

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

In re	:	Chapter 11
	:	
DBMP LLC, <sup>1</sup>	:	Case No. 20-30080 (JCW)
	:	
Debtor.	:	
	:	

**JOINDER TO DEBTOR’S OBJECTION AND OBJECTION  
OF CERTAINTED LLC AND SAINT-GOBAIN CORPORATION  
TO THE CLAIMANT REPRESENTATIVES’ MOTION TO  
COMPEL DISCOVERY PURPORTEDLY BASED ON THE  
CRIME-FRAUD EXCEPTION OR PRIVILEGE WAIVER**

CertainTeed LLC (“New CT”) and Saint-Gobain Corporation (“SGC”) submit this joinder to the Debtor’s objection [Dkt. 1071], and objection (the “Objection”)<sup>2</sup> to the *Motion of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants’ Representative to Compel Discovery Pursuant to the Crime-Fraud Exception and/or Waiver of the Attorney Client Privilege and Work Product Protection* [Dkt. 1006] (the “Motion”), and respectfully state as follows:

**JOINDER**

1. New CT and SGC join in the Debtor’s objection to the Motion, and for the reasons set forth in the Debtor’s objection, the Motion should be denied.
2. The crime-fraud exception does not apply. The Claimant Representatives have entirely failed to make a *prima facie* showing of an intentional fraudulent transfer involving concealment, as required. *See, e.g., In re Fin. Oversight & Mgmt. Bd. for P.R.*, 392 F. Supp. 2d

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

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings given to them in the Debtor’s Objection.

344 (D.P.R. 2019) (crime-fraud exception could not apply where structure and effects of corporate reorganization were disclosed). To the contrary, the Corporate Restructuring was effectuated through a series of public transactions and was fully disclosed through, among other things, the Debtor's first-day filings. *See, e.g.*, Dkt. 24 (Declaration of Robert J. Panaro in Support of First Day Pleadings) at ¶¶ 19-23 and Annex 2 (copy of Funding Agreement).

3. Likewise, neither the Debtor, New CT, nor SGC has waived the privilege by relying on advice of counsel or by disclosing privileged communications or work product to establish any of their contentions in this case.

#### **ADDITIONAL GROUNDS FOR OBJECTION**

4. The Motion should be denied for additional reasons relating specifically to SGC and New CT.

##### **A. The Motion Should be Denied as to Documents Where the Privileges Either Belong to SGC/New CT or Are Shared by SGC/New CT.**

5. The attorney-client privilege and/or work product protection covering a significant number of the documents on the privilege log either (a) belong solely to SGC or New CT (the "Affiliate Privileged Documents") or (b) are shared by the Debtor and either SGC or New CT (the "Shared Privileged Documents"). For additional reasons, the Motion should be denied as to these documents.

6. The Affiliate Privileged Documents consist of: (a) privileged communications between SGC and attorneys representing SGC; (b) privileged communications between New CT and attorneys representing New CT; (c) work product materials prepared by attorneys representing SGC in anticipation of litigation; and (d) work product materials prepared by attorneys representing New CT in anticipation of litigation.

7. As the owners of the privilege for the Affiliate Privileged Documents, only New CT or SGC, respectively, can waive the privilege. *See Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998) (“[t]he client is the holder of the attorney-client privilege and can waive it either expressly, or through conduct”) (citations omitted).

8. Here, there has been no such waiver by New CT and SGC. As non-parties to the Adversary Proceeding, neither could have possibly put anything “at issue” in that proceeding.<sup>3</sup> Plainly, the fact that counsel for non-party New CT instructed certain of its employees in their non-party depositions not to disclose privileged communications or information did not effectuate a privilege waiver; to the contrary, such instructions are necessary to *preserve* privilege in the face of questions that improperly seek divulgence of privileged materials. And, as noted, neither New CT nor SGC has waived the privilege by relying on advice of counsel or by disclosing privileged communications or work product to establish any contentions in the Adversary Proceeding (or otherwise in this case).

9. Accordingly, the request to compel production of the Affiliate Privileged Documents should be denied for this additional reason. *See Cincinnati Ins. Co. v. Zurich Ins. Co.*, 198 F.R.D. 81 (W.D.N.C. 2000) (denying motion to compel production of privileged communications).<sup>4</sup>

10. The Shared Privileged Documents consist of privileged documents that were shared between the Debtor and SGC and/or New CT. Indeed, this Court has already denied the Claimant

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<sup>3</sup> The Claimant Representatives did not allege any at issue waiver by SGC.

<sup>4</sup> New CT and SGC have not taken any actions that rise to the level of waiver of the work-product protection. *Nutramax Labs., Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 464–65 (D. Md. 1998) (work product privilege can only be waived by actions of the attorney or client which are consistent with a “conscious disregard of the advantage that is otherwise protected by the work product rule.”) (quoting *In re John Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981).

Representatives' earlier motion to compel production of the written Common Interest Agreement between the Debtor and New CT. Adv. Pro. No. 20-03004, Dkt. No. 153 (Nov. 5, 2020).

11. It is well settled that where multiple entities share a common interest, any waiver of attorney client privilege or work product protection requires the waiver by all of the entities, not just one of them. *See e.g. In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 248 (4th Cir. 1990) ("An exception to the general rule that disclosure to a third party of privileged information thereby waives the privilege, a joint defense privilege cannot be waived without the consent of all parties who share the privilege."); *Anderson v. Cordell (In re Infinity Bus. Grp., Inc.)*, 530 B.R. 316, 322 (Bankr. D.S.C. 2015) ("Information protected by this doctrine cannot be waived without the consent of all parties who share the privilege."); *U.S. v. Gonzalez*, 669 F.3d 974, 983 (9th Cir. 2011) (finding the joint defense privilege not lost when one defendant puts privileged communications at issue).

12. For all of the reasons set forth in the Debtor's Objection, as well as the additional reason shown immediately above, neither SGC nor New CT has waived the attorney-client privilege or work product protection for any of the Shared Privileged Documents. Accordingly, the privileges and protections covering those documents cannot be deemed waived for this additional reason as well.

**B. The Claimant Representatives' Arguments That New CT Submitted False and Misleading Testimony Are Untenable and Incorrect.**

13. The Claimant Representatives assert that Mr. Gross's deposition contradicts testimony of DBMP and New CT witnesses, and then take the quantum and wholly groundless leap of using that testimony to charge that the Debtor and New CT submitted "false or misleading testimony." Motion at pp. 26-27.

14. The Debtor's objection, joined in above, thoroughly demonstrates that Mr. Gross's unfounded assertions as to the timing and authorization of the Corporate Restructuring do not remotely establish any crime or fraud, as a matter of both law and fact. Nor do they remotely show that DBMP and New CT witnesses gave any false or misleading testimony (rather the testimony was soundly based on those witnesses' personal knowledge - unlike Mr. Gross's testimony based wholly on speculation).

15. To further address the Claimant Representatives' aspersions, it is worth briefly identifying at least one reason why, as a matter of both law and fact, the question of whether DBMP should file for bankruptcy (which occurred in January 2020) had not been made as of the time of the Corporate Restructuring (which occurred in October 2019).

16. It is undisputed (and indisputable) that the person who, as a matter of Texas law, had to direct and execute the Plan of Divisional Merger for the former CertainTeed LLC ("Old CT") was the sole member (and also Chairman and CEO) of its Board of Managers, Mark Rayfield. He in fact is the sole signatory of that document.

17. But, as a matter of law, the decision whether or not DBMP should file for bankruptcy had to be made by DBMP's board of managers. Dkt. No. 1 (attaching resolutions adopted by DBMP Board of Managers). It is undisputed that Mr. Rayfield was never a member of that board. Rayfield Dep. 320:4-10 (attached hereto as Exhibit 1).

18. Moreover, upon DBMP's formation, its board of managers included an independent director (Lawrence Rayburn). Rayfield Dep. 272:9-22. Thus, Mr. Rayfield's decision to effectuate the Corporate Restructuring in October 2019 necessarily did not encompass any decision as to whether DBMP would or would not subsequently file for bankruptcy, even if a potential bankruptcy was contemplated as a possible outcome. Rayfield Dep. 65:12-17.

19. Indeed, Mr. Campbell, the project manager, testified without rebuttal that “[w]hat I can say is CertainTeed, when it implemented the restructuring, knew that it was putting the decision with respect to a future Chapter 11 bankruptcy filing within the hands of the board or the management committee of DBMP. It knew that at the time.” Campbell 30(b)(6) Dep. 101:7-12 (attached hereto as Exhibit 2).

### **RESERVATION OF RIGHTS**

20. New CT and SGC reserves all of their rights, claims, defenses, and remedies, including, without limitation, the right to amend, modify, or supplement this Joinder and Objection.

### **CONCLUSION**

New CT and SGC respectfully requests that the Court enter an Order: denying the Motion, and granting such other relief that is just and appropriate.

Dated: September 23, 2021

Respectfully submitted,

/s/ John R. Miller, Jr.

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**EXHIBITS TO JOINDER TO DEBTOR'S OBJECTION AND OBJECTION  
OF CERTAINTEED LLC AND SAINT-GOBAIN CORPORATION  
TO THE CLAIMANT REPRESENTATIVES' MOTION TO  
COMPEL DISCOVERY PURPORTEDLY BASED ON THE  
CRIME-FRAUD EXCEPTION OR PRIVILEGE WAIVER**

1. Rayfield deposition excerpts
2. CertainTeed LLC Rule 30(b)(6) deposition excerpts (Campbell)



# EXHIBIT 1

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

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)  
In re ) Chapter 11  
)  
DBMP LLC, ) Case No. 20-30080 (JCW)  
)  
Debtor. )  
)  
-----)  
DBMP LLC, )  
)  
Plaintiff, )  
)  
vs. ) Adv. Pro. No. 20-03004 (JCW)  
)  
THOSE PARTIES LISTED )  
ON APPENDIX A TO COMPLAINT )  
and JOHN AND JANE DOES )  
1-1000, et al. )  
)  
Defendants. )  
-----)

\* \* \* C O N F I D E N T I A L \* \* \*

REMOTE VIDEOTAPED DEPOSITION

OF MARK A. RAYFIELD

Stowe, Vermont

October 7, 2020

Reported by: BONNIE PRUSZYNSKI, RMR, RPR, CLR

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October 7, 2020

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REMOTE VIDEOTAPED DEPOSITION OF  
MARK A. RAYFIELD, held remotely from Stowe,  
Vermont, before Bonnie Pruszynski, a Registered  
Professional Reporter, Registered Merit Reporter,  
Certified Livenote Reporter, and Notary Public of  
the States of New York and Florida.

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Also present:

William Thomas, Videographer

Mike Berkin, FTI

1 Confidential - M. Rayfield

2 liabilities fully, fairly and completely,  
3 while maintaining no harm and complete  
4 funding for those liabilities.

5 Q. Who would determine whether the  
6 liabilities were actually addressed fully  
7 under the corporate restructuring option?

8 MR. WYNER: Objection.

9 A. I don't know.

10 Q. Was it a court?

11 A. I suspect so.

12 Q. You think the corporate  
13 restructuring option contemplated a  
14 bankruptcy; is that right?

15 MR. WYNER: Objection.

16 A. It contemplated a corporate  
17 restructuring to leave that optionality.

18 Q. And as part of that corporate  
19 restructuring, it contemplated an ultimate  
20 bankruptcy in which the asbestos liabilities  
21 would be determined fully by a court;  
22 correct?

23 MR. WYNER: Objection.

24 A. I honestly don't recall.

25 Q. Well, that's what happened, isn't

1 Confidential - M. Rayfield

2 Q. So, there were no independent  
3 directors at CertainTeed Corporation at the  
4 time of its conversion to an LLC; is that  
5 right?

6 A. That would be correct.

7 Q. Do you know whether there currently  
8 are any independent -- strike that.

9 Does DBMP have a board of  
10 directors?

11 MR. WYNER: Objection, foundation.

12 A. It does.

13 Q. Are any of those directors  
14 independent?

15 MR. WYNER: Same objection.

16 A. I believe, yes.

17 Q. Who is independent?

18 A. I forget the -- my recollection is  
19 Mr. Rayburn, but I may have the name  
20 incorrect, but that is my recollection.

21 Q. And who is Mr. Rayburn?

22 A. An independent director for DBMP.

23 Q. Does he have another role besides  
24 independent director for DBMP?

25 A. I don't know him personally, so I

1 Confidential - M. Rayfield

2 A. I don't recall. It's an eclectic  
3 group of people, so I don't know.

4 Q. Okay. Who made up the board of  
5 directors for DBMP LLC at the point in time  
6 just prior to its Chapter 11 filing?

7 MR. WYNER: Objection, foundation.

8 A. I would have to go take a look  
9 at -- I -- I believe it was Joe Bondi, Sean  
10 Knapp, and Larry Rayburn.

11 Q. So, you mentioned earlier that  
12 Mr. Rayburn was an independent director.

13 A. I did.

14 Q. Hadn't Mr. Rayburn worked for  
15 Saint-Gobain at one point in time?

16 A. I believe he may have, yes.

17 Q. Do you remember what his role was  
18 in Saint-Gobain?

19 A. I did not work with Mr. Rayburn.

20 Q. Do you know whether he was counsel  
21 for Saint-Gobain Gypsum? Does that ring a  
22 bell?

23 A. I don't recall still.

24 Q. Do you know who chose Mr. Rayburn  
25 to --



# EXHIBIT 2

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

-----)  
)  
In re ) Chapter 11  
)  
DBMP LLC, ) Case No. 20-30080 (JCW)  
)  
Debtor. )  
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-----)  
DBMP LLC, )  
)  
Plaintiff, )  
)  
vs. ) Adv. Pro. No. 20-03004  
) 20-03004 (JCW)  
THOSE PARTIES LISTED )  
ON APPENDIX A TO COMPLAINT )  
and JOHN AND JANE DOES )  
1-100, )  
)  
Defendants. )  
-----)

\* \* \* C O N F I D E N T I A L \* \* \*

REMOTE VIDEOTAPED 30(b)(6) DEPOSITION OF

CERTAINTIED LLC BY KEITH CAMPBELL

Niagra Falls, Canada

December 18, 2020

Reported by: BONNIE PRUSZYNSKI, RMR, RPR, CLR

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December 18, 2020

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DEPOSITION OF CERTAINTEED LLC BY KEITH CAMPBELL,  
held remotely from Niagara Falls, Canada, before  
Bonnie Pruszynski, a Registered Professional  
Reporter, Registered Merit Reporter, Certified  
Livenote Reporter, and Notary Public of the States  
of New York and Florida.

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Also present:

William Thomas, Videographer

1 Confidential - K. Campbell

2 a decision to file for bankruptcy without  
3 consulting with New CT?

4 MR. WYNER: Objection.

5 MR. SEIDEN: Objection.

6 MR. WYNER: Same objection.

7 A. What I can say is CertainTeed, when  
8 it implemented the restructuring, knew that  
9 it was putting the decision with respect to a  
10 future Chapter 11 bankruptcy filing within  
11 the hands of the board or the management  
12 committee of DBMP. It knew that at the time.

13 Q. And so, New CT at the time expected  
14 to have no influence whatsoever over DBMP's  
15 decision to file or not file for bankruptcy;  
16 is that your testimony?

17 MR. WYNER: Same objection.

18 You can answer.

19 A. I would say that CT knew that the  
20 DBMP board would make that decision.

21 Q. My question was different.

22 MR. MASTORIS: Bonnie, would you  
23 mind reading back my question?

24 (Record read.)

25 MR. WYNER: Same objection.