

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re

DBMP LLC,¹

Debtor.

Chapter 11

Case No. 20-30080 (JCW)

**MOTION OF THE DEBTOR FOR AN ORDER
AUTHORIZING IT TO ENTER INTO TOLLING AGREEMENT**

DBMP LLC, the debtor and debtor in possession in the above-captioned chapter 11 case (the “Debtor”), moves the Court, pursuant to sections 105(a) and 363 of the Bankruptcy Code, for an order authorizing the Debtor to enter into a tolling agreement substantially in the form attached hereto as Exhibit A (the “Tolling Agreement”).²

Background

1. Through their *Motion for Entry of an Order (I) Granting Leave, Standing, and Authority to Investigate, Commence, Prosecute, and to Settle Certain Causes of Action, and (II) to Conduct Relevant Examinations* [Dkt. 1008] (the “Standing Motion”), the official committee of asbestos personal injury claimants (the “Asbestos Committee”) and Sander L. Esserman as the legal representative for future asbestos claimants (the “Future Claimants’ Representative”) and, together with the Asbestos Committee, the “Claimant Representatives”), seek standing to pursue alleged, unidentified claims of the Debtor’s estate with respect to the corporate restructuring completed on October 23, 2019 (the “Corporate

¹ The last four digits of the Debtor’s taxpayer identification number are 8817. The Debtor’s address is 20 Moores Road, Malvern, Pennsylvania 19355.

² The proposed Tolling Agreement is in a form similar to the tolling agreements used in *Kaiser Gypsum* and other cases.

Restructuring”). The Claimant Representatives seek this relief despite the fact that they “have not completed their investigation” (Standing Mot. ¶ 42) or attached a draft complaint to the Standing Motion.

2. The Standing Motion states that potential estate claims with respect to the Corporate Restructuring may include actual fraudulent transfer, alter ego and successor liability claims, and claims for breaches of fiduciary duty among others. Standing Mot. ¶¶ 39-41. Because some or all of these claims could become time-barred if not commenced by January 23, 2022, the Debtor has offered to enter into a tolling agreement with the Claimant Representatives and the potential defendants to ensure that any such causes of action are preserved for the benefit of the estate and to provide the Claimant Representatives with time to complete their investigation and properly seek derivative standing, if appropriate.³

3. Although the Claimant Representatives have expressed concern that the statute of limitations under section 546(a)(1)(A) is set to expire on January 23, 2022 (Standing Mot. ¶¶ 3, 51), to date, the Claimant Representatives have yet to engage in discussions on a draft tolling agreement prepared by the Debtor. Nonetheless, CertainTeed LLC (“New CT”), CertainTeed Holding Corporation (“CT Holding”) and Saint-Gobain Corporation (“SGC”) are all willing to enter into a tolling agreement with the Debtor, to both (a) ensure that no potential estate claim of the kind indicated to be the subject of the Claimant Representatives’ investigation becomes time-barred and (b) avoid the premature commencement of litigation that may be

³ Although the Debtor agrees that the Claimant Representatives should complete their investigation, such investigation should be rational and cannot be unlimited in time, cost or scope. As such, the Debtor reserves all rights to object to further investigation of the Corporate Restructuring to the extent it is wasteful, not in the best interests of the estate and detrimental to the efficient resolution of this chapter 11 case.

unnecessary and of no benefit to the estate. The Tolling Agreement also specifically contemplates that other potential defendants may be added as parties to the agreement. Tolling Agreement at 1.⁴

4. The Tolling Agreement will preserve estate causes of action without impeding in any way the Claimant Representatives' ability to complete their investigation. Because the Tolling Agreement will provide the Claimant Representatives with additional time to investigate and formulate any claims they believe are colorable, it will also enable them to prepare and provide the Court and the parties with a draft complaint, which is required for a proper derivative standing request. Otherwise, and assuming that derivative standing is even available in the Fourth Circuit, the Court's ability to determine whether commencement of the proposed litigation will or will not benefit the estate will be impaired (although the Debtor believes that no matter how the claims may ultimately be asserted, litigation will not be beneficial but instead will only distract the Court and the parties from focusing on matters that will move this case forward to a successful conclusion).⁵

The Tolling Agreement⁶

5. The Tolling Agreement broadly preserves (a) any claims that the Debtor's estate may have against the potential defendants as of the effective date of the Tolling Agreement related to or arising from the Corporate Restructuring, including, but not limited to, by virtue of the powers of a trustee under sections 1107, 1108 and 544 of the Bankruptcy Code, under any legal

⁴ To date, the Claimant Representatives have not identified which parties they believe are potential defendants in the actions they have been investigating. The Debtor included as counterparties to the Tolling Agreement those parties who seemed most likely to be potential defendants, but is willing to seek agreement from other potential defendants who may be identified by the Claimant Representatives. As noted, the proposed Tolling Agreement is drafted to accommodate that.

⁵ Concurrently with this Motion, the Debtor is filing an opposition to the Standing Motion that addresses these issues in greater detail.

⁶ The description of the key terms of the Tolling Agreement set forth herein is for summary purposes only, and the terms of the Tolling Agreement control in all circumstances.

theory or applicable law, whether asserted by claim, counterclaim, cross-claim or otherwise (collectively referred to herein as the “Estate Claims”), and (b) any defenses and responses the potential defendants may have thereto. Tolling Agreement, Recitals C and D.

6. In particular, the Tolling Agreement provides that, to preserve the *status quo*, all applicable statutes of limitations, including those in sections 546(a), 549(d) and 108(a) of the Bankruptcy Code, are tolled and extended through July 31, 2022 (the “Initial Extended Date”), which is an extension of approximately six months from the current deadline of January 23, 2022. The Tolling Agreement further provides that the Initial Extended Date is automatically extended for additional six-month intervals unless a potential defendant provides notice of the defendant’s intention not to renew at least sixty days prior to the expiration of the extended deadline. *Id.* at §§ 1 and 2. If such notice is given by one potential defendant, the Tolling Agreement remains in full force and effect as to the other potential defendants. *Id.* at § 2.

7. In addition, pursuant to the Tolling Agreement, the Claimant Representatives shall retain any rights during the tolling period to seek discovery to complete their investigation of the Corporate Restructuring, subject to the rights of parties to challenge any such discovery. *Id.* at § 3. The Tolling Agreement is not a standstill and does not prevent either the investigation of Estate Claims or the pursuit of those claims (subject to approval of standing by the Court).⁷

⁷ Because the Tolling Agreement is not a standstill, there would be no need to terminate it to pursue litigation, as suggested by the Claimant Representatives. *See* Hr’g Transcript 11:5-7 (Sept. 17, 2021) (Mr. Neier) (“if there’s a tolling agreement that allows the party with standing to terminate that tolling agreement, that might be acceptable.”); Claimant Representatives’ objection to Debtor’s motion to continue [Dkt. 1048], ¶ 25 (“The ACC and the FCR are perfectly willing to consider any proposal with respect to tolling agreements, but irrespective of whether such tolling agreements are entered into, *the ACC and FCR should have standing so as to be able to terminate the tolling agreements if they desire to do so*, as is the norm.”) (emphasis added).

8. The parties to the Tolling Agreement also agree that (a) section 546(a) of the Bankruptcy Code, and any other applicable rule, provision, defense or principle based upon the passage of time, is not a limit on the Court’s jurisdiction, and can be tolled by agreement; and (b) no party will assert any contrary position in any action, suit or proceeding. If a court nonetheless holds, in a final and non-appealable order, that the court does not have jurisdiction over any Estate Claim because the Estate Claim was filed after January 23, 2022, or such other date upon which any applicable time-based defense would have expired but for the Tolling Agreement, the Tolling Agreement provides that: (a) the party asserting such Estate Claim will nevertheless have a separate, distinct contractual right and claim against the party subject to such Estate Claim for avoidance and/or recovery; and (b) the party subject to such Estate Claim will have a corresponding separate and distinct contractual obligation to the party asserting such Estate Claim, in the amount of and for the remedies, if any, that the party asserting such Estate Claim would have been entitled to avoid and/or recover had it asserted such Estate Claim prior to January 23, 2022, or such other date upon which any applicable time-based defense would have expired but for the Tolling Agreement, and obtained a final and non-appealable judgment from the court in its favor, subject to all other available rights, claims, remedies, and defenses of each party. *Id.* at § 4. This addresses the concern articulated by the Claimant Representatives (but not shared by the Debtor) that tolling may not be permissible. *See* Dkt. 1048 at n.16 (Claimant Representatives citing cases for the proposition that “tolling agreements in this context are ineffectual as § 546(a) is a statute of repose that may not be tolled”); *but see infra* ¶¶ 20-21 (citing contrary cases and other authority representing the majority rule).

9. For the avoidance of doubt, the Tolling Agreement provides that the agreement shall inure to the benefit of the Claimant Representatives in the event they are appointed agents or representatives of the Debtor's estate with respect to any Estate Claim. *Id.* at § 6.

Jurisdiction

12. This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested and Basis Thereof

13. The Debtor seeks authority to enter into the Tolling Agreement, pursuant to sections 105(a) and 363 of the Bankruptcy Code. The effectiveness of the Tolling Agreement is conditioned upon the approval of the Court. *See* Tolling Agreement § 12.

14. Section 105(a) of the Bankruptcy Code provides that the Court may “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). This section thus grants bankruptcy courts broad authority and discretion to enforce the provisions of the Bankruptcy Code either under specific statutes or under equitable common law principles.

15. Section 363(c)(1) of the Bankruptcy Code provides, in relevant part, that the Debtor “may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing.” 11 U.S.C. 363(c)(1). Even if the entry into the Tolling Agreement is outside the ordinary course of business, the Debtor satisfies the applicable standard for entry into such agreement.

16. Section 363(b) of the Bankruptcy Code provides that a debtor “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b). Under applicable case law in this and other circuits, a court may

authorize the use, sale or lease of a debtor's property outside of the ordinary course of business under section 363(b)(1) of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re MCSGlobal Inc.*, Case No. 15-11674-BFK, 2017 Bankr. LEXIS 16, at *12 (Bankr. E.D. Va. Jan. 4, 2017) ("Courts generally look to the trustee's business judgment in analyzing asset sales under Section 363(b)."); *In re Century Drive LHDH, LLC*, Case No. 10-01253-8-SWH, 2010 Bankr. LEXIS 1453, at *4 (Bankr. E.D.N.C. Apr. 28, 2010) ("court should consider whether the debtor-in-possession has exercised sound business judgment such that approval of the proposed course of action is warranted."); *see also In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991)); *In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992).

17. When a debtor articulates a valid business justification, "[i]t has been recognized that courts should approve the exercise of a debtor's business judgment unless it is 'so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, whim or caprice.'" *See In re Georgetown Steel Co., LLC*, 306 B.R. 549, 555 (Bankr. D.S.C. 2004) (quoting *In re Aerovox, Inc.*, 269 B.R. 74, 80 (Bankr. D. Mass. 2001)). Indeed, under the business judgment standard, courts "will generally not entertain objections to the debtor's conduct" if the debtor "articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously)." *See In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

18. The Debtor's decision to enter into the Tolling Agreement has a strong business justification. In view of the upcoming expiration of the statute of limitations applicable to potential Estate Claims (including the types of claims referenced in the Standing Motion), the Debtor determined that entry into the Tolling Agreement is the best means of preserving the *status*

quo and, in particular, any potential Estate Claims. As set forth more fully in the Debtor's opposition to the Standing Motion, filed concurrently with this Motion, preserving the Estate Claims is particularly important here given the uncertainty as to whether derivative standing is available to creditors within the Fourth Circuit. *See In re Baltimore Emergency Servs. II, Corp.*, 432 F.3d 557, 561 (4th Cir. 2005) (observing that it is "far from self-evident that the Bankruptcy Code permits creditor derivative standing"). Tolling therefore may be a more effective way to preserve these claims than having the Claimant Representatives obtain a standing order and file a complaint.

19. With the Tolling Agreement in place, the Claimant Representatives can conduct any further investigation that is appropriate, and then, if appropriate, file a proper motion for derivative standing. The Tolling Agreement will fully preserve any Estate Claims, thereby avoiding the need to initiate litigation prematurely or commence litigation that may not be necessary.⁸ The Debtor believes this is a more appropriate way to proceed, as described in its opposition to the Standing Motion. Importantly, nothing in the Tolling Agreement would prevent or delay the Claimant Representatives' ability to pursue such claims if the Court grants the Standing Motion or a later request for standing.

20. The effectiveness of tolling agreements in chapter 11 cases is well established, and the use of tolling agreements is specifically endorsed by the legislative history of section 546(a).⁹ Courts in this District and within the Fourth Circuit have specifically held that

⁸ In *Garlock*, the Court approved a tolling agreement rather than the filing of a complaint, concluding: "I think that what I ought to do is just enter the tolling agreements and preserve where we are. I don't see any reason to – I think there is some *de minimis*, at most, risk in that, although there may be some. But it seems to me that's the proper way to preserve where we are and where we might go, while keeping the focus on the estimation and going from there." *In re Garlock Sealing Techs., LLC*, No. 10-31607 (GRH) (Bankr. W.D.N.C. June 1, 2012) [Dkt. 2300], Hr'g Tr. 94:10-16.

⁹ *See* H.R. REP. 103-835, 49-50, 1994 U.S.C.C.A.N. 3340, 3358 ("The section is not intended to affect the validity of any tolling agreement or to have any bearing on the equitable tolling doctrine where there has

the statute of limitations with respect to avoidance actions under section 546 of the Bankruptcy Code is subject to tolling.¹⁰ *See, e.g., In re Kaiser Gypsum Co., Inc.*, No. 16-31602 (JCW) (Bankr. W.D.N.C. Sept. 14, 2018) [Dkt. 1154] (the “Kaiser Order”); *Garlock* [Dkt. 2281] (Bankr. W.D.N.C. June 4, 2012) (the “Garlock Order”).¹¹ In fact, in both the Kaiser Order and the Garlock Order, this Court found that section 546(a) sets forth a statute of limitations that can be extended by agreement. *See* Kaiser Order at F (“Entry into the Tolling Agreements will preserve the Estate Claims because, among other things, section 546(a) of the Bankruptcy Code sets forth a statute of limitations and not a statute of repose and, therefore, is not jurisdictional in nature”); Garlock Order at 3 (same).

21. Further, the Fifth, Seventh, Eighth, Ninth and Eleventh Circuit United States Courts of Appeal have determined that the time limitations established by section 546(a) are not jurisdictional, and therefore may be extended by agreement or waived.¹² The clear weight

been fraud determined to have occurred. The time limits are not intended to be jurisdictional *and can be extended by stipulation between the necessary parties* to the action or proceeding.”) (emphasis added).

¹⁰ *See In re Madeoy*, 551 B.R. 172, 180 (D. Md. 2016) (finding that “[a] tolling agreement is a valid means to extend the § 546 statute of limitations.”); *In re Innovative Logistics Techniques, Inc.*, No. 14-10053-BFK, 2016 WL 3212186, at *5 (Bankr. E.D. Va. May 31, 2016) (finding that statute of limitations in section 546 can be equitably tolled).

¹¹ *See also In re Specialty Prods. Holding Corp.*, No. 10-11780 (JKF) (Bankr. D. Del. Apr. 19, 2012) [Dkt. 2336] (authorizing the use of tolling agreements to preserve avoidance actions).

¹² *See, e.g., Gladstone v. U.S. Bancorp*, 811 F.3d 1133, 1143 (9th Cir. 2016) (“The trustee’s avoidance action was subject to the two-year limitations period in § 546(a)(1)(A). The statute of limitations in § 546(a)(1) may be subject to equitable tolling.”); *In re Draiman*, 714 F.3d 462, 466 (7th Cir. 2013) (stating that “the statute of limitations in 11 U.S.C. § 546(a) is subject to equitable tolling” which “would permit an extension”); *In re Raynor*, 617 F.3d 1065, 1070-71 (8th Cir. 2010) (“We have not previously addressed this exact issue. We do so now and agree with a majority of courts that have addressed the applicability of Rule 9006(a) to § 546(a) and hold that § 546(a) is *not* jurisdictional and thus Rule 9006(a) is the proper time-calculation method to use when applying § 546’s limitations period.”) (emphasis in original); *In re Int’l Admin. Servs., Inc.*, 408 F.3d 689, 699 (11th Cir. 2005) (“Therefore, § 546 is indeed a statute of limitations, subject to waiver, equitable tolling, and equitable estoppel.”); *In re Pugh*, 158 F.3d 530, 538 (11th Cir. 1998) (concluding that limitations periods set forth in sections 546(a) and 549(d) are statutes of limitations that can be waived); *In re Texas Gen. Petroleum Corp.*, 52 F.3d 1330, 1337-38 (5th Cir. 1995) (holding that section 546(a) is a statute of limitations that can be waived if not asserted in the answer of an adversary proceeding).

of authority supports the conclusion that section 546(a) of the Bankruptcy Code is a statute of limitations that is subject to extension and is not a statute of repose.¹³

22. In the highly unlikely event that a court nonetheless holds that the Tolling Agreement does not extend the deadline under section 546 of the Bankruptcy Code, the Tolling Agreement creates a contractual right and claim against the potential defendants in the amount and for the remedies, if any, that the party asserting such Estate Claim would have been entitled to avoid and/or recover had it asserted such Estate Claim prior to January 23, 2022, or such other applicable deadline. Therefore, the Tolling Agreement preserves the Estate Claims even if the agreement is not effective in tolling the section 546 deadline.

23. For these reasons, the Debtor submits that entry into the Tolling Agreement is supported by a valid business justification and should be authorized pursuant to sections 105(a) and 363 of the Bankruptcy Code.

Notice

24. Consistent with the *Order Establishing Certain Notice, Case Management and Administrative Procedures* [Dkt. 27] (the “Case Management Order”), notice of this Motion has been provided to: (a) the Bankruptcy Administrator for the Western District of North Carolina; (b) counsel to the Asbestos Committee; (c) counsel to the Future Claimants’ Representative; (d) counsel to New CT; and (e) the other parties on the Service List established by the Case

¹³ See also 5 Collier on Bankruptcy ¶ 546.02 (16th 2021) (“Although there is a split of authority among the courts of appeal, the better view is that the statute of limitations in section 546(a) is not jurisdictional in nature. Under this view, if the defense is not timely asserted, a defendant may waive its statute of limitations defense under section 546(a). In addition, the section 546(a) limitations periods may be extended by stipulation between the parties to the proceeding.”) In *Kaiser Gypsum*, the asbestos claimants’ committee and the future claimants’ representative acknowledged that tolling agreements were sufficient to toll proposed estate claims. See *Kaiser Gypsum*, Dkt. 1112, at 2-3 (Bankr. W.D.N.C Aug. 10, 2018).

Management Order. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be provided.

No Prior Request

25. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests that the Court (a) enter an order substantially in the form attached hereto as Exhibit B granting the relief requested herein and (b) grant such other and further relief to the Debtor as the Court may deem proper.

Dated: September 23, 2021
(Charlotte, North Carolina)

Respectfully submitted,

/s/ Garland S. Cassada
Garland S. Cassada (NC Bar No. 12352)
David M. Schilli (NC Bar No. 17989)
Andrew W.J. Tarr (NC Bar No. 31827)
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246
Telephone: (704) 377-2536
Facsimile: (704) 378-4000
E-mail: gcassada@robinsonbradshaw.com
dschilli@robinsonbradshaw.com
atarr@robinsonbradshaw.com

Gregory M. Gordon (TX Bar No. 08435300)
Amanda Rush (TX Bar No. 24079422)
JONES DAY
2727 North Harwood Street, Suite 500
Dallas, Texas 75201
Telephone: (214) 220-3939
Facsimile: (214) 969-5100
E-mail: gmgordon@jonesday.com
asrush@jonesday.com
(Admitted *pro hac vice*)

Jeffrey B. Ellman (GA Bar No. 141828)
JONES DAY
1221 Peachtree Street, N.E., Suite 400
Atlanta, Georgia 30361
Telephone: (404) 581-3939
Facsimile: (404) 581-8330
E-mail: jbellman@jonesday.com
(Admitted *pro hac vice*)

ATTORNEYS FOR DEBTOR AND
DEBTOR IN POSSESSION

EXHIBIT A

Form of Tolling Agreement

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

<p>In re</p> <p>DBMP LLC,¹</p> <p style="text-align: center;">Debtor.</p>	<p>Chapter 11</p> <p>Case No. 20-30080 (JCW)</p>
--	--

TOLLING AGREEMENT

This Tolling Agreement (this “Agreement”) is effective as of [____], 2021 (the “Effective Date”) by and among the following parties (collectively, the “Parties” and each a “Party”): (1) the above captioned debtor and debtor in possession (the “Debtor” or “DBMP”); and (2) these potential defendants (together, the “Potential Defendants”): CertainTeed LLC (“New CT”), CertainTeed Holding Corporation (“CT Holding”), Saint-Gobain Corporation (“SGC”), and any other individual or entity that executes a signature page to this Agreement.²

RECITALS

A. On January 23, 2020 (the “Petition Date”), the Debtor commenced this case by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Western District of North Carolina (the “Bankruptcy Court”).

B. The Official Committee of Asbestos Personal Injury Claimants (the “ACC”) and Sander L. Esserman as Legal Representative for Future Asbestos Claimants

¹ The last four digits of the Debtor’s taxpayer identification number are 8817. The Debtor’s address is 20 Moores Road, Malvern, Pennsylvania 19355.

² **[NOTE: To date, the ACC and the FCR (as defined below) have not identified which parties they believe are potential defendants based on the investigation they are conducting. The Debtor is willing to seek agreement from other potential defendants who may be identified by the ACC and the FCR.]**

(the “FCR”) have advised the Bankruptcy Court, the Debtor, and the other Parties that they believe a basis exists to challenge the corporate restructuring of the former CertainTeed Corporation (“Old CT”) completed and effective on October 23, 2019, by which Old CT ceased to exist and the Debtor and New CT were created (the “Corporate Restructuring”)³ as a fraudulent conveyance or on other grounds. The Parties have agreed to enter into this Agreement to preserve any claims with respect to the Corporate Restructuring that the Debtor’s bankruptcy estate may have against the Potential Defendants as of the Effective Date and any defenses and responses that the Potential Defendants may have with respect to such claims.

C. The Parties wish to preserve the *status quo* and toll all applicable statutes of limitations or repose or other rule, provision, defense, or principle based upon the passage of time (including, without limitation, waiver, estoppel, and laches), whether at law or at equity, whether statutory, contractual, or otherwise, including, but not limited to, those contained in sections 546(a), 549(d), and 108(a) of the Bankruptcy Code, and other applicable provisions of bankruptcy law and/or non-bankruptcy law (each individually referred to as a “Time-Based Defense” and collectively referred to as the “Time-Based Defenses”), thereby to preserve any claims that the Debtor’s estate may have against the Potential Defendants as of the Effective Date, which claims relate to or arise from the Corporate Restructuring, including, but not limited to, by virtue of the powers of a trustee under sections 1107, 1108, and 544 of the Bankruptcy Code, under any legal theory or applicable law, whether asserted by claim, counterclaim, cross-claim, or otherwise (collectively, the “Preserved Claims”), and to preserve any defenses and responses the Potential Defendants may have thereto (the “Preserved Defenses”).

³ The Corporate Restructuring is described in greater detail in the *Declaration of Robert J. Panaro in Support of First Day Pleadings* [Dkt. 24].

D. The Parties are willing to enter into this Agreement to preserve all Preserved Claims that the Debtor's estate may have against the Potential Defendants as of the Effective Date, and all Preserved Defenses that any such defendant may have, according to the terms set forth herein and subject to approval of the Bankruptcy Court.

AGREEMENT

In consideration of the mutual promises set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, hereby agree as follows:

1. To preserve the *status quo*, any and all Time-Based Defenses with respect to the Preserved Claims and the Preserved Defenses are tolled and extended from the Effective Date of this Agreement through and including July 31, 2022 (the "Initial Extended Date").

2. The Initial Extended Date shall be automatically extended for additional six month intervals (each, a "Subsequent Extended Date") unless a Potential Defendant gives the Debtor, the ACC, and the FCR written notice of its intention not to renew at least 60 days prior to the expiration of the Initial Extended Date or a Subsequent Extended Date. If written notice is timely given, this Agreement shall remain in full force and effect until the later of (a) the Initial Extended Date, (b) a Subsequent Extended Date, or (c) 60 days after the entry of an order by the Bankruptcy Court adjudicating a motion by the ACC or the FCR for authority to commence suit on behalf of the Debtor's estate asserting Preserved Claims against one or more of the Potential Defendants, *provided that* in this latter case, the ACC and the FCR filed such motion prior to or within 60 days of receipt of the written notice. For the avoidance of doubt, if written notice is given by one Potential Defendant, this Agreement shall remain in full force and effect as to other Potential Defendants.

3. For the avoidance of doubt, nothing in this Agreement shall affect (a) the rights of the ACC and the FCR during the tolling period to seek discovery to complete their investigation of potential Preserved Claims or (b) any party's right to object to such discovery.

4. The Parties agree that: (a) section 546(a) of the Bankruptcy Code (or any other Time-Based Defense) is not a limit on the Bankruptcy Court's jurisdiction and can be tolled by agreement; and (b) no Party will assert any contrary position in any action, suit, or proceeding (whether filed in the Bankruptcy Court, the United States District Court for the Western District of North Carolina, or, in the event the Debtor's chapter 11 case is no longer pending or a plan of reorganization that preserves the Preserved Claims has been confirmed, a Federal District Court or State Court of competent jurisdiction), including, without limitation, any proceedings relating to confirmation of a plan of reorganization. If a court nonetheless holds, in a final and non-appealable order, that the court does not have jurisdiction over any Preserved Claim because the Preserved Claim was filed after January 23, 2022, or such other date upon which any applicable Time-Based Defense would have expired but for this Agreement, the Parties agree that: (x) the entity asserting such Preserved Claim on behalf of the Debtor's estate nevertheless shall have a separate, distinct contractual right and claim against the Party subject to such Preserved Claim for avoidance and/or recovery (subject to the same legal requirements, levels of proof, and defenses as the related Preserved Claim); and (y) the Party subject to such Preserved Claim will have a corresponding separate and distinct contractual obligation to the entity asserting such Preserved Claim on behalf of the Debtor's estate (if such claim is successful), in the amount and for the remedies, if any, that the entity asserting such Preserved Claim would have been entitled to avoid and/or recover on behalf of the Debtor's estate had it asserted such Preserved Claim prior to January 23, 2022, or such other date upon which any applicable Time-Based Defense would have

expired but for this Agreement, and obtained a final and non-appealable judgment from the court in its favor, subject to all other available rights, claims, and defenses of each Party. The agreements contained in this paragraph are a material inducement to each Party to enter into this Agreement.

5. This Agreement shall not in any manner revive, resurrect, or create any claims, rights, causes of action, or suits that, as of the Effective Date, had expired or were barred by any Time-Based Defense, or limit in any way the assertion of any defense available as of the Effective Date. For avoidance of doubt, nothing in this Agreement shall prevent the Potential Defendants from asserting that any Preserved Claim became subject to or barred by a Time-Based Defense on or before the Effective Date, and nothing in this Agreement shall prevent the Debtor or any party representing the Debtor's estate or the interests of such estate or a successor thereto from contesting such assertion.

6. This Agreement shall bind and inure to the benefit of the Parties hereto, the Debtor's estate, and creditors and any agent or authorized representative of any of the foregoing appointed by the Bankruptcy Court in this case or in connection with any plan of reorganization or liquidation. For the avoidance of doubt, this Agreement shall inure to the benefit of each of the ACC and the FCR in the event either of them is appointed as the estate agent or representative with respect to one or more of the Preserved Claims. Nothing contained in this Agreement shall create, grant, or limit any person or entity, the right, ability, or standing to pursue the Preserved Claims.

7. This Agreement shall not operate as an admission of liability by any Party. Except as expressly set forth herein, by entering into this Agreement, neither the Debtor nor any Potential Defendant has waived or limited in any respect any right, claim, cause of action, or defense.

8. Nothing in this Agreement amounts to, and nothing in this Agreement may be considered: (a) a consent by any of the Parties to jurisdiction by the Bankruptcy Court over any Preserved Claim that must be tried by a court established under Article III of the United States Constitution; (b) a consent by any of the Parties to the trial of any Preserved Claim by the Bankruptcy Court as a “core” proceeding under 11 U.S.C. 157(b)(2); (c) a waiver of any defenses by any of the Parties based on personal jurisdiction that any Party may have with respect to any Preserved Claim; or (d) a waiver of trial by jury that any Party may have with respect to any Preserved Claim as to which a right of trial by jury exists. The Parties consent to Bankruptcy Court jurisdiction solely for purposes of interpreting and enforcing this Agreement.

9. This Agreement may not be modified, altered, or amended except by a writing signed by or on behalf of the Parties to this Agreement and approval of the Bankruptcy Court. This Agreement may be extended by further written agreement signed by or on behalf of the Parties. This Agreement is the entire agreement between the Parties with respect to the subject matter hereof, and no representations, acknowledgments, warrants, promises, or conditions were made by any Party except as expressly set forth herein.

10. Each Party entering into and executing this Agreement represents and warrants that such Party has the full authority and legal power to do so. This Agreement may be executed in counterparts and/or by facsimile or other electronic signature, and each such counterpart together with the others shall constitute one and the same instrument.

11. This Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of North Carolina, without reference to the conflicts or choice of law principles thereof.

12. Upon approval of the Bankruptcy Court, this Agreement shall be deemed to have been executed as of the Effective Date hereof.

IN WITNESS WHEREOF, the undersigned have duly executed and delivered this Agreement as of the date hereof.

[Signature Pages Follow]

DBMP LLC

Name:

Title:

Signature Page to Tolling Agreement

NAI-1520813776

CERTAINTEED LLC

Name:

Title:

Signature Page to Tolling Agreement

NAI-1520813776

CERTAINTEED HOLDING CORPORATION

Name:

Title:

SAINT-GOBAIN CORPORATION

Name:
Title:

[ADD ANY ADDITIONAL SIGNATURE PAGES]

Signature Page to Tolling Agreement

NAI-1520813776

EXHIBIT B

Proposed Order

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re

DBMP LLC,¹

Debtor.

Chapter 11

Case No. 20-30080 (JCW)

**ORDER AUTHORIZING THE DEBTOR
TO ENTER INTO TOLLING AGREEMENT**

This matter coming before the Court on the *Motion of the Debtor for An Order Authorizing It to Enter Into Tolling Agreement* (the “Motion”);² the Court having reviewed the Motion and having heard the statements of counsel with respect to the Motion at a hearing before the Court (the “Hearing”);

THE COURT HEREBY FINDS AND CONCLUDES THAT:

A. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334;

¹ The last four digits of the Debtor’s taxpayer identification number are 8817. The Debtor’s address is 20 Moores Road, Malvern, Pennsylvania 19355.

² Capitalized terms not otherwise defined herein have the meanings given to them in the Motion.

B. This is a core proceeding pursuant to 28 U.S.C. § 157(b);

C. A copy of the Motion and notice of the Hearing was provided to:

- i. the Bankruptcy Administrator for the Western District of North Carolina;
- ii. counsel to the Asbestos Committee and the Future Claimants' Representative;
- iii. all parties on the service lists established by the Case Management Order in this chapter 11 case [Dkt. 27];
- iv. all persons or entities that have requested notice of the proceedings in this chapter 11 case, and
- v. all non-debtor parties to the Tolling Agreement.

D. Notice of the Motion and the Hearing was sufficient under the circumstances for all purposes;

E. Entry into the Tolling Agreement will preserve the Estate Claims because, among other things, section 546(a) of the Bankruptcy Code sets forth a statute of limitations and not a statute of repose and, therefore, is not jurisdictional in nature;

F. Because entry into the Tolling Agreement will preserve the Estate Claims, there is no need for any further action to be taken to preserve such claims, including by the commencement of an action or actions asserting such Estate Claims;

G. Entry into the Tolling Agreement is in the best interests of the Debtor and its estate and creditors;

H. All persons or entities that are parties to the Tolling Agreement have agreed to enter into the Tolling Agreement willingly, without coercion and upon the advice of counsel;

I. The terms of the Tolling Agreement, including the contractual obligations set forth therein, are binding and effective under applicable law upon the parties that execute the Tolling Agreement; and

J. The legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Debtor is hereby authorized to enter into the Tolling Agreement attached to the Motion as Exhibit A, pursuant to sections 105(a) and 363 of the Bankruptcy Code.
3. The Debtor is authorized and empowered to take all actions necessary or appropriate to implement the relief granted in this Order.
4. This Court shall retain exclusive jurisdiction over any and all matters arising from or related to the implementation, interpretation or enforcement of this Order.

This Order has been signed electronically. The Judge's signature and Court's seal appear at the top of the Order.

United States Bankruptcy Court