UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	:	Chapter 11
DBMP LLC,[1]	:	Case No. 20-30080 (JCW)
Debtor.	:	

DEBTOR'S OPPOSITION TO CLAIMANT REPRESENTATIVES' MOTION FOR LEAVE, STANDING, AND AUTHORITY TO INVESTIGATE, COMMENCE, PROSECUTE, AND SETTLE CERTAIN CLAIMS

DBMP LLC, the above-captioned debtor and debtor in possession ("DBMP" or the "Debtor"), hereby objects to the *Motion of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants' Representative 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" or "Mot."), filed by the official committee of asbestos personal injury claimants (the "ACC") and Sander L. Esserman as the Court-appointed representative of future asbestos claimants (the "FCR" and, together with the ACC, the "Claimant Representatives").

PRELIMINARY STATEMENT

The Claimant Representatives seek broad derivative standing to pursue undefined claims on behalf of the estate. Even if the requested derivative standing is permitted under the Bankruptcy Code—which the Fourth Circuit has said is "far from self-evident"—the Standing Motion is premature, unnecessary, and will not promote the fair and efficient resolution of this case.

[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.

The Claimant Representatives do not need derivative standing to further investigate the pre-bankruptcy corporate restructuring (the "Corporate Restructuring").[2] They have that ability already under the Bankruptcy Code and, in fact, one of the three law firms retained by the ACC was hired specifically to conduct that investigation. The request for standing to "commence, and prosecute, and . . . settle," causes of action puts the cart before the horse. The Claimant Representatives acknowledge that they "have not completed their investigation," Mot. ¶ 42, which is further evidenced by the lack of any sort of accompanying draft complaint—customary for derivative standing motions—setting forth the causes of action, defendants, and remedies to be pursued. Any litigation activity on the contemplated claims should not proceed before this investigation is completed and the specific claims are presented to this Court for evaluation.

Nor is there any pressing need to grant derivative standing, particularly where (a) the Claimant Representatives' investigation is alleged to be incomplete and (b) the Claimant Representatives are not in a position to even formulate their claims. While the statute of limitations under section 546(a)(1) of the Bankruptcy Code runs in just over four months, CertainTeed LLC ("New CT") and other potential defendants have offered to enter into a tolling agreement to preserve any estate claims with respect to the Corporate Restructuring. And while the Court has expressed concerns that the Corporate Restructuring *may* affect asbestos claimants' ability to recover on their claims—noting the possibility of New CT failing to honor its obligations under the Funding Agreement or taking hypothetical actions that could erode its ability to pay claims—no such events have occurred to date. Nor will they, as the Debtor and New CT have responded to the concerns of the Claimant Representatives and the Court through the *Motion of the Debtor*

[2] Capitalized terms used but not otherwise defined in the Preliminary Statement have the meanings given to them in the body of this Opposition.

for an Order Authorizing It to Enter Into Second Amended and Restated Funding Agreement [Dkt. 1051] (the "Motion to Amend Funding Agreement"). Should circumstances change, derivative standing can be sought at that time. In the meantime, the proposed tolling agreement would preserve all potential claims.

The Standing Motion also fails to carry its burden to show that the Debtor has "unjustifiably refused" to prosecute colorable claims and that derivative standing is "necessary and beneficial to the fair and efficient resolution of the bankruptcy proceeding[]." *In re Airocare, Inc.*, No. 10-14519, Adv. No. 10-1481, 2011 WL 2133526, at *2 (Bankr. E.D. Va. May 24, 2011) (citing *Scott v. Nat'l Century Fin. Enters., Inc. (In re Baltimore Emergency Servs. II, Corp.)*, 432 F.3d 557, 562−63 (4th Cir. 2005)). The Fourth Circuit has made clear that any derivative standing that might be permitted under the Bankruptcy Code would be the "exception rather than the rule" and subject to "strict conditions." *Baltimore*, 432 F.3d at 561-62. With no complaint laying out the proposed causes of action, defendants, and remedies sought, the Court cannot reasonably assess if the claims are colorable and whether pursuing them now satisfies the cost-benefit test applied to derivative standing motions. *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 245 (6th Cir. 2009) ("courts initially look to the 'face of the complaint'" in evaluating proposed claims).

The Claimant Representatives generically allege that the proposed claims "would have a profound effect on the availability and distribution" of the Debtor's property and would "yield substantial recoveries to creditors, including asbestos creditors otherwise shut out of the process." Mot. ¶ 42. But they fail to explain *how* successful prosecution of undefined claims would yield this result where the Debtor's estate already has uncapped access to the value of New CT's assets through the Funding Agreement. Any concern that the Funding Agreement is not enforceable or

cannot be enforced by the Claimant Representatives in the event that the Debtor fails to exercise its rights should be alleviated by the proposed modifications and clarifications to the Funding Agreement and the proposed order approving the amended and restated agreement. Moreover, given the uncertainty of whether derivative standing is available in this Circuit, prosecuting the claims now—rather than entering into a tolling agreement—risks compromising any potential claims altogether. And this risk that potential claims will be lost is compounded by the fact that the Claimant Representatives' investigation apparently is not complete.

By contrast, the proposed litigation promises to be time-consuming and costly (and funded entirely by the estate) and will focus the parties and the Court on issues that will not promote progress in these cases. In the nearly two years since this case was filed, the Claimant Representatives have spent millions of dollars in estate resources investigating the Corporate Restructuring—what it now characterizes as a "limited" investigation—and otherwise attempting to defeat the Debtor's motion for a preliminary injunction (the "Injunction Motion"). None of that activity advanced or informed what is the central issue in this case: the extent of the Debtor's liability for current and future asbestos claimants. Indeed, the Claimant Representatives have refused to even discuss that issue despite the Debtor's invitations, made shortly after the Claimant Representatives were appointed and thereafter, to engage in settlement discussions.

The proposed litigation has nothing to do with the central issue in this case. It will only further delay potential resolution of these cases by consuming the parties with additional litigation activities on ancillary issues. As numerous courts have done in asbestos-driven bankruptcies, including this Court in *Kaiser Gypsum* and Judge Hodges in *Garlock*, the Court should deny the request for derivative standing to pursue fraudulent transfer and other claims, approve tolling of

the statute of limitations if not agreed upon by the parties, and move this case forward towards estimation and a resolution of the central issue that must be addressed.

Finally, the Court should deny the Claimant Representatives' request that the Court pre-approve an investigation that is unlimited in scope and duration. They provide no precedent or reason to support such "blank-check" discovery power. Courts have rejected such an approach and instead required targeted Bankruptcy Rule 2004 motions so that the court can reasonably exercise its discretion on a particularized basis. Apart from privilege issues that are the subject of a separate motion, the Claimant Representatives cite no topic of investigation that was not already thoroughly covered by their prior extensive discovery. If anything, the Court should exercise *more* supervision going forward to prevent duplicative discovery. Should the Claimant Representatives believe there are particular topics or targets for additional discovery, they should discuss these matters with the Debtor and New CT and, if an agreement on informal discovery cannot be reached, file Bankruptcy Rule 2004 motions to support such requests.

BACKGROUND

General Case Background

1. On October 23, 2019, the former CertainTeed Corporation ("Old CT") underwent the Corporate Restructuring, which included a divisional merger whereby Old CT ceased to exist and its assets and liabilities were allocated to two new corporations, New CT and DBMP. The Corporate Restructuring also involved New CT's and DBMP's entry into various intercompany agreements, including a funding agreement designed to ensure that DBMP has the same ability to pay asbestos claims as Old CT did before the Corporate Restructuring (the "Funding Agreement").[3]

[3] The Corporate Restructuring is described in greater detail in the *Declaration of Robert J. Panaro in Support of First Day Pleadings* [Dkt. 24] (the "First Day Decl."). A proposed amended and restated Funding Agreement (the

2. On January 23, 2020 (the "Petition Date"), the Debtor commenced this case (the "Chapter 11 Case") by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On the same date, the Debtor filed a complaint initiating an Adversary Proceeding seeking to enjoin the filing or continued prosecution of actions against its non-debtor affiliates (the "Non-Debtor Affiliates") that sought recovery on asbestos-related claims allocated to DBMP in the Corporate Restructuring. The Debtor also filed the Injunction Motion [Adv. Pro. Dkt. 2] in the Adversary Proceeding.

3. Discovery and briefing on the Injunction Motion were extended multiple times. Through March 2021, the Claimant Representatives incurred professional fees of over $11 million on activities relating to the Injunction Motion. This included extensive discovery, much of which was focused on the Corporate Restructuring.[4]

4. During the course of discovery related to the Injunction Motion, the Debtor sought to move this case forward. On August 19, 2020, the Debtor filed the *Debtor's Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts* [Dkt. 416] (the "Trust Motion") and the *Debtor's Motion for Order Pursuant to Bankruptcy Rule 2004 Directing Submission of Personal Injury Questionnaires by Pending Mesothelioma Claimants* [Dkt. 417] (the "PIQ Motion"). At the Claimant Representatives' request, a hearing on the PIQ and Trust Motions has been moved multiple times and the motions have remained pending for more than a year.

"Amended Funding Agreement"), and a redline showing changes to the prior Funding Agreement, are attached as Exhibits A and B, respectively, to the Motion to Amend Funding Agreement.

[4] On May 18, 2020, the Court granted the ACC's request to retain Winston & Strawn LLP ("Winston") as "special litigation counsel" to investigate and potentially pursue "fraudulent conveyance and related claims." [Dkt. 298]. Through April 2021, Winston has incurred over $2.3 million in fees and expenses in these proceedings. *See Order Granting the First Interim Application of Winston*, [Dkt. 400] ($118,581.50 for March through April 2020); *Order Granting the Second Interim Fee Application of Winston*, [Dkt. 559] ($338,532.61 for May through August 2020); *Order Granting the Third Interim Fee Application of Winston*, [Dkt. 784] ($1,196,565.34 for September through December 2020); *Order Granting the Fourth Interim Fee Application of Winston*, [Dkt. 941] ($661,891.66 for January through April 2021).

5. On January 13, 2021, the ACC filed the *Motion of the Official Committee of Asbestos Personal Injury Claimants to Lift the Stay Pursuant to 11 U.S.C.§ 362 as to Certain Asbestos Personal Injury Claims* (the "Stay Motion") [Dkt. 614, Adv. Pro. Dkt. 195]. The Injunction and Stay Motions were heard together on March 1 through 3, 2021, upon a consolidated evidentiary record.

6. Pending the Court's ruling on the Injunction and Stay Motions, the Debtor made additional efforts to move this case forward. The Debtor filed its motion for estimation of current and future mesothelioma claims [Dkt. 948] (the "Estimation Motion") and its *Plan of Reorganization of DBMP LLC*, along with forms of a Trust Agreement and Trust Distribution Procedures as exhibits [Dkt. 944], in July 2021. The Estimation Motion, along with an estimation protocol motion filed by the Claimant Representatives, is set for hearing on October 4−5, 2021.

The Court's Injunction Decision

7. On August 10, 2021, the Court entered its decision and order on the Injunction Motion [Dkt. 972; Adv. Pro. Dkt. 343] (together, the "Injunction Decision" or "Inj. Dec.").[5] The Court held that "under controlling [Fourth] Circuit precedent, DBMP is entitled to try to reorganize and to persuade the asbestos claimants to join it in a Section 524(g) plan." Inj. Dec. at 8. The Court found that DBMP's effort to reorganize would "be impossible without the benefit of the automatic stay and the preliminary injunction." *Id.; see also id.* ¶ 208.

8. The Court, however, expressed concern that the divisive merger may have "had a material, negative impact on the asbestos creditors' ability to recover on their claims." *Id.* ¶ 172; *see also id.* ¶ 165. The Court based its concern on the allocation of most of Old CT's assets to

[5] Citations to the Injunction Decision herein refer to the Court's Findings of Fact and Conclusions of Law at Dkt. 972 and Adv. Pro. Dkt. 343.

New CT and certain perceived limitations in the terms and enforcement of the Funding Agreement. *See id.* ¶¶ 65 (recognizing Funding Agreement is "central to DBMP's assertion that it has the same ability as Old CertainTeed to pay the DBMP Asbestos Claims"), 69-77, 170.[6]

9. Notwithstanding its concerns, the Court observed that a "section 524(g) trust established by an asbestos debtor in chapter 11 in cooperation with the [Claimant] Representatives, and with each fiduciary acting in good faith and with an earnest desire to achieve a full and fair resolution of asbestos claims, could well provide all asbestos claimants—including future claimants who have yet to initiate litigation—a more efficient means to resolve their claims." *Id.* ¶ 226 (citing *In re Bestwall LLC*, 606 B.R. 243, 257 (Bankr. W.D.N.C. 2019), *Declaration of Charles E. Bates Phd.*, [Adv. Pro. Dkt. 238] ¶¶ 21, 26).

10. "In the meantime," the Court stated that the Claimant Representatives could "seek authority to pursue the causes of action challenging the merger and allocations on behalf of the Estate, meaning all asbestos claimants." *Id.* ¶ 228. The Court explicitly expressed "no opinion whether such an action would be successful" or "whether such an action would benefit the reorganization effort," noting: "[I]f DBMP and New CertainTeed mean what they say—that they desire, and New CertainTeed is willing to fund, a full and fair resolution of these asbestos liabilities—it may not be necessary or productive to bring such lawsuit." *Id.* at note 231.

The Standing Motion

11. Less than two weeks after the Injunction Decision, the Claimant Representatives filed the Standing Motion; a new adversary complaint and related motion seeking to substantively

[6] Respectfully, the Court's finding that a condition of funding for any section 524(g) plan is that New CT "must receive relief under Section 524(g)," (*id.* ¶ 72; *see also id.* ¶ 74), is mistaken. There is nothing in the Funding Agreement, whether in Section 2(d) ("Conditions to Payment") or otherwise, that conditions the funding of any plan of reorganization on New CT receiving relief under Section 524(g). Regardless, this issue is clarified in the proposed Amended Funding Agreement.

consolidate DBMP with New CT [Dkt. 1005] (the "Substantive Consolidation Motion"); and two other motions, Dkts. 1002 (the "Rule 2004 Motion") and 1006 (the "Privilege Motion"). The Claimant Representatives made no effort to meet and confer with counsel for DBMP or New CT prior to filing these motions and new adversary proceeding. They made no effort to explore the possibility of entering into tolling agreements, reach agreement on additional discovery in support of their ongoing investigation, or negotiate potential amendments to the Funding Agreement that might address any concerns about its viability and enforceability.

12. The Standing Motion seeks two forms of relief. First, it asks for "leave, standing and authority" to "investigate, commence, and prosecute, and authority to settle, causes of action on behalf of the estate … with respect to the Corporate Restructuring… ." Mot. at 1. Second, it seeks pre-approved and unlimited discovery of "the Debtor and its parent(s) and affiliates, and certain third parties" concerning "the aforementioned investigation," all "without the necessity of seeking further authority from the Court." *Id.*

Proposed Amendments to the Funding Agreement

13. As stated at the outset of this Chapter 11 Case, the Corporate Restructuring was specifically designed to ensure that DBMP would have the same ability to fund asbestos claims as Old CT had before the Corporate Restructuring. *See* First Day Decl. ¶ 15. The Corporate Restructuring's goal has never been to "shield" assets from asbestos claimants or in any way limit the resources available to pay their recoveries.

14. The Debtor has no basis to believe that New CT will fail to honor its obligations under the Funding Agreement. In the Injunction Decision, the Court found that, "[t]o this point, New CertainTeed has performed under the Funding Agreement" (transferring about $64.5 million as of February 18, 2021), and acknowledged that to the extent it continued to do so in the future,

"New CertainTeed has the financial ability to satisfy [its obligations to provide funding for a section 524(g) trust] as evidenced by New CertainTeed's considerable owners' equity and profitable operations." Inj. Dec. ¶¶ 108-09. To the extent New CT ever fails to honor its funding obligations (despite its commitment to fulfill, and track record of fulfilling, these obligations), DBMP is prepared to enforce the Funding Agreement as necessary.

15. In view of the concerns expressed by the Claimant Representatives and the Court, however, the Debtor and New CT have agreed to amendments to the Funding Agreement to provide further assurances that the Corporate Restructuring had no "material, negative impact on the asbestos creditors' ability to recover on their claims." *Id.* ¶ 172. As described in the Motion to Amend Funding Agreement, DBMP and New CT have agreed to the following modifications and clarifications in the proposed Amended Funding Agreement and in an agreed order to approve that agreement (the "Proposed Agreed Order") (attached to the Motion to Amend Funding Agreement [Dkt. No. 1051] as Exhibits A and C, respectively):

(a) the findings in the Proposed Agreed Order make clear, with the agreement of DBMP and New CT, that the Amended Funding Agreement is a valid and binding contract, enforceable in accordance with its terms (Proposed Agreed Order at 2);

(b) paragraph 6 of the Proposed Agreed Order provides that both the ACC and the FCR will have the power to enforce DBMP's remedies as Payee under the Funding Agreement if DBMP fails to do so after 10 business days' advance written notice;[7]

(c) both DBMP and New CT submit to the jurisdiction of the Bankruptcy Court during the pendency of the Chapter 11 Case for any legal proceeding seeking to enforce or otherwise related to the Funding Agreement;

(d) the "necessary or appropriate" language in the definition of Permitted Funding Use and similar language in section 2(a) of the Funding Agreement has been removed to ensure that no limitations arguably apply to the funding thereunder;

[7] The definition of Permitted Funding Use has been revised to provide that any costs and expenses incurred by DBMP to pursue its remedies to collect any unfunded payments, or otherwise enforce performance of the Funding Agreement, will be funded under the terms of the Funding Agreement.

(e) the definition of Permitted Funding Use has been revised to make clear, as intended, that New CT will fund any section 524(g) plan regardless of whether the plan provides New CT with the protections of section 524(g) or New CT supports the plan;

(f) New CT has agreed that it will not enter into any contract that prohibits it from funding payments under the Funding Agreement;

(g) New CT has agreed it will not make any dividends except for distributions to fund tax liabilities;

(h) New CT has agreed that it will not forgive any obligation owed to it by an affiliate and that it will cause its subsidiaries not to forgive any obligation owed to them by an affiliate; and

(i) as provided in paragraphs 3−5 of the Proposed Agreed Order, and to assist the Claimant Representatives in monitoring compliance with the Funding Agreement, the Debtor will be required to provide counsel for the Claimant Representatives (i) financial information received from New CT under the Amended Funding Agreement within five business days of receipt, (ii) any notices received from New CT with respect to the Amended Funding Agreement within five business days of receipt, (iii) any notices given by the Debtor to New CT with respect to the Amended Funding Agreement (including any Notices of Default) within three business days after giving such notice, (iv) all funding requests under the Amended Funding Agreement within three business days of the Debtor making such request, and (v) proof of funding of each such funding request within five business days of such proof becoming available to the Debtor.

The Debtor's Proposed Tolling Agreement

16. New CT, and other potential defendants in the Claimant Representatives' possible lawsuit, have offered to enter into a tolling agreement to preserve estate causes of action with respect to the Corporate Restructuring. *See* draft Tolling Agreement (attached as Exhibit A to the *Motion of the Debtor for an Order Authorizing It to Enter Into Tolling Agreement*, filed contemporaneously herewith).[8] The draft Tolling Agreement, which is patterned after the tolling agreement this Court approved in *Kaiser Gypsum*, provides for an initial tolling period of approximately six months after the current statute of limitations—*i.e.*, through July 31, 2022—and

[8] The other potential defendants include Saint-Gobain Corporation ("SGC") and CertainTeed Holding Corporation ("CT Holding").

would be automatically extended for additional six-month intervals unless a potential defendant provides notice of its intention not to renew. The draft Tolling Agreement would preserve all potential claims and related defenses, as described therein. The draft Tolling Agreement also provides that the parties agree, and will not argue otherwise, that section 546(a) of the Bankruptcy Code is not a limit on the Bankruptcy Court's jurisdiction and can be tolled by agreement. It also provides for a separate, distinct contractual right and claim against potential defendants in the event a court holds otherwise. Importantly, the Tolling Agreement does not prevent the Claimant Representatives from completing their investigation, filing a derivative standing motion or, if such motion is granted, prosecuting a lawsuit against any of the potential defendants.

17. The draft Tolling Agreement has been provided to counsel to the Claimant Representatives, but they have stated they are not agreeable to entering into a tolling agreement at this time and are focused on first adjudicating the Standing Motion. The Debtor is filing a motion for approval of the Tolling Agreement contemporaneously with this Opposition.

ARGUMENT

I. THE CLAIMANT REPRESENTATIVES HAVE NOT ESTABLISHED THEY ARE ENTITLED TO DERIVATE STANDING.

A. Derivative Standing in the Fourth Circuit

18. The Fourth Circuit has never decided "whether a creditor may bring a derivative suit," *McInnis v. Phillips (In re Phillips)*, 573 B.R. 626, 641 (Bankr. E.D.N.C. 2017), nor "blessed derivative standing for creditors." *McInnis v. Phillips*, 2018 U.S. Dist. LEXIS, at *6 (E.D.N.C. Aug. 3, 2018); *see also In re Tara Retail Grp., LLC*, 595 B.R. 215, 225 n.6 (Bankr. N.D. W. Va. 2018). In *Baltimore*, the Fourth Circuit, citing the strong arguments made in a four-judge dissent in the Third Circuit's seminal *Cybergenics* decision, observed that it is "far from self-evident that the Bankruptcy Code permits creditor derivative standing." 432 F.3d at 561.

19. As detailed in the *Cybergenics* dissent—and, later, an opinion from the Tenth Circuit's Bankruptcy Appellate Panel—the Bankruptcy Code's fraudulent transfer provisions explicitly provide only that "the *trustee* may" avoid and recover fraudulent transfers. 11 U.S.C. §§ 544(b)(1), 548(a)(1), 550(a) (emphasis added); *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 580 (3d Cir. 2003) (*en banc*); *United Phosphorus, Ltd. v. Fox (In re Fox)*, 305 B.R. 912, 915 (B.A.P. 10th Cir. 2004) (holding creditors and creditors' committees have no ability to obtain derivative standing to pursue fraudulent transfer claims); *cf. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6−7 (2000) (holding only trustee could bring claim under 11 U.S.C. § 506(c), based on the same "the trustee may" language in Sections 544, 548, and 550).

20. "Since Congress has specifically authorized a creditors' committee to act in various other provisions of the [Bankruptcy] Code, but has not done so with regard to § 544, we should 'presume[ ] that Congress act[ed] intentionally and purposely in the disparate … exclusion. '" *Cybergenics*, 330 F.3d at 581; *see also Fox*, 305 B.R. at 915 ("The mandate of both [the Supreme Court's] decision in *Hartford* and the statute say unequivocally that only trustees may assert these statutory remedies.").

21. Given the Fourth Circuit's long adherence to interpreting a statute in accordance with its plain language, this Court should not lightly assume that the Fourth Circuit would agree that derivative standing is available to the Claimant Representatives. *See Botkin v. DuPont Cmty. Credit Union*, 650 F.3d 396, 401 (4th Cir. 2011) (quoting *United States v. Ide*, 624 F.3d 666, 670 n.3 (4th Cir. 2010), for rule that where "the language of [the statute] is plain, [the court] need not address the various public policy arguments that each side advances"); *Coleman v. Cmty. Trust Bank*, 426 F.3d 719, 725 (4th Cir. 2005) ("If the language is plain and the statutory scheme is

coherent and consistent, we need not inquire further.") (internal citations and quotations omitted). Just this year, the Fourth Circuit cautioned that "tools of statutory construction … can be helpful," but "we must not use them in a way that contravenes plain statutory text." *Benitez v. Charlotte-Mecklenburg Hosp. Auth.*, 992 F.3d 229, 237 (4th Cir. 2021) (appeal docketed).

22. To be sure, the Fourth Circuit acknowledged in *Baltimore* that other circuits have granted derivative standing "in two limited circumstances," namely, when the trustee or debtor-in-possession (1) "unreasonably refuses to bring suit on its own" or (2) "grants consent." 432 F.3d at 560. The Court cautioned, however, that even if it recognized derivative standing, it would do so only in rare circumstances and under "strict conditions." *Id.* at 561-62.[9]

23. Accordingly, bankruptcy courts would play a "vital gatekeeper role in determining whether derivative standing is appropriate in a given case." *Id.* at 562. The proponent of derivative standing "ha[s] the burden of proof" to show—in addition to a colorable claim—that it "is (a) in the best interest of the bankruptcy estate, and (b) is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceeding[]." *Airocare*, 2011 WL 2133526, at *2−3 (citing *Baltimore*, 432 F.3d at 562−63).

24. This requires a "cost-benefit analysis," *In re Racing Servs., Inc.*, 540 F.3d 892, 901 (8th Cir. 2008),[10] with a court weighing the potential delay and expense to the estate with the ability of the party seeking derivative standing to succeed on its claim in a meaningful way. *See Foster*, 516 B.R. at 543 ("Analyzing a trustee's refusal to bring suit focuses on whether a clear

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[9] *See also In re Foster*, 516 B.R. 537, 541 (B.A.P. 8th Cir. 2014), *aff'd*, 602 F. App'x 356 (8th Cir. 2015) ("[T]he power to grant derivative standing to a creditor to pursue estate causes of action ... should not be exercised in a relaxed manner by bankruptcy courts. Otherwise, a creditor could 'hijack' a Chapter 7 bankruptcy case in a manner Congress did not envision.") (quoting *Reed v. Cooper (In re Cooper)*, 405 B.R. 801, 807 (Bankr. N.D. Texas 2009)).

[10] *See also In re Sabine Oil & Gas Corp.*, 547 B.R. 503, 516 (Bankr. S.D.N.Y.), *aff'd*, 562 B.R. 211 (S.D.N.Y. 2016); *In re Wash. Mut., Inc.*, 461 B.R. 200, 222-24 (Bankr. D. Del. 2011); *In re Centaur, LLC*, No. 10-10799 (KJC), 2010 WL 4624910, at *5 (Bankr. D. Del. Nov. 5, 2010); *In re G-I Holdings, Inc.*, Civil No. 04-3423 (WGB), 2006 WL 1751793, at *13 (D.N.J. June 21, 2006).

benefit to the estate can be identified or whether only insignificant benefits would be realized."); *Sabine Oil*, 547 B.R. at 516 ("court must assure itself (i) 'that there is a sufficient likelihood of success to justify the anticipated delay and expense to the bankruptcy estate that initiation and continuation of litigation will likely produce,' … (ii) that the claims, if proven, will provide a basis for recovery; and (iii) that the proposed litigation will not be a 'hopeless fling'") (internal citations omitted). A court is to make "detailed factual findings" in support its cost-benefit analysis.[11]

B. The Standing Motion Is Premature.

25. Even assuming derivative standing is permitted in this Circuit, the Standing Motion is unnecessary and premature. The Claimant Representatives make clear that they have not completed their investigation of potential claims. *See, e.g.*, Mot. ¶ 52 (referring to the "limited investigation to date"), ¶¶ 53-62 (requesting authority to "fully investigate the subject transactions"). Thus, the Standing Motion's first request for relief—standing to commence, prosecute, and settle claims relating to the Corporate Restructuring—puts the cart before the horse.

26. The Claimant Representatives have no need for derivative standing to continue their investigation into the Corporate Restructuring. As noted in the Standing Motion, "Congress specifically authorized official committees to 'investigate the acts, conduct, assets, liabilities and financial condition of the debtor… .'" Mot. ¶ 29 (quoting 11 U.S.C. § 1103(c)(2)). Briefing and related litigation activities relating to a request for derivative standing should not proceed before that investigation is complete and potential claims are identified specifically and can be evaluated.

[11] *See Lehman Cap. v. Off. Comm. of Unsecured Creditors of Fas Mart Convenience Stores, Inc.*, No. 01-60386, 2003 WL 22048024, at *5 (E.D. Va. June 25, 2003) (reversing denial of motion to dismiss creditors' committee's derivative complaint, reasoning bankruptcy court "made no specific factual findings with respect to the Trustee's unjustifiable failure to act," "no finding concerning the best interests of the estate," and no finding on "whether the Committee's claim, if successful, would benefit the estate."); *G-I Holdings*, 2006 WL 1751793, at *12.

27. Neither the specific causes of action the Claimant Representatives seek to pursue nor the parties that would be subject to such causes of action have been identified. The Standing Motion lacks a draft complaint, customary for such motions (including in asbestos-related and other mass tort bankruptcies).[12] The Court should not grant derivative standing to pursue a prolonged and expensive litigation without specificity on the causes of action to be pled, the targeted defendants, and the remedies to be sought.

28. There is simply no pressing need for the Court to grant derivative standing to commence and prosecute claims that, according to the Claimant Representatives, require additional investigation. At this point, the two-year statute of limitations under section 546(a)(1) remains over four months away and, as noted, the potential defendants have agreed to enter into a tolling agreement to preserve any estate claims and maintain the *status quo*.

29. The Standing Motion is premature for another, more practical reason: although the Court has expressed concern that New CT *might* fail to honor its Funding Agreement obligations and/or that New CT's assets *might* be compromised by a hypothetical transaction, neither concern has come to pass in the nearly two years since the completion of the Corporate Restructuring. New CT has honored all if its obligations under the Funding Agreement to date, providing nearly $72.5 million in funding through July 31, 2021.[13] There have been no dividends by New CT

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[12] *See, e.g., In re Kaiser Gypsum Co., Inc.*, No. 16-31602, [Dkt. 952] (Bankr. W.D.N.C. May 16, 2018) (70-page complaint attached to standing motion); *In re Garlock Sealing Techs. LLC*, No. 10-31607, [Dkt. 2150] (Bankr. W.D.N.C. Apr. 30, 2012) (65-page redacted complaint attached to standing motion); *In re Boy Scouts of Am. & Delaware BSA, LLC*, No. 20-10343, [Dkt. 2364] (Bankr. D. Del. Mar. 12, 2021) (21-page complaint); *In re Roman Catholic Church of Archdiocese of Santa Fe*, No. 18-13027, [Dkts. 383, 384] (Bankr. D. N.M. May 29, 2020) (three complaints); *In re United Gilsonite Laboratories*, No. 11-02032, [Dkt. 1303] (Bankr. M.D. Pa. June 24, 2013) (18-page redacted complaint); *In re Specialty Prods. Holding Corp.*, No. 10-11780, [Dkt. 1799] (Bankr. D. Del. Nov. 14, 2011) (42-page complaint); *see also In re Phillips*, No. 12-09022, [Dkt. 147] (Bankr. E.D.N.C. Aug. 4, 2014) (joint complaint and motion); *In re Airocare, Inc.*, No. 10-14519, Adv. No. 10-1481, [Adv. Pro. Dkt. 27] (Bankr. E.D. Va. Jan. 24, 2011) (45-page complaint).

[13] *See* Inj. Dec. ¶ 108 ("To this point, [New CT] has performed under the Funding Agreement."); *Declaration of Mark. A. Rayfield*, [Adv. Pro. Dkt. 238] Ex. D ¶ 13 (Feb. 18, 2021) (the "Rayfield Declaration") (noting $64.5 million in funding as of February 18, 2021); *see also Monthly Status Reports* for March 2021 [Dkt. 811] at 5

(outside of a distribution to pay for New CT's tax liability)[14] and no forgiveness of intercompany debt by New CT or its subsidiaries—nor will there be due to the prohibitions in the Amended Funding Agreement—that would threaten the New CT asset base available to pay asbestos claims. There is no basis to grant derivative standing to remedy such hypothetical possibilities unless and until they occur, at which point derivative standing to pursue any claims arising out of those events could be considered in the appropriate context.

C. Granting Derivative Standing Is Neither Necessary Nor Beneficial to the Estate.

30. The Claimant Representatives must establish that their proposed claims are "colorable" and that pursuing them is in the estate's best interests based on a cost-benefit analysis. *See supra* ¶¶ 23-24; Mot. ¶ 34. Apart from mentioning potential fraudulent transfer claims, the Claimant Representatives do little to support whether any other claims they propose to investigate and commence are colorable. *See* Mot. ¶¶ 35-41. Courts routinely scrutinize draft complaints—including an assessment of the causes of action and whether there is an evidentiary basis for specific allegations—when evaluating motions for derivative standing. *See, e.g., In re Murray Metallurgical Coal Holdings, LLC*, 614 B.R. 819, 826 (Bankr. S.D. Ohio 2020) ("[T]he Sixth Circuit noted that in determining whether a claim is colorable "courts initially look to the 'face of the complaint.'") (quoting *In re Trailer Source, Inc.*, 555 F.3d at 245).[15] Here, there is no complaint and there are no allegations to assess.[16]

(identifying an additional $3 million in funding) and June 2021 [Dkt. 953] at 5 (identifying an additional $5 million in funding).

[14] *See* Rayfield Declaration ¶ 16 (New CT "has not issued any dividends and, excluding distributions to cover the tax liability arising from New CT's income, New CT has no plans to issue dividends to its parent.").

[15] *See also In re Thomas*, No. 16-27850-K, 2018 WL 10323389, at *3 (Bankr. W.D. Tenn. Aug. 24, 2018) ("To make such a determination, courts look to the face of the complaint."); *Sabine Oil*, 547 B.R. at 517; *In re Centaur*, 2010 WL 4624910, at *4; *In re Adelphia Commc'ns Corp.*, 330 B.R. 364, 369 (Bankr. S.D.N.Y. 2005).

[16] To the extent claims are identified, they are weak on the merits. That the Corporate Restructuring occurred after the Debtor "had been sued or threatened with asbestos-related suits," Mot. ¶ 39, is not a "badge of fraud." Old

31. The Standing Motion dedicates a single, conclusory paragraph to the critical question of whether prosecution of the claims satisfies the cost-benefit test. Mot. ¶ 42. The Claimant Representatives provide no explanation of *how* prosecution of the claims would have a "profound effect on the availability and distribution" of the Debtor's property or *how* prosecuting the claims would generate funds for "asbestos creditors otherwise shut out of the process." *Id.* They do not even bother to identify the remedies to be sought through the potential claims.

32. In light of the Funding Agreement (further bolstered by the negotiated amendments to this agreement), the proposed lawsuit would not generate any funds that are not otherwise *already available* to asbestos claimants. Through the Funding Agreement, asbestos claimants already have uncapped access to all of New CT's assets to help fund a trust in this case or otherwise pay asbestos claims. If the Debtor has sufficient resources to satisfy all of its liabilities—which DBMP does—the proposed claims have no value irrespective of their merits. *See Slone v. Lassiter (In re Grove-Merritt)*, 406 B.R. 778, 811 (Bankr. S.D. Ohio 2009) ("A fraudulent transfer should be avoided only to the extent creditors were harmed."); *In re Murphy*, 331 B.R. 107, 122 (Bankr.

CT had been sued in the tort system for *decades*; the Corporate Restructuring was not undertaken in response to some particular suit, as contemplated by that badge of fraud. The Corporate Restructuring was not done in secret or "purposefully concealed." *Id.* All of the filings necessary to effectuate the transaction were filed with the applicable Secretary of State offices and became known to the plaintiffs' bar within days by voluntarily disclosure by the Debtor in various tort cases around the country. The fact that various corporate projects that could lead to the potential transactions effectuated here were subject to confidentiality agreements—as are many corporate projects—does not qualify as a badge of fraud. Nor was the Corporate Restructuring designed to "avoid[] existing and future creditors" or to "evade its asbestos liabilities" by placing "hundreds of millions of dollars, if not billions, worth of assets and value … beyond the reach of asbestos claimants." *Id.* It was specifically designed to assure that asbestos claimants were *not* harmed by preserving the availability of New CT's assets. All the same assets remained within the reach of creditors and available to satisfy their claims. As ACC counsel acknowledged in the *Bestwall* proceeding—which involved a corporate restructuring using the same Texas divisional merger and funding agreement structure—the restructuring did not "technically run[] afoul of fraudulent transfer laws." *In re Bestwall LLC*, No. 17-31795, [Dkt. 495] at 4 (Bankr. W.D.N.C. Aug. 15, 2018). As to any putative claim for constructive fraudulent transfer, the ACC advances no facts to support any contention that the Corporate Restructuring left DBMP insolvent or with unreasonably small capital. The failure to plead such facts renders any constructive fraudulent transfer claim subject to immediate dismissal. *See In re Healthco Int'l, Inc.*, 195 B.R. 971, 984 (Bankr. D. Mass. 1996) (dismissing constructive fraudulent transfer claim, noting "[n]owhere does the Trustee allege that on November 2, 1990 Healthco was insolvent or possessed unreasonably small capital" or "allege lack of consideration for the transfer").

S.D.N.Y. 2005) (fraudulent transfers should be avoided under sections 548 and 550 only in respect of "the amount necessary to make creditors of the debtor's estate whole").

33. By contrast, there can be little doubt that the costs and delay associated with any prosecution of the proposed claims would be significant. The Standing Motion provides no estimate of the cost to prosecute the claims, how that cost would be funded, or—perhaps most importantly—how long the litigation would last. The Claimant Representatives already have spent (through just March 2021) over $11 million of the estate's funds in connection with the Injunction Motion, focusing extensively on the Corporate Restructuring. The Claimant Representatives' reference to their "limited investigation to date" (Mot. ¶ 52) and request for an unlimited investigation suggests they are just getting started on what would be (if permitted) an exorbitantly expensive and expansive litigation. The Claimant Representatives have not offered to prosecute the matter on a contingency basis, meaning the entire expense would be borne by the estate. *See Smart World Tech., LLC v. Juno Online Servs, Inc. (In re Smart World Tech. LLC)*, 423 F.3d 166, 180 (2d Cir. 2005) ("courts often view favorably the willingness of the party seeking derivative standing to absorb the costs of litigation, since such willingness not only demonstrates a belief in the merits of the claim, but also spares the bankruptcy estate from absorbing any further costs").

34. Finally, the Standing Motion should be denied because it is uncertain, based on the Fourth Circuit's statements, whether the Court has authority to grant the relief sought. This uncertainly casts serious doubt on whether the filing of the proposed claims ultimately will result in preserving any potential claims. An order granting the Standing Motion could be appealed and overruled after the two-year deadline for asserting estate claims has lapsed. The best way to assure the estate claims are preserved is for the Claimant Representatives to enter into the proposed Tolling Agreement with the potential defendants. Tolling agreements are common in chapter 11

cases and, in fact, were approved by courts in recent asbestos-driven bankruptcies in this and other districts, including recently by this Court in *Kaiser Gypsum*.[17] With tolling in place, the Claimant Representatives can conduct any further investigation that is appropriate, and the parties meanwhile can advance this case to pursue a resolution through a consensual plan.

D. Granting the Standing Motion Would Further Delay and Distract from the Reorganization Process.

35. The Court also must evaluate how the proposed "derivative action is *both* '*necessary and beneficial* to the fair and efficient resolution of [the bankruptcy proceedings].'" *Racing Servs.*, 540 F.3d at 902 (quoting *In re Commodore Int'l Ltd.*, 262 F.3d 96, 100 (2d Cir. 2001)). Courts should be wary of the "potential for spiteful, dilatory or wasteful litigation tactics," *NBD Park Ridge Bank v. SJR Enters., Inc. (In re SJR Enters., Inc.)*, 151 B.R. 189, 196 n.7 (Bankr. N.D. Ill. 1993), and creditors seeking to "commandeer[] bankruptcy proceedings to pursue their own interests to the detriment of the estate and other creditors." *Baltimore*, 432 F.3d at 558. The Fourth Circuit has noted the need to "reduc[e] the number of ancillary suits that can be brought in the bankruptcy context so as to advance the swift and efficient administration of the bankrupt's estate." *Id.* at 560.

36. Due to the Claimant Representatives' singular focus on the Injunction Motion until the Court's recent ruling—and despite the Debtor's efforts—"there have yet to be meaningful

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[17] *See In re Kaiser Gypsum Co., Inc.*, No. 16-31602 (JCW), [Dkt. 1154] (Bankr. W.D.N.C. Sept. 14, 2018); *Garlock Sealing Techs. LLC, et al.*, No. 10-31607 (GRH), [Dkt. 2281] (Bankr. W.D.N.C. June 4, 2012); *In re Specialty Prods. Holding Corp.*, No. 10-11780 (JKF), [Dkt. 2336] (Bankr. D. Del. Apr. 19, 2012). The use of tolling agreements is specifically endorsed by the legislative history of section 546(a). *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 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."). 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, and this Court specifically found that "[e]ntry 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." [Dkt. 1154] at 2.

settlement negotiations or plan formulation actions in the case." Inj. Dec. ¶ 259; *id.* ¶ 261 ("[R]esolution of the preliminary injunction motion was made the first order of business."). Having now dedicated some 18 months on the Injunction Motion, the time has come for the parties to engage in efforts that focus on the central issue in this case, namely, the extent of the Debtor's liability for current and future asbestos claims. As the Court has recognized, DBMP has, "on several occasions, voiced its willingness to engage with the [Claimant] Representatives toward a consensual resolution of this case" and "has also attempted to move forward into other case matters." *Id.* ¶¶ 262–63 (citing PIQ and Trust Motions).

37. The Standing Motion makes no effort to explain how granting derivative standing to commence and prosecute the proposed claims is relevant to the central issue or otherwise necessary or beneficial to resolving this Chapter 11 Case. The commencement of the proposed claims will only serve to distract the parties from the reorganizational effort. Rather than make any effort to initiate discussions with the Debtor on a plan after the Injunction Decision, the Claimant Representatives instead promptly filed the Standing Motion, a new adversary complaint and motion seeking to substantively consolidate New CT and DBMP, the Privilege Motion invoking the crime-fraud exception to privilege, and a motion plainly designed to alarm New CT's creditors (*i.e.*, the Rule 2004 Motion).

38. None of this collateral litigation—which repeats the same themes already advanced in the Claimant Representatives' oppositions to the Injunction Motion—has anything to do with the extent of the Debtor's liability for asbestos claims. Granting the Standing Motion will only provide further excuses for the Claimant Representatives to refuse to engage in activity that would meaningfully advance a resolution of this case, allow the Claimant Representatives to run up fees on collateral and repetitive litigation, and otherwise distract the parties.

39. In its Injunction Decision, the Court stated that a derivative standing proceeding was filed *Garlock* and noted that, "thereafter, the parties reached accord on a Section 524(g) plan." Inj. Dec. at 64 fn. 231. In fact, while the ACC and the FCR in *Garlock* filed a *Joint Motion for Leave to Control and Prosecute Certain Claims as Estate Representatives* (including a draft complaint) on April 30, 2012 [*Garlock*, Dkt. 2150], the bankruptcy court *denied* that motion on June 1, 2012 and instead granted the debtors' *Motion for Order Authorizing the Debtors to Enter Into Affiliate Tolling Agreement and Proposed Managers Tolling Agreement* [*Garlock*, Dkt. 2194]. The *Garlock* bankruptcy court provided its reasoning at a June 1, 2012 hearing:

> 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.

June 1, 2012 Hr'g Tr. 94:10-16 (excerpts attached hereto as Exhibit A). The parties in *Garlock* reached an agreement on a plan only after the estimation trial, which concluded in August 2013, and the bankruptcy court's estimation decision on January 10, 2014.[18] The court never granted the ACC in that case derivative standing to commence fraudulent transfer or other claims.[19]

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[18] *See* Estimation Motion at 14. Estimation has been a key catalyst in many other asbestos-related bankruptcies to promote consensual plans of reorganization, including in *Specialty Products* (after three years of stalled negotiations, parties reached agreement the next year after bankruptcy court issued estimation decision); *G-I Holdings* (parties reached agreement before estimation hearing concluded); *W.R. Grace* (parties reached agreement shortly before estimation hearing); and *USG* (parties reached agreement after court ordered estimation but before estimation hearing). *See id*.

[19] The Standing Motion notes that the court in *Specialty Products* granted derivative standing to the asbestos committee. In that case, as counsel to the Claimant Representatives surely are aware given certain of their involvement in that case, the debtors initially opposed the asbestos committee's and future claimant representative's motion for derivative standing to prosecute estate claims. *See, e.g.*, *In re Specialty Prods. Holding Corp.*, No. 10-11780, *Debtors' Obj. to Mot. for Standing*, [Dkt. 1881] (Bankr. D. Del. Dec. 5, 2011). Various parties then entered into tolling agreements, which were filed with the court. *Specialty Prods.*, *Notice of Filing* [Dkt. 2246] (Bankr. D. Del. Mar. 27, 2012). The bankruptcy court then entered an order indicating that the claimants' derivative standing motion would remain pending subject to the claimants' right to set it for further hearing. *Specialty Prods.*, *Order with Respect to Standing Mot. and Tolling Agreements* [Dkt. 2336] (Bankr. D. Del. Apr. 19, 2012). Following the debtors' estimation trial, the claimants renewed their request for standing. *Specialty Prods.*, *Renewed Mot. for Standing* [Dkt. 4281] (Bankr. D. Del. Nov. 4, 2013). The debtors objected to that motion on a limited basis, but given the stage of the cases

40. Similarly, here, the Debtor believes that the parties should focus their efforts on an estimation proceeding and discovery regarding asbestos claims. If the parties can reach agreement on a plan of reorganization that is confirmed by this Court, there is no benefit whatsoever to commencing and prosecuting the Claimant Representatives' proposed litigation claims. As the Court has recognized, "if DBMP and New CertainTeed mean what they say—that they desire, and New CertainTeed is willing to fund, a full and fair resolution of these asbestos liabilities—it may not be necessary or productive to bring such a lawsuit." Inj. Dec. at 64 fn. 231. The potential defendants' willingness to enter into a tolling agreement provides the breathing room for such a path forward.

II. THE COURT SHOULD DENY THE CLAIMANT REPRESENTATIVES' UNPRECEDENTED REQUEST FOR AN UNLIMITED AND UNSUPERVISED INVESTIGATION.

41. The Standing Motion asks for *carte blanche* authority to conduct *any* discovery related to the Corporate Restructuring, "without the necessity of seeking further authority from the Court." Mot. at 1. It cites no precedent to support such an extraordinary request.

42. The Debtor does not dispute that the Claimant Representatives may use Bankruptcy Rule 2004 to investigate the Corporate Restructuring. *Id.* ¶ 54-56. But Bankruptcy Rule 2004 is not without limits and a party seeking discovery under that rule must file a motion and show "good cause" for the discovery sought. *See* Fed. R. Bankr. P. 2004(a) ("On motion of any party in interest, the court may order the examination of any entity"); *In re Bestwall*, 3:21-cv-151-RJC, 2021 WL 1857295 (Bankr. W.D.N.C. May 10, 2021) ("Bankruptcy Rule 2004(a) provides that the Bankruptcy Court '*may*' order the examination of any entity *upon the motion* of a party in interest.

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and the parties' negotiations, did not oppose affording the claimants derivative standing. *Specialty Prods.*, *Debtors' Limited Obj. to Renewed Standing Mot.* [Dkt. 4291] (Bankr. D. Del. Nov. 8, 2013). The court's order granting standing was entered in that context.

By such phrasing, the rule's 'plain meaning grants to bankruptcy courts complete discretion in determining whether a Rule 2004 examination is appropriate.'") (citations omitted) (emphasis added). As the Claimant Representatives are well aware from their objections to the Bankruptcy Rule 2004 discovery sought by the debtors in this and the *Bestwall* proceeding, such requests can be heavily contested. Discussions among the parties, at a minimum to clarify the scope of information requested, would be beneficial and assist in avoiding unnecessary disputes.

43. Apart from stating they "do not intend to duplicate discovery that has already been obtained in connection with the discovery already obtained by the Movants," Mot. ¶ 53, the Claimant Representatives purport to place no limits on the discovery sought or the time to complete their investigation. While claiming there are "certain parties, including third parties, that have not yet been examined," *id.*, the Standing Motion fails to identify any additional targets beyond certain Debtor affiliates and three high-level officials of Debtor affiliates. *Id.* ¶ 61.

44. The failure to specify all of the "third parties" from whom discovery will be sought and what materials would be requested—so that the Court can reasonably consider the discovery sought and all implicated parties can respond to the motion—circumvents the appropriate procedure for Bankruptcy Rule 2004 discovery. *See, e.g., In re Roman Catholic Church of the Diocese of Gallup*, 513 B.R. 761, 766 (Bankr. D.N.M. 2014) (declining movants' single motion for Bankruptcy Rule 2004 discovery against six allegedly affiliated entities, stating "the Court thinks it is better practice for the [Unsecured Creditors Committee] to file Rule 2004 exam motions for each Alleged Affiliate"); *In re Young*, No. 17-22665, 2019 Bankr. LEXIS 3966, at *4 (Bankr. N.D. Ind. July 5, 2019) (noting "better practice would have been for the Debtors to file separate motions requesting a 2004 examination as to each entity," but noting each entity was "properly served and given an opportunity to object to the motion").

45. While the Claimant Representatives say they "do not intend to duplicate discovery," Mot. ¶ 53, the sheer amount of discovery already undertaken on the Corporate Restructuring *only heightens* the need for the Court to carefully supervise any ongoing discovery. Whether additional discovery is duplicative or necessary cannot be left solely in the hands of counsel for the Claimant Representatives, which has every incentive to conduct additional discovery, particularly since the costs of that discovery are fully borne by the estate.

46. Indeed, apart from documents and testimony withheld on privilege grounds, the Standing Motion makes no effort to identify *anything* about the Corporate Restructuring or Project Horizon that is not already known to the Claimant Representatives and was not exhaustively covered by their prior discovery. *See id.* ¶¶ 53, 57, 59. The privilege issues, however, are the subject of the *separate* Privilege Motion, and provide no basis to support the expansive, pre-approved, and unchecked investigation sought in the Standing Motion.

47. The Debtor reserves all rights to object to further investigation of the Corporate Restructuring as wasteful, not in the best interests of the estate, and detrimental to the efficient resolution of this Chapter 11 Case. As detailed above, the Debtor believes—particularly given the proposed modifications and clarifications to the Funding Agreement—that the claims the Claimant Representatives seek to investigate have no benefit to the estate, as asbestos claimants already have access to the New CT assets that are the apparent targets of such claims.

CONCLUSION

For the foregoing reasons, the Standing Motion should be denied.

Dated: September 23, 2021
Charlotte, North Carolina

Respectfully submitted,

/s/ Garland S. Cassada

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ATTORNEYS FOR DEBTOR AND DEBTOR IN POSSESSION

EXHIBIT A

Garlock June 1, 2012 Hearing Transcript Excerpts

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In the matter of:)
)
GARLOCK SEALING TECHNOLOGIES, LLC,) No. 10-31607
et al.,) Jointly Administered
)
Debtors.)

GARLOCK SEALING TECHNOLOGIES, LLC,)
et al.,)
)
Plaintiffs,)
)
v.) Adv. No. 10-03145
)
THOSE PARTIES LISTED ON)
EXHIBIT B TO THE COMPLAINT,)
)
Defendants.)

Charlotte, NC
June 1, 2012, 9:31 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GEORGE R. HODGES
UNITED STATES BANKRUPTCY JUDGE

Electronic Recorder
Operator: Chelsea Sanders

Transcriber: Patricia Basham
6411 Quail Ridge Drive
Bartlett, TN 38135
901-372-0613

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service.

1 Your Honor.

2 All we are asking is that the claims be preserved and

3 the parties work out, with the court's direction, a schedule

4 that's appropriate to move the case forward but they be

5 preserved and that we be allowed the opportunity, either

6 because you have given us authority now or to move to

7 intervene, so that we can be plaintiffs in these causes of

8 action.

9 Thank you, Your Honor.

10 THE COURT: Okay. Well, I think that what I ought to

11 do is just enter the tolling agreements and preserve where we

12 are. I don't see any reason to – I think there is *de minimis*,

13 at most, risk in that, although there may be some. But it

14 seems to me that's the proper way to preserve where we are and

15 where we might go, while keeping the focus on the estimation

16 and going from there.

17 I had given some thought to allowing the filing of the

18 complaint and just staying it, but it seems to me that this

19 gets us to the same place.

20 I don't think, under any scenario, that we ought to be

21 actively pursuing the complaint at this point simply because

22 it's premature. There may be some delay caused by that

23 approach, but I think it would be a small delay and that it's

24 worth taking that risk because there may be no need for it. We

25 just don't know that yet.