UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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

OBJECTION OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS TO DEBTOR'S MOTION TO APPROVE SECOND AMENDED FUNDING AGREEMENT

The Official Committee of Asbestos Personal Injury Claimants ("**Committee**"), by and through its undersigned counsel, hereby objects to the *Motion of the Debtor for an Order Authorizing It to Enter into Second Amended and Restated Funding Agreement*, dated September 15, 2021 (ECF No. 1051) ("**Motion**"). For the reasons explained below, the Motion should be denied.

PRELIMINARY STATEMENT

1. By its Motion, the Debtor seeks leave of this Court to enter into the Second Amended and Restated Funding Agreement ("**Second Amended Funding Agreement**") with its nondebtor affiliate, CertainTeed LLC ("**CertainTeed**"). In conjunction with that request, the Debtor is asking this Court to enter the proposed Agreed Order Authorizing the Debtor to Enter into Second Amended and Restated Funding Agreement ("**Approval Order**")[2] and thus adopt the findings contained therein. Among the findings sought by the Debtor are that "the terms of the Second Amended Funding Agreement are fair and reasonable, and contain adequate protections

[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] Motion at 54.

for the Debtor's estate and its creditors;" that "the Second Amended Funding Agreement is a valid contract, enforceable in accordance with its terms;" and that the Second Amended Funding Agreement represents "a reasonable exercise of the Debtor's business judgment and is in the best interests of the Debtor's estate and creditors."[3]

2. The Debtor claims that the Second Amended Funding Agreement is intended to "address the concerns raised by the Claimant Representatives and the Court" about the First Amended and Restated Funding Agreement ("**Funding Agreement**") currently in place.[4] This, however, is subterfuge. The existing Funding Agreement is a key component of the Corporate Restructuring and, according to the Debtor, is its principal asset ensuring that "the same assets that were available to pay claims before the Corporate Restructuring remained available after the Corporate Restructuring."[5] Thus, with proposed findings in the Approval Order such as "fair and equitable" terms, "business judgment," "valid" and "enforceable" contract, "adequate protections," and "best interests of the Debtor's estate and creditors," the intent of the Second Amended Funding Agreement and those findings is plain: to try to extinguish fraudulent transfer claims that would unwind the Corporate Restructuring, and to try to defeat the pending request to substantively consolidate the Debtor's estate with CertainTeed, before those matters can be fully heard by this Court. In other words, the Second Amended Funding Agreement and the findings in the Approval Order are designed to "cleanse" and shield the Corporate Restructuring from creditor challenge and judicial scrutiny.

3. Therefore, the Second Amended Funding Agreement is yet another stratagem, not a transaction with a valid business purpose. It constitutes a "deal" between the Debtor and one of

---

3 Approval Order at 2.

4 Motion ¶ 3.

5 *Id*.

its insiders, a situation that demands heightened scrutiny, not deference under the business judgment rule. As a principal target of a fraudulent transfer action and the pending request for substantive consolidation, CertainTeed would be the sole beneficiary of the Second Amended Funding Agreement and this Court's entry of the Approval Order. And, by seeking to benefit an insider through the attempted extinguishment of potentially valuable estate claims and other remedies that would unwind the Corporate Restructuring, the Debtor labors under a profound conflict of interest.

4. At the end of the day, and like its similarly deficient predecessors, the Second Amended Funding Agreement will not alter the ring-fencing and structural subordination of asbestos claims in this case. Even with the Second Amended Funding Agreement in place, CertainTeed's non-asbestos creditors will continue to be paid in the ordinary course, and CertainTeed will continue to upstream its net earnings, through putative "loans," to entities in the upper echelons of the Saint-Gobain enterprise group. But asbestos creditors will remain unpaid and disadvantaged as a result of the Corporate Restructuring and the Debtor's chapter 11 filing. As explained in part I of the Argument below, the changes embodied in the Second Amended Funding Agreement will not alter the disadvantaged position of asbestos creditors in the case. If anything, the changes are more gloss than substance. And, as explained in part II below, there is no proper basis for the findings contained in the proposed Approval Order. For all the reasons set forth herein, this Court should deny the Motion.

ARGUMENT

I. THE PROPOSED CHANGES IN THE SECOND AMENDED FUNDING AGREEMENT ARE MERE WINDOW-DRESSING AND FAIL TO CORRECT THE RING-FENCING AND STRUCTURAL SUBORDINATION OF ASBESTOS CLAIMS

A. The Alleged "Prohibition on Dividends" Would Not Curb CertainTeed's Practice of "Loaning" Its Net Earnings to Affiliates

5. The Second Amended Funding Agreement adds a new section 4(c) that would prohibit CertainTeed from paying any "Dividend," except any distributions made to fund its tax liabilities (defined as "Payor Tax Liabilities"). The term "Dividend" is defined as "a distribution of cash or any other assets or properties made by such entity to such entity's member or parent company."[6]

6. This purported bar against paying "Dividends" is inadequate because it would not halt CertainTeed's current practice of upstreaming cash to affiliates in the form of "loans."[7] CertainTeed loans its net earnings on a daily basis to its affiliate Saint-Gobain Finance Corporation ("**SG Finance**"), which leaves CertainTeed with minimal available cash.[8] The loan is made to SG Finance each day, and the amount loaned to SG Finance can fluctuate depending on CertainTeed's cash requirements.[9] The balance of the "daily" loan made by CertainTeed is accumulating, and CertainTeed has not called on the loan to SG Finance to date.[10] When current CertainTeed was formed on October 23, 2019, it received the loan balance owed to former CertainTeed of approximately $494 million.[11] Several weeks later, on January 9, 2020, the balance grew to

---

6 Second Amended Funding Agreement at 4.

7 Nor would it stop CertainTeed from transferring value to its parent company by redeeming a portion of its equity security interests (potentially at an inflated price).

8 CertainTeed 30(b)(6) Dep. 46:13-47:7 (Placidet).

9 *Id*. at 48:6-9; 50:22-51:8.

10 *Id.* at 51:22-52:16.

11 *Id*. at 138:23-139:23.

approximately $676 million.[12] Through this loan arrangement, CertainTeed is able to move cash from its own coffers to a different part of the Saint-Gobain organization without Bankruptcy Court oversight. The Second Amended Funding Agreement does nothing to stop that.

7. New section 4(c)(ii) of the Second Amended Funding Agreement would prohibit CertainTeed from forgiving obligations owed to it by an affiliate and would require CertainTeed to restrain its subsidiaries from forgiving the intercompany obligations owed to them. But this still would not prevent cash from being upstreamed away from CertainTeed and its subsidiaries, under the pretense of a "loan," leaving CertainTeed effectively cash-poor and paying parent companies (equity holders) ahead of asbestos creditors.

B. The Proposed Change to "Permitted Funding Use" Would Not Block CertainTeed's Effective Veto of Any Creditor-Proposed Plan

8. The Second Amended Funding Agreement contains a change to the definition of "Permitted Funding Use," which purports to allow CertainTeed to fund a 524(g) trust under a plan, "regardless of whether such plan of reorganization provides that . . . [CertainTeed] will receive the protection of section 524(g) of the Bankruptcy Code and regardless of whether . . . [CertainTeed] supports such plan of reorganization."[13] But this added language amounts to an empty gesture because the agreement's anti-assignment clause is being left unchanged and, therefore, would still prevent the assignment of CertainTeed's funding obligations to a 524(g) trust established under a plan proposed by the Committee and FCR and opposed by CertainTeed.[14]

9. The anti-assignment clause is a key defect of the existing Funding Agreement and would remain so under the Second Amended Funding Agreement. As this Court found in its

---

[12] *Id*. at 136:6-20.

[13] Second Amended Funding Agreement at 6 (definition of "Permitted Funding Use").

[14] *See id*. § 13 ("The Payee's rights and obligations under this Agreement may not be assigned without the prior written consent of the Payor.").

preliminary injunction ruling, "the Funding Agreement may only be assigned with consent of the counterparty."[15] Thus, "in this case arguably the Funding Agreement could not be assigned to a trust under a creditor Plan and that Plan could not be funded—unless New CertainTeed favors that Plan."[16] In effect, "while the Funding Agreement may provide funding for a plan, it will do so only if New CertainTeed favors that Plan."[17] Because of the anti-assignment clause in the Second Amended Funding Agreement, CertainTeed would continue to wield veto power over a creditor plan and could thus demand unwarranted 524(g) protection and other concessions as the price of its agreement to waive the anti-assignment clause. In short, the language added to the "Permitted Funding Use" definition would, in practice, change nothing.

C. The Proposal to Provide Financial Information to the Committee and FCR Is Inadequate and Enables CertainTeed to Continue to Enjoy the Benefits of Bankruptcy Without the Burdens

10. The proposed change to section 4(a) would authorize the Debtor to share financial information about CertainTeed with the Committee and FCR on a confidential basis.[18] But the financial information would take the form of unaudited financial statements without "notes to the financial statements and related disclosures,"[19] thereby omitting details on account balances and material transactions.

11. In addition, the Committee and FCR would receive this information no more frequently than on a quarterly basis.[20] If CertainTeed itself had filed chapter 11, it would have had

---

[15] Findings of Fact and Conclusions of Law Regarding Order: (I) Declaring Automatic Stay Applies to Certain Actions Against Non-Debtors, (II) Denying Comm.'s Mot. to Lift Stay, and Alternatively (III) Prelim. Enjoining Such Actions ¶ 71, 3:20-ap-03004, ECF No. 343 (footnote omitted) ("**Court's Findings and Conclusions**").

[16] *Id*.

[17] *Id*. ¶ 74.

[18] Second Amended Funding Agreement § 4(a)(ii).

[19] *Id*. § 4(a)(i).

[20] *See id*.

to file monthly status reports with the Court, which would give asbestos creditors and their representatives a more timely and transparent picture of CertainTeed's financial position. Those reports would be in addition to the detailed bankruptcy schedules and statement of financial affairs that all debtors are required to provide. Yet, CertainTeed enjoys the benefits of bankruptcy, chiefly in the form of an indefinite, nationwide litigation stay, without the transparency required of debtors, and the Second Amended Funding Agreement does nothing to rectify that situation.

D. The Language Added to Section 5 (Indemnification Obligations) Would Effect No Real Change

12. Section 5 of the current Funding Agreement requires the Debtor to perform its indemnification obligations owing to CertainTeed in all material respects. Through the Second Amended Funding Agreement, the Debtor is proposing to add language saying that the Debtor's duty to fulfill its indemnification obligations is subject "to the resulting automatic stay under section 362 of the Bankruptcy Code."[21] The added language effects no real change, because CertainTeed has previously acknowledged to the Debtor that its indemnification claims are stayed under § 362.[22] As with other changes in the Second Amended Funding Agreement, this change is more cosmetic than substantive.

E. The Proposed Changes to Section 6 (Events of Default) Fail to Provide Sufficient Protection or Adequate Recourse to the Asbestos Claimants Constituency

13. Under the Second Amended Funding Agreement, CertainTeed would still have "10 Business Days"—or two weeks—to cure a payment default.[23] This cure period is too long, especially in view of the fact that CertainTeed, at least theoretically, has the ability each day to

---

[21] *Id.* § 5.

[22] *See* ACC-FCR Ex. 144, at DBMP-BR_0147100 (stating that CertainTeed's notice of indemnification claim "does not constitute an act to obtain possession of money or other property from DBMP, an act to collect, assess, or recover on a claim against DBMP, or any other act prohibited by 11 U.S.C. § 362").

[23] Second Amended Funding Agreement § 6(a).

call in hundreds of millions of dollars of its "loan" to SG Finance. Indeed, the two-week cure period suggests that CertainTeed's "loan" arrangement with SG Finance is simply a sham—nothing more than a way to siphon value up the chain of the enterprise group for the benefit of the parent companies.

14. The Second Amended Funding Agreement would also reduce the cure period for any breach of a covenant, representation, or warranty from 90 days to 30 days, after a written notice of default is sent by the Debtor via registered or certified mail.[24] As with the cure period for payment defaults, this reduced cure period of 30 days is still too long, as the following hypothetical illustrates: Suppose CertainTeed transferred substantially all of its assets without the transferee assuming CertainTeed's funding obligations, as the Second Amended Funding Agreement requires. The Committee and FCR would have to wait for the Debtor to get around to sending a notice of default by registered or certified mail and then wait an additional month ("30 days") for CertainTeed to "cure" the transgression before an Event of Default occurs. Once an Event of Default occurred, the Committee and FCR would have to wait for the Debtor to take action to enforce its "remedies as Payee" against CertainTeed as "Payor." If the Debtor failed to enforce its rights, the Committee and FCR would be required, under the proposed Approval Order, to provide "10 business days' advance written notice" (again, two weeks) before they could "pursue remedies" in this Court.[25] In other words, the Second Amended Funding Agreement lays out a process that would take 45 days or, most likely, longer, before the Committee and FCR could pursue unspecified "remedies," at which point the transferred assets—particularly cash—would be long gone.

---

[24] *Id.* § 6(b). In addition, the cure period for failing to provide financial information to the Debtor under section 4(a) of the agreement would be reduced from 180 days to 60 days. *Id.*

[25] Approval Order ¶ 6.

15. And, to boot, CertainTeed would have no obligation to pay the enforcement or collection costs of the Committee and FCR since, under new clause (f) of the "Permitted Funding Use" definition, those costs would not be the "costs and expenses of *the Payee*" (*i.e.*, the Debtor).[26] For all the reasons explained above, the changes embodied in the Second Amended Funding Agreement are nothing more than gamesmanship.

F. The Second Amended Funding Agreement Would Still Permit CertainTeed to Incur Senior Debt and Engage in Mergers, Consolidations, and Material Asset Transfers

16. Also notable about the Second Amended Funding Agreement are the deficiencies it does not correct. For example, under the Second Amended Funding Agreement, CertainTeed would still be free to incur unlimited debt that would be senior in priority to its obligations to fund the Debtor.

17. In addition, the Second Amended Funding Agreement leaves section 4(b) untouched. As a result, CertainTeed is expressly permitted to engage in consolidations and mergers, and to transfer "all or substantially all" of its assets.[27] To be sure, the Second Amended Funding Agreement would purport to require the surviving merger party or the transferee of "substantially all" assets to assume CertainTeed's funding obligations thereunder,[28] but this supposed safeguard is illusory. When questioned about the meaning of "substantially all" in the preliminary injunction proceeding, one DBMP witness could not quantify the proportion of CertainTeed's assets—whether it be 50% of the assets, 80%, or 90%—that would constitute "substantially all" property.[29] The ambiguity leaves the door open for mischief and abuse, even

---

[26] Second Amended Funding Agreement at 6 (emphasis added).

[27] *Id.* § 4(b)(i).

[28] *See id*.

[29] Bondi Dep. 224:4-226:12 (Oct. 9, 2020).

aside from the obvious difficulties in enforcing that provision in a situation where the parties to the Second Amended Funding Agreement no longer have the assets.[30]

II. THERE IS NO BASIS FOR THE FINDINGS IN THE PROPOSED APPROVAL ORDER, WHICH ARE AN ATTEMPT TO QUASH ESSENTIAL CLAIMS AND REMEDIES FOR UNWINDING THE DIVISIONAL MERGER

18. In addition to approving the Second Amended Funding Agreement, the Debtor is asking this Court to make four objectionable findings in the proposed Approval Order—findings that are designed to undermine the Committee and FCR's request for substantive consolidation and their motion for standing to pursue a fraudulent transfer action and potentially other estate claims.

A. First Objectionable Finding: Best Interests of the Estate and Creditors

19. The first objectionable finding sought by the Debtor is: "the Debtor's entry into the Second Amended Funding Agreement . . . is in the *best interests of the Debtor's estate and creditors*."[31]

20. There is no basis for this finding. Even if the Second Amended Funding Agreement were to become effective (and it should not), "new" CertainTeed would still hold 97% of "old" CertainTeed's assets.[32] "New" CertainTeed continues to manufacture and sell the building products historically sold by "old" CertainTeed.[33] "New" CertainTeed continues to pay non-asbestos creditors in the ordinary course.[34] Unlike the non-asbestos claims of "old" CertainTeed, the *asbestos* claims of "old" CertainTeed have been corralled and isolated in this

[30] The other proposed amendments are likewise unavailing, more in the vein of a Potemkin village than a restorative for the obvious (and recognized) failings of the Funding Agreement.

[31] Approval Order at 2 (emphasis added).

[32] Court's Findings and Conclusions ¶ 53.

[33] *Id.* ¶ 60.

[34] *Id.*

bankruptcy. The Second Amended Funding Agreement does not change that. Asbestos victims remain locked in this chapter 11 case indefinitely, unable to obtain recompense for the harm inflicted by "old" CertainTeed. In the meantime, tens or hundreds of millions of dollars from "new" CertainTeed continue to be upstreamed to the upper echelons of the Saint-Gobain enterprise group, through putative "loans," while asbestos claims remain unpaid. The isolation and structural subordination of asbestos claims would continue with the Second Amended Funding Agreement.

21. With these fundamentals remaining in place, the Debtor and CertainTeed can simply prolong this chapter 11 case, as they are doing now. They can continue to seek to inflict burdensome and invasive "estimation" discovery on asbestos victims and their lawyers while propagating their bankruptcy story of tainted and overvalued settlements. They can continue to push a time-consuming and costly estimation proceeding, which will not result in the final determination of any issues whatsoever, while trying to evade responsibility for their improper prepetition machinations. And they will do all of these things in the hopes that—as claimants and critical witnesses die, as memories fade, as legal rights and remedies are lost—the asbestos claimants' representatives will knuckle under and settle for 524(g) funding that will be far less than warranted in light of CertainTeed's extensive asbestos liabilities. That state of play—which the Second Amended Funding Agreement will not change—is *not* in the best interests of asbestos creditors, who are the only creditors affected by this entire scheme.

22. Moreover, the Second Amended Funding Agreement is not in the best interests of the Debtor's estate, because that agreement and the findings in the proposed Approval Order are designed to extinguish potentially valuable causes of action under chapter 5 of the Bankruptcy Code and other estate-held claims. The Debtor has confirmed this intent in its recent filings with the Court. For example, in its opposition to the Committee and FCR's motion to obtain standing,

the Debtor asserts that "given the proposed modifications and clarifications to the Funding Agreement . . . the claims the . . . [Committee and FCR] seek to investigate have no benefit to the estate . . . ."[35] The Debtor is positing that the Second Amended Funding Agreement cures everything and thus undoes the harm caused by the Corporate Restructuring to asbestos creditors, thereby extinguishing claims arising from the harm that the estate may have. But, as explained above, the Debtor's position lacks merit. The changes in the Second Amended Funding Agreement are, as a practical matter, mere window-dressing. The fundamental position of asbestos claimants remains the same: asbestos claims are isolated and structurally subordinated to CertainTeed's non-asbestos creditors and equity holders. It does not matter that CertainTeed has allegedly fulfilled its obligations under the existing Funding Agreement *so far*. What matters is that the Corporate Restructuring has hindered, delayed, and disadvantaged asbestos claimants, and that is a circumstance that the Second Amended Funding Agreement cannot cure.[36] Enlisting the aid of this Court through their proposed findings, the Debtor and CertainTeed are trying to preemptively manufacture a defense against potential fraudulent transfer claims and other estate causes of action and to defeat the Committee and FCR's request for substantive consolidation before that request moves beyond the pleadings stage. And the Debtor is agreeing to the Funding Agreement changes and the findings in the Approval Order with its insider, in exchange for no meaningful consideration to the estate in return. It is neither the Debtor's estate nor asbestos creditors that will benefit from the Second Amended Funding Agreement; rather, it is CertainTeed, which underscores the clear conflict of interest at work here. The Court should not permit this.

---

[35] Debtor's Opp'n to Claimant Reps' Mot. for Leave, Standing, & Authority to Investigate, Commence, Prosecute, and Settle Certain Claims ¶ 47, ECF No. 1072.

[36] Indeed, putative remedial actions taken postpetition by the Debtor and CertainTeed cannot shield from avoidance a *prepetition* transaction—*i.e.*, the Corporate Restructuring—undertaken by CertainTeed with the intent to hinder and delay asbestos creditors.

B. Second Objectionable Finding: Business Judgment

23. The second objectionable finding sought by the Debtor is: "the Debtor's entry into the Second Amended Funding Agreement is a reasonable exercise of the Debtor's *business judgment*."[37]

24. As with the first objectionable finding, there is no proper basis for the second finding. The Second Amended Funding Agreement suffers from the same key infirmity as the existing Funding Agreement: it is between DBMP and CertainTeed, two affiliates owned by the same parent company.[38] As an affiliate, CertainTeed is an insider of DBMP. *See* 11 U.S.C. § 101(31)(E) (defining "insider" to include an "affiliate"). "By definition, the business judgment rule is not applicable to transactions among a debtor and an insider of the debtor." *In re Latam Airlines Grp. S.A.*, 620 B.R. 722, 769 (Bankr. S.D.N.Y. 2020). Rather, those "kinds of transactions are inherently suspect because 'they are rife with the possibility of abuse[,]'" and therefore courts use "heightened scrutiny," not business-judgment deference, "in assessing the bona fides of a transaction among a debtor and an insider of the debtor." *Id.* (citations omitted). Because the Second Amended Funding Agreement is between the Debtor and an insider, the business judgment rule does not apply. Indeed, the conflict of interest is most acute here: the Debtor is treating with an insider that is the target of the substantive consolidation motion and a potential defendant in a fraudulent transfer proceeding. And the proposed changes to the Funding Agreement and the objectionable findings in the proposed Approval Order are intended to shut down that motion and potential action. For this reason, heighted scrutiny, not deference, is warranted. *See In re HyLoft, Inc.*, 451 B.R. 104, 117 (Bankr. D. Nev. 2011) (declining to approve proposed settlement

[37] Approval Order at 2 (emphasis added).

[38] Court's Findings and Conclusions ¶ 58.

agreement that "was essentially negotiated and determined between insiders of the Debtor without the participation of the remaining creditors").

25. Additionally, the Debtor cannot invoke "business judgment" and ask for this Court's deference when the Debtor has no business to begin with. The Debtor is a special purpose vehicle created and designed specifically to put CertainTeed's asbestos liabilities into bankruptcy without CertainTeed's assets. As this Court found in its preliminary injunction ruling: "That DBMP was created with no employees and no operations reflects its single purpose: the Debtor was a vessel designed to ferry Old CertainTeed's asbestos liabilities into bankruptcy."[39] "Vessels" with no business operations are not entitled to "business judgment." Nor are transactions with insiders that have no business reason or purpose. *See In re Flour City Bagels, LLC*, 557 B.R. 53, 77-84 (Bankr. W.D.N.Y. 2016) (denying sale of substantially all of debtor's assets to debtor's insider as the evidence did not demonstrate a sound business reason justifying the sale).

26. Furthermore, in its injunction ruling, this Court found that the existing Funding Agreement was not an arm's length contract.[40] Nothing has changed with respect to the Second Amended Funding Agreement. The Debtor has put forward no evidence of any arm's length bargaining or any kind of bargaining at all. Moreover, this Court found in its injunction ruling that the existing Funding Agreement had been "revised and ratified by New CertainTeed, through signatories who held positions with both . . . [DBMP and CertainTeed] and/or their parent. For example, DBMP executed the Funding Agreement by signature of Joseph Bondi, an officer of both DBMP and New CertainTeed."[41] The Second Amended Funding Agreement does not cure or correct that infirmity: its signature page reserves a signature block for Joseph Bondi, who, based

[39] Court's Findings and Conclusions ¶ 83.

[40] *Id.* ¶ 63.

[41] *Id.*

on the current record, remains the president of DBMP and vice president of "new" CertainTeed.[42] In other words, as president of the Debtor, Mr. Bondi would be signing an agreement for CertainTeed's benefit when he also serves as vice president of CertainTeed. Mr. Bondi's dual capacity underscores the striking conflict of interest at work here. *See In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 551-52 (Bankr. S.D.N.Y. 1997) (finding no "effective exercise of business judgment" and disapproving proposed sale that lacked "both disinterestedness and due care," as key individual held executive positions with both sellers and buyers). For these reasons, there is no proper basis for finding any exercise of "business judgment."[43]

C. Third Objectionable Finding: Valid and Enforceable Contract

27. The third objectionable finding sought by the Debtor is: "the Second Amended Funding Agreement is a *valid contract, enforceable* in accordance with its terms."[44]

28. Apparently, the Debtor is introducing this finding in response to the Court's previous finding that "the legal enforceability of . . . [the Funding Agreement] vis a vis third parties is doubtful."[45] But the Court's finding on "legal enforceability" was based on "the insider relationships and conflicts of interest" that still exist here.[46] The Debtor and CertainTeed remain

---

[42] *Id*. ¶ 88.

[43] The cases cited by the Debtor in support of its "business judgment" finding are inapposite. *In re MCSGlobal, Inc.*, 562 B.R. 648 (E.D. Va. 2017), involved a § 363 sale negotiated between a bankruptcy trustee and a third-party purchaser, not a conflicted transaction between two closely-affiliated entities. *In re Georgetown Steel Co.*, 306 B.R. 549 (Bankr. D.S.C. 2004), involved the approval of a key employee retention plan that, unlike here, was not between two closely-affiliated entities and was supported by the debtor's principal creditors, the creditors' committee, and the United States Trustee. In *In re Johns-Manville Corp.*, 60 B.R. 612 (Bankr. S.D.N.Y. 1986), the court held that Manville's retention of lobbyists was in the ordinary course of its business, a situation different from here, as the Second Amended Funding Agreement is not being made in the ordinary course of business. Finally, in *In re Century Drive LHDH, LLC*, No. 10-01253-8-SWH, 2010 WL 1740560 (Bankr. E.D.N.C. Apr. 28, 2010), the court *denied* the proposed assumption of a prepetition lease after concluding that the "lease is not in the debtor's best business interests." *Id*. at *2.

[44] Approval Order at 2 (emphasis added).

[45] Court's Findings and Conclusions ¶ 63 (citing *Schmoll v. ACandS, Inc.*, 703 F. Supp. 868, 874 (D. Or. 1988), *aff'd*, 977 F.2d 499 (9th Cir. 1992)).

[46] *Id*.

closely held entities under common ownership.[47] The Debtor's officers, including Mr. Bondi, concurrently serve as officers of current CertainTeed, Millwork & Panel LLC, or Saint-Gobain Corporation.[48] The Debtor remains dependent on CertainTeed to fund its administrative expenses and, ultimately, the amount necessary to establish a 524(g) trust.[49] Again, the fundamentals of this case have not changed, even with the Second Amended Funding Agreement. There is no basis for this Court to reconsider and replace its earlier finding with this third objectionable finding.

D. Fourth Objectionable Finding: Fair and Reasonable Terms and Adequate Protections

29. The fourth objectionable finding sought by the Debtor is: "the terms of the Second Amended Funding Agreement are *fair and reasonable*, and contain *adequate protections for the Debtor's estate and its creditors*."[50]

30. As explained above, the terms of the Second Amended Funding Agreement are *not* "fair and reasonable." For example, the agreement's anti-assignment clause remains unchanged, so CertainTeed retains its power to veto any creditor-proposed plan.[51] The Second Amended Funding Agreement would not require CertainTeed to share the same level of financial information that CertainTeed would be required to disclose had it filed chapter 11 itself.[52] The Second Amended Funding Agreement would allow CertainTeed to continue upstreaming its net earnings through intercompany "loans."[53] CertainTeed would also be permitted to layer on senior debt and

---

47 *Id*. ¶ 58.

48 *Id*. ¶¶ 87-88.

49 *Id*. ¶¶ 57, 75.

50 Approval Order at 2 (emphasis added).

51 *See supra* paras. 8-9.

52 *See supra* paras. 10-11.

53 *See supra* paras. 6-7.

engage in mergers, consolidations, and material asset transfers, to the detriment of asbestos creditors.[54] These are not "fair and reasonable" terms.

31. Nor do the changes in the Second Amended Funding Agreement provide "adequate protections" for the Debtor's estate and asbestos creditors. As with the existing Funding Agreement, there is no collateral securing CertainTeed's obligations under the Second Amended Funding Agreement.[55] None of the other Saint-Gobain affiliates has guaranteed CertainTeed's obligations.[56] Although the Second Amended Funding Agreement purports to grant the Committee and FCR the ability under certain circumstances to "pursue remedies" if there is an Event of Default,[57] this ability, as a practical matter, is not meaningful. If there were a payment default, the Committee and FCR would have to wait at least **20 business days** (*i.e.*, four weeks) before they could pursue collection against CertainTeed.[58] A lot of cash and other value previously held by CertainTeed could disappear within the span of four weeks, thus making CertainTeed judgment-proof. Moreover, if CertainTeed were to breach a covenant in the Second Amended Funding Agreement (*e.g.*, by paying Dividends to its parent company for reasons other than funding its tax liabilities), the Committee and FCR would have to wait at least **45 days** (more than six weeks) before they could "pursue remedies" against CertainTeed.[59] And, the Committee and

---

54 *See supra* paras. 16-17.

55 Court's Findings and Conclusions ¶ 75.

56 *Id*. Presumably, the affiliates could afford to guarantee CertainTeed's obligations. The Debtor and CertainTeed's ultimate parent holding company, Compagnie de Saint-Gobain S.A., as of September 28, 2021, had a market capitalization of €31.3 billion (or over $36 billion). Compagnie de Saint-Gobain S.A. (SGO.PA), YAHOO! FINANCE (Sep. 28, 2021, 5:35 PM CEST), https://finance.yahoo.com/quote/sgo.pa/.

57 Approval Order ¶ 6.

58 The "20 business days" is computed from the cure period of "10 Business Days" set forth in section 6(a) of the Second Amended Funding Agreement and the "10 business days' advance written notice" that the Committee and FCR would have to provide under paragraph 6 of the Approval Order before they would be permitted to pursue remedies on behalf of the Debtor.

59 The "45 days" is computed from the 30-day cure period set forth in section 6(b) of the Second Amended Funding Agreement, at least one (1) day for the Debtor to manifest its failure to take action to enforce its "remedies" against CertainTeed, and the "10 business days' advance written notice" (effectively, 14 calendar days) that the Committee

FCR most likely would not discover the covenant breach until the next quarterly financial statement was delivered to them.[60] Tellingly, even if the Committee and FCR were to pursue remedies against CertainTeed, the Second Amended Funding Agreement would not require CertainTeed to fund the Committee and FCR's costs of collection or enforcement.[61] In other words, the contingent right of the Committee and FCR to "pursue remedies" in the event of a CertainTeed default is, as a practical matter, illusory and fails to provide "adequate protections." There is no proper basis for making this fourth proposed finding.

CONCLUSION

The Second Amended Funding Agreement has no legitimate business purpose. It is simply a stratagem intended to preclude the Committee and FCR from pursuing any cause of action or remedy to unwind the Corporate Restructuring—nothing more than a litigation tactic designed to shield the Corporate Restructuring from creditor challenge and judicial scrutiny. The Second Amended Funding Agreement and the proposed Approval Order should therefore be rejected. For all the reasons stated above, the Court should sustain this objection, deny the Motion, and grant such other and further relief as the Court deems just and appropriate.

and FCR would have to provide under paragraph 6 of the Approval Order before they would be permitted to pursue remedies on behalf of the Debtor.

60 *See* Second Amended Funding Agreement § 4(a); Approval Order ¶ 3.

61 *See* Second Amended Funding Agreement at 6 (clause (f) of the "Permitted Funding Use" definition).

Respectfully submitted,

HAMILTON STEPHENS STEELE
+ MARTIN, PLLC

/s/ Glenn C. Thompson
Glenn C. Thompson (Bar No. 37221)
525 North Tryon Street, Suite 1400
Charlotte, North Carolina 28202
Telephone: (704) 344-1117
Facsimile: (704) 344-1483
Email: gthompson@lawhssm.com

Local Counsel to the Official Committee of Asbestos Personal Injury Claimants

CAPLIN & DRYSDALE, CHARTERED
Kevin C. Maclay (admitted *pro hac vice*)
Todd E. Phillips (admitted *pro hac vice*)
Jeffrey A. Liesemer (admitted *pro hac vice*)
One Thomas Circle NW, Suite 1100
Washington, DC 20005
Telephone: (202) 862-5000
Facsimile: (202) 429-3301
Email: kmaclay@capdale.com
tphillips@capdale.com
jliesemer@capdale.com

Counsel to the Official Committee of Asbestos Personal Injury Claimants

ROBINSON & COLE LLP
Natalie D. Ramsey (admitted *pro hac vice*)
Davis Lee Wright (admitted *pro hac vice*)
1201 North Market Street, Suite 1406
Wilmington, Delaware 19801
Telephone: (302) 516-1700
Facsimile: (302) 516-1699
Email: nramsey@rc.com
dwright@rc.com

Counsel to the Official Committee of Asbestos Personal Injury Claimants

David Neier (admitted *pro hac vice*)
Carrie V. Hardman (admitted *pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 294-6700
Fax: (212) 294-4700
Email: dneier@winston.com
chardman@winston.com

Special Litigation and International Counsel to the Official Committee of Asbestos Personal Injury Claimants

Dated: September 29, 2021