UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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

REPLY OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS IN FURTHER SUPPORT FOR THE CONDITIONAL MOTION PURSUANT TO RULE 2004 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE FOR AN ORDER DIRECTING THE SUBMISSION OF INFORMATION BY DEBTOR'S DEFENSE COUNSEL

The Committee,[2] by and through its undersigned counsel, respectfully submits this reply to the Debtor's objection (the "**DCQ Objection**") to the Committee's conditional motion (the "**DCQ Motion**"), requesting that this Court enter an order compelling Debtor's historical asbestos defense firms ("**Defense Counsel**") to complete and submit the questionnaire (the "**DCQ**") attached to the DCQ Motion. In support, the Committee states as follows:

PRELIMINARY STATEMENT

1. The Debtor—an artifice created to insulate CertainTeed LLC, Saint Gobain Corporation, and their ultimate French parent from significant personal injury liabilities stemming from decades of corporate malfeasance and negligence related to the manufacture of asbestos-contaminated products—sought this Court's protection and now seeks this Court's approval to issue extensive, invasive discovery to eleven asbestos settlement trusts and to thousands of

[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 shall have the meanings ascribed to them in the DCQ Motion.

asbestos claimants. Meanwhile, the Committee seeks modest discovery from the Debtor's defense counsel.

2. The Debtor responded to the DCQ Motion with hyperbole, accusations of an effort to breach the Debtor's purported privilege, and complaints about the potential costs involved to the estate if Defense Counsel are required to complete the DCQ. The Debtor has little room for complaint—it first questioned its own settlement history in the *Informational Brief of DBMP LLC*. And, if the Court concludes it is appropriate to grant the Trust Discovery Motion, the Committee will need the DCQ Responses to determine whether the Debtor's and CertainTeed's assertions about their historical experiences in the tort system are accurate and what information the Debtor and CertainTeed had when resolving CertainTeed's asbestos-related liabilities.

3. Should this Court determine that the Debtor's estimation program, with its attendant discovery, be permitted, the Committee posits it is reasonable for it to be permitted to take some discovery of its own from the Defense Counsel who litigated, settled, or otherwise resolved CertainTeed's asbestos liabilities. The DCQ seeks information about the factual underpinnings and other information known to Defense Counsel about the settlements—settlements that ***the Debtor*** *and not the Committee* first called into question on the Petition Date. To be clear, the Committee seeks *facts*, which are not privileged even when included in an otherwise privileged communication.

4. The Debtor contends that the Committee should be content with the existing discovery productions. This argument, however, runs counter to the Debtor's other assertion that gaps exist in its own records. Dr. Bates acknowledges these gaps, but further posits that Defense Counsel records must be likewise incomplete while asserting that only the plaintiffs *and their counsel* have complete records for current and historical claims. The Debtor's—and Dr. Bates'—

contentions are illogical: the Defense Counsel and the Debtor must have developed their own set of individual facts in connection with a decision to resolve a particular case. If the Debtor's 2004 Motions are granted, the Committee should have the opportunity to test the Debtor's assertion.

5. Finally, the Debtor attempts to take the Court's recent limited ruling on at-issue waiver out of context. Facts that the Debtor and Defense Counsel knew at the time they resolved a particular case are not privileged material subject to an at-issue waiver because *facts are not privileged even when incorporated into an otherwise privileged document.* Fact discovery directed to Defense Counsel is appropriate if the Court concludes that the Debtor has met its burden on issuing the discovery requested in the Trust Discovery Motion. If the Court grants the Trust Discovery Motion, then the Court should also grant the DCQ Motion and permit the Committee to issue the DCQ to Defense Counsel (and require Defense Counsel to submit responses).

REPLY

I. THE DCQ IS RELEVANT BECAUSE IT WILL ASSIST THE COMMITTEE IN RESPONDING TO ANY DISCOVERY PRODUCED PURSUANT TO THE TRUST DISCOVERY MOTION AND USED BY THE DEBTOR.

6. The Debtor suggests that the DCQ will not lead to relevant information. *See* DCQ Objection at 5-6. The Debtor furthers this assertion by attempting to recharacterize the DCQ as discovery more extensive and more intrusive than the Debtor's own proposed Trust Discovery (or, for that matter, the PIQ Discovery). This is a false dichotomy. The Trust Discovery Motion seeks extensive information on 9,000 *former claimants* from each of eleven (11) asbestos settlement trusts. These settled claimants, many of whom may be deceased, are no longer claimants of the Debtor but are potentially and involuntarily going to become part of this proceeding.[3] Conversely, the DCQ seeks discovery from a limited number of Defense Counsel for a select group of former

[3] Trust Discovery Motion, ¶¶2, 5.

claimants. The DCQ provides the Committee with discovery necessary to provide a complete picture of a portion of the Debtor's settlement history.

7. The Debtor's objection to the DCQ is further undermined by the Debtor's assertion that it was the Committee, and not the Debtor, that first placed the Debtor's historical settlement values at issue. This assertion is demonstrably false; it was the Debtor who first questioned its settlement history.

8. *First*, the Debtor's Informational Brief[4]—filed on the first day of this case—argues that CertainTeed was a "victim" of evidence suppression that inflated settlement values. Completely unrelated to any estimation methodology, the Debtor discusses alleged failures to disclose trust submission by several claimants which the Debtor contends impacted its settlement analysis.[5] Tellingly, the Debtor stated:

> As a result of what is at least troubling and potentially intentional product misidentification and failures to disclose all material exposure evidence, Old CT could not be assured that even if it spent significant sums to fully investigate every claim, it would learn all facts relevant to its defense. As a result, it made more economic sense for Old CT to agree to (usually) small settlements rather than fully litigate the claims filed against it. Plaintiffs' practices also may have increased Old CT's trial risk in the small number of cases it settled for significant amounts, and potentially in the even smaller number of cases where plaintiffs obtained verdicts against Old CT. *Determining the full extent of the impact would require discovery.*[6]

Indeed, trust disclosures were always contemplated by the Debtor as part of its *case-in-chief* and any effort to recast it now as a defensive mechanism is specious.

9. *Second*, Amiel Gross's deposition testimony demonstrated that the 2019 Corporate Restructuring's purpose was to isolate CertainTeed's asbestos liabilities in a separate company

[4] *Information Brief of DBMP, LLC* [Docket. No. 22] (filed Jan. 23, 2020).

[5] *Id.* at 20-24.

[6] *Id.* at 24.

stripped of vital assets.[7] The theory continued that the filing the Debtor's bankruptcy case would permit CertainTeed—through the Debtor—to engage in a *Garlock*-type estimation designed to reduce the Debtor's tort system liabilities by questioning CertainTeed's settlement history.[8] The Debtor itself has determined that invalidating its settlement history is a critical component to the *Garlock*-like estimation proceeding it seeks.

10. Further manipulating the narrative, the Debtor asserts that the Committee's estimation methodology requires the Debtor to seek the Trust Discovery to test the Committee's estimation methodology. More accurately, the Debtor seeks Trust Discovery to substantiate its otherwise unsupported allegation from the Informational Brief (and the Trust Discovery Motion briefing)—filed before any estimation process had even been proposed by the Debtor, before the Court appointed either the Committee or the FCR, and before any methodology was even discussed by the parties[9]—that that asbestos plaintiffs knew more than CertainTeed (or the Debtor, at least for the minimal amount of time it was in the tort system)—ignoring, or course, the impact of certain state discovery laws—when CertainTeed chose to settle or otherwise resolve a case. In other words, the Debtor seeks discovery to determine if what it asserted at the beginning of the case, should have been asserted at the beginning of the case.

11. The Debtor and its ongoing effort to challenge CertainTeed's settlement history is why the DCQ is relevant discovery. If the Debtor is permitted to engage in a quixotic investigation

[7] *See* Gross Dep. Tr. 106:17-107:10, June 2, 2021 ("I believed and knew that the real purpose [of CertainTeed's restructuring] was to wind up with . . . an entity loaded with asbestos liability for purpose of a bankruptcy proceeding and ultimate estimation that was less than continuing business as usual."). As the Court is aware, Amiel Gross is a former in-house counsel for CertainTeed who was also seconded to the Debtor until October 2020.

[8] *Id.* at 107:20-23 ("Q. Did you understand that an estimation proceeding was part of the objective of the bankruptcy? A. Of course."); *see also id*. at 108:8-16 (testifying that estimation was "what happened with Garlock to a favorable outcome. And that, you know, was where the Bestwall matter was heading, and so . . . the understanding is that the end objective is to obtain a final asbestos liability bill for less . . . than the tort system." (emphasis added)).

[9] *Information Brief of DBMP, LLC* [Docket. No. 22] filed on January 23, 2020, the Petition Date.

for "complete information" in an attempt to invalidate CertainTeed's past settlements with the benefit of 20/20 hindsight, then the Committee is likewise entitled to discovery to determine what facts CertainTeed (and the Debtor) knew or should have known when it entered into such settlements. The information sought by the DCQ would be vital to the Committee in connection with any Trust Discovery and it is only fair that the Committee be allowed to test the Debtor's characterization of its settlement history. Unlike the Debtor, the Committee *does not* have access to any of this information. Further, the DCQ will also give the Committee insight into the extent to which the Debtor utilized large group settlements, and how claims within those settlements were selected and treated, which is part of the Debtor's *case- in-chief.*[10]

II. THE COMMITTEE HAS GOOD CAUSE TO ISSUE THE DCQ BECAUSE THE DEBTOR HAS NOT PROVIDED THE REQUESTED DISCOVERY.

12. The Debtor asserts that the requests in the DCQ, if directed to anyone, should be directed to the Debtor. But the Committee has already requested discovery from the Debtor, to which the Debtor has asserted that it has responded. *DCQ Obj.*, at 6-7. The Debtor's Objection acknowledges that the Debtor has determined that information is responsive in its sole discretion. *Id.*, at 7 n.8.

13. Despite the Debtor's protests that its production has been comprehensive, *id.*, at 5-6, the Debtor's records are, by its own admission, incomplete. The Debtor's chief legal officer, Michael Starczewski (on secondment from the Debtor's parent, Saint-Gobain Corporation), has provided extensive testimony regarding the Debtor's PACE database, including information expected to be uploaded to that database by defense counsel, but which may have been missed. *Transcript of Deposition of Michael Starczewski* (April 30, 2021) ("Starczewski Dep. Tr."), 24:22-

[10] The Debtor's Objection states that the Debtor has provided information with respect to two group settlements because, in the Debtor's view, they are the "only settlements that *the Debtor* considers 'group settlements." DCQ Objection, at 7 n.8.

25:14 (describing limitations of data kept by PACE); 37:19-42:23 (describing expectations that defense counsel would upload to PACE dismissal and settlement information, including settlement amounts, and gaps in information due to defense counsel's failure to properly report). Indeed, Mr. Starczewski noted that historically, while "local counsel were directed to notify PACE and submit a form with the supporting documentation to PACE, which would then allow PACE to change the status of the claim in our database," keeping records up to date "was a continuing issue" with defense counsel. *Id.,* 39:4-7, 40:23-41:3.

14. Accordingly, Mr. Starczewski's testimony directly contradicts the Debtor's assertion that the discovery on defense counsel is "premised on a false assumption." *DCQ Obj.*, at 11. Defense counsel may, in fact, have information that the Debtor itself may lack. While the Committee appreciates the Debtor's asserted willingness to continue to respond to requests for relevant, non-privileged information, *DCQ Obj.*, at 7-8, the Debtor cannot provide information that it does not have. If its defense counsel has this information, they are in the best position to provide it efficiently. Just as the PIQs, if approved, likely will be completed by counsel to the asbestos claimants rather than the claimants to which they ostensibly are directed, the Debtor's historical defense counsel are a natural source for these fact-based requests.

15. Because the conditional discovery sought by the Committee is necessary for the protection of the interests of the Committee's constituency, the Committee has shown good cause for the discovery sought in the DCQ Motion, and, to the extent this Court grants the relief sought in the Trust Motion and the PIQ Motion, the conditional relief sought in the DCQ Motion similarly should be granted. *See*, *e.g.*, *In re Moore Trucking, Inc.,* 2020 WL 6948987, *7 (Bankr. S.D. W.Va, July 14, 2020).

III. THE REQUESTED DISCOVERY DOES NOT IMPOSE UNDUE HARDSHIP ON THE DEBTOR.

16. The Debtor asserts that requiring Defense Counsel to respond to the DCQ will significantly increase estate expenses. DCQ Objection, at 9-10. Of course, the Debtor appears to have no qualms about imposing significant, burdensome, and costly discovery on asbestos claimants and their counsel. However, the Debtor's protestations ring hollow.

17. *First*, and most importantly, it is simply disingenuous for the Debtor to now argue that the Court should not grant the DCQ Motion because the Debtor's estate allegedly will be burdened by paying CertainTeed's defense counsel to complete the DCQ, while the Debtor simultaneously touts the Funding Agreement's purported ability to provide the asbestos claimants with all of the paying power of former CertainTeed.[11] The irony is strong with the Debtor's argument, and it presupposes that the Debtor does not have the desire—or the ability—to truly request funding from CertainTeed to pay all of the necessary expenses for this bankruptcy proceeding.

18. *Second*, the Debtor has identified 40, not 400, Defense Counsel and the Committee has limited its requests only to 2007 and thereafter, a point in time at which most records have long since been kept electronically. The requested information is likely readily available and the DCQ could be completed by a paralegal, or other administrative professional, working at a fraction of typical attorney billing rates. The DCQ does not pose a hardship for Defense Counsel or a significant burden on the Debtor's estate.

[11] Cost to the estate is simply not a factor. The Debtor has the Funding Agreement with CertainTeed LLC—a solvent nondebtor entity that is part of an international conglomerate that reported operating income exceeding €2.376 billion in the first half of 2021—and is simultaneously seeking costly, uncompensated discovery from claimants and their counsel. *See Saint-Gobain First-half 2021 results* (July 29, 2021), at 6, https://www.saint-gobain.com/sites/saint-gobain.com/files/media/document/CP_S1_2021_VA_t.pdf The Debtor cannot have it both ways.

IV. THE REQUESTED INFORMATION IS NOT PRIVILEGED.

19. Much of the Debtor's Objection complains that the Committee, through the DCQ, seeks privileged information. DCQ Objection, at 14. However, the DCQ clearly seeks only factual information that will allow the Committee to attempt to draw its own conclusions on the pre-petition settlement strategy of the Debtor and its counsel. Section B6 of the DCQ, for example, asks whether payment to the claimant was contingent on providing proof of diagnosis or other information. DCQ Motion, *Ex. B*, at 10. That is a purely factual inquiry. Similarly, Part D seeks factual information about asbestos containing products. *Id.* at 13. Part G requests factual information regarding diagnosis, *id.* at 18, and Parts H and I seek information regarding the claimant's exposure to CertainTeed and non-CertainTeed products. *Id.* at 19-24. That information is purely factual. Indeed, while there may be confidentiality restrictions in place with respect to certain of the requested information, confidentiality and privilege are hardly the same, and the parties can agree upon proper measures for preserving confidentiality.

20. In addition, the use by counsel of factual information in a settlement or other analysis does not subject those facts to attorney-client privilege.[12] The information sought pursuant to the DCQ Motion is not akin to the withheld information that this Court recently declined to compel the Debtor to produce in connection with the Debtor's Trust Motion. DCQ Objection, at 14. The Committee seeks discrete facts, which its experts may use to try and better understand the Debtor's (and the Debtor's predecessor's) historic settlement posture. There is nothing inherently violative in that process. To the extent these facts may be contained in

[12] Dr. Mark Peterson is the Committee's liability expert, not its counsel. The Debtor's effort to challenge Dr. Peterson's knowledge regarding the nuances of attorney-client privilege is unwarranted. *See* DCQ Objection, at 12-13; Peterson Dep. Tr. at 45:8-19. Notwithstanding the inappropriateness, Dr. Peterson testified that the Committee was not seeking privileged information. *Id.* at 46:7-12, 46:15-18. When pressed, Dr. Peterson stated that he did not have a "legal opinion" as to whether any of the requested information is privileged. *Id.* at 154:18-21.

otherwise privileged communications, they are still just facts, and may be disclosed. *See*, *e.g.*, *LendingTree, LLC v. Zillow, Inc.*, 2013 WL 6385297 (W.D. N.C. Dec. 6, 2013), at *9 (*quoting Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3 851, 864 (3d. Cir. 1994)) ("Facts are discoverable, the legal conclusions regarding those facts are not. A litigant cannot shield from discovery the knowledge it possessed by claiming it has been communicated to a lawyer; nor can a litigant refuse to disclose facts simply because that information came from a lawyer.").

21. Finally, to the extent any of the information requested by the DCQ truly turns on privileged information or communications—which the Committee disputes—the Committee is willing to discuss tailoring the DCQ to avoid the inadvertent disclosure of privileged information. To date, the Debtor has not approached the Committee with such a request.

CONCLUSION

22. The Debtor's objection fails to recognize that discovery is reciprocal, and the Committee is entitled to seek discovery from the Debtor and its agents as necessary. The Committee respectfully requests that, to the extent this Court grants the Debtor's Trust Motion and PIQ Motion, the Court also enter an order: (i) granting the DCQ Motion; (ii) approving the DCQ; (iii) directing Debtor's Defense Counsel to complete and submit the DCQ; and (iv) granting such other and further relief as the Court deems appropriate.

Dated: October 14, 2021
Charlotte, North Carolina

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