Docket #0050 Date Filed: 5/12/2022

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 (LSS) (Jointly Administered)
Welded Construction, L.P., Plaintiff, vs. Industrial Fabrics, Inc., Defendant.	 Adv. No. 20-50932 **Re: Adv. Docket No. 47, 49**

NOTICE OF FILING OF PROPOSED REDACTED VERSION OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, pursuant to Rule 9018-1(d)(ii) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, Plaintiff Welded Construction, L.P. hereby files with the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, Wilmington, Delaware 19801, the proposed redacted version of *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment* previously filed under seal.

[1] The debtors in these chapter 11 cases (the "Debtors"), 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).

Dated: May 12, 2022

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IN THE UNITED STATES BANKRUPTCY COURT
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In re: Welded Construction, L.P., *et al.*, Debtors.[1]	Chapter 11 Case No. 18-12378 (LSS) (Jointly Administered)
Welded Construction, L.P., Plaintiff, vs. Industrial Fabrics, Inc., Defendant.	Adv. No. 20-50932

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Dated: May 9, 2022

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Pursuant to Federal Rule of Civil Procedure 56(a), made applicable herein pursuant to Federal Rule of Bankruptcy Procedure 7056, Welded Construction, L.P. (the "Plaintiff") hereby submits this memorandum of law in opposition to *Industrial Fabrics, Inc.'s Motion for Summary Judgment* [Adv. D.I. 39] (the "Defendant's Motion").

Since Industrial Fabrics, Inc. (the "Defendant") has failed to raise a genuine issue of material fact to rebut Plaintiff's *prima facie* case or in support of an affirmative defense, the undisputed material facts warrant summary judgment as a matter of law against Defendant and in Plaintiff's favor.

I. SUMMARY OF ARGUMENT

Defendant contends that it is entitled to summary judgment on two primary grounds: (i) that it held inchoate lien rights at the time of the Transfers which immunized Defendant from avoidance, and (ii) the Transfers were ordinary as compared to the parties' past transactions. The first theory fails as a matter of law because, to the extent Defendant held inchoate lien rights for unpaid supplies and services, those rights did not attach to property of the Debtor and the facts in this case do not give rise to a contemporaneous exchange for new value. Defendant's second theory is reliant on erroneous calculations which hide the fact that at least $197,520.00 of the Transfers were not ordinary under any method of measurement.

Because Defendant has not shown there is no genuine issue of material fact that would entitle Defendant to judgment as a matter of law, the Defendant's Motion should be denied. Based on Defendant's failure to offer evidence sufficient to support its burden of proof on its affirmative defenses under Section 547(c), summary judgment should be granted in favor of Plaintiff.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff incorporates fully as if set forth herein the *Statement of Undisputed Material Facts* appearing in Plaintiff's *Memorandum of Law in Support of Motion of Summary Judgment* [Adv. D.I. 43].

2. Prior to the Preference Period, Welded Construction, L.P. and Columbia Gas Transmission, LLC entered into Agreement No. 4600008133 for the construction of pipeline in West Virginia, known as the "Mountaineer XPress Project". *See* App., pp. B001-3 (Second Krysztofik Decl.), at ¶ 4; App., pp. B004-62 (Exhibit G – Agreement No. 4600008133).

3. The Debtors' work on the Mountaineer Xpress Project was ongoing throughout the Preference Period. *See* App., pp. B001-3 (Second Krysztofik Decl.), at ¶ 5.

4. Of the Transfers, $197,520.00 represents payment for work performed in connection with the Mountaineer Xpress Project. *See* App., pp. B001-B003 (Second Krysztofik Decl.), at ¶ 6.

5. Prior to the Preference Period, Welded Construction, L.P. and Sunoco Marketing Partners & Terminals, LP and/or Sunoco Pipeline, LP entered into Master Construction Services Agreement No. 4600000999 for the construction of pipeline in Pennsylvania, known as the "Mariner East Project". *See* App., pp. B001-3 (Second Krysztofik Decl.), at ¶ 7; App., pp. B063-123 (Exhibit H – Master Construction Services Agreement No. 4600000999).

6. The Debtors' work on the Mariner East Project was ongoing throughout the Preference Period. *See* App., pp. B001-3 (Second Krysztofik Decl.), at ¶ 8.

7. Of the Transfers, $82,829.42 represents payment for work performed in connection with the Mariner East Project. *See* App., pp. B001-3 (Second Krysztofik Decl.), at ¶ 9.

III. ARGUMENT

A. Any Inchoate Lien Rights Do Not Absolve Defendant of Liability

Defendant asserts that it held inchoate materialman's lien rights at the time it received the Transfers, which preclude Plaintiff from recovering the Transfers under one of two theories: (i) that inchoate lien rights created a security interest in favor of Defendant, barring recovery under Section 547(a)(5); or (ii) Defendant released its inchoate lien rights at the time of each Transfer, which resulted in a contemporaneous exchange for new value under Section 547(c)(1). For the reasons that follow, Defendant is not immune from avoidance under either theory.

1. Inchoate Lien Rights Do Not Constitute a Security Interest in Property of the Estate. Thus, Defendant Received More than it Would Have in a Hypothetical Chapter 7 case.

To the extent Defendant held inchoate lien rights, they did not constitute a security interest in property of the estate because the property subject to lien belonged to the project owners, and not the Debtor.

Of the Transfers, the first payment of $82,829.42 corresponds to the Mariner East Project in Pennsylvania. *See* App., pp. B001-3 (Second Krysztofik Decl.), at ¶¶ 7-9. Pennsylvania's mechanic's lien statute provides for a lien against "every improvement and the estate or title of ***the owner in the property***". 49 Pa. Stat. Ann 1301 (emphasis added). The Debtor was a general or subcontractor on the Pennsylvania project and had no interest in the property being improved. Thus, Defendant could not under any circumstances (whether it perfected a lien or not) be a secured creditor as to the Debtor.

The remaining payments totaling $197,520 relate to the Mountaineer Xpress Project in West Virginia. *See* App., pp. B001-3 (Second Krysztofik Decl.), at ¶¶ 4-6. Similar to Pennsylvania's lien law, W Va. Code 38-2-4 provides the supplier of materials or supplies with a

lien upon the property being improved, and the owner's interest in such real property. *See* W Va. Code 38-2-1; 38-2-4. The Debtor did not have an interest in the subject property in West Virginia; thus, any lien rights held by Defendant do not give rise to an interest in property of the estate.

As a result, Defendant received more than it otherwise would have in a hypothetical chapter 7 case, and its alleged inchoate lien rights do not defeat Plaintiff's *prima facie* case for avoidance under Section 547(b). *See United Concrete Products v. VCW Enters., Inc. (In re VCW Enters., Inc.)*, 2015 WL 224385 (E.D. Pa. Jan. 15, 2015); *In re Pameco Corp.*, 356 B.R. 327, 337 (Bankr. S.D.N.Y. 2006).

Defendant relies on *Official Comm. of Unsecured Creditors of 360Networks (USA) Inc v. AAF-McQuay, Inc. (In re 360Networks (USA) Inc.)*, 327 B.R. 187 (Bankr. S.D.N.Y. 2005) (hereinafter, "360Networks"), in which the court noted that it "would be absurd" to allow a debtor to avoid payments to some materialmen but not others, depending solely on whether they opted to perfect an inchoate lien right. However, this reasoning is inapplicable in our case, where Defendant's lien would be against the owner's property, rather than the Debtor's. The bankruptcy judge in *360Networks* issued a later opinion in *In re Pameco Corp.*, 356 B.R. at 337, reaching a contrary result based on this very distinction:

> Defendant's reliance on this Court's decision in *Official Comm. of Unsecured Creditors of 360Networks (USA), Inc. v. AAF–McQuay, Inc. (In re 360Networks (USA), Inc.)*, 327 B.R. 187 (Bankr.S.D.N.Y.2005), is misplaced. Defendant cites *In re 360Networks* for the holding that a creditor's inchoate mechanics lien immunized a payment it had received from a preference action, in that otherwise "holders of inchoate statutory liens would be faced with an unreasonable Hobson's choice between accepting payment or taking the commercially unreasonable step of declining payment in order to perfect an inchoate statutory lien." *Id.* at 192, citing *Ricotta v. Burns Coal & Building Supply Co.*, 264 F.2d 749 (2d Cir.1959). However, both *Ricotta* and *In re 360Networks* dealt with a statutory lien that would have been imposed directly upon the debtor's property and are inapposite under the facts of this case.

In re Pameco Corp., 356 B.R. at 337.

Because any inchoate lien rights possessed by Defendant did not constitute an interest of property in the estate, Defendant has failed to rebut Plaintiff's *prima facie* case that the Transfers enabled Defendant to receive more than it would have received in a hypothetical Chapter 7 case under Section 547(b)(5).

2. Under these Facts, the Waiver of the Right to Assert a Lien is Not a Contemporaneous Exchange of New Value under 547(c)(1)

Defendant argues that it relinquished its inchoate lien rights in exchange for the Transfers, and such waiver operated as a contemporaneous exchange for new value under Section 547(c)(1). To gain a contemporaneous exchange defense, the Defendant must prove "(1) it extended new value to the debtors; (2) the parties intended the new value and the disputed transfers to be contemporaneous exchanges; and (3) the exchanges were, in fact, substantially contemporaneous." *FBI Wind Down, Inc. Liquidating Trust v. Innovative Delivery Systems, Inc. (In re FBI Wind Down, Inc.)*, 581 B.R. 387, 413 (Bankr. D. Del. 2018). The party against whom recovery or avoidance is sought bears the burden of proving a defense under Section 547(c). 11 U.S.C. § 547(g).

The contemporaneous exchange defense under Section 547(c)(1) is generally not available where the transfers at issue paid aged invoices. Judge Sontchi recently examined the application of the contemporaneous exchange defense, finding:

> Defendant, citing to an Eighth Circuit case, argues that the Pressure Payments were made in a contemporaneous exchange as evidenced by "the parties [discussion] about minimizing vendor's credit exposure." The Liquidating Trustee correctly notes, however, that *Payless Cashways* did not correspond to the current situation, **where the Transfers were made for *prior* delivery of goods and services.** In *Payless Cashways*, the contemporaneous defense was appropriate because the credit exposure existed merely as a conduit to future services; **the contemporaneous exchange defense applied as it "protects transactions that were meant to be cash transactions, but which unavoidably involved a brief extension of credit."** In contrast, the Pressure Payments were made in satisfaction

> of services completed between 11 to 417 days before payment. That the payments were done for past services also fits with the Agreement's payment terms and IDS's practice of billing for deliveries 'the following Monday of that week" with payments coming after billing.
>
> The Court finds that there is no contemporaneous exchange for new value as to the Pressure Payments.

In re FBI Wind Down, Inc., 581 B.R. 387, 413 (Bankr. D. Del. 2018) (emphasis added). As in *FBI Wind Down*, the transactions between the Debtor and Defendant were not nor ever intended to be cash transactions. The Defendant provided materials and supplies, then issued invoices payable within 30 days. The Transfers were paid well past the due date for payment (with payments ranging between 54 and 88 days past invoice date). Thus, there was no actual or intended contemporaneous exchange for new value.

Although there is no dispute that the Transfers paid past due invoices, the Defendant contends that a contemporaneous exchange occurred in the form of inchoate lien waivers. Although Defendant has cited some cases in the Ninth and Tenth Circuits in support of its position, these cases represent the minority view. Most courts employ a narrow interpretation of the definition of "new value" under Section 547, holding that the release of an inchoate lien is not a contemporaneous exchange for new value. *See, e.g.*, *360Networks*, 327 B.R. at 192-93 ("the release of a right to perfect a lien is not included in the Bankruptcy Code's definition of "new value," and that the Defendants do not have a new value defense") (citing various cases); *In re Pameco Corp.*, 356 B.R. at 338-39; *In re Chase & Sanborn Corp.*, 904 F.2d 588, 596 (11th Cir. 1990). These courts reason that it is the materials themselves which represent the value given by a materialman in exchange for payment, rather than forbearance from filing a claim of lien. *See also Lyndon Property Ins. Co. v. Eastern Kentucky University*, 200 F. App'x. 409, 418 (6th Cir. 2006) (citing cases standing for proposition that forbearance is excluded from Section 547's

definition of new value). Thus, there was neither an actually contemporaneous exchange, nor an intent to make a contemporaneous exchange, and Section 547(c)(1) is not applicable.

Even if this Court were persuaded that the relinquishment of unperfected inchoate lien rights could in some circumstances constitute contemporaneous new v alue, the facts in this case do not give rise to a contemporaneous exchange for new value where Defendant did not provide a written lien waiver at the time of the Transfers. Defendant cites *In re J.A. Jones*, 361 B.R. 94 (Bankr. W.D.N.C. 2007) and *In re R.M. Taylor, Inc.*, 257 B.R. 289 (Bankr. W.D. Mo. 2000) for the proposition that an inchoate lien waiver constitutes contemporaneous new value. However, the subcontractors in those cases executed written lien releases in favor of the debtor general contractor as a condition for each payment. *In re J.A. Jones,* 361 B.R. at 98; *In re R.M. Taylor, Inc.*, 257 B.R. at 291-92. Unlike those subcontractors, Defendant has not produced any evidence that it delivered a written lien waiver or other agreement memorializing its intent to waive the right to assert a lien at the time of payment.

A written lien waiver was important for the Debtor to receive compensation from the project owners.[1] Absent a written lien waiver from Defendant, the Debtor was not assured of payment from the project owners. *See In re Instrumentation and Controls, Inc. v. Northeast Union, Inc. (In re Instrumentation and Controls, Inc.)*, 506 B.R. 677, 682 (Bankr. E.D. Pa. 2014) (holding that, in order to establish a Section 547(c)(1) defense under an indirect transfer theory, the defendant must prove, among other things, that a waiver of lien rights against a third party caused the third party to continue to perform existing contracts with the debtor).

[1] [redacted]

It is Defendant's burden to prove, not just the intent for and occurrence of a contemporaneous exchange of new value, but also the specific measure of new value that was exchanged. *Id.* at 680 (citing *In re Spada*, 903 F.2d 971, 976 (3d Cir. 1990)). Defendant has not offered any evidence in support of contemporaneous new value, and therefore Defendant is not entitled to judgment in its favor. Moreover, because the facts in this case do not give rise to a contemporaneous exchange for new value, Plaintiff is entitled to summary judgment as a matter of law.

B. The Transfers Were Not Made in the Ordinary Course of Business

Defendant asserts that the Transfers are immune from avoidance and recovery by Plaintiff under the "subjective ordinary course of business" defense pursuant to Bankruptcy Code § 547(c)(2)(A). In order to prevail on this defense, Defendant must establish that the Transfers were in payment of a debt incurred by the Debtor in the ordinary course of business or financial affairs of the Debtor and Defendant, and made in the ordinary course of business or financial affairs of the Debtor and Defendant. *See* 11 U.S.C. § 547(c)(2)(A); *In the Matter of J.P. Fyfe, Inc. of Florida*, 891 F.2d 66 (3rd Cir. 1989). For the following reasons, Defendant has not, and cannot, satisfy this defense.

In considering the subjective ordinary course defense, courts examine several 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.

Miller v. Welke (In re United Tax Group, LLC), 2021 WL 6138214 (Bankr. D. Del. Sept. 2, 2021).

Thus, the transfers at issue should "conform to the norm established by the debtor and creditor in the period before, preferably well before, the preference period." *In re Molded Acoustical Products, Inc.*, 18 F.3d 217, 223 (3rd Cir. 1994), *citing In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993). A creditor must generally produce some evidence of the "baseline of dealings" between the parties to "enable the court to compare the payment practices during the preference period with the prior course of dealings." *In re Schick*, 234 B.R. 337, 348 (Bankr. S.D.N.Y.1999).

1. Length of Relationship is Insufficient

In this case, the relationship between the Debtor and Defendant commenced approximately one year before the Preference Period and consisted of just 14 invoices paid over an 8-month span. *See Appendix to Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment with Respect to Plaintiff's Claims Against Defendant Industrial Fabrics, Inc.* [Adv. D.I. 43-1] ("Plaintiff's App."), p. A003 (Krzysztofik Decl. at ¶ 13); p. A010 (Exhibit D – Summary of Historical Invoices). This Court has found a similar data set to be insufficient to establish a baseline course of dealing. *FBI Wind Down Inc. Liquidating Trust v. All American Poly Corp. (In re FBI Wind Down, Inc.)*, 581 B.R. 116 (Bankr. D. Del. 2018) (recognizing that "courts are less willing to establish an ordinary course of dealings where the parties' prior business relationship was a year or less"; 20 payments covering 81 invoices made over an 8-month period was insufficient to establish a baseline course of dealings); *In re Sierra Concrete Design, Inc.*, 463 B.R. 302 (Bankr. D. Del. 2012) (pre-preference relationship consisting of 17 checks covering 68 invoices over an 11-month period was insufficient to establish an ordinary course of business). The Debtor and Defendant had a similarly abbreviated relationship, which precludes Defendant from establishing a baseline course of dealings for the Court to analyze.

Even though the relationship was of recent origin, the Transfers stand out as unusual because they were paid later than previous payments and inconsistent with payment terms. The invoice terms in this case were net 30 days, while the Transfers were paid between 54 and 88 days after invoice. Moreover, 66% of the Transfers were paid later than any prior payment in the parties' limited history. Thus, the Defendant is simply unable to establish an ordinary course of business defense due to an insufficient baseline course of dealing and the other irregularities with the Transfers.

2. The Transfers were Significantly Later than Prior Payments

Even if the Court were to adopt a baseline course of dealings from the parties' limited history, the Transfers fall outside the ordinary course of business under any of the average lateness, bucketing, or total range analyses. In comparing the parties' historical and preference period transactions, "courts place particular importance on the timing of payments." *Radnor Holdings Corp. v. PPT Consulting, LLC (In re Radnor Holdings Corp.)*, 2009 WL 2004226 (Bankr. D. Del. Jul. 9, 2009). Courts may review the range of payments centered around the average and also group payments in buckets by age. *See, e.g., Davis v. R.A. Brooks Trucking Co. (In re Quebecor World (USA), Inc.*, 491 B.R. 379, 388 (Bankr. S.D.N.Y. 2013) (citing *In re Hechinger Inv. Co. of Delaware, Inc.,* 489 F.3d 568, 578 (3d Cir. 2007); *Chapter 11 Estate Liquid. Trust v. Inserts East, Inc. (In re Philadelphia Newspapers, LLC),* 468 B.R. 712, 716 (Bankr. E.D. Pa. 2012); *In re Forklift LP Corp.*, 2006 WL 2042979, *8 (D. Del. 2006) (examining percentages and weighted averages when determining that defendant had not satisfied burden under ordinary course of business defense).

Prior to the Preference Period, the Debtor made payments on 14 invoices, with an average of 51.18 days between invoice and payment. *See* Plaintiff's App., p. A010 (Exhibit D – Summary

of Historical Invoices). In contrast, there were 3 invoices paid during the Preference Period with an average of 72.33 days between invoice and payment, representing a 21 day and 40% increase.[2] *See* Plaintiff's App., p. A009 (Exhibit C – Summary of Transfers). Courts have found payments with similar variances from the historical average to be avoidable. *See, e.g., Off. Plan Comm. v. Expeditors Int'l of Wash, Inc. (In re Gateway Pac. Corp.)*, 153 F.3d 915, 918 (9th Cir. 1998) (payments not ordinary when there is a 19-day (54%) difference between the historical and preference periods); *Off. Comm. of Unsecured Creditors v. CRST, Inc. (In re CGG 1355, Inc.)*, 276 B.R. 377, 383-84 (Bankr. D.N.J. 2002) (not ordinary when payments made, on average, 89.5 days from invoice during preference period compared to 66.47 days from invoice historically, including 73.4 days during final year of relationship (35% and 24% increases, respectively); *In re CIS Corp.*, 214 B.R. 108, 120 (Bankr. S.D.N.Y. 1997) (payments not ordinary when there was a 29 day (57%) increase from historical to preference period).

As an alternative to comparing averages, Defendant employs a "bucketing analysis" pursuant to which transfers paid within an age range equivalent to 88% of historical payments should be deemed ordinary. Under this analysis, Defendant contends that payments between 31 and 90 days past invoice date are ordinary. However, Defendant misconstrues the applicable range for the bucketing method by incorporating a 31 – 90 day range. In actuality, 12 of the 14 invoices paid prior to the preference period, or 86%, were paid between 33 and 70 days past invoice. *See* Plaintiff's App., p. A010 (Exhibit D – Summary of Historical Invoices). Thus, under a bucketing analysis Defendant would be liable to return those Transfers paid more than 70 days past invoice, or $197,520.00. *See* Plaintiff's App., p. A009 (Exhibit C – Summary of Transfers). Furthermore,

[2] In its brief, Defendant states that the preference period average lateness was 63 days. This calculation appears to be the result of a mathematical error. Plaintiff determined the preference period average lateness to be 72.33 days, by adding the length of time between invoice and payment for each of the three invoices (54, 75 and 88 days) and dividing by 3.

because 100% of the invoices were paid between 27 and 71 days past invoice, there is simply no basis for treating payments as late as 90 days past invoice as ordinary, as Defendant attempts to do.

Similarly, Defendant would be liable for at least $197,520.00 under a "range analysis". The range analysis assumes that any transfers paid within the entire range of historical payments are deemed ordinary under Section 547(c)(2)(A). Because the Debtor paid $197,520.00 later than any previous payment, Defendant cannot escape liability even under this broad application of the ordinary course defense.

C. Preference Policy Dictates that the Transfers be Avoided

The Transfers are avoidable for the benefit of the estate because they allowed Defendant to receive better treatment than other unsecured creditors and do not fit within the narrow subset of transfers for which the ordinary course of business exception was designed to protect. As explained by the Bankruptcy Court for the Southern District of New York:

> Preferential transfers, referred to colloquially as "preferences," are recoverable in civil actions under the Code because they run contrary to the goal of equality of treatment amongst creditors—one of the longest standing, and fundamental, principles of American bankruptcy law. It is not unlawful or otherwise improper to receive a preference, but when the requirements of the Code are satisfied, and no applicable defense is available, preferences must be returned to the estate, so they then may be made available for the entirety of the unsecured creditor community.

Ames Dept. Stores, Inc. v. Cellmark Paper, Inc. (In re Ames Dept. Stores), 450 B.R. 24, 30 (Bankr. S.D.N.Y. 2011). The Bankruptcy Code adopted an exception to the general rule of avoidance for payments that were consistent with past transactions in order to "encourage creditors to continue dealing with distressed debtors on normal business terms" and to "promote equality of distribution by ensuring that creditors are treated equitably." *In re Pillowtex Corp.*, 427 B.R. 301, 306 (Bankr. D. Del. 2010) (citing *Fiber Lite Corp. v. Molded Acoustical Products, Inc. (In re Molded*

Acoustical Products, Inc.), 18 F.3d 217, 219 (3d Cir. 1994)).

The Transfers do not fit within the limited exception reserved for creditors who "continue to deal with distressed debtors on normal business terms." The parties' short transaction history is starkly juxtaposed with the type of well-cemented relationships which the preference exceptions were designed to protect. *See Morris v. Sampson Travel Agency (In re U.S. Interactive, Inc.)*, 321 B.R. 388, 393 (Bankr. D. Del. 2005) (determining rigorous scrutiny of industry standard was required where defendant only had a year-long relationship with debtor and therefore did not create "the kind of significant relationship of which *Molded Acoustical* speaks: a 'steady, enduring relationship whose terms have not significantly changed during the pre-petition insolvency period.'"). In fact, by the time of the preference period there was no relationship to preserve, as the Defendant did not engage in any business with the Debtor during the preference period. Finally, the Transfers themselves were not made in accordance with normal business terms as evident from their disparity with the parties' prior dealings and the payments terms in effect. It follows that the policy underlying Section 547 favors avoidance for the benefit of the estate.

IV. CONCLUSION

In summary, Defendant has failed to show that there is no genuine issue of material fact as to the application of its affirmative defenses, especially with respect to those Transfers paid in September 2020 in the combined sum of $197,520.00. For the foregoing reasons, Plaintiff respectfully requests that this Court deny the Defendant's Motion in its entirety. Further, as Defendant has failed to introduce evidence to rebut the Plaintiff's prima facie case or to satisfy its burden of proof on its affirmative defenses, Plaintiff requests that summary judgment be granted to Plaintiff.

Dated: May 9, 2022

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IN THE UNITED STATES BANKRUPTCY COURT
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APPENDIX TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Dated: May 9, 2022

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SECOND DECLARATION OF JACKLYN KRZYSZTOFIK IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Jacklyn Krzysztofik, am the former Human Resources Manager for Welded Construction, L.P. (the "Plaintiff" and, together with Welded Construction Michigan, LLC, the "Debtors"). Upon the July 31, 2020 effective date of the Debtors' court-approved Amended Plan of Liquidation (the "Effective Date"), I resigned my position as Human Resources Manager and became a consultant to the Debtors on a post-Effective Date basis. I submit this Declaration in support of the Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, filed with this Court in the above-captioned Adversary Proceeding (the "Memorandum of Law").[2]

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. In my capacity as the former Human Resources Manager for the Debtors, and in my capacity as a consultant to the Debtors on a post-Effective Date basis, I was and remain

[1] The debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Welded Construction, L.P (5008) and Welded Construction Michigan, LLC (9830).

[2] All capitalized, undefined terms herein shall have the meanings assigned to them in the Memorandum of Law.

generally familiar with the Debtors' books and records, operations and customer relationships, including their operations during the 90-day period preceding the Debtors' bankruptcy filing date, which is July 24, 2018 through and including October 22, 2018 (the "Preference Period").

3. The following facts are within my knowledge and are based upon my review of the documents regarding these matters and pleadings in this action.

4. Prior to the Preference Period, Welded Construction, L.P. and Columbia Gas Transmission, LLC entered into Agreement No. 4600008133 for the construction of pipeline in West Virginia, known as the "Mountaineer XPress Project". A copy of Agreement No. 4600008133 is attached hereto as Ex. "G".

5. The Debtors' work on the Mountaineer Xpress Project was ongoing throughout the Preference Period.

6. During Preference Period, the Debtor paid Industrial Fabrics, Inc. for invoices # 101762 and 101763 in the combined amount of $197,520.00 for work performed on the Mountaineer Xpress Project.

7. Prior to the Preference Period, Welded Construction, L.P. and Sunoco Marketing Partners & Terminals, LP and/or Sunoco Pipeline, LP entered into Master Construction Services Agreement No. 4600000999 for the construction of pipeline in Pennsylvania, known as the "Mariner East Project". A copy of Master Construction Services Agreement No. 4600000999 is attached hereto as Ex. "H".

8. The Debtors' work on the Mariner East Project was ongoing throughout the Preference Period.

9. During the Preference Period, the Debtor paid invoice # 101623 in the amount of $82,829.42 for work performed on the Mariner East Project.

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

Executed this 6th day of May, 2022.

Jacklyn Krzysztofik

EXHIBIT G

[REDACTED]

EXHIBIT H

[REDACTED]