UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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

STATUS REPORT AND STATEMENT OF THE FUTURE CLAIMANTS' REPRESENTATIVE

Sander L. Esserman, the legal representative for future asbestos-related personal injury claimants (the "**FCR**"), files this status report and statement to provide the Court with background information and the current status of this bankruptcy case and related adversary proceedings.

INTRODUCTION

The role of the FCR is to protect the interests of future claimants—those individuals who were exposed to asbestos but have not yet become sick. The future claimants are the largest constituency in this case. This bankruptcy case jeopardizes the due process rights of future (and current) claimants because it is an attempt by a solvent business enterprise to force claimants to accept a lower recovery on their claims than they could obtain through civil litigation in the tort system. It would be fundamentally unfair to future claimants, and contrary to the requirements of the Bankruptcy Code, for future claimants to receive less compensation for their claims than claimants historically received.

CertainTeed Corporation created DBMP for one reason—to remove its valuable assets from the reach of asbestos claimants and strand those asbestos claimants in the bankruptcy 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 19335.

DBMP, a newly created shell entity with no employees or business operations of its own. Through a divisive merger under Texas law, DBMP received minimal assets but all of CertainTeed's asbestos liabilities. DBMP promptly filed for bankruptcy and obtained a preliminary injunction to protect the CertainTeed business enterprise from asbestos litigation while DBMP's bankruptcy case is pending. As a result, CertainTeed currently enjoys all the benefits of bankruptcy with none of the burdens.

The FCR and the Official Committee of Asbestos Claimants (the "**ACC**" and together with the FCR, the "**Claimant Representatives**") are pursuing three adversary proceedings to remedy the harmful effects of the divisive merger: (i) an adversary proceeding to avoid the divisive merger as a fraudulent transfer, (ii) an adversary proceeding seeking to substantively consolidate DBMP and CertainTeed, and (iii) an adversary proceeding for breach of fiduciary duty. The adversary proceedings are based on different legal theories, but they all pursue the same goal for the benefit of the bankruptcy estate—restoring asbestos claimants to the same position they were in before the divisive merger and ensuring that all of CertainTeed's assets are available to satisfy asbestos claims.

DBMP, on the other hand, seeks an estimation proceeding which will cause years of delay and accomplish nothing. DBMP does not seek an estimation that would determine what current and future claimants would receive if their claims were resolved through civil litigation in the tort system based on historical values. Instead, DBMP seeks to relitigate prior settled claims by pushing a manufactured narrative of its settlement history and arguing that future claimants should receive less than claimants historically received. The final result will not be binding on anyone, and claimants can hardly be expected to agree to a plan that would provide them less than they would receive outside of bankruptcy.

STATEMENT AND STATUS REPORT

I. Section 524(g) and the Role of the FCR.

Section 524(g) is a unique provision of the Bankruptcy Code that attempts to balance a debtor's desire to achieve a final resolution of its asbestos liability with the need to provide due process and fair compensation to the "future claimants" whose asbestos-related diseases do not manifest until after the bankruptcy.

Section 524(g) provides that a bankruptcy court may, specifically in connection with an order confirming a plan of reorganization under chapter 11, issue an injunction "to supplement the injunctive effect of a discharge[.]" 11 U.S.C. § 524(g)(1)(A). This supplemental injunction channels claims against the debtor to a separate trust that is appropriately funded and structured to pay fair compensation to the debtor's asbestos claimants when and as their diseases arise. *Id.* § 524(g)(2)(B)(ii)(V), (g)(4)(B)(ii). Assuming the requirements of the Bankruptcy Code and federal law are met, the confirmation injunction can extend to non-debtors whose liability for asbestos claims against the debtor "arises by reason of" one of four circumstances specified in the statute. *Id.* § 524(g)(4)(A)(ii)(I)-(IV); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004) ("Importantly for this case, § 524(g) limits the situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor[.]"); *In re Pittsburgh Corning Corp.*, 453 B.R. 570, 590 (Bankr. W.D. Pa. 2011) (a court may channel asbestos liability only "to the extent that the liability of such third party is derivative of the [d]ebtor's liability under one of four circumstances").

Section 524(g) conditions the issuance of the supplemental confirmation injunction on multiple requirements, including (1) a finding that "pursuit of [future] demands outside the procedures prescribed by such plan is likely to threaten" the goal of treating current and future

claims fairly,[2] (2) acceptance of the plan by a 75% supermajority of current asbestos claims,[3] (3) reasonable assurance that the trust is funded and structured to "be in a financial position to pay" future claims, whenever they arise, pro rata with current claims,[4] and (4) a determination that the terms of the injunction would be "fair and equitable" to future claimants.[5]

The need for a future claimants' representative arises because asbestos-related diseases have long latency periods, sometimes up to forty years or longer between first exposure and manifestation of disease, which presents unique due-process challenges. It is well established that the Due Process Clause of the Fifth Amendment to the United States Constitution requires that a creditor receive adequate notice of the bankruptcy proceedings before it can be bound by a plan of reorganization.[6] However, the latent nature of asbestos injuries makes it impossible to provide effective notice to all potential victims.[7]

Appointment of a future claimants' representative under § 524(g) is the only constitutionally permissible means to satisfy future claimants' rights to due process.[8] By providing "vigorous and faithful vicarious representation" of future claimants, the future

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[2] 11 U.S.C. § 524(g)(2)(B)(ii)(III).

[3] *Id.* § 524(g)(2)(B)(ii)(IV)(bb).

[4] *Id.* § 524(g)(2)(B)(ii)(V).

[5] *Id.* § 524(g)(4)(B)(ii).

[6] *See DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 150 (2d Cir. 2014) ("[A] claim cannot be discharged if the claimant is denied due process because of lack of adequate notice."); *Wright v. Owens Corning*, 679 F.3d 101, 107 (3d Cir. 2012) ("Inadequate notice accordingly 'precludes discharge of a claim in bankruptcy.'" (quoting *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995))); *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 835 (11th Cir. 1989) (affirming lower court's holding that debtors' failure to provide constitutionally adequate notice exempted creditor's claim from discharge); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984); *see also New York v. N.Y.C., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953).

[7] *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) ("[W]e recognize the gravity of the question whether . . . notice sufficient under the Constitution and Rule 23 could ever be given to legions [of asymptomatic future asbestos claimants] so unselfconscious and amorphous.").

[8] *See generally* Ralph R. Mabey & Jamie Andra Gavrin, *Symposium on Bankruptcy: Chapter 11 Issues: Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. Rev. 745, 784 (1993).

claimants' representative allays the due-process concerns attendant to the rights of unknown victims and allows a reorganized debtor to move forward without the specter of future asbestos-related demands.[9]

Among the future claimants' representative's duties is to assure that the protections of § 524(g) are afforded only where consistent with the interests of future claimants and that any claims-resolution trust ultimately proposed in this case is adequately funded and appropriately structured to assure that future claimants will be treated and paid in a manner substantially similar to current claimants.[10] The estimated number and value of future claims make future claimants one of the most important constituencies in this bankruptcy. It is likely that tens of thousands of future claimants will assert claims for compensation.

On June 1, 2020, on the motion of the Debtor and with the support of the ACC, the Court appointed Sander Esserman as the FCR in this case.[11] Mr. Esserman has more than 25 years of experience handling asbestos and mass tort related issues in various capacities, including serving as a future claimants' representative, counsel to future claimants' representatives, and counsel to mass tort trusts. He currently serves as the Future Claimants' Representative in the chapter 11 cases of *Bestwall LLC* (Case No. 17-31795 (LTB) (Bankr. W.D.N.C.)) and *BMI Oldco Inc.* (Case No. 23-90794 (Bankr. S.D. Tex.)), and for the NGC Bodily Injury Trust. Additionally, he acts as counsel to approximately 20 mass tort trusts, the majority of which are asbestos-related.

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[9] *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993); *In re Flintkote Co.*, 486 B.R. 99, 125 n.68 (Bankr. D. Del. 2012) ("Appointing an FCR is an appropriate method of providing due process for unknown individuals who have yet to make demands for payment . . . .").

[10] *See* 11 U.S.C. § 524(g)(4)(B)(i) (an injunction affecting future claimants may only be issued if "the court appoints a legal representative for the purpose of *protecting the rights of persons* that might subsequently assert demands . . . ." (emphasis added)).

[11] *Order Appointing Sander L. Esserman as Legal Representative for Future Asbestos Claimants*, at 2 [D.I. 310].

II. Company Background.

CertainTeed Corporation ("**Old CT**") was a Delaware-incorporated building material manufacturer who, since 1988, was wholly owned by Compagnie de Saint-Gobain, a French multinational corporation. From the 1930s to the 1990s, Old CT manufactured and/or sold a number of asbestos-containing products, including asbestos cement pipes from 1962 to 1992. Those asbestos cement pipes on average contained 10% to 15% crocidolite asbestos fibers, a particularly hazardous form of asbestos. Old CT also manufactured or sold asphalt roofing products, certain gypsum products, and specialty railroad insulation products.

There is no dispute that Old CT's products cause mesothelioma. Beginning in the early 1970s, Old CT faced substantial litigation for asbestos-induced personal injuries and wrongful death. In the mid-1980s, Old CT was a member of the Asbestos Claims Facility, an association of the major asbestos defendants and insurers that was formed to evaluate and settle claims asserted against its members and allocate liability among them.[12] From 1988 to 2001, Old CT was a member of the Center of Claims Resolution, an entity formed by former members of the Asbestos Claims Facility after that facility dissolved.[13] From 2002 to the Debtor's bankruptcy filing on January 23, 2020, Old CT's yearly settlement, judgment, and defense costs related to its asbestos liabilities ranged from $80 million to $160 million, totaling approximately $2 billion during that period.

By early 2019, Old CT and its North American parent company, Saint-Gobain Corporation ("**SGC**"), began planning what came to be known as "Project Horizon"—a project to isolate Old CT's asbestos liabilities into a new company that would file for bankruptcy. Old

[12] *See* Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 L. & CONTEMP. PROBS. 13 (1990).

[13] *Id*.

CT and SGC carried out that plan through a corporate restructuring in October 2019 (the "**Corporate Restructuring**"). SGC first formed CertainTeed Holding Corporation ("**CT Holding**") and contributed all of Old CT's issued and outstanding stock to CT Holding. Old CT then converted to a Texas limited liability company and underwent a divisional merger under Texas law to split itself into two entities: (i) CertainTeed LLC ("**New CT**") which received 97% of Old CT's assets and (ii) DBMP which was saddled with all of Old CT's asbestos liabilities despite receiving only 3% of its assets.

DBMP was also provided a Funding Agreement from New CT which purports to require New CT to fund DBMP's bankruptcy case and the amounts necessary for a § 524(g) trust. Judge Whitley described that Funding Agreement as nothing more than "a conditional agreement which is dependent on New CertainTeed's approval of any reorganization plan and upon New CertainTeed's continued good financial health."[14]

DBMP has no employees or business operations of its own. A small number of employees were seconded from SGC to DBMP. DBMP has only one operating subsidiary, Millwork & Panel LLC ("**Millwork & Panel**"), an exterior siding and trim business that was formed as part of Project Horizon. Millwork & Panel's only customer is New CT. Thus, DBMP is completely dependent on New CT and SGC.

Judge Whitley summarized the Corporate Restructuring as follows:

> [I]n a matter of hours and without notice to any of its asbestos creditors, Old CertainTeed separated virtually all of its business, assets, and employees from its asbestos liabilities, transferring those liabilities to DBMP. This enabled Old CertainTeed to reach its goal

[14] *Findings of Fact and Conclusions of Law Regarding Order: (I) Declaring that the Automatic Stay Applies to Certain Actions Against Non-Debtor, (II) Denying Motion of the Official Committee of Asbestos Personal Injury Claimants to Lift the Stay, and Alternatively (III) Preliminarily Enjoining Such Actions*, ¶ 77, Adv. Pro. No. 20-03004 [D.I. 343] ("**PI Findings of Fact and Conclusions of Law**").

> of placing its asbestos liabilities into bankruptcy without the entire enterprise filing for chapter 11.[15]

Judge Whitley further recognized that the corporate restructuring was "materially prejudicial"[16] to the rights of asbestos claimants and explained:

> Before the Corporate Restructuring, Old CertainTeed's asbestos creditors had the same ability and rights to access Old CertainTeed's considerable assets as did its other unsecured (non-asbestos) creditors. As a result of the Corporate Restructuring, asbestos creditors were placed one step beyond those assets and made dependent on the DBMP's willingness to press its rights under the Funding Agreement. . . .
>
> [I]t appears that the Divisive Merger had a material, negative effect on the asbestos creditors' ability to recover on their claims.[17]

III. Key Events in the Bankruptcy Case.

A. The Preliminary Injunction.

As planned by SGC and Old CT, DBMP filed for bankruptcy shortly after its formation.[18] Upon its bankruptcy filing, DBMP immediately sought a preliminary injunction to protect New CT and other members of the Saint-Gobain business enterprise from asbestos claims during the bankruptcy case. The FCR objected to the preliminary injunction, in part, because (i) the jurisdiction supporting the preliminary injunction had been artificially manufactured and (ii) an injunction was not necessary to prevent irreparable harm to DBMP—because New CT is ultimately responsible for the payment of asbestos claims under the Funding Agreement, DBMP is not harmed if claimants obtain judgments against New CT. Despite these objections, and similar objections from the ACC, the preliminary injunction was granted on August 10, 2021.

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[15] *Id*. ¶ 56.

[16] *Id*. at 42.

[17] *Id*. ¶¶ 170-172.

[18] Judge Whitley rejected testimony that DBMP exercised independent judgment in deciding to file for bankruptcy, finding that the testimony "strains credibility." *Id*. ¶ 102.

From the FCR's perspective, the existence of the preliminary injunction complicates the ability to reach any consensual resolution in this case. In a typical bankruptcy case, all parties are motivated to resolve the case as quickly as possible. Creditors want prompt recovery, and the debtor wants to free itself from costly case administration and burdensome court oversight. In this case, however, with the preliminary injunction in place, New CT has all the benefits of bankruptcy with none of the burdens. It is protected from asbestos claims while still being able to operate without court oversight. That includes the ability to "loan" funds to its corporate affiliates.[19] As long as that arrangement is in place, New CT has little incentive to agree to funding of a § 524(g) trust other than on its own terms.

B. The Adversary Proceedings.

The Court granted the Claimant Representatives standing to bring causes of action challenging the Corporate Restructuring on November 3, 2021.[20] The Claimant Representatives filed three adversary proceedings (the "**Adversary Proceedings**"):

1. Substantive Consolidation Proceeding [Adv. Pro. 21-3032]: In this proceeding, the Claimant Representatives seek the substantive consolidation of DBMP and New CT. The Defendants in the Substantive Consolidation Proceeding are DBMP and New CT.

2. Fraudulent Transfer Proceeding [Adv. Pro. 22-03000]: In this proceeding, the Claimant Representatives assert causes of action for actual and constructive fraudulent transfers. The Defendants in the Fraudulent Transfer Proceeding are CertainTeed LLC, CertainTeed Holding Corporation, and Saint Gobain Corporation.

[19] As part of SGC's centralized cash management systems, excess cash held by New CT is "loaned" to Saint Gobain Finance Corp ("**SGFC**"). Although funds "loaned" to SGFC are payable upon demand by New CT, funds held by SGFC are presumably loaned to other entities within the Saint Gobain enterprise. That arrangement would not be possible if New CT filed for bankruptcy itself. In that case, cash generated by New CT would need to be held for distribution to New CT's creditors.

[20] *Order Granting in part, Denying in part Motion of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants Representative for Entry of an Order (I) Granting Leave, Standing, and Authority to Investigate, Commence, Prosecute, and to Settle Certain Causes of Action, and (II) to Conduct Relevant Examinations* [D.I. 1197] (the "**Standing Order**").

3. Fiduciary Duty Proceeding [Adv. Pro. 22-03001]: In this proceeding the Claimant Representatives assert causes of action for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty and civil conspiracy. The Defendants in the Fiduciary Duty Proceeding are Compagnie de Saint-Gobain S.A., Saint Gobain Corporation, Saint Gobain Delaware Corporation, CertainTeed LLC, CertainTeed Holdings Corporation, and 20 individuals who were officers or directors of one or more of the corporate defendants.

The defendants filed motions to dismiss in the Substantive Consolidation Proceeding and the Fraudulent Transfer Proceeding. The Court denied both motions.[21] The Fiduciary Duty Proceeding is currently stayed pending the outcome of the other proceedings.[22] However, to avoid duplicative discovery, the Adversary CMO provides that all discovery conducted in any of the Adversary Proceedings shall be deemed to have occurred in all of the Adversary Proceedings, including the Fiduciary Duty Proceeding.[23]

The Adversary CMO also provided that all discovery conducted in the Preliminary Injunction Proceeding was deemed to have been conducted in connection with the Adversary Proceedings. A related motion to compel (the "**Crime-Fraud/Waiver Motion**") filed in the Preliminary Injunction Proceeding was also deemed submitted in the Adversary Proceedings.

In the Crime-Fraud/Waiver Motion, the Claimant Representatives sought the production of thousands of documents related to the Corporate Restructuring that the Debtor and New CT withheld from production in the Preliminary Injunction Proceeding on the grounds of privilege and attorney work product. As explained in the Crime-Fraud/Waiver Motion, either the crime-fraud exception to attorney-client privilege applied or DBMP and New CT waived privilege by

[21] *Order Denying in Part and Granting in Part the Motion of the Debtor to Dismiss the Adversary Complaint and CertainTeed LLC's Motion to Dismiss Complaint and Brief in Support*, Adv. Pro. 21-3032 [D.I. 49] (In the Substantive Consolidation proceeding, the Court denied the motions to dismiss the substantive consolidation claim but granted the defendants' motion to dismiss an alternative count based on unconscionability); *Order Denying Defendant's Motion to Dismiss Amended Complaint and Brief in Support*, Adv. Pro. No. 22-03000 [D.I. 89].

[22] *Case Management Order*, ¶ B.3.iii, Adv. Pro. No. 22-03000 [D.I. 48] (the "**Adversary CMO**").

[23] Adversary CMO, ¶ C.1.i.

putting the purpose of the Corporate Restructuring at issue. As alternative relief, the Claimant Representatives requested the appointment of a discovery mediator. Due to the time constraints of the Preliminary Injunction Proceeding, the Claimant Representatives withdrew the Crime-Fraud/Waiver Motion without prejudice in the Preliminary Injunction Proceeding. The Adversary CMO effectively revived the Crime-Fraud/Waiver Motion for purposes of the Adversary Proceedings.

After months of discussions and status conferences with the Court regarding how to resolve the issues raised by the Crime-Fraud/Waiver Motion, the Court entered an order (the "**Discovery Referee Order**")[24] appointing retired Judge Forrest D. Bridges (the "**Discovery Referee**") to serve as discovery referee to address three disputes: (i) the sufficiency of the Debtor's privilege log, (ii) whether the crime-fraud exception to attorney-client privilege and/or the work product doctrine applies and, if so, which documents on the privilege log should be produced, and (iii) whether an at-issue waiver of the attorney client privilege and/or work product doctrine occurred and, if so, the scope of such waiver.[25] The Discovery Referee was authorized to review documents *in camera* and to issue one or more reports. Upon issuance of a report, parties have twenty days to file an objection. If an objection is filed, the issue is to be heard by the Court on *de novo* review.

The Discovery Referee issued an initial report on March 4, 2024.[26] In that initial report, the Discovery Referee addressed objections and instructions not to answer that were made during

[24] *Order Appointing Discovery Referee and Establishing Protocol for Resolution of Crime-Fraud/Waiver Motion*, Adv. Pro. 22-03000 [D.I. 171].

[25] Discovery Referee Order, ¶ 6.

[26] *Discovery Referee Report and Recommendation No. 1*, Adv. No. 22-03000 [D.I. 190] (the "**Discovery Referee Report**").

depositions.[27] The Discovery Referee first noted a "repeated pattern" of an "overly broad assertion of the privilege, coupled with [an instruction not to answer] that, as a practical matter, amounted to witness coaching."[28] With respect to at-issue waiver, the Discovery Referee stated:

> Debtor has offered sworn testimony that Bankruptcy was simply one of several options available to it following the divisional merger, coupled with the recurring Deposition testimony of company officials that their understanding of those options came from confidential communications with counsel. By doing so, Debtor has taken an affirmative step to place in issue the advice of its counsel relating to how the decision was made to file bankruptcy . . . . Having placed the matter in issue, Debtor should not be allowed to use the attorney-client privilege to prevent a fulsome inquiry into the basis for this assertion. To conclude otherwise would allow Debtor to make an affirmative assertion that could operate as a fraud upon the court, if that assertion is later shown through more complete testimony to have been false.[29]

Based on those conclusions, the Discovery Referee recommended that depositions should be reconvened to allow the Claimant Representatives an opportunity to ask questions where witnesses had previously been instructed not to respond.[30]

Although the Discovery Referee Order expressly provided that the Discovery Referee could issue one or more reports, the Debtor filed a motion to extend the objection deadline until the Discovery Referee issued a final report. The Court granted that motion and ordered that objections to the Discovery Referee's recommendations would be due 20 business days after the

[27] Discovery Referee Report, at 6.

[28] *Id*. at 9; *see also id.* at 12 ("In many cases, the objections lodged by Debtor's (or the non-Debtor affiliates') counsel were overly broad, extending to matters well beyond the protection afforded by the attorney-client privilege of confidential communications with counsel and preventing the disclosure of underlying facts known to the persons who communicated with the attorneys.").

[29] *Id*. at 18-19 (internal citations omitted).

[30] *Id*. at 24.

Discovery Referee files a final report.[31] That order was entered "without prejudice to the right of the successor to the Judge" to modify its terms.[32]

Based on recent updates from the Discovery Referee, the FCR is hopeful that the Discovery Referee will issue a final report by the end of the year. The FCR also anticipates that one or more additional motions will be filed shortly to address privilege issues not subject to the Discovery Referee Order. Resolution of privilege issues is critically important. Old CT and SGC included lawyers in virtually all meetings or discussions regarding the Corporate Restructuring to shield those discussions from discovery. Thus, discovery cannot fully commence until these privilege issues are resolved.

Prior rulings also deferred additional discovery issues that will need to be addressed at some point. For instance, the parties proposed competing discovery plans to the Court in October 2022.[33] One of the disputed issues was whether mobile devices (smart phones and tablets) and instant messaging programs used by document custodians would be searched for responsive documents. The Court ruled that "for present purposes" mobile devices would not need to be searched if the custodian certified that they weren't used for business purposes or were used only on a negligible basis.[34] Given the prevalence of text messaging in modern business communications, the FCR believes it is inevitable that this issue will need to be revisited.

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[31] *Order Granting Motion of DBMP LLC to Suspend the Deadline to Object to Discovery Referee's Report and Recommendation*, Adv. Pro. No. 22-03000 [D.I. 248].

[32] *Id*. ¶ 3.

[33] *See Joint Letter to Court from Parties re Discovery Plan in Adversary Proceedings*, Adv. Pro. No. 22-03000 [D.I. 120].

[34] Hr'g Tr. at 103:19-25 (Dec. 15, 2022).

Another issue that the Court will need to address is the extent to which either the Debtor or its domestic affiliates have possession, custody or control of documents maintained by employees of the Debtor's ultimate French parent, Compagnie de Saint-Gobain ("**CSG**"). CSG executives were among the key decisionmakers involved in the Corporate Restructuring. However, the Debtor and New CT refuse to produce documents from those individuals and claim that they do not have possession, custody or control of those documents.

The Claimant Representatives filed a motion to compel production of those documents on May 6, 2024.[35] The Court denied that motion, without prejudice, on June 25, 2024.[36] The Court noted that a separate subpoena had been served on CSG and that production of documents from the U.S. Defendants might include some limited correspondence from CSG.[37] The Court concluded that a ruling on the motion to compel was premature until CSG responded to the subpoena and the U.S. Defendants produced their own files.[38]

Since entry of that order, CSG responded to the subpoena by stating that French law prohibited it from producing documents except under the Hague Convention. The FCR does not believe that the Claimant Representatives should be forced to resort to the Hague Convention to obtain documents that are within the possession, custody, or control of the U.S. Defendants. Because the Court's prior ruling deferred a decision on that critical issue, the Court likely will need to resolve it.

Finally, despite many discussions and exchanges, the parties have not agreed on search terms to be applied by the defendants when collecting documents responsive to the Claimant

[35] *Motion of the Official Committee of Asbestos Personal Injury Claimants and The Future Claimants' Representative to Compel the U.S. Defendants to Produce Documents*, Adv. Pr. 22-03000 [D.I. 243].

[36] *Order Denying Motion to Compel*, Adv. Pr. 22-03000 [D.I. 269].

[37] *Id*. ¶ 5.

[38] *Id*. ¶ 6.

Representatives' discovery requests. The FCR is hopeful that this issue can be resolved without Court involvement.

In sum, although the Adversary Proceedings have been pending for two years, they are still in the earliest stages of discovery with the parties extensively litigating various discovery and case management issues during that time. As noted above, the scope of future discovery will depend on the outcome of various privilege issues, including those referred to the Discovery Referee.

The FCR intends to vigorously pursue the Adversary Proceedings because at this point they appear to be the only way for all assets of the CertainTeed business enterprise to be available for current and future asbestos claimants.

C. The Estimation Proceeding.

DBMP filed its motion seeking estimation of its liability for mesothelioma claims on July 29, 2021. The FCR opposed estimation because it serves no legitimate purpose where DBMP can access funds sufficient to pay all asbestos claims in full.[39] The FCR also argued that estimation would cause undue delay[40] and result in nothing more than a non-binding advisory opinion.[41] Regardless of the outcome of the estimation proceeding, a plan cannot be confirmed without acceptance of 75% of asbestos claimants. Likewise, if DBMP does not agree with the estimated amount, it would not be obligated to propose a plan based on that amount.

Despite the objections of the FCR and ACC, DBMP's estimation motion was granted on November 29, 2021. The order approving estimation states that estimation "is not being

[39] *Future Claimants' Representative's Objection to Motion of the Debtor for Estimation of Current and Future Mesothelioma Claims*, at 13 [D.I. 1040].

[40] *Id.* at 17-19.

[41] *Id*. at 8-9.

conducted for purposes of distribution, but rather for plan negotiation and confirmation purposes."[42] The order further clarifies that "[e]stimation shall not be used to establish a non-consensual cap on the Debtor's asbestos liabilities."[43] The Estimation Order did not establish deadlines for the estimation proceeding but, instead, stated that those deadlines would be contained in a separate case management order.

Unfortunately, since entry of the Estimation Order, the FCR's initial concern that estimation would lead to undue delay has proven to be correct. The case management order (the "**Estimation CMO**")[44] contemplated by the Estimation Order was not entered until August 19, 2022—10 months after estimation was ordered. In June 2023, the Court entered an order (the "**Claims Sample Order**")[45] establishing a set of 3,093 of the Debtor's historical litigation claims (defined as the "**Agreed Claims**") that would be subject to discovery.[46] On March 13, 2024, more than two years after originally ordering estimation, the Court entered an order suspending the deadlines provided in the Estimation CMO to allow the Debtor sufficient time to complete its initial document collection.[47] As of the parties' last meet-and-confer on August 28, 2024, the Debtor indicated that it had collected approximately 3.3 million documents, and that it

[42] *Order Authorizing Estimation of Current and Future Mesothelioma Claims*, ¶ 3 [D.I. 1239] (the "**Estimation Order**").

[43] *Id*.

[44] *Agreed Case Management Order for Estimation of the Debtor's Current and Future Mesothelioma Claims* [D.I. 1560].

[45] *Agreed Order With Respect To Resolved Claims Sampling For Purposes of Estimation Discovery* [D.I. 2506].

[46] The Agreed Claims consists of two samples: (i) a sample of 2,028 resolved claims (the "Debtor Sample") proposed by the Debtor's experts and (ii) a sample of 1,500 resolved claims (the "Claimant Sample") proposed by the Claimant Representatives' experts. Given an overlap of 435 claims in the two samples, the total number of Agreed Claims is 3,093.

[47] *Order Suspending the Deadlines Established by the Agreed Case Management Order for Estimation of the Debtor's Current and Future Mesothelioma Claims* [D.I. 2718].

anticipated substantially completing its initial production at the end of the first quarter or the beginning of the second quarter of 2025.

Additional documents will need to be produced after that initial production. For an unknown number of the Agreed Claims, the Debtor has not begun reviewing collected documents because it asserts that some of the agreed search terms led to overly broad "hits" for those claims. The Debtor previously said that it would provide a "hit report" to the Claimant Representatives by the end of September so that the Claimant Representatives could evaluate the Debtor's contention and consider any requests to alter the search terms previously agreed upon. The FCR has not yet received that "hit report" or the Debtor's proposed new search terms.

The Court will also need to address the Debtor's assertion of attorney-client privilege before written discovery can be completed. The Debtor's estimation theory puts its reasoning for settling prior claims at issue. In *Garlock*, Judge Hodges found that the Debtor waived privilege applicable to its settlement evaluations when it identified specific claims it was relying on to pursue its theory.[48] Similarly, in *Bestwall*, Judge Beyer stated that an at-issue waiver was inevitable based on the debtor's estimation theory,[49] and a motion to compel is pending in *Bestwall* now that the debtor has made specific contentions regarding individual claims.[50] The Debtor will need to

[48] *Order Granting in Part, Denying in Part Motion of the Official Committee of Asbestos Personal Injury Claimants and Joseph W. Grier, III, Future Asbestos Claimants Representative, for an Order in Limine or, in the Alternative to Compel Discovery*, ¶ 2, *In re Garlock Sealing Techs. LLC*, No. 10-31607 (June 18, 2013) [D.I. 2960] (detailing the scope of the subject-matter waiver); Hr'g Tr. at 159:22-25, *In re Garlock Sealing Techs. LLC*, No. 10-31607 (June 6, 2013) [D.I. 2935] ("there is a specificity which would . . . require further examination into . . . otherwise privileged matters.").

[49] Hr'g Tr. at 215:14-17, *In re Bestwall LLC*, No. 17-31795 (LTB) (Sept. 1, 2021) [D.I. 2068].

[50] *The Official Committee of Asbestos Claimants' and the Future Claimants' Representative's Motion for a Finding of Waiver of Privilege or Immunity and for an Order Compelling the Debtor to Produce Withheld Documents*, *In re Bestwall LLC*, No. No. 17-31795 (LTB) (Oct. 15, 2024) [D.I. 3530].

produce additional documents in this case when it inevitably waives privilege by making specific contentions regarding individual files that results in an at-issue waiver.[51]

The FCR would prefer to avoid the delay caused by this extensive discovery. However, the Debtor is pursuing a *Garlock*-style estimation theory based on a one-sided manufactured narrative of its litigation history. So long as the Debtor is allowed to follow that approach, the Claimant Representatives must be provided sufficient discovery and time to present the Court with a complete record of the Debtor's litigation history.

Although the Debtor seeks to follow the *Garlock* playbook, the true lesson of *Garlock* is the futility of conducting an estimation process like the one sought by the Debtor. Judge Whitley, who presided over the *Garlock* case after the original estimation decision was issued, later stated that the parties in *Garlock* "were farther away instead of closer"[52] after estimation and were "pretty much . . . at war after the estimation hearing."[53] The plan ultimately confirmed in *Garlock* (more than 3 years after the estimation proceeding concluded) provided for a trust in the amount of $480,000,000, an amount approximately *4 times* larger than the amount found in the estimation decision. If the purpose of the estimation is to assist with negotiation of a plan, *Garlock* does not provide a model to be followed. Rather, it is a cautionary tale.

CONCLUSION

The FCR is always willing to engage in constructive discussions regarding ways to resolve the bankruptcy case without the delay caused by extensive litigation. However, as long

[51] The Estimation CMO requires the Debtor to respond to an interrogatory to identify the specific claims for which the Debtor contends that the plaintiff's product identification was false, incomplete or misleading or that the plaintiff did not fully disclose exposure to asbestos-containing products of other manufacturers. Estimation CMO, ¶ 10.

[52] Hr'g Tr. at 83:12 (Oct. 14, 2021) [D.I. 1155].

[53] Hr'g Tr. at 105:4-10 (Oct. 4, 2021) ("Looked to me like [Judge Hodges] pretty much had everyone at war after the estimation hearing.").

as the Debtor and New CT insist on using the bankruptcy process to pay claimants less than they would receive outside of bankruptcy, the FCR thinks that a consensual resolution will be difficult.

Indeed, in the *Kaiser Gypsum* case, Judge Whitley recognized that claimants should not be expected to negotiate for reduced recoveries when they could otherwise be paid in full outside of bankruptcy. In that case, Judge Whitley rejected the complaints of Kaiser's insurance company, Truck Insurance Exchange, that it had been excluded from negotiations, stating: "It is not surprising that Truck found it difficult to negotiate with the parties to reduce its unlimited obligations under the Truck Policies to a fixed or otherwise limited amount. . . ."[54]

That is equally true here. DBMP and New CT acknowledge that all current and future asbestos claims could be paid in full based on their historical values outside of bankruptcy. Given that reality, they should not find it surprising that claimants have little interest in negotiating for a capped recovery that would pay claimants less than they would receive outside of bankruptcy.

[Signatures on Following Page]

[54] *Order Recommending Entry of Findings of Fact and Conclusions of Law and Order Confirming Joint Plan of Reorganization*, at 27, *In re Kaiser Gypsum Company, Inc.*, No. 16-31602 (Sept. 28, 2020) [D.I. 2486].

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