

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re

DBMP LLC,¹

Debtor.

Chapter 11

Case No. 20-30080 (JCW)

**REPLY IN SUPPORT OF MOTION OF THE DEBTOR FOR
AN ORDER AUTHORIZING IT TO ENTER INTO TOLLING AGREEMENT**

DBMP LLC, the debtor and debtor in possession in the above-captioned chapter 11 case (the “Debtor” or “DBMP”), files this Reply in support of the *Motion of the Debtor for an Order Authorizing It to Enter into Tolling Agreement* [Dkt. 1069] (the “Tolling Motion”)² and in response to the *Objection to the Debtor’s Motion for an Order Authorizing the Debtor to Enter into Tolling Agreements* [Dkt. 1128] (the “Objection”) filed by the Claimant Representatives.

Preliminary Statement

1. Before filing the Tolling Motion, the Debtor advised the Claimant Representatives that it intended to put in place a tolling agreement to ensure that estate claims are preserved for the benefit of the estate and to provide the Claimant Representatives with time to complete their (apparently unfinished) investigation. The Debtor’s counsel sent a draft agreement to the Claimant Representatives’ counsel on September 14, 2021 and at a later meet and confer asked the Claimant Representatives to identify potential defendants they wanted the Debtor to include as parties to the agreement. The Claimant Representatives never responded to the draft tolling agreement, nor did they identify any potential defendants for inclusion as parties to the

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 Capitalized terms not defined herein have the meanings given to them in the Tolling Motion.

agreement. The Claimant Representatives instead asserted that obtaining standing to pursue claims against some unidentified set of potential defendants was their priority, sought the Debtor's agreement to standing and raised issues about the effectiveness of tolling agreements.³ This led the Debtor to propose the Tolling Agreement with New CT, CT Holding and SGC (the most likely known targets of a potential action) to preserve causes of action against them for the benefit of the estate.⁴ The Objection ignores this history and raises a series of unfounded concerns that are contrary to the plain language of the Tolling Motion and the Tolling Agreement.

2. The Claimant Representatives complain that the Debtor has declined to consent to standing in a situation where the Claimant Representatives have not completed their investigation, have not identified potential defendants, have not submitted a proposed complaint and have not demonstrated that the potential benefits of the proposed litigation outweigh the potential costs. *See* Obj. ¶¶ 1, 6. But none of this bears on whether the Tolling Agreement is appropriate.

3. The Tolling Agreement is a well-established mechanism to preserve estate causes of action and should be approved here. The Tolling Motion should be granted.

Argument

4. Legal Standard. In the Objection, the Claimant Representatives assert that entry into the Tolling Agreement should be subject to strict scrutiny, not a business judgment standard. Obj. Part I. Although the Tolling Agreement is between the Debtor and certain affiliates,

³ *See, e.g.*, Claimant Representatives' objection to Debtor's motion to continue [Dkt. 1048 at n.16] (citing cases for proposition that "tolling agreements in this context are ineffectual as § 546(a) is a statute of repose that may not be tolled"). The Debtor addressed this issue in the Tolling Motion and in the Tolling Agreement. *See, e.g.*, Tolling Mot. ¶¶ 20-22 (citing cases supporting effectiveness of tolling agreements and describing alternative contractual right granted by the Tolling Agreement); Tolling Agreement ¶ 4 (creating distinct contractual right in the unlikely event that tolling is ineffective).

⁴ The Tolling Agreement is substantially similar to the one proposed to the Claimant Representatives prior to the filing of the Tolling Motion.

it is solely for the benefit of the estate and operates only to preserve Estate Claims. The Tolling Agreement imposes no obligations or costs on the Debtor and cannot harm the Debtor's estate, nor does it prevent the Claimant Representatives from pursuing Estate Claims if the Court grants them standing to do so. The Claimant Representatives' assertion that the Debtor cannot meet the entire fairness standard thus is incorrect and beside the point.⁵

5. No Impact on Standing Motion. The Claimant Representatives argue that the Tolling Motion is an attempt to delay and derail the Standing Motion. Obj. ¶¶ 6-7. But the Standing Motion already has been fully briefed and argued before the Court. And nothing in the Tolling Agreement would prevent the Claimant Representatives from bringing Estate Claims were the Court to grant them standing (either now, over the Debtor's objection, or in the future), as explicitly stated in the Tolling Motion. Tolling Mot. ¶ 7. But if standing is denied (as the Debtor believes is appropriate at this juncture), the Tolling Agreement will ensure that Estate Claims will not become time-barred.

6. No Injunction. The assertion that the proposed order would somehow enjoin the relief sought in the Standing Motion ignores both the plain language and meaning of the proposed order. The proposed order states that "there is *no need* for any further action to be taken to *preserve* such claims," Tolling Mot., Ex. B ¶ F (emphasis added). The Claimant Representatives purport to read this phrase as an injunction. But this language prohibits nothing. *See, e.g.*, Tolling Mot. ¶ 7 (the Tolling Agreement "is *not* a standstill and does *not* prevent either the investigation of Estate Claims or the pursuit of those claims") (emphasis added). Instead, it benefits the Debtor's

⁵ The cases cited by the Claimant Representatives are inapposite. *See Stancill v. Harford Sands Inc. (In re Harford Sands Inc.)*, 372 F.3d 637 (4th Cir. 2004); *In re Red F Mktg., LLC*, 547 B.R. 168 (Bankr. W.D.N.C. 2016). The issue in both those cases was the validity of a claim held by an insider of the debtor. Determination of that issue could result in a finding of liability against the debtor and could affect recoveries of other estate creditors. Here, the Tolling Agreement can only benefit the estate by preserving Estate Claims.

estate by making clear that Estate Claims are *preserved* even if no complaint is filed and no other action is taken prior to the limitations deadline. This is the fundamental purpose of the Tolling Agreement. The concerns about a standstill or implied injunction have no merit.

7. Termination Rights. Similarly, the argument that the “unilateral termination rights” in the Tolling Agreement are improper, Obj. ¶ 10, ignores that the Tolling Agreement is *not* a standstill. The potential defendants have the right to terminate the tolling if they want to avoid further delay in the determination of whether suits will be brought against them. But an estate representative would have no need to terminate the agreement. The Tolling Agreement does not prevent an estate representative from pursuing litigation that is authorized by the Court, and the agreement would not need to be terminated for that purpose. Tolling Mot. ¶ 7 n.7.

8. Definition of Estate Claims. The Claimant Representatives argue that the definition of Estate Claims is improperly narrow, Obj. ¶¶ 8-9, but disregard that Estate Claims are defined in the Tolling Agreement as “any claims that the Debtor’s estate may have against the Potential Defendants as of the Effective Date, which claims *relate to or arise from* the Corporate Restructuring.” Tolling Agreement, Recital C (emphasis added). The definition itself utilizes the “related to” and “arising from” constructs that the Claimant Representatives maintain are lacking. Obj. ¶ 9. Nonetheless, the Debtor would be willing to amend the definition if the Claimant Representatives believe that other potential estate claims may exist that are unrelated to the Corporate Restructuring.

9. Potential Defendants. The Claimant Representatives’ final argument is that the Debtor “should not be the arbiter of who should enter into tolling agreements.” Obj. ¶¶ 11-13. The Debtor agrees and that is the reason it asked the Claimant Representatives for input regarding

potential defendants. In the absence of any response, the Debtor included, as counterparties to the Tolling Agreement, those parties who seemed most likely to be potential defendants. At the same time, however, the Debtor expressly noted that it would facilitate agreement from other potential defendants who may be identified *by the Claimant Representatives*. Tolling Agreement at 1 n.2; *see also* Tolling Mot. ¶ 3 n.4 (“To date, the Claimant Representatives have not identified which parties they believe are potential defendants in the actions they have been investigating. The Debtor . . . is willing to seek agreement from other potential defendants who may be identified by the Claimant Representatives. As noted, the proposed Tolling Agreement is drafted to accommodate that.”)

10. The Claimant Representatives’ failure to provide input to date on potential defendants is not a basis to deny the Tolling Motion. The Tolling Agreement as drafted would only benefit the estate by preserving claims against the three potential defendants the Debtor has identified. Additionally, the Debtor has indicated its willingness to facilitate the inclusion of additional parties to the Tolling Agreement that may be identified by the Claimant Representatives.

11. Instead of objecting to the Tolling Motion, the Claimant Representatives should be cooperating with the Debtor to finalize a tolling agreement that preserves all potential estate claims against all potential defendants.

Conclusion

For all of these reasons and those set forth in the Tolling Motion, this Court should authorize the Debtor’s entry into the Tolling Agreement.

Dated: October 11, 2021
Charlotte, North Carolina

Respectfully submitted,

/s/ Garland S. Cassada

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