

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

In re:

DBMP LLC<sup>1</sup>

Debtor.

Chapter 11

Case No. 20-30080 (JCW)

**REPLY IN FURTHER SUPPORT OF 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**

The Official Committee of Asbestos Personal Injury Claimants (the "Committee"), and Sander L. Esserman, the representative for future asbestos-related personal injury claimants (the "Future Claimants' Representative," together with the Committee, the "Movants"), respectfully submit this Reply in further support of 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* (ECF No. 1008) (the "Motion" or "Mot.")<sup>2</sup> and in response to (i) the *Debtor's Opposition to Claimant Representatives' Motion for Leave, Standing, and Authority to Investigate, Commence, Prosecute, and Settle Certain Claims* (ECF No. 1072) ("Opposition" or "Opp.") and (ii) the *Joinder to Debtor's Opposition of Certain Teed LLC and Saint-Gobain Corporation to Claimant Representatives' Motion for Leave, Standing, and*

<sup>1</sup> The last four digits of the Debtor's federal tax identification number are 8817. The Debtor's mailing address is Twenty Moores Road, Malvern, PA 19355.

<sup>2</sup> Capitalized terms not otherwise defined herein have the same meaning as in the Motion.

*Authority to Investigate, Commence, Prosecute, and Settle Certain Claims and to Conduct Examinations* (ECF No. 1074) (the “Joinder”). For the reasons set forth below as well as those in the Motion, the Movants respectfully request that the Motion be granted.

### **PRELIMINARY STATEMENT**

1. The Opposition and Joinder confirm that the Motion should be granted. There are “viable” fraudulent transfer claims regarding the Corporate Restructuring, and the “Debtor is in no position to file or prosecute them against New CertainTeed and the Other Affiliates.” Findings and Conclusions ¶¶ 172, 228. Nothing in the Opposition and Joinder refute these central tenets supporting the relief requested in the Motion.

2. Instead, the Debtor primarily relies on relief requested in two other motions, to provide tolling agreements from potential defendants and to amend the Funding Agreement, to argue that the Motion is “premature.” However, these agreements have no bearing on whether the Movants have met the requirements for derivative standing. Movants are willing to consider tolling agreements, but tolling agreements have nothing to do with standing. Similarly, the Debtor’s proposal to make postpetition amendments to the Funding Agreement has nothing to do with who should have standing with respect to viable prepetition causes of action.

3. The Debtor also asserts that a draft complaint is a prerequisite for any standing motion to be granted and that Fourth Circuit law on committee standing is not “definitive.” As discussed below, neither argument is persuasive. As at least one of the cases cited by the Debtor makes clear, a draft complaint is not required.<sup>3</sup> In addition, courts in this Circuit have acknowledged that, in circumstances like those that are present here, where there are viable

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<sup>3</sup> See *In re G-I Holdings Inc.*, 2006 WL 1751793, at \*13 (D.N.J. June 21, 2006).

prepetition claims and the Debtor is unwilling to prosecute those claims, derivative standing can be granted.<sup>4</sup>

4. With respect to discovery, the Motion simply requested that, as is permitted under Fed. R. Civ. P. 45(a)(3), the Movants not be required to seek an *ex parte* order under Local Rule 2004-1 each and every time the Movants make a request or issue a subpoena for a deposition. Movants will otherwise fully comply with Local Rule 2004-1. Such relief will save both time and estate expenses.

### **ARGUMENT**

#### **I. MOVANTS HAVE SATISFIED THE REQUIREMENTS FOR DERIVATIVE STANDING**

##### **A. Colorable Claims Exist and the Debtor has no Intention of Pursuing Those Claims**

5. As an initial matter, there is no requirement that a party seeking derivative standing must submit a draft complaint—and none of the cases cited in the Opposition suggest otherwise.<sup>5</sup> Indeed, the Opposition relies on a case where standing was granted and no draft complaint was submitted. *See In re G-I Holdings*, 2006 WL 1751793, at \*13 (“Although the Committee did not file a proposed complaint in conjunction with its motion for leave to prosecute the Pushdown Claims, it did file a summary of claims to be asserted by the Committee. The motion was sufficiently detailed to provide the Bankruptcy Court with enough information to determine standing.”) (internal citations omitted).

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<sup>4</sup> *See Scott v. Nat'l Century Fin. Enters., Inc. (In re Baltimore Emergency Servs. II, Corp.)*, 432 F.3d 557, 560 (4th Cir. 2005) (citations omitted) (“several circuits have recognized such standing when the trustee or debtor-in-possession unreasonably refuses to bring suit on its own”); Findings and Conclusions ¶ 151 n.153.

<sup>5</sup> Although the Debtor cites cases where draft complaints were submitted in connection with standing motions, *see* Opp. at 16 n.12, none of those cases—nor any other cases cited in the Opposition—provide that a draft complaint is required for a court to evaluate a standing motion.

6. As set forth in the Motion, rather than requiring the submission of draft complaints, “[c]aselaw construing requirements for ‘colorable’ claims has made it clear that the required showing is a relatively easy one to make.” *In re Adelpia Commc’ns Corp.*, 330 B.R. 364, 376 (Bankr. S.D.N.Y. 2005);<sup>6</sup> *see also* Mot. at 16 & n.43.

7. The Motion clearly sets forth in sufficient detail the claims the Movants intend to pursue if this Motion is granted. For example, the Motion explicitly states that “the Movants present more than colorable grounds to support potential claims *under both the Bankruptcy Code and UFTA for actual fraudulent conveyance*, among other claims,” Mot. at 18 (emphasis added), and further provides an overview of the allegations that support such claims, *see id.* at 18-19.<sup>7</sup> A draft complaint is therefore not required.

8. The Movants intend to commence an action asserting actual fraudulent transfer claims against at least CertainTeed Corporation, CertainTeed LLC (*i.e.*, New CertainTeed), and CertainTeed Holding Corporation. *See* Findings and Conclusions ¶ 172 (“[A]t the moment, it appears that the Divisive Merger had a material, negative effect on the asbestos creditors’ ability to recover on their claims. Thus, an action to contest the merger and its exclusive allocation of all of Old CertainTeed’s asbestos claims to DBMP, appears to be a viable cause.”); *see also id.* at p. 7, ¶ 22 (“Due to the apparent negative effects of the Divisional Merger (and this ensuing bankruptcy filing) on the legal rights of Asbestos Claimants, that Merger and its allocations *may*

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<sup>6</sup> *See also* Transcript of Proceedings, *In re Fedders North America, Inc.*, No. 1:07-bk-11176 (BLS), ECF No. 933, p. 97 (Bankr. D. Del. Apr. 3, 2008) (noting that “the sufficiency of the allegations simply cannot be [held] to a Rule 12(b)(6) standard, because we haven’t even filed the complaint yet”).

<sup>7</sup> And if that were not enough, the Motion also incorporates by reference both the Opposition to the Preliminary Injunction Motion and the Crime Fraud Motion, the latter of which contains an even more detailed recitation of the evidence adduced to date that supports an actual fraudulent transfer claim. *See* Mot. at 18; *see generally* *Motion of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants’ Representative to Compel Discovery Pursuant to the Crime-Fraud Exception and/or Waiver of the Attorney Client Privilege and Work Product Protection* (ECF No. 1006) (“Crime Fraud Motion”) at 29-31.

constitute an avoidable fraudulent transfer or otherwise be subject to attack under remedial doctrines like alter ego and successor liability.”) (emphasis in original); *see also* Mot. at 16 & n.44.

9. Contrary to the Debtor’s claims, the Motion sets forth specific colorable claims that Movants intend to promptly pursue should this Court grant this Motion, and nothing more is required. The Motion therefore is not “premature.” Opp. at 1, 15-17.<sup>8</sup>

**B. Derivative Standing is Permitted in these Circumstances**

10. In the Motion, the Movants acknowledged that “[i]n this Circuit, as in other Circuits, it is the exception, rather than the rule, that other estate fiduciaries and their professionals should be granted standing in lieu of the debtor and its professionals.” Mot. at 21 (citing *In re Baltimore Emergency Servs. II*, 432 F.3d at 560). However, the circumstances here are a prime example of the exception—a situation where the Bankruptcy Code’s contemplated scheme for protecting creditors “breaks down” and this Court should use its equitable power to craft an appropriate remedy and grant the Movants standing. *See, e.g., Off. Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 330 F.3d 548, 553 (3d Cir. 2003) (*en banc*); *see also* Mot. at 13-16.

11. As demonstrated in detail in the Motion, the Debtor and its affiliates and professionals are clearly conflicted with respect to the Corporate Restructuring; they actively participated in the Corporate Restructuring and will not pursue claims related to the Corporate Restructuring. *See* Mot. at 3, 21-23; Findings and Conclusions ¶ 228 (“if the current proceedings have proven anything, it is this: to the extent that such claims lie, the Debtor is in no position to

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<sup>8</sup> The fact that Movants might also pursue other claims as well pending further investigation does not alter the conclusion that the Motion is ripe. The Motion identifies for the Court and the Debtor these other potential claims (for example, breaches of fiduciary duty and aiding and abetting these breaches), the potential defendants (the Debtor’s managers and officers and parent companies) and summarizes the basis for such potential claims. *See* Mot. at 19-20. There is evidence that has been proffered that support such claims. Findings and Conclusions ¶ 63. The Motion thus satisfies the “plausibility” requirement for these claims, as well.

file or prosecute them”); *id.* ¶ 151 & n.153 (Debtor cannot “be expected to [bring a fraudulent transfer claim] given its close relationship to New CertainTeed”).

12. The Debtor’s contention that the Movants have failed to satisfy a claimed “cost-benefit test” also fails. The benefit to the estate clearly outweighs the cost of the investigation and prosecution of claims related to the Corporate Restructuring, as summarized in the Motion. *See* Mot. at 20. If the Corporate Restructuring that separated Old CertainTeed’s asbestos liabilities from its assets were avoided, it would certainly provide substantial benefits to asbestos creditors and exceed the costs associated with pursuing the contemplated fraudulent transfer action.

13. Finally, in a last-ditch effort to avoid standing, the Debtor argues that allowing the Movants to pursue colorable fraudulent transfer claims would delay and further distract from the “central issue” of determining the extent of the Debtor’s liability for asbestos claims and the reorganization process. *See* Opp. at 20-23. However, the fraudulent transfer claims regarding the Corporate Restructuring that the Movants intend to pursue go to the very heart of the appropriateness of the Debtor’s bankruptcy filing. The Movants submit that, through the Corporate Restructuring, CertainTeed engaged in a scheme aimed at hindering and delaying payments to asbestos creditors, who, alone amongst all of CertainTeed’s creditors, were subjected to compromise of their claims through bankruptcy. If so, then there simply is no need for an estimation proceeding. It is thus the Debtor—and not the Movants—that seeks to “put[] the cart before the horse.” Opp. at 2, 15.

**C. The Proposed Tolling Agreements and Amended Funding Agreement are Irrelevant to the Issue of Standing**

14. The Opposition and Joinder rely heavily on the proposed tolling agreements and amended Funding Agreement to argue that the Movants’ standing Motion is premature and unnecessary. These arguments, however, are irrelevant to the central questions presented by this

Motion—namely, whether colorable claims related to the Corporate Restructuring exist and whether the Movants, rather than the Debtor, are the proper party for bringing such claims.

15. Among other issues that will be addressed in a separate response to the unrelated motion, the proposed tolling agreements are unilateral in nature, they are unlimited in time frame, and they can only be terminated by the potential defendant.<sup>9</sup> As such, they are not “agreements” so much as part of a strategy to attempt to delay and derail any potential estate causes of action from being commenced, and the Court should consider them of no moment in determining whether the Movants are entitled to obtain standing. The Movants are willing to consider bilateral tolling agreements that can be terminated by the Movants on behalf of the estate in addition to the potential defendant, but the Debtor refuses to consent to standing for anyone but itself. In any event, whether parties agree to toll statutes of limitations has nothing to do with who should have standing to assert estate causes of action.

16. The Opposition makes several references to the tolling agreements entered into in the *Kaiser Gypsum* and *Garlock* bankruptcies and suggests that a similar tolling agreement should be acceptable to Movants here. However, neither of those cases involved a prepetition divisional merger, separating the assets from asbestos claims.<sup>10</sup>

17. Similarly, postpetition amendments to the Funding Agreement have nothing to do with who has standing to commence causes of action based on prepetition conduct.<sup>11</sup> In sum,

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<sup>9</sup> The Movants anticipate filing a response or responses to the Debtor’s motion to approve the tolling agreement (*Motion of the Debtor for an Order Authorizing It to Enter into Tolling Agreement*, ECF No. 1069), and thus reserve all rights with respect thereto.

<sup>10</sup> In addition, in the *Kaiser Gypsum* bankruptcy, the debtor made the motion to enter into tolling agreements only *after* the ACC had reached a global resolution with the debtors. *In re Kaiser Gypsum Co., Inc.*, No. 3:16-bk-31602 (JCW), ECF Nos. 854, 1131 (Bankr. W.D.N.C.) (tolling agreement dated Aug. 24, 2018, reached *after* the Debtors filed a term sheet with ACC on Mar. 6, 2018, which noted that the parties had reached an agreement “on the treatment of current and future asbestos-related claims in a consensual plan of reorganization”).

<sup>11</sup> The Movants refer the Court to the *Objection of the Official Committee of Asbestos Personal Injury Claimants to Debtor’s Motion to Approve Second Amended Funding Agreement* Hearing dated September 29, 2021 (ECF No.

because the proposed tolling agreements and amendments to the Funding Agreement have no bearing on the central issues relevant to whether derivative standing for the Movants is appropriate, they provide no grounds for denying the instant Motion.

## II. THE RULE 2004 DISCOVERY SOUGHT BY MOVANTS IS PROPER

18. The Movants seek to conduct Rule 2004 examinations to fully investigate the Corporate Restructuring without having to obtain an *ex parte* order for each deposition pursuant to Local Rule 2004-1, as is permitted under Fed R. Civ. P. 45(a)(3) (“An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.”). This will save both time and estate expenses without prejudicing anyone’s rights. The Movants will otherwise comply with Local Rule 2004-1, including with respect to conferring about a mutually agreeable date for examination and giving the appropriate amount of notice as provided in Local Rule 2004-1(c). In response, the Debtor and its corporate affiliates argue that the Movants are required to identify “all of the ‘third parties’ from whom discovery will be sought and what materials would be requested.” Opp. at 24. Leaving aside the fact that the Motion does identify parties that the Movants seek to examine, *see, e.g.*, Mot. at 27, 28, courts have granted broad authority to conduct Rule 2004 examinations without requiring the party seeking the discovery to identify the specific parties that could be subject to the investigation or subpoenas.<sup>12</sup>

19. In addition, if the authority requested by the Movants to conduct Rule 2004 examinations is granted, the subjects of the examination are not without protections. As a case

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1083), and the *Joinder of the Future Claimants’ Representative to the Objection of the Official Committee of Asbestos Personal Injury Claimants to Debtor’s Motion to Approve Second Amended Funding Agreement* dated September 29, 2021 (ECF No. 1084).

<sup>12</sup> *See, e.g., In re Lehman Brothers Holdings Inc.*, No. 08-bk-13555 (JMP), ECF Nos. 2694, 2804 (S.D.N.Y. Bankr. 2009) (granting examiner authority to issue Rule 2004 subpoenas without requirement to make individual applications to court); *In re Caesars Entertainment Operating Co., Inc.*, No. 1:15-bk-01145 (ABG), ECF. Nos. 363, 367, 675 (N.D. Ill. Bankr. 2015) (same).

cited by the Debtor makes clear, Rule 2004 “contemplates only that the court may order the examination of any entity; cooperation in the examination process is then secured with a subpoena, issued under Rule 45 of the Federal Rules of Civil Procedure. If the target of the examination believes that the subpoena is inappropriate, it may take advantage of the procedures outlined there.” *In re Young*, No. 17-22666, 2019 Bankr. LEXIS 3966, at \*3 (Bankr. N.D. Ind. July 5, 2019) (internal citation omitted). As such, any claims by the Debtor that the discovery sought will somehow be “unsupervised” by the Court are unfounded.

20. Contrary to the arguments in the Opposition and Joinder, the discovery sought is not unlimited. The investigation contemplated by the Movants is finite in time and scope. As explained in the Motion, the Movants seek to investigate the Corporate Restructuring, which began at a finite period of time. The discovery primarily concerns events that took place over an approximately two-year period.<sup>13</sup> Similarly, the Movants have made clear that the focus of the discovery sought is the Corporate Restructuring. Further, the Movants made clear in the Motion that they will not seek to duplicate the discovery already obtained. Mot. ¶ 53. Accordingly, far from being “unlimited,” the scope of the Rule 2004 examinations sought is appropriately circumscribed.

21. Having acknowledged the Movants’ right to investigate the Corporate Restructuring, the Debtor should not now be permitted to hinder, delay or prevent that examination. Accordingly, for the reasons set forth above and in the Motion, this Court should

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<sup>13</sup> See, e.g., *Debtor’s Objection to the Official Committee of Asbestos Personal Injury Claimants’ and the Future Claimants’ Representative’s Motion to Compel Discovery Pursuant to the Crime-Fraud Exception and/or Waiver of the Attorney Client Privilege and Work Product Protection* (ECF No. 1071), p. 6 (“Project Horizon was the name given to the effort to evaluate undertaking what became the Corporate Restructuring, and *Project Horizon meetings were held serially over the course of nearly two years.*”) (emphasis added).

grant the Movants' request to conduct Rule 2004 examinations to fully investigate the Corporate Restructuring without the need to obtain *ex parte* orders pursuant to Local Rule 2004-1.

**CONCLUSION**

Wherefore, for the foregoing reasons as well as those set forth in the Motion, the Movants respectfully request that this Court enter an order, substantially in the form attached to the Motion as Exhibit A, granting the relief requested, and granting the Movants such other and further relief as the Court deems just and proper.

[signature page follows]

Respectfully submitted,

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