IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
WELDED CONSTRUCTION, L.P., *et al.*,	)	Case No. 18-12378 (CSS)
	)	(Jointly Administered)
Debtors.	)	**Re: D.I. 1363**

OMNIBUS REPLY OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF CONFIRMATION OF THE AMENDED CHAPTER 11 PLAN OF WELDED CONSTRUCTION, L.P. AND WELDED CONSTRUCTION MICHIGAN, LLC

The Official Committee of Unsecured Creditors (the "Committee") of Welded Construction, L.P., *et al.* (the "Debtors") files this omnibus reply (the "Reply") in support of confirmation of the *Amended Chapter 11 Plan of Welded Construction, L.P. and Welded Construction Michigan, LLC* [D.I. 1363] (the "Plan")[1] and joins in the Debtors' *Memorandum of Law in Support of Confirmation of Amended Chapter 11 Plan of Welded Construction, L.P. and Welded Construction Michigan, LLC* (the "Confirmation Brief").[2] In support thereof, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. The Committee fully supports confirmation of the Plan. The Plan represents the culmination of nearly 18 months of effort to complete the Debtors' ongoing projects as of the Petition Date and to market and sell a certain key project and monetize the company's very significant pool of equipment, its real property and other tangible asset value. While this complex effort was ongoing under the close watch and with significant assistance from the Committee, each

[1] Capitalized terms used but not defined in this Reply have the meanings ascribed to such terms in the Plan.

[2] All of the statements and arguments contained in the Confirmation Brief, to the extent not inconsistent with this Reply, hereby are incorporated by reference.

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of the Debtors and the Committee have worked collaboratively to identify and pursue valuable claims and estate causes of action. In order to identify, pursue and achieve or preserve such causes of actions and their value, the Committee has investigated the Debtors' prepetition affairs thoroughly, including the company's commercial relationship with its equity sponsors, including the Bechtel entities.

2. The Plan seeks approval of the fruits of the Committee's work, including, importantly, the Plan Settlement Agreement (this deal resolves all issues with the company's equity), while furthering the implementation of other settlements approved by the Court earlier in these cases, including the Surety Cooperation Agreement. The result is a comprehensive and consensual resolution of these complex Chapter 11 Cases in a manner that maximizes the value of the Debtors' Estates for the benefit of their unsecured creditors.

3. The Plan has the overwhelming support of unsecured creditors. Each class of claims entitled to vote on the Plan has voted to accept the Plan by a wide margin. While a few dissenters objected to confirmation, their objections primarily seek advantage for their own interests in litigations adjacent to the collective remedy for all unsecured creditors evidenced by the Plan. Those litigations will continue to proceed fairly post-confirmation and the dissenters' objections need not detain this Honorable Court long.

4. The Plan complies in all respects with all applicable provisions of the Bankruptcy Code and the Bankruptcy Rules. The Plan provides the greatest potential for recoveries to unsecured creditors as a whole. The Court should overrule the remaining objections and confirm the Plan.

RELEVANT BACKGROUND

5. On October 22, 2018 (the "Petition Date"), the Debtors each filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their businesses and property as debtors in possession.

6. On October 30, 2018, the Office of United States Trustee for the District of Delaware appointed the Committee. The Committee currently is comprised of the following members: Ohio Machinery Co.; Cleveland Brothers Equipment Co., Inc.; PipeLine Machinery International, L.P.; Earth Pipeline Services, Inc.; IUOE and Pipe Line Employers Health and Welfare Fund; and Schmid Pipeline Construction, Inc..

7. Since its formation, the Committee has been actively engaged in these cases, the sale of key assets (enhancing value achieved), and the negotiation of key settlements, all for the benefit of unsecured creditors.[3] The Committee also was involved actively in negotiating the various terms of the Plan. The Debtors, upon emergence, will be under control of the Plan Administrator, a creditor-appointed fiduciary, and the oversight of a group of the company's key creditors, including Federal, likely its largest unsecured creditor.

8. On May 7, 2020, the Court entered an Order [D.I. 1362], among other things, approving the Disclosure Statement and the Debtors' solicitation and balloting procedures.

9. On May 8, 2020, the Debtors filed the Plan and the Amended Disclosure Statement [D.I. 1364].

REPLY

10. The Committee does not seek to duplicate the arguments made by the Debtors in their Confirmation Brief. Rather, given the Committee's active role in these cases and its position

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[3] Such matters are described more fully below and in section III of the Disclosure Statement [D.I. 1344].

as the representative of all unsecured creditors, the Committee files this Reply to provide further context and responses regarding why the objections filed by Central States [D.I. 1457] and the Williams Parties [D.I. 1460] should be overruled and the Plan should be confirmed.

I. The Central States Objection Should be Overruled.

11. Central States argues that the Plan discriminates against its Claim by estimating the amount of such claim at $0 solely for purposes of calculating distributions and reserves. Central States is mistaken. As discussed below, the Plan treats the Central States Claim the same as any other general unsecured claim. The Claim is properly estimated at $0 because reserving for a nearly $39 million disputed claim, which will be paid entirely, if at all, from a source outside the retained Estates, would unduly delay the administration of these cases and unnecessarily delay distributions to other general unsecured creditors. Central States' objection should be overruled.

A. The Plan Properly Estimates Central States Claim at $0.

12. "Congress has given the bankruptcy courts broad discretion to estimate a claim pursuant to section 502(c)(1)."[4] In *Bittner v. Borne Chemical Company*, the Third Circuit observed that the procedure to estimate a claim amount should be "undertaken initially by the bankruptcy judges, using whatever method is best suited to the particular contingencies at issue."[5] "The principal consideration must be an accommodation to the underlying purposes of the Code."[6] Estimation does not require perfect information; estimation requires only "sufficient evidence on which to base a reasonable estimate of the claim."[7] In estimating the amount of a claim, "the court

[4] *Bittner v. Borne Chem. Co., Inc.*, 691 F.2d 134, 136 n.9 (3d Cir. 1982) (affirming the bankruptcy court's determination to estimate at $0 the value of a claim asserted by a contract counterparty that was involved in prepetition litigation with the debtor, pending the outcome of such litigation.).

[5] *Id.* at 135.

[6] *Id.*

[7] *Id.*

is bound by the legal rules which may govern the ultimate value of the claim."[8] But "there are no other limitations on the court's authority to evaluate the claim save those general principles which should inform all decisions made pursuant to the Code."[9] And the bankruptcy court "is afforded complete discretion" to set the amount of a reserve for a disputed claim based upon "the facts and circumstances" of the case.[10]

13. Courts have recognized that when a contingent or unliquidated claim may be satisfied, in part or in full, from a source other than the debtor's estate, the estimated amount of such claim must be reduced accordingly. A failure to recognize that a claim will be paid from a source outside the estate "would unfairly penalize other unsecured creditors".[11]

14. In estimating a claim amount the court may consider the underlying merits of the claim. For example, in *Bittner v. Borne Chemical Company* the Third Circuit estimated the contract counterparty's claim at $0 based upon its estimation of "the ultimate merits of the[] state court litigation."[12]

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[8] *Id.*

[9] *Id.* at 136.

[10] *In re Oakwood Homes Corp*., 329 B.R. 19, 22 (D. Del. 2005) (The District Court affirmed the Bankruptcy Court's post-confirmation determination to set a $0 reserve for a disputed claim asserted in the amount of $61,017,425.).

[11] *In re Teigen*, 228 B.R. 720, 723 (Bankr. D.S.D. 1998). In *In re Teigen* two creditors asserted claims against individual chapter 7 debtors, who were the principals of an entity that was itself a chapter 11 debtor, as well as claims against the chapter 11 debtor entity. *See id.* at 722. On the trustee's motion to estimate the claims in the chapter 7 case, the bankruptcy court stated, "[w]hile their respective agreements with Debtors allow them to collect their full claims against Debtors, in estimating the claims under § 502(c), the Court cannot ignore that these two claims are scheduled to be paid in part through the [entity debtor's] confirmed Chapter 11 plan." *Id.* at 723. The court recognized the creditors had a source of recovery that was not available to any other unsecured creditor. *See id.* Accordingly, the court ordered that the estimated amount of the creditors' claims be reduced by "the amounts paid or to be paid" from outside the chapter 7 estate. *Id.* (citing *Butler Machinery, Inc. v. Haugen (In re Haugen)*, 998 F.2d 1442, 1448 (8th Cir.1993) (The Eighth Circuit held a judgment claim against an individual debtor based upon alter ego theory must be reduced by the amount paid to the claimant on its claim in a different bankruptcy case)).

[12] *Bittner*, 691 F.2d at 137; *see, e.g., In re Genesis Health Ventures, Inc.*, 272 B.R. 558 (Bankr. D. Del. 2002), *aff'd* 112 Fed. Appx. 140 (3d Cir. 2004) (estimating a False Claims Act qui tam claim at zero dollars for allowance purposes where there was no likelihood of ultimate liability for the claim); *see also, e.g., In re Enron Corp.*, No. 01-16034, 2006 WL 544463, at *6 (Bankr. S.D.N.Y. Jan. 17, 2006) (estimating a disputed claim to be zero dollars for reserve purposes under a confirmed plan to reflect the debtor's expected ultimate liability and rejecting an argument that a $0 estimation resulted in disparate treatment of the claims in violation of Bankruptcy Code section 1123(a)(4)).

15. Estimation is appropriate where the proponent of the plan has shown "by a preponderance of the evidence" that its estimate of the claim amount "is a reasonable approximation of the amount of liability, the Plan does not result in a materially lower recovery for the Unsecured Creditors, and there is no discrimination."[13]

16. Here, section 8.4.1 of the Plan provides for the Central States Claim to be estimated at $0.00 solely for purposes of determining the General Unsecured Claim Distribution and any related reserve. Section 8.4.1 of the Plan also expressly preserves the rights of all parties, including Central States, "with respect to the allowance, liquidation or determination of liability with respect the Central States Claim . . . ." Fundamentally, the Plan treats the Central States Claim like any other general unsecured claim.[14] The Central States Claim is classified under the Plan as a general unsecured claim with the claims of all other similarly situated creditors. The Central States Claim is subject to the same dispute and estimation procedures as all other contingent or unliquidated claim. And Central States, like any other holder of a Disputed Claim, is not entitled to receive a distribution from the Estates unless and until the Central States Claim becomes an Allowed Claim as defined in the Plan.

17. In its objection, Central States argues its general unsecured claim is being treated "differently from and worse than all other general unsecured claims."[15] But the Plan does not treat Central States worse than other unsecured creditors.

18. Central States has the same opportunity to recover from the Estates as all other holders of disputed claims. And Central States' right to enforce its claims, if any are allowed,

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[13] *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 124 (D. Del. 2006) (estimating contingent and unliquidated asbestos-related claims in connection with plan confirmation).

[14] *See* Plan, §§ 8.2, 8.3, and 8.4.

[15] Central States Pension Fund's Objection to Confirmation of the Debtors' Chapter 11 Plan [D.I. 1457] ("Central States Objection") ¶ 3.

against the estate is preserved under the Plan. But under the Indemnity Agreement (and a related surety agreement), it is Bechtel, not the retained Estates that will pay any such judgment. This allocation of risk to Bechtel is a key term of the Plan Settlement Agreement; it holds the Debtors' general unsecured creditors harmless from any risk on the Central States' Claim.

19. In that regard, Central States is unique among unsecured creditors in these cases. It has a highly capable non-debtor party, Bechtel, that is jointly and severally liable on the debt and to which Central States can and has looked for payment. Indeed, Central States has already received more than $5,000,000 from Bechtel, even though arbitration proceedings have only recently been commenced to determine any withdrawal liability. In addition, Central States continues to receive payments of $378,436.74 _per month_ from Bechtel on account of its asserted withdrawal liability claim.[16] Central States is receiving what amounts to adequate protection payments on account of its disputed unsecured claim. No other unsecured creditor in these cases (disputed or undisputed) is receiving similar treatment.

20. Central States argues its Claim should be estimated in an amount greater than $0 in the unlikely event "Bechtel becomes unable to make payments to Central States on the withdrawal liability obligation,"[17] if any. That is purely hypothetical. By contrast, the Plan proposes to estimate the Central States Claim at $0 based upon the very real likelihood that Bechtel, one of the largest construction companies in the world -- and one of the largest private companies in the United States -- will pay *in full* any claim Central States ultimately proves it has.

21. The Committee and the Debtors recognized the need to address both the Central States Claim and its assertion of joint and several withdrawal liability against Welded.

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[16] *See* Central States Objection ¶ 4.

[17] *Id.* ¶ 4.

Accordingly, the Committee took a lead role in the extensive good faith and arm's-length negotiations with the Debtors, Bechtel and the other Partner Settlement Parties. The product of those negotiations, the Plan Settlement Agreement, the Indemnity Agreement, and a related Bechtel surety, which are annexed to the Plan, enables confirmation of the Plan on terms acceptable to the consenting majority of unsecured creditors, while permitting the arbitration to proceed post-confirmation.

22. The Plan Settlement and the Indemnity Agreement together provide significant value to the Debtors' Estates, all for the benefit of unsecured creditors. The settlement is in the paramount interests of creditors as it includes, without limitation, (i) a $2,000,000 cash payment by the Partner Settlement Parties to the estate, (ii) a full indemnification of the Estates by Bechtel of all claims asserted against the Estates by Central States, and (iii) Bechtel's agreement to defend and reimburse the Welded Indemnitees against all claims, demands, or actions brought against them by the Central States on the terms set forth in the Indemnity Agreement, among other things. The Indemnity Agreement avoids the need to either (x) incur the cost and burden of objecting to the Central States Claim at this time, (y) establish a disputed claim reserve for the Central States Claim, which likely would delay distributions to all general unsecured creditors, or (z) make a distribution on the Central States' disputed and contingent claim even though the Debtor may have no liability with respect to such claim. The Plan Settlement and the Indemnity Agreement are fair, reasonable, and in the best interests of all creditors and should be approved in their entirety.

23. Estimating the Central States Claim at $0 also is appropriate based upon the merits of the Claim. Welded withdrew from the pension plan in or about 2011 and ceased to have any further obligation to contribute to Central States.[18] Upon information and belief, in December

[18] *See* Central States Objection, Ex A., Settlement Agreement and Release, ¶ I.

2016, a settlement was reached whereby approximately $16 million was paid by the Bechtel control group to Central States releasing the Bechtel control group's 2011 partial withdrawal liability. Of that $16 million, Welded paid $10 million on account of Welded's purported share of the partial withdrawal liability.[19] As discussed more fully in the Confirmation Brief, serious questions exist regarding whether Welded even remains liable to Central States. And even if it is, the Plan Settlement Agreement and included Indemnity Agreement ensure that Bechtel will be the party to pay any Central States Claim.

24. For purposes of Plan confirmation, the Court does not need to delve into the merits of the Central States Claim, which will be determined in due course through the arbitration and litigation process. Rather, the Debtors are only required to show the $0 estimation of the Central States Claim "is a reasonable approximation of the amount of liability, the Plan does not result in a materially lower recovery for the Unsecured Creditors, and there is no discrimination."[20] The Committee submits the Debtors have met their burden by a preponderance of the evidence. A zero-dollar claim is a "reasonable approximation" of the Estates' liability given the Plan Settlement and the Indemnity Agreement provide for any Claim of Central States to be paid in full by Bechtel. Because Bechtel is agreeing to fully indemnify the Estates against the Central States Claim while paying Central States hundreds of thousands of provisional dollars every month during the pendency of related litigation, the Estates, through the Plan Settlement, have fully and properly provisioned payments on account of such Claim as required by the Plan and by applicable bankruptcy law. As discussed above and in the Confirmation Brief, the Plan does not result in a

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[19] The Indemnity Agreement is a key component of the Plan Settlement Agreement in light of the Committee's conclusion, *inter alia*, that the Estates may assert contingent contribution claims against Bechtel in the event of any Estate liability on the Central States Claim, especially when Welded already paid $10 million towards withdrawal liability.

[20] *Armstrong World*, 348 B.R. at 124.

materially lower recovery for any unsecured creditor (rather it maximizes such value). Moreover, given the existence of the Indemnity Agreement and the related Bechtel surety and the fact that a set of non-debtor parties remain purportedly jointly and severally liable to Central States in connection with its claims and are pre-paying Central States on its disputed unsecured claims, Central States cannot credibly argue that the Plan treats Central States worse than other general unsecured creditors.

25. For the foregoing reasons, the Court should estimate the Central States Claim at $0 as provided in the Plan.

B. Requiring a Reserve for Central States' Claim Would Unduly Delay the Administration of These Cases and Distributions to All Unsecured Creditors.

26. Estimation of a contingent or unliquidated claim is required where the resolution of such claim would "unduly delay" the administration of the case.[21] "Estimation helps the court avoid the need to await the resolution of outside lawsuits to determine issues of liability or amount owed by means of anticipating and estimating the likely outcome of these actions."[22]

27. "[B]ecause a deferral of a distribution affects the efficient administration of a case, the possibility of such deferral provides a justification for estimation of a claim."[23] "A main goal of the Bankruptcy Code is to equitably distribute the debtor's assets among its creditors. Lengthy bankruptcy proceedings cause delayed distributions, which in turn, greatly devalue the claims of

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[21] *See* 11 U.S.C. § 502(c); *In re G-I Holdings, Inc.*, 323 B.R. 583, 599 (Bankr. D.N.J. 2005) (observing that "Section 502(c) of the Bankruptcy Code is drafted in mandatory terms" and holding that estimation was required for unliquidated asbestos claims against the estate).

[22] *In re Fed.-Mogul Glob., Inc.*, 330 B.R. 133, 154 (D. Del. 2005) (affirming the bankruptcy court's estimation of the aggregate allowable amount on all pending and future asbestos-related personal injury claims) (internal quotation omitted).

[23] *Enron*, 2006 WL 544463, at *7.

all creditors as they cannot use the assets until they receive them."[24] A court should estimate the amount of a claim where "[o]ther creditors' payments would be delayed unnecessarily" while such claim is resolved.[25]

28. Estimating the Central States Claim in an amount greater than $0 would unduly delay the administration of these Estates and distributions to all general unsecured creditors.

29. As discussed more fully in the Plan and Disclosure Statement, earlier this year certain arbitration proceedings were commenced by Welded and by Bechtel with respect to Central States' asserted claims for withdrawal liability. These arbitration proceedings are in their preliminary stages. The complex issues involved may well require several years to be fully resolved, including through *de novo* post-arbitration litigation and potentially appeals thereafter.

30. Distributions to general unsecured creditors would be unnecessarily delayed if the Estates were forced to wait for a final resolution of the withdrawal liability dispute and the Central States Claim. Importantly, unlike Central States, all other general unsecured creditors in these cases (i) do not have a non-debtor party that is jointly and severally liable, (ii) do not have the benefit of the Indemnity Agreement with respect to their unpaid claims, and (iii) are not receiving substantial monthly payments while they await a final resolution of their claims.

31. As a matter of fairness and equity, distributions to general unsecured creditors as a whole should not be held hostage to the resolution of one creditor's claim, particularly where that creditor's claim would be paid from outside the estate. The Committee submits the Plan properly

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[24] *In re Lionel L.L.C.*, No. 04-17324, 2007 WL 2261539, at *2 (Bankr. S.D.N.Y. Aug. 3, 2007) (granting the debtor's motion to estimate claims where the underlying litigation had been ongoing for years and both parties had indicated an intent to appeal).

[25] *Teigen*, 228 B.R. at 723 ("To wait [several years] to see what remains for Debtors to pay under their guaranty or indemnity agreements with the [creditors whose claims were subject to estimation] is too long.").

estimates and treats the Central States Claim in accordance with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules.

II. The Williams Parties' Objection Should be Overruled.

32. The Williams Parties' objection to confirmation largely relates to provisions of the Plan that effectuate the Surety Cooperation Agreement Order entered by Judge Gross in the Chapter 11 Cases some 13 months ago. The time to raise any such objections has long since passed, and the Williams Parties' improper collateral attack on this Court's prior order should be rejected. The Williams Parties also raise a slew of issues relating to alleged Plan impacts on their rights in ongoing litigation before this Honorable Court that defy any reasonable reading of the Plan. The Williams Parties' objection, one part untimely attack on a finally ordered settlement of this Court and one part unnecessary rights reservation, should be overruled.

A. The Williams Parties' Objections to the Treatment of the Surety's Claims and Rights Under the Plan Is an Impermissible Collateral Attack on This Court's Prior Order.

33. Much of the Williams Parties' objection seeks to rehash matters that have long since been resolved pursuant to the Surety Cooperation Agreement Order. The treatment of the Surety's claim and its equitable subrogation rights already have been determined by the Court in the Surety Cooperation Order. The Williams Parties should not be permitted to relitigate a final order of the Court at the confirmation hearing.

34. The Committee need not belabor the numerous reasons why the Court should overrule the Williams Objection, as the Debtors have addressed this more fully in their Confirmation Brief. But the Committee notes that the treatment of the Surety's claims and equitable subrogation rights were heavily negotiated and the Committee was actively involved in that process. The Surety Cooperation Agreement Motion is clear on this point, and expressly provided that:

> The Surety has asserted equitable subrogation rights in any Recovery. The Debtors and the Committee have engaged in lengthy, arm's-length negotiations with the Surety regarding the Surety's asserted rights, the path forward with the Williams Litigation, and the sharing of the Recovery. The Cooperation Agreement is the outcome of these negotiations and fairly allocates the benefits and burdens of the Williams Litigation and the Recovery. Notably, the Committee took a leading role in negotiating a sharing mechanism between the Estate and the Surety for the disposition of the Net Proceeds. The Cooperation Agreement additionally provides the Debtors' estates with funding to pursue the Williams Litigation and allows the Debtors to do so without diminishing or jeopardizing their estates' existing assets. Both key components of the Cooperation Agreement align the interests of the parties and provide certainty regarding the benefits of the Recovery.[26]

35. The Committee believes now, as it did then, that entry into the Surety Cooperation Agreement was in the best interest of the Debtors and their Estates, especially recognizing the relative strength of the Surety's position. Pursuant to the Surety's rights of equitable subrogation, once the Debtors defaulted under their obligations on the Williams project bonded by the Surety, the Surety became equitably subrogated to the rights of any claimants or bond obligees whose claims the Surety satisfied. *See Pearlman v. Reliance Ins. Co.,* 371 U.S. 132 (1962). The Third Circuit and this Court have recognized the independent application of state law equitable subrogation in bankruptcy cases. *See In re Bridge*, 18 F.3d 195, 201-02 (3d Cir. 1994); *In re Modular Structures, Inc*., 27 F.3d 72, 77-79 (3d Cir. 1994); *In re LTC Holdings, Inc*., 597 B.R. 565, 574 (Bankr. D. Del. 2019) (Sontchi, J.) (Noting that "the Third Circuit recognizes both equitable subrogation and state subrogation laws in the bankruptcy context.").

36. The Surety Cooperation Agreement thus consensually resolved a significant potential litigation with the Surety while driving value to the Estates for the benefit of creditors. Among other things, the Surety Cooperation Agreement provided for (i) resolution of the Surety's

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[26] *See Debtors' Motion for Entry of an Order Approving the Litigation Funding and Cooperation Agreement* [D.I. 704] (the "Surety Cooperation Agreement Motion").

assertion of equitable subrogation rights, (ii) up to $2.5 million in funding by the Surety to cover fees and costs in prosecuting the Williams Litigation,[27] and (iii) a protocol to share the net proceeds recovered in such litigation, with the Estates receiving approximately 10% of such proceeds, with the remaining proceeds being used to satisfy the Surety Bond Claim.

37. The Debtors sought approval of the Surety Cooperation Agreement by motion filed with the Court on notice to parties in interest, including the Williams Parties.[28] No party objected to the motion.[29] Accordingly, on May 22, 2019, the Court entered the Surety Cooperation Agreement Order [D.I. 745] approving the agreement in its entirety.

38. The Surety Cooperation Agreement Order is a final, non-appealable order and is law of the case.[30] The Williams Parties had a full and fair opportunity to challenge the terms of the Surety Cooperation Agreement in May 2019. They chose to remain silent. That was their right. But the Williams Parties do not have the right to attempt to use the confirmation process to launch a collateral attack on this Court's prior approval of the Surety Cooperation Agreement. The Court should see the Williams Parties' objection for what it really is: as defendants in a substantial adversary proceeding brought on behalf of the Estates, the Williams Parties are seeking to advance their own parochial interests, while prejudicing the rights of general unsecured creditors, who

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[27] *See Welded Construction, L.P. v. Williams Co., Inc., et al.*, Adv. Proc. No. 19-50194 (CSS).

[28] *See* Surety Cooperation Agreement Motion; *Affidavit of Service* [D.I. 709] (listing, among other notice recipients, the Williams Parties' counsel at that time).

[29] *See* Certificate of No Objection [D.I. 743].

[30] *See, e.g., In re Vaso Active Pharm., Inc.,* 500 B.R. 384, 398 (Bankr. D. Del. 2013) ("The doctrine of law of the case is as follows: once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless a compelling reason to do so appears."). When a matter has been "actually litigated" and "has been addressed in a procedurally appropriate way by a court", the court should not permit a party to relitigate "issues in which parties have already had a full and fair opportunity to litigate." *Id.* at 399; *see In re LTC Holdings, Inc.*, 587 B.R. 25, 34 (Bankr. D. Del. 2018) (Sontchi, J.) (*quoting Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir. 1994) ("a successor judge should not lightly overturn decisions of his predecessors in a given case")). The Williams Parties have shown no reason, let alone a "compelling reason," why the Court should revisit the Surety Cooperation Agreement Order at this juncture. *See id.*

benefit directly from a successful Estate outcome in the Williams Litigation as a result of the Surety Cooperation Agreement.[31]

B. The Williams Parties' Rights Reservations Are Unnecessary.

39. The Williams Parties appear to misinterpret or misconstrue what are fairly standard provisions of the Plan that routinely are approved in other cases before this Court.

40. The Exculpation provision for estate fiduciaries contained in section 11.12 of the Plan cannot credibly be read to prejudice the Williams Parties' rights in the Williams Litigation. In fact, the Plan and Disclosure Statement specifically, and repeatedly, rely on the continuation of such litigation post-confirmation. The Plan does not purport to prejudice or alter either parties' rights in the Williams Litigation. The Court should decline the Williams Parties' invitation to imperil the positions of estate fiduciaries, including the Committee, by altering the Plan's standard exculpation provisions for the Williams Parties' sole and exclusive benefit.

41. Similarly, in order to bind creditors to the distributional process and requirements of the Plan, it is necessary (as well as usual and entirely supported by applicable law) for assets to vest free and clear in the retained Estates under the Plan. If not, the Plan would not, and could not, accomplish its most basic objective of providing for the liquidation of the Debtors' assets and the distribution of properly protected retained Estate proceeds to unsecured creditors.

42. The Williams Parties also overstate the Plan's limitation on the amendment of filed proofs of claim after the passage of the applicable bar dates in these Chapter 11 Cases. The Plan prohibits amendments to *increase* liability or to assert *new* liabilities absent Court or Post-Effective Date Debtor authorization. Again, nothing prejudices the Williams Parties' rights in the pending

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[31] *See* Disclosure Statement, § III.D.4, p. 24 ("the projected recoveries for Holders of Allowed Surety Bond Claims and General Unsecured Claims may be materially impacted by any recovery in the Williams Litigation.").

litigation as to their pleadings (their rights are what they are in that adversary subject to the Plan's collective remedy and applicable law) – a litigation that has progressed past dispositive motions. But neither can the Plan place the Williams Parties in an enhanced position relative to other unsecured creditors, enabling endless changes in their claims and rights to the detriment of the Plan's collective remedy and the orderly progress of the Williams litigation itself. The language proposed by the Williams Parties in their objection is superfluous and should be rejected.

43. Similarly, the Plan properly places the Plan Administrator in square and full charge of claims reconciliation.[32] Granting the Plan Administrator sole authority to object to claims facilitates the "orderly and expeditious administration" of the Estates and avoids piecemeal litigation over claims.[33] This is nothing unusual as federal bankruptcy law generally assigns that task to trustees and estate representatives like the Plan Administrator.[34] Indeed, the Advisory Committee Notes to Bankruptcy Rule 3007 state that "[w]hile the debtor's other creditors may make objections to the allowance of a claim, the demands of orderly and expeditious administration have led to a recognition that the right to object is generally exercised by the trustee."[35] While there may be rare circumstances where a creditor might have superior standing

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[32] *See* Plan § 5.5.3(iv) ("Powers and Duties of Plan Administrator").

[33] *In re Abengoa Bioenergy Biomass of Kansas, LLC*, No. 16-10446, 2018 WL 2138620, at **3-4 (Bankr. D. Kan. May 7, 2018) ("*ABBK*") ("The primacy of the Trustee in the liquidation process is consistent with long-recognized bankruptcy practice. . . . [W]hen a trustee has been appointed, courts generally hold that a general creditor does not have standing to object to a proof of claim." In *ABBK* the bankruptcy court upheld the exclusive authority of the liquidating trustee under a confirmed chapter 11 plan of liquidation to object to and resolve claims in accordance with the terms of the Plan.); *In re Western Asbestos Co*., 313 B.R. 832, 845 (Bankr. N.D. Cal. 2003) (holding that a proposed chapter 11 plan properly vested a post-effective date trust with exclusive authority to object to asbestos claims); *cf. In re Adelphia Commc'ns Corp.*, 371 B.R. 660, 674–76 (S.D.N.Y. 2007), *affd*, 544 F.3d 420 (2d Cir. 2008) (affirming a post-confirmation trust's exclusive authority to object to claims).

[34] *See W. Asbestos Co.*, 313 B.R. at 845. (Bankr. N.D. Cal. 2003) ("In a chapter 11 case, 11 U.S.C. § 502(a) only governs the right of a party in interest to object to a claim until the plan is confirmed. Once a plan is confirmed, the terms of the plan govern who may object to the claim. 11 U.S.C. § 1141(a). Generally, a plan assigns that right and duty either to the reorganized debtor or to the official creditors' committee. In these cases, that duty is assigned to the Trust. **There is nothing inconsistent with the Bankruptcy Code in this provision.**") (emphasis added).

[35] Fed. R. Bankr. P. 3007, Advisory Committee Notes.

to assert claims objections, those circumstances are not evident here. The pre-confirmation Debtors have comprehensively reconciled claims. What remains can and will be undertaken post-Effective Date by the Plan Administrator, an impartial fiduciary selected by creditors and of deep experience in such matters. Thus, the Plan's delegation of claims reconciliation to the Plan Administrator and the Post-Effective Date Debtors makes good sense. There is no need to amend the Plan to grant the Williams Parties' license to object to the claims of the Surety presumably to leverage the Williams Parties' position in the pending Williams litigation.

44. For the foregoing reasons and for the reasons set forth more fully in the Confirmation Brief, the Committee submits the Plan as proposed complies in all respects with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules, is fair and equitable, and is in the best interests of the Estates and creditors. Accordingly, the Plan should be confirmed.

RESERVATION OF RIGHTS

45. The Committee reserves the right to supplement this Reply at or prior to any hearing on confirmation of the Plan.

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CONCLUSION

WHEREFORE, the Committee respectfully requests the Court overrule any unresolved objections to confirmation, confirm the Plan, and grant such other relief as is just and proper.

Dated: June 22, 2020
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Josef W. Mintz, hereby certify that on June 22, 2020, I served or caused to be served the foregoing *Omnibus Reply of the Official Committee of Unsecured Creditors in Support of Confirmation of the Amended Chapter 11 Plan of Welded Construction, L.P. and Welded Construction Michigan, LLC*, by electronic notice upon all parties registered in these cases to receive notices through the Court's CM/ECF filing system and by email and U.S. first-class mail, postage fully pre-paid upon the following persons:

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