

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

In re:

DBMP LLC¹

Debtor.

Chapter 11

Case No. 20-30080 (JCW)

**OBJECTION TO THE DEBTOR’S MOTION FOR AN ORDER AUTHORIZING
THE DEBTOR TO ENTER INTO TOLLING AGREEMENTS**

The Official Committee of Asbestos Personal Injury Claimants (the “Committee”) and the Future Claimant’s Representative (the “FCR” and, collectively with the Committee, the “Claimant Representatives”), respectfully submit this objection (the “Objection”) to the *Motion of the Debtor for an Order Authorizing It to Enter into Tolling Agreement* (ECF No. 1069) (the “Motion”),² which seeks approval of the Debtor’s proposed form of tolling agreement that is attached to the Motion as Exhibit A (the “Proposed Tolling Agreement”) and state as follows:

PRELIMINARY STATEMENT

1. The Motion is a further attempt to delay and derail the Claimant Representatives’ motion for standing (ECF No. 1008) (the “Standing Motion”).³ However, the Claimant Representatives are not opposed to the entry of *consensual* tolling agreements. Toward that end, the Claimant Representatives proposed that any tolling agreement be entered into with the Claimant Representatives and not merely as an agreement between insiders. The Debtor rejected

¹ 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.

² Capitalized terms not otherwise defined herein have the same meaning as in the Motion.

³ The Debtor and its affiliates objected to the Standing Motion (ECF Nos. 1072 & 1074), and the Claimant Representatives filed a reply in support of the Standing Motion. (ECF No. 1085). The Court heard argument on the Standing Motion and related pleadings on October 5, 2021, and as of this date, the matter is *sub judice*.

that and stated it would not consent to standing under any circumstances. The Claimant Representatives further proposed that the Debtor defer this Motion until after the Standing Motion had been resolved, but, once again, the Debtor refused. Accordingly, notwithstanding that there might eventually be a consensual tolling agreement for certain potential defendants, the Claimant Representatives are compelled to oppose the Proposed Tolling Agreement.

2. Although the Debtor argues that entry into the Proposed Tolling Agreement either (i) needs no approval of the Court, or (ii) should be approved as within the Debtor's business judgment, neither argument is appropriate. An agreement between insiders, as the Fourth Circuit has made clear, is subject to "rigorous" or "strict scrutiny." This standard requires an "inherent fairness and good faith" in the terms of the Proposed Tolling Agreement. The Motion and the Proposed Tolling Agreement should be denied on that basis and for the following reasons:

- The Motion's proposed order⁴ contains a disguised injunction of the Standing Motion;
- The Proposed Tolling Agreement provides an overly narrow definition of Estate Claims;
- The Proposed Tolling Agreement cannot be terminated by anyone other than the potential defendants; and
- Because only the Debtor and the potential defendants are parties to the Proposed Tolling Agreement, they alone decide who would enter into the Proposed Tolling Agreement.

ARGUMENT

I. THE MOTION SEEKS APPROVAL OF AN INSIDER TRANSACTION THAT IS SUBJECT TO STRICT SCRUTINY.

3. The Debtor submits that the Motion should be approved pursuant to section 363(c)(1) of the Bankruptcy Code (which permits transactions to be entered into in the ordinary

⁴ See ECF No. 1069, Ex. B (the "Proposed Order").

course of business without notice and a hearing), or alternatively, pursuant to section 363(b) (which permits non-ordinary course transactions to be approved in a debtor's business judgment).

Motion, ECF No. 1069, ¶¶ 15-17. Neither standard is appropriate.

4. The Proposed Tolling Agreement is an agreement among insiders, between the Debtor and its direct and indirect parents and affiliates, who will be subject to a complaint for actual fraudulent transfer if the Standing Motion is granted.⁵ Accordingly, the Motion is subject to "rigorous" or "strict scrutiny." *Stancill v. Harford Sands Inc. (In re Harford Sands Inc.)*, 372 F.3d 637, 640-41 (4th Cir. 2004) (proof of claim by insider subject to strict scrutiny, and insider claimant bears heightened burden of proving "the inherent fairness and good faith of the challenged transaction"); *see also In re Red F Mktg., LLC*, 547 B.R. 168, 175 (Bankr. W.D.N.C. 2016) (Whitley, J.) (citing *Harford Sands* and other cases and noting that, "[b]ecause of the influence and control an insider may wield, an insider's transactions with a debtor are subject to 'rigorous' or 'strict scrutiny.'"). Accordingly, the Debtor must demonstrate that the transaction meets the entire-fairness standard. *In re Red F Mktg., LLC*, 547 B.R. at 175 (citing *Harford Sands*). With no employees of its own, a conflicted board, and with controlling parent(s) and affiliates that are potential defendants, the Debtor cannot meet the entire fairness standard.

II. THE PROPOSED ORDER APPROVING THE MOTION AND THE PROPOSED TOLLING AGREEMENT CONTAIN IMPROPER PROVISIONS.

5. The Proposed Order and the Proposed Tolling Agreement contain improper provisions, as described in detail below, which further establish that the relief sought in the Motion does not meet the entire fairness standard.

⁵ See 11 U.S.C. §101(31)(B) (defining "insider"); *see also In re Oakwood Country Club, Inc.*, 2010 WL 4916436, at *5 (Bankr. W.D. Va. Apr. 6, 2010) (definition of insider is suggestive and not exclusive, and requires only "sufficient closeness to the debtor to preclude the notion of an arms' length transaction" (citations omitted)).

A. The Motion Is a Further Attempt by the Debtor to Delay and Derail the Standing Motion.

6. Although entry into tolling agreements has nothing to do with the issue of who should have standing to assert estate claims, the Debtor primarily attempts to use the Motion to reargue its opposition to the Standing Motion. *See, e.g.*, Motion, ECF No. 1069, ¶¶ 1-4. Re-argument with respect to a motion that is already *sub judice* should be disregarded.

7. As the Proposed Order makes clear, the Motion’s true intention is to derail, and even potentially enjoin, the relief sought in the Standing Motion. The Proposed Order states that:

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

Motion, ECF No. 1069, Ex. B ¶ F.

B. The Estate Claims Proposed to Be Tolled Are Improperly Narrow.

8. The Proposed Tolling Agreement is limited to claims with respect to the “Corporate Restructuring” as is described by the *Declaration of Robert J. Panaro in Support of First Day Pleadings*, ECF No. 24 (the “First Day Declaration”). *See* Motion, ECF No. 1069, Ex. A ¶ C. In the First Day Declaration, the “2019 Corporate Restructuring” is defined as the transaction that was completed on October 23, 2019. *See* First Day Declaration, ECF No. 24, ¶¶ 14-18.

9. This definition of the potential causes of action to be tolled is improperly narrow and limited. The 2019 Corporate Restructuring, as defined in the Proposed Tolling Agreement, does not encapsulate all steps taken *both prior to and after* October 23, 2019, including, without limitation, the determination of the board to file a bankruptcy petition for DBMP. Any tolling agreement should toll *all* claims that could be asserted arising from, related to, or otherwise concerning the Corporate Restructuring.

C. Unilateral Termination Rights Are Improper.

10. The Proposed Tolling Agreement provides an initial six-month extension to “all applicable statutes of limitations,” subject to an automatic extension unless the *potential defendant* provides notice of an intention not to renew, which is required on at least 60 days’ notice. Motion, ECF No. 1069, ¶ 6; *see also id.*, ECF No. 1069, Ex. A ¶¶ 1-2 (emphasis added). The Proposed Tolling Agreement is ominously silent as to whether an action can be commenced prior to its termination. The existence of an executed tolling agreement could be used by a potential defendant to dismiss any action commenced, even if that action is commenced by a Claimant Representative (assuming the Court grants the Standing Motion).

D. The Debtor Should Not Be the Arbiter as to Who May Enter into a Tolling Agreement.

11. The Debtor proposes to toll statutes of limitations with New CT, CT Holding, and SGC. Motion, ECF No. 1069, ¶ 3. The Debtor further notes that it may seek tolling agreements from other potential defendants that may be identified by the Claimant Representatives. Motion, ECF No. 1069, ¶ 3 n.4; Motion, ECF No. 1069, Ex. A n.2. The Debtor should not be the arbiter of who should enter into tolling agreements; that should be done directly between a non-insider and a potential defendant. It is conceivable that that Debtor may have reasons to offer some and not others tolling agreements, just as the Claimant Representatives may have reasons to offer some and not others tolling agreements. The Debtor, its direct and indirect parents and affiliates should not be involved in this determination.

12. In addition, although the Proposed Tolling Agreement is offered in lieu of granting the Standing Motion, it is unclear what would happen if the Standing Motion was denied in favor of the Proposed Tolling Agreement, and a potential defendant elected *not* to execute the Proposed Tolling Agreement. There is the potential that the applicable statutes of limitations would lapse

as to that potential defendant. Nowhere in the Motion is there any commitment that every potential defendant would enter into a tolling agreement. Nor is there any guarantee that if a potential defendant declines to execute a tolling agreement that the Debtor will timely file an action against that defendant.

13. Simply put, leaving standing to commence estate causes of action in the hands of the Debtor while also leaving the Debtor as the arbiter of who enters into a tolling agreement is a recipe for mischief, and for prejudice to the Debtor's estate and the asbestos claimants which constitute all of its creditors.

CONCLUSION

Wherefore, for the foregoing reasons, the Claimant Representatives respectfully request that this Court deny the Motion and grant the Claimant Representatives such other and further relief as the Court deems just and proper.

[signature page follows]

Respectfully submitted,
Dated: October 7, 2021

**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 for the Official Committee of
Asbestos Personal Injury Claimants*

CAPLIN & DRYSDALE, CHARTERED

Kevin C. Maclay (admitted *pro hac vice*)
Jeffrey A. Liesemer (admitted *pro hac vice*)
Todd E. Phillips (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
jliesemer@capdale.com
tphillips@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*

ALEXANDER RICKS PLLC

/s/ Felton E. Parrish

Felton E. Parrish (NC Bar No. 25448)
1420 East 7th Street, Suite 100
Charlotte, NC 28204
Telephone: 704-365-3656
Facsimile: 704-365-3676
Email: felton.parrish@alexanderricks.com

*Local Counsel to the Future Claimants'
Representative*

**YOUNG CONAWAY STARGATT
& TAYLOR, LLP**

James L. Patton, Jr. (Del. Bar No. 2202)
Edwin J. Harron (Del. Bar No. 3396)
Sharon M. Zieg (NC Bar No. 29536)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253
Email: jpatton@ycst.com
eharron@ycst.com
szieg@ycst.com

*Counsel to the Future Claimants'
Representative*

WINSTON & STRAWN LLP

David Neier (admitted *pro hac vice*)

Carrie V. Hardman (admitted *pro hac vice*)

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*