

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

)		
In re:)	Chapter 11	
)		
WELDED CONSTRUCTION, L.P., <i>et al.</i> , ¹)	Case No. 18-12378 (KG)	
)		
Debtors.)	(Jointly Administered)	
)	Ref. Docket No. _____	

ORDER APPROVING LITIGATION FUNDING AND COOPERATION AGREEMENT

Upon consideration of the motion (the “**Motion**”)² of the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) for the entry of an order, pursuant to sections 105(a), 363(b), and 364(c) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “**Bankruptcy Code**”); Rules 2002, 4001, 6004, and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”); and Rule 4001-2 of the Local Rules of Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), (i) approving that certain *Litigation Funding and Cooperation Agreement*, attached hereto as Exhibit 1 (the “**Cooperation Agreement**”), by and among Welded Construction, LP (“**Welded**”), Federal Insurance Company (the “**Surety**”) and the Official Committee of Unsecured Creditors (the “**Committee**” and, together with Welded and the Surety, the “**Parties**”), and (ii) authorizing the Debtors to take any and all actions necessary to effectuate the Cooperation Agreement; and upon consideration of the Motion and all pleadings related thereto; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion and the relief provided for herein is required; and it

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). The mailing address for each of the Debtors is 26933 Eckel Road, Perrysburg, OH 43551.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.



appearing that the Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that the Court may enter a final order herewith consistent with Article III of the U.S. Constitution; and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and creditors and an appropriate exercise of the Debtors' business judgment; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED, as set forth herein.
2. The Cooperation Agreement, attached to this Order as Exhibit 1 and incorporated herein by reference as if set forth in full (including, without limitation, the estate sharing arrangement contained in paragraph 3 of the Cooperation Agreement), is approved in its entirety pursuant to sections 105(a), 363(b), and 364(c).
3. The Debtors are authorized to enter into the Cooperation Agreement, comply with their obligations thereunder, and to take all actions necessary to carry out the terms of the Cooperation Agreement.
4. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
5. This Court shall retain jurisdiction with respect to all matters arising from or related to the Cooperation Agreement and the implementation of this Order.



KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT 1

Cooperation Agreement

LITIGATION FUNDING AND COOPERATION AGREEMENT

THIS LITIGATION FUNDING AND COOPERATION AGREEMENT (the “**Agreement**”) is made and entered into as of the 3rd day of May, 2019, by and between:

- 1) FEDERAL INSURANCE COMPANY (“**Surety**”),
- 2) WELDED CONSTRUCTION, LP (“**Debtor**”), and
- 3) OFFICIAL COMMITTEE OF UNSECURED CREDITORS (“**Committee**”) (all entities recited above, collectively, the “**Parties**”).

WITNESSETH:

WHEREAS, Surety, on behalf of and at the request of Debtor, issued Performance Bond no. 8219-24-58 (the “**Bond**”) in the amount of \$454,471,254, naming Debtor as principal and Transcontinental Gas Pipe Line Company, LLC (“**Transcon**”) as obligee, relating to a construction contract dated August 10, 2016 between Debtor and Transcon (a company indirectly owned by Williams Partners Operating LLC and Williams Companies, Inc., (collectively, “**Williams**”)) for construction work on the Atlantic Sunrise natural gas pipeline (the “**Williams Project**”);

WHEREAS, as consideration for the issuance of the Bond, Debtor executed the General Indemnity Agreement dated February 27, 2017 (the “**Indemnity Agreement**”), pursuant to which Debtor agreed, among other things, to indemnify and hold Surety harmless from any losses incurred by Surety as a result of having issued the Bond;

WHEREAS, Surety has received claims on the Bond in excess of \$74 Million and has paid in excess of \$33 Million to date. Pursuant to the Surety’s right of equitable subrogation, the Surety asserts that it has a right to all contract balances due under the Williams Contract to the extent the Surety has satisfied claims made by subcontractors and suppliers under the Bond and further asserts that such right is superior to any right of the Debtor or any creditor of the Estate in the contract balances;

WHEREAS, the Debtor and the Committee have discussed the equitable subrogation rights with the Surety and the Parties have agreed to consent to such equitable subrogation rights, subject to the sharing arrangement set forth herein;

WHEREAS, without limiting other claims or causes of action that the Debtor or any other party in interest has or may have against Transcon, the Debtor has asserted that Transcon has failed to pay all of the amounts due to the Debtor under the Williams Contract and that such failure has contributed to Debtor’s inability to pay the subcontractors and suppliers on the Williams Project. The Debtor is prepared to prosecute affirmative claims against Transcon and Williams arising under or in relation to the Williams Project, including any contract or agreement related thereto with Transcon, Williams or either of their affiliates (the “**Williams Contract**”) for, among other things, the underpayments and other associated claims (the “**Williams Claims**”). The Parties agree that the net proceeds of any recovery on the Williams Claims should be paid to subcontractors and suppliers on the Williams Project, or otherwise to

the Surety pursuant to its equitable subrogation rights to the extent the Surety has satisfied claims made by subcontractors and suppliers under the Bond; provided, however, that the Surety has agreed to sharing a portion of the recovery on the Williams Claims, including any settlement thereof, with the Debtor's estate (the "**Estate**") for the benefit of the creditors in the Bankruptcy Case (as defined below);

WHEREAS, on October 22, 2018, the Debtor and Welded Construction Michigan, LLC (the "**Michigan Debtor**") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**") and are currently operating as debtors-in-possession in cases jointly-administered under case no. 18-12378 (the "**Bankruptcy Case**");

WHEREAS, the Debtor and Surety are parties to that certain Joint Defense and Common Interest Agreement dated December 23, 2018 (the "**Debtor Joint Defense Agreement**") and the Committee and the Surety are parties to that certain Joint Defense and Common Interest Agreement dated as of February 6, 2019, (the "**Committee Joint Defense Agreement**") (the Debtor Joint Defense Agreement, the Committee Joint Defense Agreement and any other joint defense or common interest agreements by and between any of the Parties, whether or not in writing, are collectively referred to hereafter as the "**Joint Defense Agreements**");

WHEREAS, the Surety has agreed to provide funding to allow the Debtor to pursue the Williams Claims under the terms set forth in this Agreement; and

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Litigation Costs. The Surety agrees to fund up to a maximum of \$2,500,000, subject to increase with the prior written consent of the Parties (the "**Litigation Fund**") for fees and costs actually incurred in prosecuting the claims and defenses of the Debtor arising under or in relation to the Williams Claims (the "**Williams Litigation**"). The Litigation Fund, to be further identified in a confidential budget provided solely to the Parties, shall be used to pay the fees and expenses of Young Conaway Stargatt & Taylor, LLP (counsel to the Debtor), Lewis Brisbois Bisgard & Smith LLP, AlixPartners, LLP, litigation consultants, experts, contractors, and e-Discovery vendors related solely to the extent of work performed or costs incurred in connection with the Williams Litigation, but shall not be used to pay the fees and expenses of any other entity, including but not limited to, the Committee appointed in the Bankruptcy Case or its professionals. Upon 30 days written notice to the Debtor, the Surety may terminate the obligation to fund the Williams Litigation for any fees or costs incurred from and after the expiration of such notice period (a "**Funding Termination Event**"); *provided, however*, that a decision by the Surety not to fund any amounts in excess of \$2,500,000 to the Litigation Fund shall not be deemed a Funding Termination Event. Upon a Funding Termination Event where the Debtor determines to proceed with prosecuting the Williams Litigation utilizing funds not provided by Surety, the Surety shall be entitled to reimbursement of any costs advanced by Surety under this Agreement pro-rata with any costs incurred by Debtor and its estate prior to any other disposition of the proceeds of a recovery in the Williams Litigation, if any, obtained

from prosecution or settlement of the Williams Litigation. If a Funding Termination Event occurs, except with respect to pro-rata reimbursement of the Surety's litigation costs, the Surety shall be deemed to have released its first priority interest and liens in the Recovery (as defined below). For avoidance of doubt, the Surety shall at all times retain its rights under the Indemnity Agreement, subject only to the terms of this Agreement.

2. Reimbursement of Surety from Litigation Proceeds. Unless there is a Funding Termination Event where the terms of Paragraph 1 shall apply, in the event of any recovery by the Debtor as a result of a judgment in, or settlement of, the Williams Litigation (the "**Recovery**"), the Surety shall be reimbursed only from and to the extent of the Recovery for all amounts advanced by the Surety into the Litigation Fund (to the extent that such amounts exceed the \$2,500,000 maximum amount set forth above such excess shall have been consented to in writing by each of the Parties). The Surety shall be granted a first priority lien on only the Recovery and on no other assets or property of the Debtor, the Michigan Debtor, the Debtor's estate or the Michigan Debtor's estate, or the proceeds thereof, which lien shall be approved by the Bankruptcy Court as a condition of this Agreement. The reimbursement to Surety under this paragraph shall be made prior to any other disposition of the Recovery. In the event that there is no Recovery or the Recovery is less than the amount advanced in the Litigation Fund, the Surety shall have a general unsecured, non-priority claim against the Debtor for the unpaid amounts advanced under this Agreement.

3. Estate Sharing Arrangement and Related Matters: The Parties agree to the following sharing arrangement with respect to the disposition of the proceeds of a recovery in the Williams Litigation:

(a) Unless there is a Funding Termination Event where the terms of Paragraph 1 shall apply, the Surety shall receive reimbursement of all amounts advanced for the Williams Litigation in accordance with Paragraph 2 with the remaining proceeds after such reimbursement defined for purposes of this Agreement as the "**Net Proceeds.**"

(b) The Estate shall receive from the Net Proceeds the lesser of \$250,000 or the Net Proceeds ("**Estate Reimbursement**") to cover the costs incurred by the Estate for maintaining staff and other resources necessary for the litigation of the Williams Claims.

(c) In addition to the Estate Reimbursement, the Estate will receive one of the following mutually exclusive payments:

(1) Where the Net Proceeds are less than or equal to \$5 million, the Estate will receive 10% of the Net Proceeds inclusive of the Estate Reimbursement. For example, if the Net Proceeds are equal to \$3 million, the Estate will receive \$50,000 in addition to the Estate Reimbursement.

(2) Where the Net Proceeds are greater than \$5 million and less than or equal to \$10 million, the Estate will receive \$750,000 in addition to the Estate Reimbursement (\$1 million total).

(3) Where the Net Proceeds are greater than \$10 million, the Estate shall receive 10% of the Net Proceeds inclusive of the Estate Reimbursement. For example, if the Net Proceeds are equal to \$12 million, the Committee will receive \$950,000 in addition to the Estate Reimbursement.

(d) The Surety will share in any payments to the general unsecured creditor class on the basis of any allowed Surety unsecured, non-priority claim hereunder or under or in respect of the Bond and the Indemnity Agreement, to the extent such claim has been allowed pursuant to applicable bankruptcy law or by final, unstayed Bankruptcy Court order.

(e) The Surety shall provide each of the Debtor and the Committee with a monthly, confidential, detailed accounting of payments it makes to claimants under the Bond. The Surety shall use its reasonable, best efforts to make payments on each outstanding claim submitted under the Bond by no later than June 30, 2019 and to the extent permitted by applicable law, so long as such claimant has provided appropriate documentation to the Surety pertaining to its claim.

4. Cooperation and Settlement Authority. The Parties shall reasonably cooperate with respect to the Williams Litigation, including information that may be requested by any Party, and the Debtor shall keep the Surety and the Committee advised of all material matters relating to the Williams Litigation. The Debtor agrees to consult with the Surety and the Committee in advance of, and allow the Surety and the Committee to participate in, any settlement negotiations relating to the Williams Litigation, as well as any final disposition of the Williams Litigation. Additionally, upon request of the Surety or the Committee, subject to the Joint Defense Agreements, the Debtor shall provide a confidential update to the Surety and the Committee of the then current status of the Williams Litigation and shall consult with the Surety and the Committee regarding any litigation issues that may materially impact the success of the Williams Litigation.

(a) Nothing in this Agreement shall be deemed to preclude the Surety from (i) settling, for itself only, any claims made by subcontractors, suppliers, and assignees of subcontractors and suppliers under the Bond on terms acceptable to the Surety in its sole and absolute discretion, or (ii) obtaining from Williams a release of Surety's liability under the Bond on terms acceptable to Surety in its sole discretion.

(b) Nothing herein shall be deemed to waive any terms, conditions or limitations contained in the Bond, including, without limitation, the penal limit thereof and the Bond shall remain in full force and effect.

(c) Nothing in this Agreement shall be deemed to limit or alter the Debtor's exercise of its fiduciary duties or the Debtor's rights and defenses against the Surety or in any way related to the Bond or the Indemnity Agreement.

5. Joint Defense. The Parties agree that the terms of the Joint Defense Agreements shall govern all communications between the Parties with respect to this Agreement or the

Williams Litigation, ensuring that all communications between the Parties related to such proceedings are protected by all applicable privileges, including but not limited to the attorney-client privilege, the work product doctrine, the self-critical examination privilege, the trade secret doctrine, and the common interest privilege.

6. Governing Law. This Agreement is entered into in the State of Delaware and shall be governed by and construed in accordance with the laws of the State of Delaware. Any dispute by and between the Debtor and the Surety shall be adjudicated by the United States Bankruptcy Court for the District of Delaware.

7. Bankruptcy Court Approval. This Agreement is subject to approval by the Bankruptcy Court pursuant to a final, unstayed order of the Bankruptcy Court (the finality requirement may be waived by the Parties in writing), which is acceptable to the Parties.

IN WITNESS WHEREOF, this Agreement is executed by the parties on the day and date first set forth above.

/s/ Sean M. Beach
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