

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

In re

DBMP LLC,

Debtor.

Chapter 11

Case No. 20-30080 (JCW)

OFFICIAL COMMITTEE OF ASBESTOS  
PERSONAL INJURY CLAIMANTS, and  
SANDER L. ESSERMAN, in his capacity as  
Legal Representative for Future Asbestos  
Claimants, each on behalf of the estate of DBMP  
LLC and its creditors,

Plaintiffs,

v.

CERTAINTEED LLC (f/k/a CERTAINTEED  
CORPORATION) (a/k/a “OLD CERTAINTEED”),

Defendant.

Adv. Pro. No. 22-\_\_\_\_\_ (JCW)

**COMPLAINT FOR APPOINTMENT OF RECEIVER AND RELATED RELIEF**

On behalf of the estate of the debtor, DBMP LLC (“DBMP” or the “Debtor”), and its creditors, the Official Committee of Asbestos Personal Injury Claimants (the “Committee”) and Sander L. Esserman, the legal representative for future asbestos-related personal injury claimants (the “Future Claimants’ Representative,” and together with the Committee, the “Plaintiffs”), by and through their undersigned attorneys, for their Complaint in the above-captioned action against CertainTeed LLC (“Defendant” or “Old CertainTeed”), which was formerly known as CertainTeed Corporation, allege<sup>1</sup> the following:

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<sup>1</sup> Certain allegations set forth herein concern matters that are solely within the Defendant’s knowledge or control and are therefore made upon information and belief.

### **NATURE OF THE ACTION**

1. This is an action to appoint a receiver for Old CertainTeed (with authority and directives as set forth herein) and, to the extent necessary, nullify the cancellation of and/or revoke the dissolution of Old CertainTeed, which, at the behest of its corporate parent and other controlling entities, participated in an intentional fraudulent transfer by taking steps to implement a divisional merger purportedly in compliance with Texas law to divide itself to:

- Create DBMP—a shell company with no employees or operations of its own—to which Old CertainTeed allocated all of Old CertainTeed’s asbestos liabilities and only 3% of its assets and that was always intended to file a bankruptcy; and
- Create CertainTeed LLC (“New CertainTeed”)—which was identical to Old CertainTeed in virtually all respects, to which Old CertainTeed allocated 97% of Old CertainTeed’s assets, all of its employees, all of its operations, all of its non-asbestos liabilities, and even Old CertainTeed’s corporate name.

These corporate transactions and the resulting bankruptcy are often referred to as the “Texas Two-Step.”<sup>2</sup>

2. Following the divisional merger, in accordance with the Plan of Divisional Merger dated as of October 23, 2019, Old CertainTeed purportedly “ceased to exist,” or failed to survive the divisional merger, although no certificate of termination or dissolution was ever filed with the Texas Secretary of State.<sup>3</sup> Accordingly, pursuant to Tex. Bus. Org. Code § 11.02, Old CertainTeed

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<sup>2</sup> The corporate transactions are more fully described in, *inter alia*, the Declaration of Robert J. Panaro in Support of First Day Pleadings dated January 23, 2020 (ECF No. 24), and in the Findings of Fact and Conclusions of Law Regarding Order: (I) Declaring That the Automatic Stay Applies to Certain Actions Against Non-Debtors, (II) Denying Motion of the Official Committee of Asbestos Personal Injury Claimants to Lift the Stay, and Alternatively (III) Preliminarily Enjoining Such Actions dated August 10, 2021 (Adv. Pro. No. 20-03004, ECF No. 343). References to “ECF No.” shall refer to documents filed in the base case bankruptcy fashioned *In re DBMP LLC*, Chapter 11 Case No. 20-30080 (JCW) (Bankr. W.D.N.C.).

<sup>3</sup> See DBMP-BR\_0002244-47.

was never terminated.

3. Through the divisional merger, other corporate transactions, and DBMP's bankruptcy, the Defendant significantly hindered, delayed, and sought to fraudulently reduce or eliminate the ability of asbestos victims to recover what was, is, or will be due to them. The Defendant's treatment of its obligations to asbestos victims stands in sharp contrast to its treatment of its non-asbestos obligations, which Old CertainTeed's "good company" successor, New CertainTeed, and its corporate parent, CertainTeed Holding Corporation ("CT Holding"), continue to timely pay in the ordinary course. Such curtailment of asbestos claimants' rights violates applicable state and federal law.

4. The Defendant acted in concert and conspired with others, including the other CertainTeed/Saint-Gobain Entities,<sup>4</sup> in a fraudulent scheme that was designed to strip Old CertainTeed's valuable assets from its significant asbestos liabilities and file a bankruptcy petition for the "bad company" successor entity laden with those asbestos liabilities, namely, DBMP, so as to hinder and delay payment of those liabilities and use the bankruptcy claims process to delay and avoid or reduce recoveries to asbestos victims and abridge their rights.

5. The divisional merger was essential to the scheme of Old CertainTeed and the other CertainTeed/Saint-Gobain Entities, as it allowed Old CertainTeed's "good company" successor, New CertainTeed, to continue to operate outside of bankruptcy while taking advantage of the bankruptcy process with respect to asbestos claims that were transferred by Old CertainTeed to Old CertainTeed's "bad company" successor, DBMP.

6. Following the divisional merger, DBMP's bankruptcy was equally essential to the

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<sup>4</sup> The "CertainTeed/Saint-Gobain Entities" include, prior to the divisional merger, Old CertainTeed, CT Holding Saint-Gobain Corporation ("SGC") and Compagnie de Saint-Gobain S.A. ("Saint-Gobain Parent"), and following the divisional merger, New CertainTeed, DBMP, CT Holding, SGC, and Saint-Gobain Parent.

scheme of the other CertainTeed/Saint-Gobain Entities, including Defendant, as it allowed them to gain leverage against asbestos victims—many of whom are gravely ill or dying—and their families. DBMP’s bankruptcy would stay all pending litigation (and thereby cut off related defense costs for the other CertainTeed/Saint-Gobain Entities) and delay payments to asbestos victims and their families for years. In addition, asbestos victims and their families would be subjected to the bankruptcy claims process and estimation so as to delay and reduce or eliminate recoveries to asbestos victims.

7. The divisional merger and DBMP bankruptcy also constitute a constructive fraudulent transfer. Specifically, the divisional merger comprised transfers of assets and the incurrence of obligations involving DBMP (i) rendering it insolvent, (ii) within two years of the Petition Date (defined below); and (iii) for which DBMP received less than reasonably equivalent value in exchange. The supposed value that the Debtor received was a prepetition “Funding Agreement,” which, far from a blanket promise to pay all liabilities of the Debtor, was an executory contract capable of being rejected in the bankruptcy that had already been planned for and promised funding only under certain conditions. Such an agreement can hardly be described as reasonably equivalent value. In addition, the Corporate Restructuring (defined herein) was intended to incur, or DBMP and its affiliates believed or reasonably should have believed that DBMP would incur, debts beyond the Debtor’s ability to pay as they became due, including, without limitation, pursuant to prepetition “Support Agreements” in which the Debtor indemnified the entire CertainTeed/Saint-Gobain enterprise for all pending and future asbestos liabilities.

#### **JURISDICTION AND VENUE**

8. This is a proceeding arising under or relating to the bankruptcy petition filed by DBMP under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). *See In re*

*DBMP LLC*, No. 20-30080 (JCW) (Bankr. W.D.N.C. Jan. 23, 2020). As a result, this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b). This matter is a core proceeding or a matter that is otherwise related to a case under chapter 11 under 28 U.S.C. § 157.

9. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### **PARTIES**

10. Plaintiff Official Committee of Asbestos Personal Injury Claimants is a statutory committee of creditors appointed by the Court pursuant to an Order dated February 14, 2020 (ECF No. 155), that is comprised of individuals who assert present or pending claims against the Debtor for personal injury or wrongful death arising from, or attributable to, exposure to asbestos or asbestos-containing products.

11. Plaintiff Sander L. Esserman was appointed as the legal representative for future asbestos claimants by order of this Court dated June 1, 2020 (ECF No. 310), to represent presently unknown individuals who in the future will incur and manifest injuries resulting from exposure to asbestos products manufactured and/or sold by the CertainTeed/Saint-Gobain Entities.

12. As detailed herein, prior to the divisional merger, Old CertainTeed was a Delaware Corporation that engaged in the following corporate transactions as part of the divisional merger, all with the intent to dissolve:

- CertainTeed Corporation converted into a Delaware limited liability company known as CertainTeed LLC;
- CertainTeed LLC converted from a Delaware limited liability company into a Texas limited liability company known as CertainTeed LLC;
- CertainTeed LLC engaged in a divisional merger pursuant to which (a) all of its operations and all of its employees, 97% of its assets, and all of its non-asbestos

liabilities were transferred to a new Texas limited liability company that also acquired the name “CertainTeed LLC” and is referred to herein as New CertainTeed, and (b) all of its asbestos liabilities transferred to a new Texas limited liability company known as DBMP LLC;

- DBMP LLC converted from a Texas limited liability company to a North Carolina limited liability company; and
- New CertainTeed converted from a Texas limited liability company to a Delaware limited liability company.

### **NON-PARTIES**

13. DBMP LLC is a North Carolina limited liability company with a service address at a registered agent located at 160 Mine Lake Court, Suite 200, in Raleigh, North Carolina, and with its principal place of business located at 20 Moores Road, Malvern, Pennsylvania 19355, and is a debtor whose bankruptcy is pending in this Court.

14. CertainTeed LLC (referred to herein as New CertainTeed) is a Delaware limited liability company with its principal place of business located at 20 Moores Road, Malvern, Pennsylvania 19355. Through the divisional merger, Old CertainTeed transferred all of its employees, 97% of its assets, all of its non-asbestos liabilities, and its corporate name and goodwill to New CertainTeed.

15. CertainTeed Holding Corporation (referred to herein as CT Holding) is a Delaware corporation with its principal place of business located at 20 Moores Road, Malvern, Pennsylvania 19355. CT Holding is the corporate parent of DBMP.

16. Saint-Gobain Corporation (referred to herein as SGC) is a Pennsylvania corporation with its principal place of business located at 20 Moores Road, Malvern, Pennsylvania 19355. SGC is the corporate parent of CT Holding.

17. Compagnie de Saint-Gobain S.A. (referred to herein as Saint-Gobain Parent) is a French corporation with its principal place of business located at Tour Saint-Gobain, 12 Place de l'Iris 92096 La Défense Cedex, France.

### **PROCEDURAL BACKGROUND**

18. On January 23, 2020 (the "Petition Date"), DBMP filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of North Carolina. *See In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C. Jan. 23, 2020).

19. Also on the Petition Date, DBMP commenced an adversary proceeding and requested a temporary restraining order and sought a preliminary injunction of asbestos lawsuits nationwide against Old CertainTeed and the post-merger CertainTeed/Saint-Gobain Entities. *See DBMP LLC v. Those Parties Listed on Appendix A to Complaint and John and Jane Does 1-1000*, Adv. Pro. No. 20-03004 (JCW) (Bankr. W.D.N.C. Jan. 23, 2020) (the "Preliminary Injunction Adversary Proceeding").

20. Since the Petition Date, DBMP has continued in possession of its property and has managed its business, as a debtor in possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the chapter 11 case.

21. On February 5, 2020, the Bankruptcy Administrator filed a motion to appoint an official committee of asbestos personal injury claimants (ECF No. 96), which the Court granted as modified in an order dated February 14, 2020 (ECF No. 155).

22. On May 8, 2020, the Debtor filed a motion to appoint Sander L. Esserman as legal representative for future asbestos victims (ECF No. 286), which the Court granted on June 1, 2020 (ECF No. 310).

23. With respect to the Preliminary Injunction Adversary Proceeding, on August 10, 2021, the Court issued *Findings of Fact and Conclusions of Law Regarding Order: (I) Declaring That the Automatic Stay Applies to Certain Actions Against Non-Debtors, (II) Denying Motion of the Official Committee of Asbestos Personal Injury Claimants to Lift the Stay, and Alternatively (III) Preliminarily Enjoining Such Actions* (Adv. Pro. No. 20-03004, ECF No. 343) (the “Findings and Conclusions”).

24. On August 23, 2021, the Plaintiffs commenced an adversary proceeding against DBMP and New CertainTeed. *See Committee v. DBMP LLC (In re DBMP)*, Adv. Pro. No. 21-03023 (JCW) (Bankr. W.D.N.C. Aug. 23, 2022) (Adv. Pro. No. 21-03023 ECF No. 1) (the “Substantive Consolidation Action”). The Plaintiffs filed an accompanying motion that same day (Adv. Pro. No. 21-03023 ECF No. 2).

25. On November 3, 2021, the Court granted the Plaintiffs standing to commence this Adversary Proceeding on behalf of the estate of the Debtor<sup>5</sup> (ECF No. 1197) so as to assert claims with respect to, arising from, or otherwise related to the Corporate Restructuring and the transactions and decisions that led to the filing of a bankruptcy petition for DBMP.

26. On January 21, 2022, the Plaintiffs commenced an adversary proceeding against New CertainTeed, CT Holding and SGC. *See Committee v. CertainTeed LLC (In re DBMP)*, Adv. Pro. No. 22-03000 (JCW) (Bankr. W.D.N.C. Jan. 21, 2022) (Adv. Pro. No. 22-03000 ECF No. 1), and the complaint in that adversary proceeding was amended on February 10, 2022 (Adv. Pro. No.

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<sup>5</sup> See Oct. 14, 2021, Hr’g Tr. at 89:22-90:16 (noting that creditors have a right to challenge the divisional merger, which are claims that, under the Court’s authority, belong to the DBMP estate).

22-03000 ECF No. 14) (the “Fraudulent Transfer Action”).

27. On January 21, 2022, the Plaintiffs commenced a second adversary proceeding against certain parties, including Saint-Gobain Parent. *See Committee v. Compagnie de Saint-Gobain S.A. (In re DBMP)*, Adv. Pro. No. 22-03001 (JCW) (Bankr. W.D.N.C. Jan 21, 2022) (Adv. Pro. No. 22-03001 ECF No. 1), and the complaint in that adversary proceeding was amended on February 12, 2022 (Adv. Pro. 12) (the “Fiduciary Duty Action”).

### **FACTUAL ALLEGATIONS**

#### **I. OLD CERTAINTEED ASBESTOS LIABILITY**

28. As alleged in the Substantive Consolidation Action, the Fraudulent Transfer Action and the Fiduciary Duty Action, prior to the Corporate Restructuring, Old CertainTeed was part of a large, multinational, and multi-billion-dollar building products conglomerate, whose ultimate parent is Saint-Gobain Parent. Old CertainTeed traces its history back to the General Roofing Manufacturing Company, an Illinois corporation formed in 1904, which transferred all of its assets and liabilities to Certain-teed Products Corporation in 1917. The company was renamed CertainTeed Corporation in 1976.

29. Saint-Gobain Parent became an indirect minority shareholder of Old CertainTeed in 1972 and an indirect majority shareholder in 1976. Old CertainTeed became an indirect wholly-owned subsidiary of Saint-Gobain Parent in 1988.

30. The primary source of Old CertainTeed’s asbestos liability is a cement and building products business that manufactured cement pipes, cement sheets, roof coating, cold process cement, joint treating compound, plastic cement, sealing cement, wet seal cement, and other items.

31. From the 1930s until 1993, Old CertainTeed manufactured and sold large amounts of asbestos-containing cement pipe and other products. Old CertainTeed’s asbestos-containing

products were extremely successful in the marketplace and were sold in substantial quantities across the United States.

32. Since the 1970s, Old CertainTeed has faced hundreds of thousands of claims for asbestos-induced personal injury and wrongful death, and exposed countless others to deadly asbestos fibers.

33. At the time of the divisional merger, Old CertainTeed was a defendant in approximately 60,000 pending asbestos cases, and Old CertainTeed generally paid all of its asbestos liabilities as they became due as a result of settlements and judgments. Between 2002 and 2019, Old CertainTeed incurred approximately \$2 billion in costs defending and resolving more than 300,000 personal injury lawsuits relating to asbestos exposure, out of which approximately \$1.5 billion constituted “out of pocket” expenditures. Over this same time, Old CertainTeed’s annual indemnity costs (payments of settlements and judgments) and defense costs ranged from approximately \$80 million to over \$160 million per year.

34. The executives of Old CertainTeed’s ultimate parent company, Saint-Gobain Parent, paid close attention to the ongoing asbestos litigation against Old CertainTeed in the United States, requiring periodic reports and updates from executives at Old CertainTeed’s parent company in North America, SGC, and consulting on and providing approval for significant decisions and actions related to the ongoing asbestos litigation.

35. Old CertainTeed was aware that its asbestos liabilities would continue into the future. In an attempt to reduce or forestall such payments (and even to eliminate them entirely as to some asbestos claimants) and curtail the rights of claimants, Old CertainTeed, its directors, officers and professionals, and the other CertainTeed/Saint-Gobain Entities and their directors, officers and professionals, devised a scheme to “restructure” Old CertainTeed so as to use the

bankruptcy process in an effort to delay, eliminate, or reduce Old CertainTeed's asbestos liability obligations to the detriment of the victims and their rights to pursue and/or recover on account of such claims, including recovery in full on claims available to asbestos claimants under applicable nonbankruptcy law.

## **II. PROJECT HORIZON: THE SCHEME BEHIND OLD CERTAINTEED'S CORPORATE RESTRUCTURING**

36. Beginning in 2018, Old CertainTeed began preparing for a series of carefully planned and executed transactions, euphemistically referred to by the Debtor as the "Corporate Restructuring," in furtherance of a scheme that included DBMP's formation, chapter 11 filing, and related Preliminary Injunction Adversary Proceeding. Old CertainTeed has stated that it engaged in the Corporate Restructuring "[t]o facilitate its ability to pursue a section 524(g) resolution" in bankruptcy "without subjecting the entire [CertainTeed/Saint-Gobain] enterprise to chapter 11."<sup>6</sup>

37. The Corporate Restructuring was launched to "deal with" Old CertainTeed's asbestos liabilities. The Corporate Restructuring was specifically designed and implemented to effectuate a bankruptcy filing that Old CertainTeed's ultimate parent company, Saint-Gobain Parent, would authorize.

38. At some point prior to February 2018, the planning and implementation of the Corporate Restructuring began, and was given the codename "Project Horizon" for use within the CertainTeed/Saint-Gobain organization.

39. Project Horizon involved both Old CertainTeed's top management personnel as well as executives at SGC, Old CertainTeed's ultimate parent company in North America. The genesis of Project Horizon has been attributed to the general counsel of SGC, and outside counsel

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<sup>6</sup> Informational Brief of DBMP LLC, *In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C. Jan. 23, 2020) (ECF No. 22) ("Informational Brief of DBMP") at 25.

was brought in early on to assist with the project.

40. At all of the Project Horizon meetings, regardless of the subject matter being discussed, at least one attorney was present, who was either in-house or from the outside counsel firms hired by the CertainTeed/Saint-Gobain Entities. From its inception, Project Horizon was driven not only by business people, but also by attorneys. In addition, preparations for bankruptcy by outside bankruptcy counsel began early on.

41. Project Horizon was a highly secretive endeavor. Indeed, there was a concern that people outside of Old CertainTeed and SGC would discover that the Corporate Restructuring was underway to address Old CertainTeed's asbestos liabilities. Old CertainTeed even went as far as prematurely stopping negotiations on rates for a securitization contract with a bank in October 2019 so that it would not have to disclose the Corporate Restructuring to the financial institution involved in that transaction.

42. Before employees were permitted to work on Project Horizon, they were required to sign nondisclosure agreements so as to keep the project under a veil of secrecy.

43. Old CertainTeed and its affiliates began taking steps to prepare for the planned bankruptcy no later than June 5, 2019, the date on which bankruptcy counsel was retained by Old CertainTeed.

44. By mid-2019, meetings among Project Horizon team members took place with increasing frequency, and, as previously mentioned, at least one attorney—whether in-house (including Michael Starczewski, who was counsel for SGC at that time) or outside counsel—attended every meeting, regardless of subject matter. Presence of counsel at every meeting was part of the scheme to try to cloak the conversations in privilege in connection with the efforts to maintain the veil of secrecy.

45. At a number of these meetings, Old CertainTeed’s business managers reviewed the details of Old CertainTeed’s experience in the tort system and the proceedings in the chapter 11 cases of *In re Garlock Sealing Technologies LLC*, No. 10-31607 (Bankr. W.D.N.C.) (“*Garlock*”), and *In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C.) (“*Bestwall*”). There were discussions about how Old CertainTeed could end up paying less under a section 524(g) plan than it would if it continued paying asbestos claims as they arose in the tort system. Indeed, the entire purpose of the Corporate Restructuring and eventual bankruptcy filing was to save money by staying litigation and using an estimation proceeding so as to obtain a final asbestos liability bill for less than the tort system, at the expense of asbestos victims and their rights as they existed prior to the Corporate Restructuring. At all relevant times, the purpose and intent of Project Horizon was the splitting of the Old CertainTeed legal entity through the Corporate Restructuring so as to isolate the asbestos liabilities of the CertainTeed enterprise from its assets and to delay, eliminate, and/or reduce Old CertainTeed’s asbestos liability obligations to the detriment of the victims and their rights to recover on account of such claims.

### **III. IMPLEMENTING THE CORPORATE RESTRUCTURING**

46. After planning the Corporate Restructuring and the intended chapter 11 filing, Old CertainTeed—with the knowledge of and under the direction of the other CertainTeed/Saint-Gobain Entities—engaged in the planned series of transactions in 2019 to carry out the scheme to isolate Old CertainTeed’s asbestos liabilities and delay indefinitely or eliminate entirely the exceedingly costly process of dealing with asbestos claimants through the tort system. The transactions were intended to divide Old CertainTeed and establish a “bad CertainTeed” saddled with all asbestos liabilities and renamed DBMP, and a “good CertainTeed” encompassing virtually all of the assets, all of the operations, and the corporate name and goodwill of Old CertainTeed.

47. In July 2019, Old CertainTeed reserved the corporate name “DBMP LLC” in North Carolina. Within a month, first day pleadings of the bankruptcy for the new North Carolina entity (DBMP) were being prepared, while Old CertainTeed’s outside attorneys and SGC’s in-house counsel, including Mr. Starczewski (currently DBMP’s chief legal officer), worked on ensuring that the French executives of Saint-Gobain Parent would authorize the bankruptcy filing, which they ultimately did. By October 2019, in-house counsel at SGC knew that the Corporate Restructuring would happen in a few weeks and that the bankruptcy filing in January 2020 was a “done deal.”

48. Later that month, the Corporate Restructuring occurred pursuant to a divisional merger under Texas law. On October 22, 2019, Old CertainTeed’s direct parent, Saint-Gobain Delaware Corporation, formed CT Holding and contributed all the issued and outstanding stock of Old CertainTeed to CT Holding in exchange for full ownership of CT Holding. That same day, Old CertainTeed converted from a Delaware corporation to a Delaware limited liability company—*i.e.*, CertainTeed LLC.

49. Millwork & Panel LLC (“Millwork & Panel”) was also formed as a direct subsidiary of Old CertainTeed, and Old CertainTeed contributed a North Carolina bank account containing approximately \$30 million and two manufacturing plants from its exterior siding and trim business—one based in Georgia and the other in North Carolina—to Millwork & Panel LLC. The siding and trim business had several plants located throughout the country, but it was the North Carolina plant that had been earmarked for allocation to a subsidiary of the entity that would eventually file for bankruptcy during Project Horizon deliberations, going back at least as far as April 2019.

50. On October 23, 2019, the day after CT Holding was formed and received all

outstanding stock of Old CertainTeed and Old CertainTeed converted from a Delaware corporation to a Delaware limited liability company, Old CertainTeed undertook a further series of corporate transactions. At 9:00 a.m. Central Time, Old CertainTeed converted from a Delaware limited liability company to a Texas limited liability company. A half hour later, at approximately 9:30 a.m. Central Time on October 23, 2019, Old CertainTeed engaged in a divisional merger so as to divide itself into two Texas limited liability companies: New CertainTeed and DBMP.

51. Under the plan of divisional merger, New CertainTeed received approximately 97% of Old CertainTeed's assets, while the remaining 3% of the assets were allocated to DBMP. Specifically, DBMP received approximately \$25 million in cash, all equity interests in Millwork & Panel, and all of Old CertainTeed's contracts related to asbestos litigation. No operating business was received by DBMP apart from its Millwork & Panel subsidiary. Millwork & Panel, by agreement, had only one customer, which, unsurprisingly, is New CertainTeed. In addition, none of the personnel that operate Millwork & Panel's facilities are employees of either Millwork & Panel or its parent company, DBMP; rather, they were employees of New CertainTeed seconded to Millwork & Panel, an arrangement that has continued unabated through the present.

52. Against these minimal assets, the Corporate Restructuring purported to allocate all of Old CertainTeed's uncapped asbestos liabilities to the Debtor and also purported to obligate the Debtor to indemnify New CertainTeed and hold it harmless from and against "all Losses" relating to those liabilities. Purportedly, by virtue of this Corporate Restructuring, creditors of Old CertainTeed became creditors of DBMP and DBMP became a creditor of Old CertainTeed.

53. Thirty minutes after the divisional merger, at 10:00 a.m. Central Time on October 23, 2019, New CertainTeed converted to a Delaware limited liability company.

54. Shortly thereafter, at 12:49 p.m. Central Time on October 23, 2019, DBMP

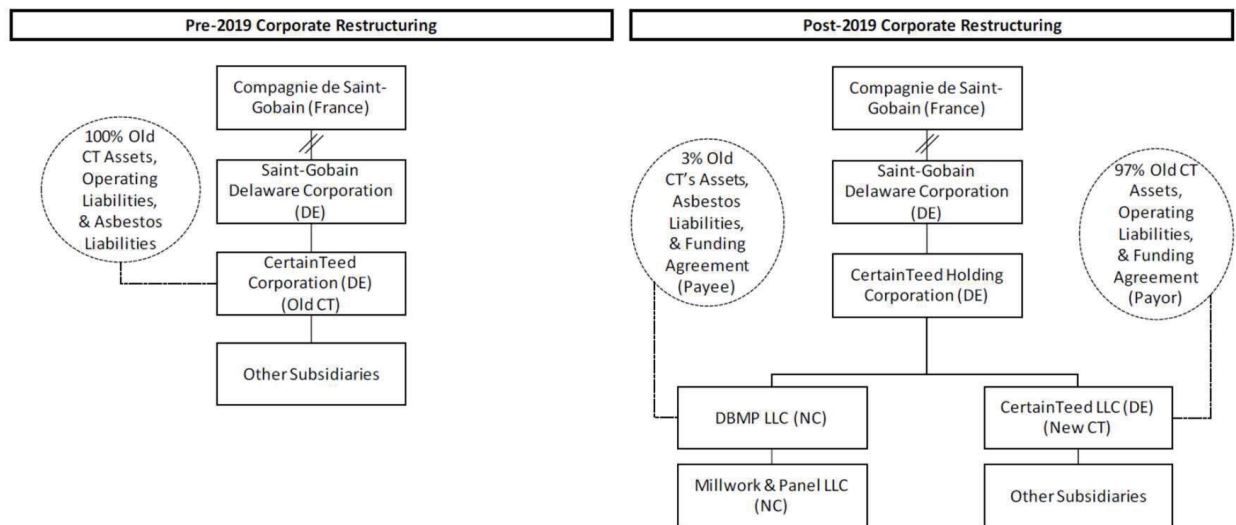
converted to a North Carolina limited liability company.

55. As a result of these rapid corporate transactions, New CertainTeed and DBMP were Texas entities for less than four hours.

56. On or about November 21, 2019, New CertainTeed registered to do business in Texas as a foreign entity and appended a consent from Old CertainTeed that it could use the CertainTeed LLC name for filing purposes in Texas.

57. The following table summarizes the organizational structure before and after the Corporate Restructuring:

Table 1.



58. Since the completion of the Corporate Restructuring, New CertainTeed has continued to manufacture and sell the commercial and residential building products historically sold by Old CertainTeed. New CertainTeed also continues to pay its (non-asbestos) creditors in the ordinary course. Specifically, between the end of 2019 and October 2020, New CertainTeed's accounts payable declined by nearly \$80 million, which demonstrates that New CertainTeed is paying all of its obligations to non-asbestos creditors in the ordinary course.

59. In contrast to New CertainTeed, DBMP does not have any employees or ongoing

business operations and has few assets. As a result of the divisional merger, DBMP was rendered insolvent, with no ability on its own to meet its existing liabilities to asbestos victims. Indeed, its only potentially relevant asset was an agreement, which is discussed below, in which New CertainTeed agreed to pay DBMP's liabilities under limited circumstances. In other words, DBMP was created to file for bankruptcy and yet remain entirely beholden to New CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, who hold all the assets (and therefore all of the cards) with respect to any recovery for asbestos victims.

#### **IV. INTERCOMPANY AGREEMENTS**

60. As part of the implementation of the Corporate Restructuring, DBMP, New CertainTeed, and various non-debtor affiliates entered into several agreements, all of which were dated "as of" October 22 or October 23, 2019, the two days on which the CertainTeed/Saint-Gobain Entities set up and executed the Texas divisional merger.

61. All of these agreements were between affiliated companies, and thus were not the result of any arm's-length negotiation over their terms.

62. Moreover, the agreements involving DBMP were not even negotiated by DBMP; they were drafted by outside counsel to the CertainTeed/Saint-Gobain enterprise (and now counsel to the Debtor) prior to the Corporate Restructuring and bankruptcy, belying any notion that DBMP's bankruptcy was merely an option and not destined to occur as part of a pre-ordained essential component of Project Horizon. First in Texas, and again in North Carolina, the DBMP Board of Managers executed unanimous consents to approve the intercompany agreements, including the Funding Agreement, the Support Agreement, and the Secondment Agreement (all defined below). These agreements were all previously drafted and approved without any real substantive amendments or modifications at the time the prepetition Debtor first executed them.

63. Taken together, the agreements make clear that DBMP lacks the basic characteristics of an independent corporate entity and was created purely to enable the other CertainTeed/Saint-Gobain Entities to eliminate or seek to reduce the corporate family's obligations to present and future asbestos victims and hinder, delay, or defraud them of their ability to obtain recoveries on their claims.

64. The most relevant agreements are described below.

**A. Funding Agreement**

65. New CertainTeed and DBMP entered into a "Funding Agreement."<sup>7</sup> The Funding Agreement provides, among other things, that New CertainTeed will transfer funds to DBMP to pay any "Permitted Funding Use." The term "Permitted Funding Use" includes (i) the costs of administering DBMP's chapter 11 case, (ii) amounts necessary to satisfy DBMP's "Asbestos Related Liabilities" in connection with funding a § 524(g) trust, and (iii) DBMP's indemnification obligations to New CertainTeed under any agreement provided for in the Plan of Merger that governed the divisional merger.<sup>8</sup>

66. Under the Funding Agreement, New CertainTeed is obligated to pay the chapter 11 administrative expenses and pay DBMP's indemnification obligations only if the cash distributions from Millwork & Panel are insufficient to pay those expenses and obligations in full. In addition, New CertainTeed is obligated to fund a § 524(g) trust only if DBMP's "other assets are insufficient to fund amounts necessary or appropriate to satisfy . . . Asbestos Related Liabilities in connection with the funding of such trust."<sup>9</sup>

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<sup>7</sup> See, e.g., Declaration of Robert J. Panaro, 3:20-bk-30080, ECF No. 24 ("Panaro Dec."), Ex. 2 – Amended and Restated Funding Agreement ("Funding Agreement").

<sup>8</sup> Funding Agreement § 2.

<sup>9</sup> *Id.* at § 2.

67. The Funding Agreement<sup>10</sup> is plagued by numerous flaws. First, and most importantly, the Funding Agreement is not an unconditional promise to pay all of DBMP's asbestos liabilities; rather, among other things, it is conditioned such that "following the commencement of any Bankruptcy Case, the Payee's Asbestos Related Liabilities [will be paid] in connection with the funding of a trust under section 524(g) of the Bankruptcy Code for the benefit of existing and future claimants that is included in a plan of reorganization for the Payee confirmed by a final, non-appealable order of the Bankruptcy Court and the District Court."<sup>11</sup> New CertainTeed's obligations under the Funding Agreement are unsecured and not guaranteed by any of the Saint-Gobain Parent companies, including the other CertainTeed/Saint-Gobain Entities.

68. Second, the Funding Agreement was made between two related parties, New CertainTeed and DBMP, and its terms were specifically dictated by Old CertainTeed in designing the agreement before DBMP even existed (and, thus, DBMP could not have had a say as to its terms). Asbestos victims were not consulted with regard to the terms of the agreement, nor did New CertainTeed or DBMP make any effort to negotiate the agreement given that, as noted above, neither company existed when this "agreement" was first drafted.

69. Third, only DBMP is permitted to enforce the terms of the Funding Agreement, notwithstanding the fact that its provisions were ostensibly intended to inure to the benefit of third-party asbestos victims. Given that all of DBMP's employees are seconded employees of SGC, the parent company of both DBMP and New CertainTeed, they are hardly likely to ever take any action contrary to the wishes of SGC and the other CertainTeed/Saint-Gobain Entities, including

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<sup>10</sup> For clarity, the relevant Funding Agreement for purposes of this Complaint and Plaintiffs' claims is the Funding Agreement in effect at the time of the Corporate Restructuring, the October 23, 2019, Amended and Restated Funding Agreement. *See* Panaro Dec. Ex. 2.

<sup>11</sup> Funding Agreement ¶ 1 at 6 (definition of "Permitted Funding Use").

enforcing the Funding Agreement on behalf of DBMP.

70. Fourth, the Funding Agreement does not prevent New CertainTeed from layering on debt that would be senior in priority to its obligations to DBMP under the Funding Agreement.

71. Fifth, the Funding Agreement does not include any limit on New CertainTeed's ability to forgive material obligations owed to it by SGC and other affiliates, including Saint-Gobain Finance Corporation.

72. Sixth, the Funding Agreement explicitly allows New CertainTeed to engage in consolidations and mergers, and to transfer "all or substantially all" of its assets,<sup>12</sup> which would leave DBMP (and its creditors) with no source of recovery under the Funding Agreement.

73. Seventh, nothing in the Funding Agreement limits or bars New CertainTeed's ability to upstream cash to its parent company, CT Holding, potentially including its full value.

74. Eighth, the Funding Agreement confines New CertainTeed's funding obligations to only costs and expenses that are "necessary or appropriate," but fails to actually specify the types of items that would qualify as such, thus giving New CertainTeed unfettered leeway to grant or deny a funding request.<sup>13</sup>

75. Ninth, the Funding Agreement further provides no dispute-resolution mechanism if a funding request by DBMP is denied.

76. Tenth, the Funding Agreement is an executory contract that could be rejected by DBMP.

77. And finally, the Funding Agreement may only be assigned with consent of the counterparty, namely New CertainTeed. Therefore, the Funding Agreement could not be assigned

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<sup>12</sup> See, e.g., Funding Agreement § 4(b)(i).

<sup>13</sup> See, e.g., Funding Agreement at 5 (definition of "Permitted Funding Use").

to a trust under a creditor plan and that plan could not be funded—unless New CertainTeed approved of that plan.

78. As a result of the Corporate Restructuring, including the bankruptcy, asbestos creditors—who, prior to the Corporate Restructuring, would have the ability to enforce judgments against all of Old CertainTeed’s assets—were stripped of their ability to lay direct claim to New CertainTeed’s assets and were instead made dependent on DBMP’s willingness to press its rights under the Funding Agreement for the benefit of asbestos creditors and to the detriment of its corporate parent (and the employer of all of its personnel). DBMP lacks the ability on its own to pay asbestos claims for which it assumed responsibility as part of the Corporate Restructuring.

79. It is indisputable that, absent the limited, flawed, and contingent rights under the Funding Agreement, DBMP was rendered insolvent as a result of the Corporate Restructuring. The Funding Agreement does not provide any funding for recoveries to asbestos claimants unless New CertainTeed agrees to provide such funding and, of course, New CertainTeed controls the beneficiary of the Funding Agreement. The restrictions on transferability, conditions and limitation on funding and uncertainties of collectability together greatly diminish the purported value of the Funding Agreement. As a result, the Funding Agreement is of little value to asbestos claimants and DBMP was rendered insolvent as a result of the Corporate Restructuring. Moreover, because the Funding Agreement at best provides recoveries for expenses related to DBMP’s bankruptcy and, under the limited circumstances set forth herein, for asbestos victims, the Funding Agreement does not provide DBMP with reasonably equivalent value to the obligations that were allocated to and assumed by DBMP in the Corporate Restructuring.

## **B. Support Agreement**

80. DBMP and New CertainTeed also entered into a Support Agreement (the “Support Agreement”) that, among other things, requires DBMP to indemnify New CertainTeed and hold it

harmless from and against all asbestos-related “Losses” and “Proceedings” to which New CertainTeed “may become subject.”<sup>14</sup>

81. Having been assigned all of Old CertainTeed’s asbestos liabilities through the Corporate Restructuring and only 3% of all assets of Old CertainTeed, DBMP has no independent ability to honor its indemnification obligations to New CertainTeed.

82. The Support Agreement specifies that DBMP and New CertainTeed are each a “disregarded entity for U.S. federal income tax purposes” and that “the Divisional Merger will be disregarded” for federal tax purposes. Further, under the Support Agreement, New CertainTeed retained the federal employer identification number (“EIN”) of Old CertainTeed, while DBMP is only required to obtain “a new EIN, if and when it is required by Law.”<sup>15</sup> This is a further example of the lack of any separateness and independence of DBMP from New CertainTeed and the other CertainTeed/Saint-Gobain Entities.

83. Entry into the Support Agreement combined with having been allocated all of Old CertainTeed’s pending asbestos claims immediately rendered DBMP insolvent. As set forth above, among other things, the Funding Agreement contains limitations and other contingencies to funding. As a result, the Funding Agreement does not come close to satisfying the liabilities assumed by DBMP.

84. Making matters worse, these payments could be funded with money borrowed from New CertainTeed. If the cash distributions from Millwork & Panel are insufficient to allow DBMP to pay its indemnification obligations to New CertainTeed, the Funding Agreement provides that New CertainTeed will provide the funds to DBMP so that DBMP, in turn, may indemnify New

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<sup>14</sup> See, e.g., DBMP-BR\_0003670 (“Support Agreement”).

<sup>15</sup> See, e.g., *id.* at § 4 (DBMP-BR\_0003671).

CertainTeed. In other words, the Support Agreement's indemnity provision, when coupled with the Funding Agreement, create, at best, a potential circular transfer of funds between the Debtor and New CertainTeed.

**C. Secondment Agreement**

85. With no employees of its own, DBMP entered into the "Secondment Agreement" with SGC.<sup>16</sup> Pursuant to the Secondment Agreement, five individuals were "loaned," or seconded, to DBMP to work as employees.

86. Since the Petition Date, two of those individuals have left SGC and therefore are no longer seconded to work for DBMP. Of the remaining three individuals, only Mr. Starczewski, formerly in-house counsel to SGC and now counsel to DBMP as chief legal officer, is slated to work for DBMP full time. The other two individuals are an attorney and an administrative assistant, who are scheduled to devote one-third of their time or less to DBMP.

**D. Millwork & Panel Agreements**

87. New CertainTeed entered into various agreements with Millwork & Panel, including a contribution agreement, a sales and marketing agreement, an intellectual property license agreement, and a secondment agreement. These agreements underscore that Millwork & Panel is wholly dependent on New CertainTeed despite it being a nominally separate business entity and under DBMP's notional control.

88. For example, under the secondment agreement between New CertainTeed and Millwork & Panel, all of New CertainTeed's employees working at the North Carolina and Georgia plants have been seconded to Millwork & Panel but remain as New CertainTeed employees.

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<sup>16</sup> See, e.g., DBMP-BR\_0003761 ("Secondment Agreement").

89. In addition, New CertainTeed is Millwork & Panel's exclusive customer, and the prices at which Millwork & Panel "sells" its goods to New CertainTeed are fixed under the sales and marketing agreement.

90. In the nearly three years since the Corporate Restructuring, the United States has experienced a surge in demand for building materials resulting from continued strength of the new-construction market alongside global supply chain challenges.

91. As such, while New CertainTeed has reaped the benefit of increased demand for its products, such benefit has not been ratably shared with the Debtor and Millwork & Panel, as Millwork & Panel is contracted to "sell" its products exclusively to New CertainTeed at a fixed cost under the pricing agreement.

## **V. AVOIDANCE OF THE DIVISIONAL MERGER AND THE INTERCOMPANY AGREEMENTS**

92. The Corporate Restructuring and the various agreements described above that were executed in connection with the Corporate Restructuring is in violation of applicable law, including the Texas Business Organizations Code (the "TBOC"). Under the TBOC, a plan of divisional merger must include "the manner and basis of allocating each liability and obligation of each organization that is a party to the merger . . . among one or more of the surviving or new organizations." TBOC § 10.0001. When the divisional merger takes effect "all liabilities and obligations of each organization that is a party to the merger are allocated to one or more of the surviving or new organizations in the manner provided by the plan of merger." TBOC § 10.008(a). Although Texas law allows for the allocation of liabilities to the surviving entities, such allocation cannot "abridge any right or rights of any creditor under existing laws." TBOC § 10.901.

93. Because the plan of divisional merger and the various intercompany agreements described above have a material adverse effect on the rights of asbestos victims as creditors, the

divisional merger and the various intercompany agreements entered into in connection with the divisional merger are in violation of TBOC § 10.901 and should all be avoided. The Texas divisional merger statute does not enable an entity to abridge creditors' rights against the predecessor entity, which in this case is Old CertainTeed. In addition, the Texas divisional merger statute does not permit New CertainTeed to divest itself of its obligations to asbestos victims.

94. Prior to the Corporate Restructuring, Old CertainTeed and its affiliated entities were defendants in many thousands of asbestos-related actions and used the assets available at Old CertainTeed to pay obligations arising out of those actions as and when such debts came due. However, beginning in early 2018 and throughout 2019, Old CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, conceived of and implemented the Corporate Restructuring, which contemplated and eventually resulted in the bankruptcy filing of an entity with only limited assets and to which all existing and future asbestos-related claims against Old CertainTeed had been assigned. The purpose of these corporate machinations was to curtail the rights of existing and future asbestos claimants to directly pursue and recover the full extent of their claims. The transfers occurring as a result of the Corporate Restructuring were effectuated by and among insiders, including Old CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, and their directors and officers, among others.

95. The Corporate Restructuring was purportedly effectuated pursuant to a divisional merger under the TBOC. However, the divisional merger cannot "abridge any right or rights of any creditor under existing laws." TBOC § 10.901. In this manner, the Corporate Restructuring and resulting DBMP bankruptcy abridged the rights of Old CertainTeed's asbestos claimants, thereby violating TBOC § 10.901.

**VI. PURPORTED “INDEPENDENT” APPROVAL AND FILING OF THE DBMP CHAPTER 11 BANKRUPTCY PETITION**

96. Joseph N. Bondi, Sean R. Knapp, and D. Lawrence Rayburn were appointed as managers to DBMP’s board of managers. Both Messrs. Bondi and Knapp were intimately involved with the planning and implementation of Project Horizon, attended numerous Project Horizon meetings prior to the formation of DBMP, and were well aware of the objective to isolate and resolve Old CertainTeed’s asbestos liabilities. They also hold, or held during the relevant times, positions at affiliate entities within the CertainTeed/Saint-Gobain organization. For example, Mr. Bondi is Vice President of New CertainTeed, and Mr. Knapp, until recently, was the Manager of Financial Planning and Analysis at New CertainTeed and the Vice President and Chief Financial Officer of Millwork & Panel. Mr. Rayburn is a former in-house attorney in SGC’s legal department, and also has substantial bankruptcy experience from his time working as an in-house lawyer at Celotex Corporation in the 1990s. Mr. Rayburn was appointed to the DBMP board for this reason.

97. In addition to the DBMP board, key officers were also appointed at DBMP from within the CertainTeed/Saint-Gobain enterprise. Mr. Starczewski, previously in-house counsel at SGC and a core team member of Project Horizon, was appointed Chief Legal Officer, Vice President, and Secretary of DBMP. Similarly, Mr. Panaro, who is currently the Senior Vice President and Chief Operating Officer of SGC, the President of Saint-Gobain Delaware Corporation and CT Holding, was appointed DBMP’s Chief Restructuring Officer. Other high-level employees from within the Saint-Gobain family of companies were appointed as officers of DBMP, including Messrs. DiNenna and Melroy, both of whom hold contemporaneous positions as SGC officers.

98. DBMP board meetings to authorize the filing of DBMP’s bankruptcy were attended

by Old CertainTeed's outside counsel, which is now DBMP's bankruptcy counsel, and officers wearing hats for both New CertainTeed (and other entities within the CertainTeed/Saint-Gobain enterprise) and DBMP, including Messrs. Starczewski and Panaro, among others.

99. Although the decision to file for bankruptcy had already been made by upper management at Old CertainTeed and SGC and approved by Saint-Gobain Parent several months prior, on January 22, 2020, the DBMP board of managers met to formally "authorize" DBMP's chapter 11 filing, a decision that New CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, claim was the "sole" and "independent" decision of the DBMP board of managers. However, as further set forth below, the determination to file bankruptcy was made long before this date, and the vote of the DBMP board managers was a mere formality intended solely to paper the record.

100. On January 23, 2020, a mere 92 days after the Corporate Restructuring was implemented, DBMP filed its chapter 11 petition in the United States Bankruptcy Court for the Western District of North Carolina.

101. As of the Petition Date, more than 60,000 asbestos-related claims and associated lawsuits were pending on court dockets against Old CertainTeed and the other CertainTeed/Saint-Gobain Entities. Through the Corporate Restructuring, liability associated with such lawsuits had been purportedly transferred to the Debtor. By filing of the Debtor's bankruptcy case, DBMP's estate is administered, including claims brought, for the benefit of the estate and its asbestos creditors.

## **VII. THE EVENTUAL FILING OF DBMP'S CHAPTER 11 PETITION WAS AN INTEGRAL PART OF THE SCHEME TO HINDER, DELAY, AND DEFRAUD ASBESTOS CREDITORS**

102. DBMP's filing of a bankruptcy petition was an integral part of the scheme of the

CertainTeed/Saint-Gobain organization, including the other CertainTeed/Saint-Gobain Entities, to hinder, delay, or defraud asbestos creditors and curtail their rights to recover on the full extent of their claims. The Corporate Restructuring was specifically designed and implemented to effectuate a bankruptcy filing that would solely impact holders of asbestos-related personal injury claims caused by exposure to Old CertainTeed's asbestos-containing products without necessitating the filing of the entire CertainTeed enterprise, thereby attempting to shield the assets apportioned to New CertainTeed from asbestos creditors while not subjecting those assets, or the claims of any other creditors of the go-forward CertainTeed enterprise, to Bankruptcy Court oversight.

103. DBMP's board of managers did not make an independent decision to file its bankruptcy petition; instead, it was the determination of the other CertainTeed/Saint-Gobain Entities that provided clear directive and instruction beginning as early as October 2019 to effectuate the Corporate Restructuring and file for bankruptcy after a 90-day waiting period had elapsed.

104. The intended purpose of the bankruptcy is to attempt to reduce or eliminate the liability of the CertainTeed/Saint-Gobain organization, including the other CertainTeed/Saint-Gobain Entities, to untold numbers of current and future asbestos personal injury claimants. The CertainTeed/Saint-Gobain organization, including the other CertainTeed/Saint-Gobain Entities, intended to use the bankruptcy process to hinder and delay recoveries to asbestos creditors and abridge their rights to recover on the full extent of their claims. In addition, the CertainTeed/Saint-Gobain Entities intended to use an estimation proceeding and improper accusations of evidence manipulation and fraud similar to those in *Garlock* and *Bestwall* against counsel for asbestos victims so as to reduce or eliminate recoveries of asbestos victims.

105. As previously mentioned, for years, the executives of Old CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, paid close attention to ongoing asbestos litigation against Old CertainTeed in the United States, requiring periodic reports and updates from executives at SGC.

106. Despite the asbestos liabilities confronting Old CertainTeed, management at Saint-Gobain Parent opposed any kind of bankruptcy relief for Old CertainTeed because of a perceived stigma surrounding bankruptcy.

107. However, the attitudes of executives at Saint-Gobain Parent and at Old CertainTeed began to change regarding a divisional merger and subsequent bankruptcy relief following the developments of the *Garlock* and *Bestwall* bankruptcy cases.

108. A Project Horizon meeting that occurred on July 2, 2019, was attended by senior executives from Saint-Gobain Parent, in-house counsel from SGC, outside bankruptcy counsel and outside consultants on estimation of asbestos liabilities. The subject of the meeting was “Project Horizon and exploring the possibility of bankruptcy for a CertainTeed newly formed spinoff.”

109. Thereafter, on August 13, 2019, a meeting was held at SGC’s headquarters with outside bankruptcy counsel in attendance. At that time, “first day” bankruptcy pleadings for the new North Carolina entity—which had not even been formed yet—were being prepared and the executives at Saint-Gobain Parent were being “socialized” to the idea of a *Bestwall* plan. The task of “socializing” the executives of Saint-Gobain Parent to the idea of a *Bestwall*-type bankruptcy was a collective effort led primarily by outside bankruptcy counsel and Mr. Starczewski. Critically, no other options for dealing with the asbestos liabilities were discussed at the meeting. This was an idea ultimately approved by Saint-Gobain Parent executives. Without their consent, the Corporate Restructuring and bankruptcy would not have occurred.

110. As early as October 10, 2019, the decision to engage in the Corporate Restructuring and the eventual bankruptcy filing of DBMP was subject to final approval from Saint-Gobain Parent's chief executive officer, Pierre-André de Chalendar, and its chief operating officer, Benoit Bazin. Once the Corporate Restructuring was effectuated, the bankruptcy was a foregone conclusion, even though it would be months before the DBMP board of managers met on January 22, 2020, to purportedly authorize the chapter 11 filing.

111. As of October 18, 2019, just a few days before the Corporate Restructuring, Mr. Starczewski had been designated to be the future Chief Legal Officer of DBMP, which would be the entity filing a bankruptcy. On October 20, 2019, Carol Gray, then-general counsel of SGC, acknowledged that following the Corporate Restructuring, DBMP would file for bankruptcy and that the bankruptcy was going to take several years. Once the bankruptcy was filed, Ms. Gray understood that all asbestos litigation would cease.

112. On October 23, 2019, the day the Corporate Restructuring was consummated, the Old CertainTeed legal team met in Charleston, South Carolina, where Craig Smith, an in-house attorney, gave a presentation regarding the company's position on the restructuring. At this meeting, the presenters attempted to push an official company story about the Corporate Restructuring that described the Corporate Restructuring as a legitimate transaction to create optionality.

113. However, the true purpose of the Corporate Restructuring was to create a subsidiary loaded with asbestos liabilities and minimal assets for purpose of a bankruptcy proceeding, thereby hindering and delaying payment of asbestos liabilities, and an ultimate estimation of claims in an amount far below what CertainTeed reasonably expected to pay asbestos claimants outside of bankruptcy. Although presented as an "option," the entire structure of the DBMP organization

was intended to carry out the objective of entering bankruptcy under the guise that it was the result of an independent decision made by DBMP's board of managers. Indeed, none of New CertainTeed or SGC's executives have ever been able to identify any other "options" apart from the Corporate Restructuring and DBMP bankruptcy filing (besides carrying on with the status quo of business as usual, which, having engaged in the Corporate Restructuring, was not a realistic option).

114. In sum, from the outset, the primary objective of the Corporate Restructuring was to allow New CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, to operate outside of bankruptcy while subjecting asbestos creditors to the stay imposed by section 362 of the Bankruptcy Code and a preliminary injunction that would deprive such creditors from any recovery unless or until they consent to a chapter 11 plan of reorganization that resolves DBMP's asbestos liabilities for a fraction of what it was paying outside of bankruptcy. The CertainTeed/Saint-Gobain Entities were well aware of the *Garlock* asbestos estimation trial and plan, and that a similar estimation had been sought in *Bestwall*, and their goal in directing, authorizing and engaging in the Corporate Restructuring and filing of a chapter 11 bankruptcy petition was to gain leverage against asbestos victims and their families. In addition, asbestos victims and their families would be subjected to the bankruptcy claims process and estimation, all as part of an effort to seek to reduce recoveries to a fraction of what they might recover if not for the bankruptcy. Meanwhile, New CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, could continue to operate outside of bankruptcy and timely pay their non-asbestos creditors in the ordinary course.

115. The corporate transactions of Old CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, were made with the intent to hinder, delay, or defraud asbestos

victims and their families and curtail their rights to pursue and recover on their claims. The Corporate Restructuring and eventual bankruptcy of DBMP had a material, negative effect on the ability of current and future asbestos claimants to recover on their claims. Among other things, the Corporate Restructuring and resulting bankruptcy were intended to eliminate and/or divest the CertainTeed/Saint-Gobain Entities of their obligations to asbestos claimants through the creation of DBMP through the allocation of all of the asbestos liabilities to DBMP. The Corporate Restructuring also deprived asbestos claimants of direct access to the assets of Old CertainTeed that were apportioned to New CertainTeed, in violation of applicable law including, without limitation, Section 10.901 of the TBOC and applicable state and federal fraudulent transfer laws.

116. In addition, the Corporate Restructuring resulted in DBMP receiving less than a reasonably equivalent value in exchange for the asbestos liabilities of Old CertainTeed that it was allocated, and also (a) rendered DBMP insolvent; (b) left DBMP with an unreasonably small amount of assets in relation to its liabilities; and/or (c) resulted in DBMP intending to incur, or believing that it would incur, asbestos debts beyond its ability to pay such asbestos liabilities as they became due. As a result of both the actual and constructive fraudulent transfers effectuated in the Corporate Restructuring engaged in by Old CertainTeed and its affiliates, including the other CertainTeed/Saint-Gobain Entities, the dissolution or cancellation of Old CertainTeed should be revoked, and a receiver appointed for Old CertainTeed for the benefit of Old CertainTeed's creditors, including the Debtor, its estate, and its creditors.

### **COUNT I**

#### **Nullification of Cancellation and/or Dissolution of Old CertainTeed**

117. Plaintiffs repeat and incorporate the allegations set forth in this Complaint as though fully set forth herein.

118. Pursuant to, *inter alia*, (i) 6 Del. C. § 18-804, and (ii) Tex. Bus. Org. Code

§§ 11.153, 11.352, a company in dissolution shall deposit, pay and/or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, of creditors known and/or unknown to the company, and to make such provisions as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the company or that have not arisen but that, based on facts known to the company, are likely to arise or to become known to the company.

119. Asbestos creditors of DBMP had claims against Old CertainTeed prior to its dissolution. In addition, Old CertainTeed, New CertainTeed, DBMP, CT Holding, SGC, and Saint-Gobain Parent, each knew or should have known that additional asbestos claims were likely to arise following such dissolution. Nonetheless, no provision was made to pay any claims of asbestos creditors, whether currently existing or reasonably expected to arise in the future.

120. Accordingly, Old CertainTeed was improperly and fraudulently converted from a Delaware corporation to a Delaware LLC, and then converted to a Texas LLC that engaged in a divisional merger with the express intention to dissolve without adequately providing for payment of the claims of creditors.

121. As a result, pursuant to, *inter alia*, (i) 6 Del. C. § 18-804; (ii) Tex. Bus. Org. Code §§ 11.153, 11.352; and (iii) applicable common law, Plaintiffs, on behalf of the estate of DBMP and its creditors, are entitled to an order nullifying the cancellation and/or dissolution of Old CertainTeed and an order directing that a certificate of correction be filed reinstating the Delaware entity as necessary.

## **COUNT II**

### **Appointment of a Receiver**

122. Plaintiffs repeat and incorporate the allegations set forth in this Complaint as though fully set forth herein.

123. Pursuant to, *inter alia*, (i) 28 U.S.C § 3103; (ii) 6 Del C. § 18-805; (iii) 8 Del. C. §§ 279, 291; (iv) Tex. Bus. Org. Code §§ 11.401-406; (v) Tex. Bus. Org. Code § 11.356; (vi) N.C. Gen. Stat. Ann. § 57D-6-04 and/or N.C. Gen. Stat. § 1-507.20 *et. seq.*, and (vii) applicable common law and/or equitable rights to receivership, Plaintiffs have shown good cause to appoint a receiver for Old CertainTeed<sup>17</sup> with the power to:

- a. take and commence such actions as the receiver deems appropriate, including, without limitation, with respect to the divisional merger and transfer of Old CertainTeed's assets and liabilities (including, without limitation, any indemnity rights and/or claims) to New CertainTeed and DBMP, including, but not limited to any action or proceeding as may in the opinion of the receiver be necessary or advisable for the management, control, collection, protection and liquidation of Old CertainTeed against, without limitation, DBMP, New CertainTeed, CT Holding, SGC, Saint-Gobain Parent, and such other entities and individuals as the receiver deems appropriate;
- b. take custody, control and possession of all property and business of Old CertainTeed, including, without limitation, all funds, property (real and personal), premises, leases, accounts, rights, credits, books and records and other assets constituting a part of, or which resided in the possession or control of, Old CertainTeed;
- c. receive and collect any and all sums of money due or owing to Old CertainTeed,

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<sup>17</sup> As set forth in this Complaint, Old CertainTeed includes CertainTeed Corporation (a Delaware corporation), CertainTeed LLC (a Delaware LLC, upon conversion from CertainTeed Corporation), and CertainTeed LLC (a Texas LLC, upon conversion and/or reincorporation from a Delaware LLC to a Texas LLC). Such reference does not include CertainTeed LLC, formed as a Texas LLC during the divisional merger described above and converted and/or reincorporated as a Delaware LLC, and defined herein as "New CertainTeed."

whether the same are now due or shall hereafter become due and payable;

- d. do such things and enter into such agreements as the receiver may deem advisable in connection with the management, control, protection and liquidation of Old CertainTeed, and incur such expenses and make such disbursements as may, in his judgment, be advisable or necessary in connection thereof;
- e. file such documents with appropriate authorities as are necessary in order to effectuate the above goals, including, without limitation, documents seeking to nullify and/or cancel certificates of cancellation and/or dissolution of Old CertainTeed; and
- f. take such other action as may be approved by the Court.

#### **RESERVATION OF RIGHTS**

124. Plaintiffs intend to conduct further investigation and discovery in relation to the Corporate Restructuring (including the Debtor's bankruptcy) and there are ongoing discovery disputes with various parties, including DBMP, New CertainTeed, CT Holding, SGC and Saint-Gobain Parent. Plaintiffs therefore expressly reserve the right to bring additional claims, including, without limitation, claims discovered as a result of Plaintiffs' ongoing efforts to obtain additional information from DBMP, New CertainTeed, CT Holding, SGC and Saint-Gobain Parent and their affiliated entities and individuals.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs demand judgment in their favor against Old CertainTeed as follows:

- A. Entry of an order or orders nullifying the certificate of cancellation and/or dissolution of Old CertainTeed, and requiring Old CertainTeed to file instruments with the

Delaware Secretary of State and Texas Secretary of State Division instruments nullifying such certificates of cancellation and/or dissolution, including but not limited to the filing of certificates of correction as necessary;

B. Entry of an order appointing a receiver for Old CertainTeed and authorizing such receiver to:

- 1) take and commence such actions as the receiver deems appropriate, including, without limitation, with respect to the divisional merger and transfer of Old CertainTeed's assets and liabilities (including, without limitation, any indemnity rights and/or claims) to New CertainTeed and DBMP, including, but not limited to any action or proceeding as may in the opinion of the receiver be necessary or advisable for the management, control, collection, protection and liquidation of Old CertainTeed against, without limitation, DBMP, New CertainTeed, CT Holding, SGC, Saint-Gobain Parent, and such other entities and individuals as the receiver deems appropriate;
- 2) take custody, control and possession of all property and business of Old CertainTeed, including, without limitation, all funds, property (real and personal), premises, leases, accounts, rights, credits, books and records and other assets constituting a part of, or which resided in the possession or control of, Old CertainTeed;
- 3) receive and collect any and all sums of money due or owing to Old CertainTeed, whether the same are now due or shall hereafter become due and payable;

- 4) do such things and enter into such agreements as the receiver may deem advisable in connection with the management, control, protection and liquidation of Old CertainTeed, and incur such expenses and make such disbursements as may, in his judgment, be advisable or necessary in connection thereof;
- 5) file such documents with appropriate authorities as are necessary in order to effectuate the above goals, including, without limitation, documents seeking to nullify and/or cancel certificates of cancellation and/or dissolution of Old CertainTeed; and
- 6) take such other action as may be approved by the Court.

C. Awarding Plaintiffs' attorneys' fees and the costs and disbursements of this action;

and

D. Granting such other and further relief as the Court may deem just and proper.

[signature page to follow]

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Dated: October 22, 2022

B1040 (FORM 1040) (12/15)

<b>ADVERSARY PROCEEDING COVER SHEET</b> (Instructions on Reverse)		<b>ADVERSARY PROCEEDING NUMBER</b> (Court Use Only)
<b>PLAINTIFFS</b> OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS, and SANDER L. ESSERMAN, in his capacity as Legal Representative for Future Asbestos Claimants, each on behalf of estate of DBMP LLC and its creditors	<b>DEFENDANTS</b> CERTAINTTEED LLC (f/k/a CERTAINTTEED CORPORATION)(a/k/a "OLD CERTAINTTEED")	
<b>ATTORNEYS</b> (Firm Name, Address, and Telephone No.) Robert A. Cox, Jr., HAMILTON STEPHENS STEELE + MARTIN, PLLC, 525 North Tryon Street, Suite 1400, Charlotte, NC 28202, (704) 344-1117, and Felton E. Parrish, ALEXANDER RICKS LLC, 142 E. 7th St., Charlotte, NC 28204, (704) 365-3656	<b>ATTORNEYS</b> (If Known)	
<b>PARTY</b> (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	<b>PARTY</b> (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	
<b>CAUSE OF ACTION</b> (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)  Action to appoint receiver for CertainTeed LLC (f/k/a CertainTeed Corporation), and to extent necessary, nullify cancellation of and/or revoke dissolution of CertainTeed LLC, pursuant to applicable federal and state law.		
<b>NATURE OF SUIT</b> (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
<b>FRBP 7001(1) – Recovery of Money/Property</b> <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other  <b>FRBP 7001(2) – Validity, Priority or Extent of Lien</b> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property  <b>FRBP 7001(3) – Approval of Sale of Property</b> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h)  <b>FRBP 7001(4) – Objection/Revocation of Discharge</b> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e)  <b>FRBP 7001(5) – Revocation of Confirmation</b> <input type="checkbox"/> 51-Revocation of confirmation  <b>FRBP 7001(6) – Dischargeability</b> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny  (continued next column)	<b>FRBP 7001(6) – Dischargeability (continued)</b> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other  <b>FRBP 7001(7) – Injunctive Relief</b> <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other  <b>FRBP 7001(8) Subordination of Claim or Interest</b> <input type="checkbox"/> 81-Subordination of claim or interest  <b>FRBP 7001(9) Declaratory Judgment</b> <input type="checkbox"/> 91-Declaratory judgment  <b>FRBP 7001(10) Determination of Removed Action</b> <input type="checkbox"/> 01-Determination of removed claim or cause  <b>Other</b> <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$	
Other Relief Sought  Receivership and, to the extent necessary, nullification and/or revocation of cancellation or dissolution of CertainTeed LLC		

**B1040 (FORM 1040) (12/15)**

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR DBMP LLC		BANKRUPTCY CASE NO. 20-30080
DISTRICT IN WHICH CASE IS PENDING Western District of North Carolina	DIVISION OFFICE Charlotte	NAME OF JUDGE J. Craig Whitley
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF)  <i>/s/ Robert A. Cox, Jr.</i>		
DATE  10/22/2022	PRINT NAME OF ATTORNEY (OR PLAINTIFF)  Robert A. Cox, Jr.	

### INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

**Plaintiffs and Defendants.** Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

**Attorneys.** Give the names and addresses of the attorneys, if known.

**Party.** Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

**Demand.** Enter the dollar amount being demanded in the complaint.

**Signature.** This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.