman Veriforce, LLC 7/19/2021

Document No.	PYMNT000000022594	Amount	\$9,510.00
Type	Payments		

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

M.Soderman Veriforce, LLC 7/19/2021



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OK



✓ OK

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Date	3/30/2015		Date Voided	0/0/0000
Customer ID	WEL003			
Name	Welded Construction LP			
Currency ID				
Payment Method	Check		<input type="checkbox"/> EFT	
Amount			\$8,417.50	
Credit Card ID				
Check/Card Number	314122			
Comment				



Apply

Distribution

Applied To Debits

Document No.	PYMNT000000032193	Amount	\$8,417.50
Type	Payments		

Document No.	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
135589	SLS	3/1/2015	3/30/2015	\$0.00	\$0.00	\$8,417.50



OK

OK

Receipt PYMNT000000035816

Date 9/14/2015

Batch ID kthurman

Date Voided 0/0/0000

Customer ID WEL003

Name Welded Construction LP

Currency ID

Payment Method Check

Amount \$9,912.50

Credit Card ID

Check/Card Number 316877

Comment

☐ EFT

Apply

Distribution

Applied To Debits

File Edit Tools Help

M.Soderman VeriForce, LLC 7/19/2021

Document No. PYMNT000000035816

Amount \$9,912.50

Type Payments

Document No.	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
154885	SLS	9/1/2015	9/14/2015	\$0.00	\$0.00	\$9,912.50

OK

OK

Receipt PYMNT000000041271

Date 3/23/2016

Batch ID kthurman

Date Voided 0/0/0000

Customer ID WEL003

Name Welded Construction LP

Currency ID

Payment Method Check

Amount \$13,469.00

Credit Card ID

Check/Card Number 321949

Comment

☐ EFT

Apply

Distribution

Applied To Debits

File Edit Tools Help

M.Soderman Veriforce, LLC 7/19/2021

Document No. PYMNT000000041271

Amount \$13,469.00

Type Payments

Document No.	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
178639	SLS	3/1/2016	3/23/2016	\$0.00	\$0.00	\$13,469.00

OK



OK

Receipt	PYMNT000000047399		Batch ID	Maura.Collins
Date	9/30/2016		Date Voided	0/0/0000
Customer ID	WEL003			
Name	Welded Construction LP			
Currency ID				
Payment Method	Check	<input type="checkbox"/> EFT		
Amount	\$15,067.00			
Credit Card ID				
Check/Card Number	323287			
Comment				

Apply

Distribution



Applied To Debits

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M.Soderman Veriforce, LLC 7/19/2021

Document No.	PYMNT000000047399	Amount	\$15,067.00
Type	Payments		

Document No.	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
202398	SLS	9/1/2016	9/30/2016	\$0.00	\$0.00	\$15,067.00



OK

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OK

Receipt PYMNT000000052616

Date	3/28/2017
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Batch ID

Maura.Collins

Date Voided

0/0/0000

Customer ID WEL003

Name	Welded Construction LP
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Currency ID

Payment Method	Cash
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☐ EFT

Amount	\$6,670.00
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Credit Card ID

Check/Card Number

Comment	ACH
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Apply

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Applied To Debits

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M.Soderman Veriforce, LLC 7/19/2021

Document No. PYMNT000000052616

Amount




\$6,670.00



Type	Payments
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[illegible]

OK

✓ OK

Receipt	PYMNT000000064496		Batch ID	Maura.Collins
Date	4/9/2018		Date Voided	0/0/0000
Customer ID	WEL003			
Name	Welded Construction LP			
Currency ID				
Payment Method	Cash	<input type="checkbox"/> EFT		
Amount	\$147,755.00			
Credit Card ID				
Check/Card Number				
Comment	ACH			



Apply

Distribution

Applied To Debits

Document No.	PYMNT000000064496	Amount	\$147,755.00
Type	Payments		

Document No.	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
283042	SLS	3/1/2018	4/9/2018	\$0.00	\$0.00	\$147,755.00

Cash Receipts Inquiry Zoom M.Soderman Veriforce, LLC 5/21/2021

File Edit Tools View Help

✓ OK

Receipt PYMNT000000070306 Batch ID Lee.Wernli
 Date 10/1/2018 Date Voided 0/0/0000

Customer ID WEL003
 Name Welded Construction LP

Currency ID
 Payment Method Cash ☐ EFT
 Amount \$251,255.00
 Credit Card ID
 Check/Card Number
 Comment ACH

Apply
 Distribution

Applied To Debits M.Soderman Veriforce, LLC 5/21/2021

File Edit Tools Help

Document No. PYMNT000000070306 Amount \$251,255.00
 Type Payments

Document No.	Type	Trx Date	Apply Date	Discounts	Write Offs	Apply Amount
314101	SLS	9/1/2018	10/1/2018	\$0.00	\$0.00	\$251,255.00

OK

Exhibit B