



A handwritten signature in black ink, appearing to read "Ashley A. Edwards".

Ashley Austin Edwards
United States Bankruptcy Judge

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

In re:

DBMP LLC,¹

Debtor.

Chapter 11

Case No. 20-30080 (AAE)

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,

Plaintiffs,

v.

CERTAINTIED LLC, CERTAINTIED
HOLDING CORPORATION, and
SAINT-GOBAIN CORPORATION,

Defendants.

Adv. Pro. No. 22-03000 (AAE)

**CONSENT ORDER PERMITTING OFFICIAL COMMITTEE OF ASBESTOS
PERSONAL INJURY CLAIMANTS AND FUTURE CLAIMANTS' REPRESENTATIVE
TO FILE CERTAIN CONFIDENTIAL INFORMATION UNDER SEAL**

Upon consideration of the *Motion to File Confidential Information Under Seal* filed by the
Official Committee of Asbestos Personal Injury Claimants and Sander L. Esserman, in his capacity

¹ The last four digits of the Debtor's taxpayer identification number are 8817. The Debtor's address is
20 Moores Road, Malvern, Pennsylvania 19355.

as legal representative for future asbestos claimants (together, the “Plaintiffs”), seeking to file certain confidential information under seal [Adv. Pro. No. 20-03000, Dkt. 461] (the “Motion”)² in connection with the *Reply Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment* [Adv. Pro. No. 20-03000, Dkt. 459] (the “Reply”); the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409, and (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; there being no opposition filed to the Motion; and the Plaintiffs, DBMP LLC, and the defendants in the above-captioned adversary proceeding having agreed to a more limited set of redactions to the Reply, as reflected in the attached Exhibit A (the “Redacted Reply”);

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as and to the extent set forth herein.
2. The redacted and sealed portions of the Reply, as reflected in the Redacted Reply, shall remain redacted and sealed as to the portions designated as confidential pursuant to the Protective Order, and not revealed on the public docket absent further order of this Court. The Plaintiffs will promptly file the Redacted Reply on the docket of the above-captioned adversary proceeding.
3. This Court shall retain jurisdiction with respect to all matters relating to the interpretation, or implementation of this Order.

This Order has been signed electronically.
The Judge’s signature and Court’s seal appear
at the top of the Order.

United States Bankruptcy Court

[Signature Pages Follow]

² Capitalized terms used but not defined herein shall have the respective meanings given to such terms in the Motion.

Dated: August 21, 2026

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EXHIBIT A

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

In re:

DBMP LLC,¹

Debtor.

Chapter 11

No. 20-30080 (AAE)

OFFICIAL COMMITTEE OF ASBESTOS
PERSONAL INJURY CLAIMANTS, and
SANDER L. ESSERMAN, in his capacity as
Legal Representative for Future Asbestos
Claimants,

Adversary Proceeding

Plaintiffs,

No. 22-03000 (AAE)

V.

CERTAINTEED LLC, CERTAINTEED
HOLDING CORPORATION, and SAINT-
GOBAIN CORPORATION.

Defendants.

**REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Dated: July 20, 2026

¹ The last four digits of the Debtor's taxpayer identification number are 8817. The Debtor's address is 20 Moores Road, Malvern, Pennsylvania 19355.

TABLE OF CONTENTS

Preliminary Statement.....	1
Response to Defendants’ Counterstatement of Facts.....	5
I. Defendants’ Resurrected “Account Receivable”	6
II. Alleged Millwork & Panel “Dispute”	8
III. Estimation of Asbestos Liabilities	9
Response to Defendants’ Evidentiary Objections.....	9
Response to Defendants’ Position on Standard of Review	13
Reply Argument	14
I. The Funding Agreement Had No “Value” When the Corporate Restructuring Occurred Because It Was an Unperformed Promise to Support the Debtor	14
A. Defendants’ Flawed Statutory Interpretation Cannot Rescue the Funding Agreement from the “Unperformed Promise” Exclusion	14
1. The Word “Support” Does Not Confine the Statute’s Scope to Only Familial Promises and Commitments.....	14
2. Defendants’ Reliance on “Legislative History” and “Commentary” Is Misplaced	17
3. Defendants’ Attempts to Label the Funding Agreement as an “Account Receivable,” “Property,” or “Enforceable” Fail to Shift the Analysis in Their Favor	20
a. “Enforceable Property Rights”	20
b. Cashier’s Checks and Guaranties	22
c. Economic Benefits, Contract Rights, and Services	24
B. This Court Can and Should Rule as a Matter of Law That CertainTeed’s Promise to Support DBMP Was Made Outside the Ordinary Course of CertainTeed’s Business	29
C. Defendants’ Untenable Reading of the Caselaw Cannot Rescue the Funding Agreement from the “Unperformed Promise” Exclusion	34
D. Value Must Be Assessed at the Time of the Transfer, Not by Reference to Post-Transfer Events	37

II. The Debtor Did Not Receive Reasonably Equivalent Value in the Corporate Restructuring Because, Among Other Things, the Funding Agreement Does Not Satisfy the Statutory Definition of “Value”	40
A. The Existing Record Is Sufficient to Decide That the Debtor Did Not Receive Reasonably Equivalent Value.....	41
B. The <i>Morris</i> Factors Favor Partial Summary Judgment.....	45
III. Because Partial Summary Judgment Should Be Granted on Counts III and IV of the Amended Complaint, the Court Should Strike Defendants’ Corresponding Affirmative Defenses	47
Conclusion	48

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Adler, Coleman Clearing Corp.</i> , 263 B.R. 406 (S.D.N.Y. 2001).....	<i>passim</i>
<i>Allied Home Mortg. Cap. Corp. v. Mark</i> , No. CIV.A. 12-10158-GAO, 2014 WL 4964728 (D. Mass. Sept. 30, 2014)	19
<i>Alvarado v. Kohl’s Dep’t Stores, Inc.</i> , No. 7:18-CV-35, 2018 WL 5411041 (S.D. Tex. Oct. 29, 2018)	6
<i>In re Am. Dev. Corp.</i> , 95 B.R. 735 (Bankr. C.D. Cal. 1989).....	30
<i>In re Amberson</i> , 54 F.4th 240 (5th Cir. 2022)	19
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	<i>passim</i>
<i>In re Apex Auto. Warehouse, L.P.</i> , 238 B.R. 758 (Bankr. N.D. Ill. 1999)	32
<i>Arconic Inc. v. Novelis Inc.</i> , No. CV 17-1434, 2020 WL 7360152 (W.D. Pa. Dec. 15, 2020).....	13, 14
<i>Balboa Ins. Co. v. United States</i> , 775 F.2d 1158 (Fed. Cir. 1985).....	22
<i>Bartels by & through Bartels v. Saber Healthcare Group, LLC</i> , 880 F.3d 668 (4th Cir. 2018)	11
<i>BedRoc Ltd., LLC v. United States</i> , 541 U.S. 176 (2004).....	25
<i>Belt v. Alabama Hist. Comm’n</i> , No. CIV.A. 04-0331-WSM, 2005 WL 1653728 (S.D. Ala. July 12, 2005), <i>aff’d</i> , 181 F. App’x 763 (11th Cir. 2006).....	12
<i>In re Bestwall LLC</i> , 605 B.R. 43 (Bankr. W.D.N.C. 2019).....	28
<i>Blake v. Baltimore County</i> , 662 F. Supp. 2d 417 (D. Md. 2009)	11

<i>In re Blessing Indus., Inc.</i> , 263 B.R. 268 (Bankr. N.D. Iowa 2001)	32
<i>In re Bloomingdale Partners</i> , 170 B.R. 984 (Bankr. N.D. Ill. 1994)	18
<i>BMO Harris Bank NA v. Superior Hauling LLC</i> , No. 8:22-CV-01252-JDA, 2023 WL 11889464 (D.S.C. July 7, 2023)	23
<i>Brown v. Waddell</i> , 50 F.3d 285 (4th Cir. 1995)	20
<i>In re Castle Trading, Inc.</i> , No. 2:14-AP-01022-BB, 2017 WL 2375493 (B.A.P. 9th Cir. May 31, 2017)	27, 28
<i>In re Chase & Sanborn Corp.</i> , 904 F.2d 588 (11th Cir. 1990)	24
<i>In re Chomakos</i> , 69 F.3d 769 (6th Cir. 1995)	27
<i>Com. Money Ctr., Inc. v. Ill. Union Ins. Co.</i> , 508 F.3d 327 (6th Cir. 2007)	22
<i>In re Cont'l Airlines Corp.</i> , 64 B.R. 865 (Bankr. S.D. Tex. 1986)	18
<i>Corotoman, Inc. v. Cent. W. Va. Reg'l Airport Auth., Inc.</i> , 582 F. Supp. 3d 343 (S.D. W. Va. 2022)	5
<i>In re Cox Motor Express of Greensboro, Inc.</i> , No. 14-10468, 2016 WL 4259801 (Bankr. M.D.N.C. Aug. 9, 2016)	31
<i>Ctr. for Env't Health v. Regan</i> , 103 F.4th 1027 (4th Cir. 2024)	18
<i>Dean v. United States</i> , 556 U.S. 568 (2009)	21
<i>In re Denison</i> , 292 B.R. 150 (E.D. Mich. 2003)	26
<i>In re Downs</i> , No. AP 17-80193, 2019 WL 654295 (Bankr. W.D. Mich. Feb. 15, 2019)	37
<i>In re Fairchild Aircraft Corp.</i> , 6 F.3d 1119 (5th Cir. 1993)	24

<i>In re Fresh Acquisitions, LLC</i> , 671 B.R. 171 (Bankr. N.D. Tex. 2025).....	32, 44, 45
<i>In re HDD Rotary Sales, LLC</i> , 512 B.R. 877 (Bankr. S.D. Tex. 2014)	26, 27
<i>Interstate 10 Partners, LLC v. Berkley Nat’l Ins. Co.</i> , No. 3:23-CV-01233, 2026 WL 800967 (M.D. Tenn. Mar. 21, 2026)	13, 14
<i>In re Karben4 Brewing, LLC</i> , 661 B.R. 392 (Bankr. W.D. Wis. 2024).....	29
<i>In re Kaypro</i> , 218 F.3d 1070 (9th Cir. 2000)	32
<i>LandAmerica Fin. Grp., Inc. v. S. Cal. Edison Co.</i> , 525 B.R. 308 (E.D. Va. 2015).....	44
<i>In re LTL Mgmt., LLC</i> , 64 F.4th 84 (3d Cir. 2023)	20
<i>In re M. Fabrikant & Sons, Inc.</i> , No. 06-12737, Adv. Nos. 07-02780, 08-01734, 2009 WL 3806683 (Bankr. S.D.N.Y. Nov. 10, 2009)	38
<i>In re MarketXT Holdings Corp.</i> , 376 B.R. 390 (Bankr. S.D.N.Y. 2007).....	36, 37
<i>In re MarketXT Holdings Corp.</i> , 426 B.R. 467 (Bankr. S.D.N.Y. 2010).....	36, 37
<i>Matala v. Consolidation Coal Co.</i> , 647 F.2d 427 (4th Cir. 1981)	18
<i>Mellon Bank, N.A. v. Metro Commc’ns, Inc.</i> , 945 F.2d 635 (3d Cir. 1991).....	24
<i>In re Merry-Go-Round Enters., Inc.</i> , 400 F.3d 219 (4th Cir. 2005)	30, 32, 33
<i>In re Morris Commc’ns NC, Inc.</i> , 914 F.2d 458 (4th Cir. 1990)	<i>passim</i>
<i>N.C. State Conf. of NAACP v. Hirsch</i> , 720 F. Supp. 3d 406 (M.D.N.C. 2024)	10, 11
<i>In re Nat’l Gypsum Co.</i> , 257 B.R. 184 (Bankr. N.D. Tex. 2000).....	36

<i>NISH v. Cohen</i> , 247 F.3d 197 (4th Cir. 2001)	16
<i>Pierson v. Gondles</i> , 693 F. Supp. 408 (E.D. Va. 1988)	11
<i>In re Pringle</i> , 495 B.R. 447 (B.A.P. 9th Cir. 2013).....	27
<i>In re R.M.L., Inc.</i> , 92 F.3d 139 (3d Cir. 1996).....	25, 26
<i>R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel</i> , No. 2:93CV902, 1998 WL 1108931 (E.D. Va. May 22, 1998).....	11
<i>Raitport v. Nat’l Bureau of Standards</i> , 385 F. Supp. 1221 (E.D. Pa. 1974)	11
<i>In re Reisner</i> , 357 B.R. 206 (Bankr. E.D.N.Y. 2006).....	34
<i>In re Renegade Holdings, Inc.</i> , 457 B.R. 441 (Bankr. M.D.N.C. 2011).....	40
<i>Ross v. Peck Iron & Metal Co.</i> , 264 F.2d 262 (4th Cir. 1959)	22
<i>In re Schaefer</i> , 331 B.R. 401 (Bankr. N.D. Iowa 2005).....	21, 27
<i>In re Se. Hotel Props. Ltd. P’ship</i> , 99 F.3d 151 (4th Cir. 1996)	32, 33
<i>In re Simone</i> , 229 B.R. 329 (Bankr. W.D. Pa. 1999)	35, 39
<i>In re Singh</i> , 434 B.R. 298 (Bankr. E.D.N.Y. 2010).....	38
<i>Sylvia Dev. Corp. v. Calvert Cnty.</i> , 48 F.3d 810 (4th Cir. 1995)	6, 8, 47
<i>In re Tanglewood Farms, Inc. of Elizabeth City</i> , 487 B.R. 705 (Bankr. E.D.N.C. 2013).....	40, 41
<i>In re Terry Props., LLC</i> , No. 16-71449, 2017 WL 507277 (Bankr. W.D. Va. Feb. 3, 2017)	44

<i>The News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.</i> , 597 F.3d 570 (4th Cir. 2010)	5, 9
<i>Thompson Everett, Inc. v. Nat'l Cable Advert., L.P.</i> , 57 F.3d 1317 (4th Cir. 1995)	13
<i>United States v. Goodstein</i> , 883 F.2d 1362 (7th Cir. 1989)	30
<i>Univ. of Texas v. Camenisch</i> , 451 U.S. 390 (1981).....	10
<i>In re Wes Dor, Inc.</i> , 996 F.2d 237 (10th Cir. 1993)	36
<i>In re White</i> , 144 F.4th 1216 (10th Cir. 2025)	38
<i>In re Zaragosa Props., Inc.</i> , 156 B.R. 310 (Bankr. M.D. Fla. 1993)	30

Statutes

11 U.S.C.	
§ 101(13).....	15
§ 101(31)(A)	15
§ 101(45).....	15
§ 109(e)	16
§ 330(a)(4)(B)	16
§ 523(a)	16
§ 548.....	<i>passim</i>
§ 548(d)(2)(A).....	<i>passim</i>
§ 707(b)(1)	16
§ 1112(b).....	28
§ 1129(a)(15)	16
18 U.S.C. § 3127(3).....	20
CAL. CIV. CODE § 3439.03	28
DEL. CODE ANN. tit. 6	
§ 1301(6).....	16
§ 1301(9).....	17
§ 1303(a).....	<i>passim</i>

N.C. GEN. STAT. ANN.

§ 39-23.1(6).....	17
§ 39-23.1(9).....	17
§ 39-23.3(a).....	<i>passim</i>

12 PA. STAT. AND CONS. STAT. ANN.

§ 5101(b).....	17
§ 5103(a).....	<i>passim</i>

TEX. BUS. & COM. CODE ANN.

§ 24.002(6).....	16
§ 24.002(9).....	17
§ 24.004(a).....	<i>passim</i>

Other Authorities

Fed. R. Civ. P. 56.....	13, 14
Fed. R. Civ. P. 56(a)	13
Fed. R. Civ. P. 56(c)(3).....	10
MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/	7, 15
Restatement (Third) of Suretyship & Guaranty § 1 (1996)	22
S. Rep. No. 95-989 (1978), <i>as reprinted in</i> 1978 U.S.C.C.A.N. 5787	18
UFTA	<i>passim</i>
UFTA § 1(6)	16
UFTA § 1(9)	17
UFTA § 3(a).....	<i>passim</i>
UVTA	<i>passim</i>
UVTA § 1(11).....	17
UVTA § 1(6).....	16
UVTA § 3(a).....	<i>passim</i>
WEBSTER’S NEW WORLD COLLECTION DICTIONARY (4th ed. 2004)	15

The Official Committee of Asbestos Personal Injury Claimants and Sander L. Esserman, in his capacity as legal representative for future asbestos claimants (collectively, “**Plaintiffs**”), by and through their respective counsel, hereby submit this reply brief in support of their Motion for Partial Summary Judgment (Dkt. No. 376) (“**Motion**”) and in response to Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for Partial Summary Judgment (Dkt. No. 411), which Defendants² filed on June 15, 2026 (“**Opp.**”). For the reasons set forth below, the Court should grant the Motion and enter partial summary judgment in Plaintiffs’ favor on Counts III and IV of the Amended Complaint (Dkt. No. 14), and on the portions of the Fourth, Fifth, and Sixth Affirmative Defenses in Defendants’ Answer (Dkt. No. 93) alleging that reasonably equivalent value was exchanged through the Corporate Restructuring.

PRELIMINARY STATEMENT

1. Defendants’ opposition strenuously—but unsuccessfully—tries to make the Motion appear fact-intensive and more complicated than it really is. In reality, the Motion asks this Court to rule on two narrowly tailored questions.

2. First, the Motion seeks a determination of whether, at the time of the Corporate Restructuring, the Funding Agreement constituted an unperformed promise by “new” CertainTeed to furnish support to DBMP. The answer to that question is a resounding *yes*, based on the following undisputed material facts: (1) the Funding Agreement between CertainTeed and DBMP arose from the Corporate Restructuring, in which “old” CertainTeed was divided into two new companies, “new” CertainTeed and DBMP; (2) the Funding Agreement provides that, under certain conditions, “new” CertainTeed will transmit funds to DBMP to pay for “Permitted Funding

² “**Defendants**” in the above-captioned adversary proceeding are CertainTeed LLC, CertainTeed Holding Corporation, and Saint-Gobain Corporation. Unless otherwise defined herein, capitalized terms have the meanings ascribed to them in the Motion.

Uses,” a category that includes DBMP’s chapter 11 administrative expenses; and (3) when the Corporate Restructuring was completed on October 23, 2019, CertainTeed had not made any payments under the Funding Agreement to DBMP, so CertainTeed’s promise to do so was unperformed at the time.

3. Defendants cannot in good faith dispute what the Funding Agreement says, when it was executed, or when performance under it began. At the time of the Corporate Restructuring, the Funding Agreement was nothing more than an unperformed promise by CertainTeed to furnish support to DBMP. It therefore falls outside the definition of “value” in 11 U.S.C. § 548(d)(2)(A) and the counterpart provisions of the UFTA and UFTA, and the Court should grant partial summary judgment in Plaintiffs’ favor on this narrow, threshold legal question.

4. Second, if the Court determines, as it should, that the Funding Agreement is excluded from the statutory definition of “value,” then the Court should proceed to the second question, which is whether DBMP received less than reasonably equivalent value in exchange for the transfers made in the Corporate Restructuring. As with the first issue, the answer to the second question is *yes* based on the following material facts provided *by Defendants themselves*: while “new” CertainTeed received 97% of “old” CertainTeed’s assets through the Corporate Restructuring, DBMP received only 3% of “old” CertainTeed’s assets, all of “old” CertainTeed’s asbestos liabilities, and its rights under the Funding Agreement. For the sake of this analysis, and reserving all rights, Defendants cannot dispute *the Debtor’s and CertainTeed’s own numbers* drawn from documents DBMP produced in discovery and from its own first-day declaration. Moreover, as established above, the Funding Agreement had no value as a matter of law, so the large disparity between what DBMP received and what DBMP was deprived of in the Corporate Restructuring

conclusively establishes that DBMP did not receive reasonably equivalent value. Accordingly, the Court should also grant partial summary judgment in Plaintiffs' favor on this second question.

5. Defendants' attempts to generate factual disputes are for naught. At the outset, they introduce facts that postdate the Corporate Restructuring, such as subsequent performance under the Funding Agreement, the Second Amended and Restated Funding Agreement they executed nearly two years later, and CertainTeed's ongoing affirmation of its obligations. But the Fourth Circuit has foreclosed consideration of post-transfer events; the Court must assess "value" when the alleged fraudulent transfer occurs. This Court should reject Defendants' inappropriate attempt to look beyond the completion date of the Corporate Restructuring.

6. Defendants additionally make the futile argument that the Motion overlooks an allegedly important asset: the so-called "Account Receivable." Opp. ¶¶ 32-33. This position is rather remarkable because the "Account Receivable" is never mentioned in the Debtor's first-day declaration. Moreover, closer scrutiny of Defendants' papers reveals that the "Account Receivable" *is* the Funding Agreement. Rebranding the Funding Agreement as an "Account Receivable" is inappropriate and does nothing to change the fact that the Funding Agreement falls outside the definition of "value" in the Bankruptcy Code and applicable state law. The "Account Receivable" label is a red herring, not a material fact.

7. Defendants also assert that the Motion is premature because the Court must first estimate the aggregate amount of the Debtor's present and future asbestos liabilities. They try to tie the value of the Funding Agreement to the yet-undetermined amount of the asbestos liabilities. But for purposes of fraudulent transfer law, the Funding Agreement is excluded from the statutory definition of "value" regardless of how asbestos liabilities are ultimately estimated. Accordingly, an estimation has no bearing on the Court's ability to grant the Motion's requested relief.

8. As for reasonably equivalent value, Defendants claim that the correct valuation of the Debtor's interest in Millwork & Panel should be the "fair market value" of approximately \$150 million, not the "book value" of approximately [REDACTED] that is cited in the Motion (and drawn from a balance sheet the Debtor produced in discovery). Whether the Debtor's interest in Millwork & Panel is worth [REDACTED] or \$150 million is of no moment because either valuation is still dwarfed by the at least [REDACTED] of "old" CertainTeed that DBMP was deprived of in the Corporate Restructuring. Accordingly, because either valuation yields the same outcome, there is no genuine dispute of *material* fact over Millwork & Panel's value for purposes of the fraudulent transfer analysis.

9. As to Defendants' legal arguments, the statute's plain and unambiguous language, as well as controlling precedent, contradict them. Defendants improperly read words into the statute—attempting to require that an unperformed promise be "unenforceable" or limited to "familial" support—but those words are not there. Supreme Court precedent supports Plaintiffs' position, as courts must resist reading words into a statute that do not appear on its face. Defendants also implicitly contend that their self-serving characterization of the Funding Agreement as "property" or an "Account Receivable" somehow removes it from the statutory exclusion for unperformed promises. It does not. They invoke non-authoritative legislative history and commentary which, in addition to being indeterminate, are also irrelevant where, as here, the statutory text is unambiguous. And the caselaw Defendants cite either supports Plaintiffs' position or is readily distinguishable.

10. Additionally, under the UFTA and UVTA, the "unperformed promise" exclusion applies if the promisor made the promise outside the ordinary course of its business. Preparing for

and funding an affiliate's bankruptcy is not ordinary course activity for any business, and the Court can so hold as a matter of law.

11. The two questions presented here are straightforward. The facts are undisputed. The statutory language is plain. Partial summary judgment is merited and will help pull the case out of the stasis it has been mired in for six years. The Funding Agreement is the centerpiece of "old" CertainTeed's Texas Two-Step, and determining that the Funding Agreement has no value as a matter of law, and that the Debtor did not receive reasonably equivalent value, will remedy the imbalance that has existed between the Debtor's side and the creditors' side and thereby help to spur forward progress in the case.³ At a minimum, granting partial summary judgment on the first question or on both questions can help advance the case by materially narrowing the issues. The Court should grant the Motion.

RESPONSE TO DEFENDANTS' COUNTERSTATEMENT OF FACTS

12. Accepting Defendants' chosen valuations for the sake of this analysis, there can be no genuine dispute of material fact. "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *The News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Accordingly, courts will grant summary-judgment motions even without a full factual record where there is no genuine dispute of material fact. *See, e.g., Corotoman, Inc. v. Cent. W. Va. Reg'l Airport Auth., Inc.*, 582 F. Supp. 3d 343, 350 (S.D. W. Va. 2022) (granting motion for partial summary judgment before the completion of discovery because the "outstanding discovery

³ As the Court has noted previously, there has been substantial delay in this proceeding, and efficient progress is desirable. *See* Hr'g Tr. 15:15-17, May 1, 2025 (Edwards, J.) (noting, in the context of the recent privilege dispute, that the Court would like to keep the case moving forward).

cited by the Airport Authority is not material to the issues presented in this motion for partial summary judgment”).⁴

13. While a court must “draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion,” the court need only consider *reasonable* inferences. *See Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 818 (4th Cir. 1995) (citations omitted). “Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.” *Id.* (quoting *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958)). “The mere existence of a scintilla of evidence in support of the . . . [non-movant’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the . . . [non-movant].” *Anderson*, 477 U.S. at 252.

I. Defendants’ Resurrected “Account Receivable”

14. Reviving a contrivance from their unsuccessful motion to dismiss,⁵ Defendants attempt to assert that DBMP received an “Account Receivable” through the Corporate Restructuring that is either separate from the Funding Agreement or at least on a different side of the same Funding Agreement coin. Opp. ¶¶ 20, 22-23, 32. To the extent Defendants proffer that this “Account Receivable” provided DBMP with any value over and beyond the Funding Agreement itself, such argument should be disregarded as lacking proper factual foundation. The Debtor’s First Day Declaration (defined below) enumerated all the assets the Debtor received

⁴ *See also Alvarado v. Kohl’s Dep’t Stores, Inc.*, No. 7:18-CV-35, 2018 WL 5411041, at *3 (S.D. Tex. Oct. 29, 2018) (granting motion for summary judgment and denying nonmovant’s request for further discovery where the nonmovant’s “vague assertions are insufficient to determine that further discovery would reveal a genuine issue of material fact”).

⁵ *See, e.g.*, Defendants’ Motion to Dismiss Amended Complaint and Brief in Support ¶¶ 8-10, 20-21, 23-24, 59-60, 63, Dkt. No. 38 (multiple references to the “Account Receivable” and the “Funding Agreement”).

through the Corporate Restructuring.⁶ It identified “Old CT’s rights and interests as payee under the Funding Agreement” but was silent about any separate “Account Receivable.”⁷ Mr. Panaro then asserted that, “[i]n total, the Debtor’s value is approximately \$175 million, *in addition to* the value of the Funding Agreement with New CT.”⁸ Therefore, according to Defendants’ own view of DBMP’s assets on the petition date, the [REDACTED] “Account Receivable” in DBMP’s balance sheet reflects the enterprise’s booking of their chosen value for the Funding Agreement because DBMP’s assets (other than the Funding Agreement) totaled approximately \$175 million.

15. Moreover, Defendants concede that the putative Account Receivable “reflects that, at the time of the Corporate Restructuring, the Funding Agreement provided a legitimate and reasonable value” (Opp. ¶ 32), bolstering Plaintiffs’ point that the Funding Agreement and the “Account Receivable” are really the same thing. Additionally, Defendants quote the deposition testimony of Joseph Bondi, DBMP’s president, who equated the Funding Agreement with the “Account Receivable.” Opp. ¶ 20 n.23. Defendants therefore provide no factual support for their assertion that “[t]he Account Receivable represents the then-booked asbestos liability, and the Funding Agreement represents the obligation of New CT to fund any excess amount in accordance with its terms.”⁹ Opp. ¶ 20 n.23. In sum, Defendants’ novel, self-serving assertions that the “Account Receivable” and Funding Agreement are somehow distinct fall outside any reasonable inference that the Court may make in Defendants’ favor given that all evidence demonstrates that

⁶ Declaration of Robert J. Panaro in Support of First Day Pleadings ¶ 18, *In re DBMP LLC*, No. 3:20-bk-30080 (Bankr. W.D.N.C. Jan. 23, 2020), Dkt. No. 24 (“**First Day Declaration**” or “**First Day Decl.**”).

⁷ *Id.* ¶ 18(b).

⁸ *Id.* ¶ 18 (emphasis added).

⁹ Nor is it clear what Defendants mean by this statement. An account receivable should not represent booked liabilities as the former represents a balance due to come *from* another while the latter represents an obligation owed *to* another. *Compare Account Receivable*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/account%20receivable> with *Liability*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/liability> (second definition).

the “Account Receivable” and the Funding Agreement are one and the same. *See Sylvia Dev. Corp.*, 48 F.3d at 818; *Anderson*, 477 U.S. at 252. No separate value can therefore be ascribed to the “Account Receivable.”

16. And regardless of their “Account Receivable” theory, Defendants do not dispute that, when the relevant transactions closed, no payments were or had been made under the Funding Agreement. Nor does the Funding Agreement provide for fixed installment payments over time. Instead, the Funding Agreement allows CertainTeed to furnish support to the Debtor by, *inter alia*, paying the allowed administrative expenses to sustain the Debtor’s bankruptcy and to keep its chapter 11 case from administrative insolvency. Defendants’ discussions about the Funding Agreement’s supposed lack of payment conditions, CertainTeed’s financial heft, or why the Second Amended and Restated Funding Agreement should apply (Opp. ¶¶ 24-31, 35-38) have no bearing on the Motion because they do not affect the statutory analysis of whether, *at the time of the Corporate Restructuring*, the Funding Agreement was an “unperformed promise to furnish support” that constitutes no “value.” § 548(d)(2)(A); UFTA § 3(a); UFTA § 3(a).¹⁰

II. Alleged Millwork & Panel “Dispute”

17. Defendants assert that the value of Millwork & Panel should be its fair market value of \$150 million rather than the book value of [REDACTED]. Opp. ¶ 33. This supposed valuation “dispute,” however, is not material. There is no genuine dispute that “new” CertainTeed received total assets of at least [REDACTED] or 97% of “old” CertainTeed’s assets and that those same assets were transferred away from the Debtor as part of the Corporate Restructuring. The [REDACTED] difference between [REDACTED] and \$150 million pales in comparison to the at least [REDACTED] in

¹⁰ DEL. CODE ANN. tit. 6, § 1303(a) (West 2026); N.C. GEN. STAT. ANN. § 39-23.3(a) (West 2026); 12 PA. STAT. AND CONS. STAT. ANN. § 5103(a) (West 2026); TEX. BUS. & COM. CODE ANN. § 24.004(a) (West 2026).

assets that DBMP was deprived of. The difference therefore does not alter the result of the reasonably equivalent value analysis and thus does not create a material issue of fact to preclude summary judgment. *See The News & Observer Publ'g Co.*, 597 F.3d at 576. Under either valuation, DBMP did not receive reasonably equivalent value in the Corporate Restructuring. *See infra* ¶¶ 73-75.

III. Estimation of Asbestos Liabilities

18. Defendants' argument that summary judgment is inappropriate because the estimation proceeding has not yet occurred (Opp. ¶¶ 39-41) is without merit because the liability estimate, whatever it may be, cannot inform the value of the Funding Agreement since that agreement was, at the time of the Corporate Restructuring, an "unperformed promise to furnish support to the debtor." Mot. ¶¶ 26-36. Once the statute is properly applied, the gross disparity between the value DBMP received and the value it gave away through the Corporate Restructuring cannot be disputed in any material way. *See infra* ¶¶ 73-82. There is no genuine dispute of material fact, and partial summary judgment is appropriate.

RESPONSE TO DEFENDANTS' EVIDENTIARY OBJECTIONS

19. Defendants complain about the Motion's alleged "heavy reliance" on the Court's Injunction Order to establish the absence of a genuine dispute of material fact. Opp. ¶ 42. But the argument cannot stand for at least four reasons. First, Defendants ignore that Judge Whitley issued the Injunction Order after conducting a comprehensive, multiday evidentiary hearing involving witness testimony, documentary evidence, deposition excerpts, and other discovery.¹¹ A plain reading of Judge Whitley's Injunction Order demonstrates that it was not a typical preliminary-

¹¹ *See* Order Partially Granting and Partially Denying Mot. ¶ 17, Dkt. No. 390 ("**Reconsideration Order**") ("Importantly, the Injunction Order resulted from multiple days of evidentiary hearings and a litany of declarations and deposition designations.").

injunction proceeding that bears “the marks of the haste characteristic of a request for a preliminary injunction.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 398 (1981).¹² Instead, it is apparent that the resulting Injunction Order reflects careful consideration of the record with extensive citations to the evidence and testimony presented.

20. Second, Plaintiffs’ citations to the Injunction Order in the Motion often also explicitly refer to the Injunction Order’s underlying citations to the record.¹³ And even where Plaintiffs do not explicitly cite the Injunction Order’s sources of evidence, those sources are noted in that Order and the Court on summary judgment may still “consider other materials in the record” that have not been cited. Fed. R. Civ. P. 56(c)(3). Indeed, much of the underlying factual record here was admitted into evidence during the preliminary-injunction proceeding.¹⁴ The parties have since agreed, and the Court expressly ordered, that discovery conducted in connection with that proceeding is deemed to have been conducted in the Adversary Proceedings.¹⁵ Evidence invoked then may properly form part of the broader record considered at the summary judgment stage.

21. Third, Plaintiffs’ approach is consistent with decisions by other courts that have, at summary judgment, adopted factual findings made in a preliminary-injunction opinion. *See N.C. State Conf. of NAACP v. Hirsch*, 720 F. Supp. 3d 406, 426 n.7 (M.D.N.C. 2024) (“The preliminary

¹² The Supreme Court’s concern in *Camenisch* was that a party should not be bound at trial by findings made after abbreviated proceedings before the party had a full opportunity to develop its case. 451 U.S. at 395. That concern is not present here.

¹³ *E.g.*, Mot. ¶¶ 10 n.15, 12 n.16, 13 nn.17-18, 14 nn.19-20. For example, in footnote 5 of the Motion, Plaintiffs cite to paragraph 40 of the Injunction Order. The Injunction Order, in turn, cited to ACC-FCR Ex. 250 in support of that finding.

¹⁴ Stipulation Regarding Evidentiary Matters, *DBMP LLC v. Those Parties Listed on Appendix A to Complaint*, Adv. No. 20-03004 (Bankr. W.D.N.C. Mar. 24, 2021), Dkt. No. 302.

¹⁵ *See* Case Management Order ¶ C(2)(i) (“All discovery (production of documents and deposition testimony) conducted in the adversary proceeding captioned *DBMP LLC v. Those Parties Listed on Appendix A to Complaint*, Adv. Pro. No. 20-03004 (JCW) and all other discovery that has occurred in the above-captioned Chapter 11 bankruptcy case . . . shall be deemed to have been conducted in connection with the Adversary Proceedings.”).

injunction materials relied on by Plaintiffs are properly a part of the record. . . . The entire record may be properly considered in determining the motion for summary judgment.” (citing *Raitport v. Nat’l Bureau of Standards*, 385 F. Supp. 1221, 1222 (E.D. Pa. 1974)); *Pierson v. Gondles*, 693 F. Supp. 408, 409 n.2 (E.D. Va. 1988) (incorporating certain factual findings from a preliminary-injunction opinion while recognizing that disputed testimony did not affect the factual findings relevant to summary judgment).¹⁶

22. This Court recently explained that “nothing categorically precludes the Court from considering evidence from the Injunction Proceeding record for a separate proceeding, nor does anything bar the Court from concurring with any reasoning in the Injunction Order, based on the Injunction Proceeding record or common sense.”¹⁷ Other courts have reached the same conclusion. *See, e.g., Raitport v. Nat’l Bureau of Standards*, 385 F. Supp. 1221, 1222 (E.D. Pa. 1974) (stating that the “entire record,” including a partial transcript of a preliminary-injunction hearing, “may properly be considered in determining whether to grant a motion for summary judgment”); *N.C. State Conf. of NAACP*, 720 F. Supp. 3d at 426 n.7.¹⁸

23. Fourth, although Defendants point to the expert testimony at the preliminary-injunction hearing and try to manufacture a “battle of the experts” (Opp. ¶ 43), the Court should not be sidetracked by these efforts. Plaintiffs’ expert, Mr. Diaz, was simply aggregating the value of the assets allocated to the Debtor in the Corporate Restructuring—values that could be found in

¹⁶ *Cf. R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, No. 2:93CV902, 1998 WL 1108931, at *3 (E.D. Va. May 22, 1998) (“Regardless of whether the preliminary-injunction order still has legal effect, the conclusions of law made by this Court in those proceedings are just that—conclusions of law. The Court will not lightly reconsider those legal conclusions.”).

¹⁷ Reconsideration Order ¶ 17.

¹⁸ Defendants rely on *Blake v. Baltimore County*, 662 F. Supp. 2d 417, 421 (D. Md. 2009) and *Bartels by & through Bartels v. Saber Healthcare Group, LLC*, 880 F.3d 668, 682 n.7 (4th Cir. 2018), for the unremarkable proposition that findings of fact made when granting a preliminary injunction are not binding at the summary judgment stage or at trial. That does not mean, however, that those findings must be ignored if they are sound and supported by evidence, as here.

the First Day Declaration and documents the Debtor produced in discovery. Mot. ¶ 16 & n.24. Plaintiffs do not credit Mr. Diaz's expert testimony merely because it was provided by a retained expert. Rather, Plaintiffs credit Mr. Diaz's testimony because it relies on Defendants' facts set forth in the First Day Declaration and the Debtor's own documents. Defendants cannot claim that the recitation of facts *they provided* somehow puts those facts into dispute. *Belt v. Alabama Hist. Comm'n*, No. CIV.A. 04-0331-WSM, 2005 WL 1653728, at *2 (S.D. Ala. July 12, 2005) ("Plaintiff cannot fabricate an issue of material fact via an unprincipled, unfounded, unreasonable objection to each and every fact presented by defendant, including those that are verbatim recitations of plaintiff's testimony."), *aff'd*, 181 F. App'x 763 (11th Cir. 2006). All Mr. Diaz did was explain the assets and asset values allocated by Defendants to the Debtor in the Corporate Restructuring, excluding any value Defendants attribute to the Funding Agreement.

24. Defendants point to the cross-examination of Mr. Diaz at the preliminary-injunction hearing where he acknowledged that he excluded any value attributable to the Funding Agreement from his analysis. Opp. ¶ 43 n.58. That Mr. Diaz did so is not in dispute. Likewise, the testimony of DBMP's expert, Mr. Coulombe, about the purported lack of conditionality of the Funding Agreement is not relevant to the Motion. *Id.* ¶ 43 n.59. Nowhere do Plaintiffs assert that the expert dispute as to how "condition light" (*id.*) the Funding Agreement might be is relevant to resolving the Motion.¹⁹ To be clear, Plaintiffs move the Court to find that the Funding Agreement has no value as a matter of law *not* because it is conditional, but because it is an unperformed promise of support. The dispute over how "conditional" the Funding Agreement may be is thus not a "material

¹⁹ That the Funding Agreement is conditional at all is similarly irrelevant to the Motion, but also not in genuine dispute. As Judge Whitley already found, "the Funding Agreement is not an unconditional promise" but "is instead a conditional agreement" Injunction Order ¶ 77.

fact” for purposes of this Motion. *See* Fed. R. Civ. P. 56(a). The Court should reject Defendants’ efforts to create a “battle of the experts” where no relevant conflict exists.

25. For all these reasons, Defendants’ evidentiary objections should be overruled.

RESPONSE TO DEFENDANTS’ POSITION ON STANDARD OF REVIEW

26. Federal Rule of Civil Procedure 56(a) provides that a party “may move for summary judgment, identifying . . . *the part of each claim or defense . . .* on which summary judgment is sought.” Fed. R. Civ. P. 56(a) (emphasis added). In response, courts “*shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.* (emphasis added). Defendants contend that motions for partial summary judgment are “generally disfavored” and “permissible *only* when they benefit both parties and serve the interest of judicial economy.” Opp. ¶ 45 (emphasis added and citations omitted). But nothing in Rule 56 supports Defendants’ contention. Rule 56 speaks for itself: it does not “disfavor” or impose a more exacting standard on motions for partial summary judgment. *Cf. Thompson Everett, Inc. v. Nat’l Cable Advert., L.P.*, 57 F.3d 1317, 1322-23 (4th Cir. 1995) (“The summary judgment practice does not become disfavored simply because a case is complex. Rather, it is favored as a mechanism to secure the ‘just, speedy and inexpensive determination’ of a case, when its proper use can avoid the cost of trial.” (quoting Fed. R. Civ. P. 1)).

27. Nor do Defendants cite any Fourth Circuit or Western District of North Carolina cases to support their argument. And their out-of-circuit cases are unpersuasive, as they involved motions for leave to file partial-summary-judgment motions governed by case management orders. *See Interstate 10 Partners, LLC v. Berkley Nat’l Ins. Co.*, No. 3:23-CV-01233, 2026 WL 800967, at *3 (M.D. Tenn. Mar. 21, 2026); *Arconic Inc. v. Novelis Inc.*, No. CV 17-1434, 2020 WL 7360152, at *1 (W.D. Pa. Dec. 15, 2020). Here, there is no similar requirement that Plaintiffs seek

leave before pursuing their Motion. And in any event, the former case involved an issue that had already been functionally conceded, *see Interstate 10 Partners*, 2026 WL 800967, at *4,²⁰ while the latter involved a second round of partial summary judgment briefing after the first had already consumed 18 months, *see Arconic*, 2020 WL 7360152, at *1. While both courts found requests for additional briefing contrary to judicial economy, those facts do not exist here. The Court should apply Rule 56 as written and reject Defendants' attempt to create artificial hurdles.

REPLY ARGUMENT

28. The Court should grant partial summary judgment to Plaintiffs on the narrow issues of (a) whether the Funding Agreement constituted value to the Debtor on the date of the Corporate Restructuring and (b) whether the Debtor received reasonably equivalent value in the Corporate Restructuring, each as a matter of law. On these issues, both the federal and the state fraudulent transfer statutes are clear: "value" cannot include an unperformed promise to furnish support to a debtor. And the undisputed facts show that, as of the date of the Corporate Restructuring, the Funding Agreement was exactly that. As a result, the Debtor did not receive reasonably equivalent value through the Corporate Restructuring.

I. The Funding Agreement Had No "Value" When the Corporate Restructuring Occurred Because It Was an Unperformed Promise to Support the Debtor

A. Defendants' Flawed Statutory Interpretation Cannot Rescue the Funding Agreement from the "Unperformed Promise" Exclusion

1. The Word "Support" Does Not Confine the Statute's Scope to Only Familial Promises and Commitments

29. Defendants' effort to confine the meaning of "support" to only family relationships (Opp. ¶ 62) is untenable. Ordinary usage is not so limited. In Defendants' own chosen dictionary,

²⁰ The *Interstate 10 Partners* court noted that "with respect to at least one aspect of Defendant's Proposed Motion for Partial Summary Judgment, there does not seem to even be an active dispute between the parties" because the plaintiff had conceded that it would not argue the issue. 2026 WL 800967, at *4.

one example of “support” is “[w]e support the theater by making annual donations.”²¹ In the same definition, *support* means “assist, help, *bombers supported the ground troops. The charity supports families in need.*”²² Other meanings also show that *support* is not confined to family settings, such as: (a) “assistance or aid provided to one in need of help, *received support from another office/district/unit,*” “*federal support for suburban housing*”; (b) “one (such as a person or agency) that provides assistance or aid, *administrative support contacted tech/technical support*”; and (c) “something that holds up or serves as a foundation or prop, *offered the patient my arm for support.*”²³

30. Defendants also contend that the word “support” is limited to familial promises because the statute partially refers to unperformed promises made to “a relative of the debtor” and the Bankruptcy Code confines the statutory meaning of “relative” to individuals. *See* Opp. ¶ 63; 11 U.S.C. § 101(45) (defining “relative”). But § 548(d)(2)(A) *also* refers to unperformed promises of support made “to the debtor.” The Bankruptcy Code’s definition of debtor is *not* confined to individuals or natural persons. Rather, *debtor* is defined as “person or municipality,” and the Code’s definition of *person* includes an “individual, partnership, and corporation.”²⁴ And *debtor* is the relevant term because the Funding Agreement, at the time of the Corporate Restructuring, constituted an unperformed promise to furnish support to DBMP—i.e., “to the debtor.”

31. When Congress wanted to limit a Code provision to an *individual* debtor, it said so. *See, e.g.,* 11 U.S.C. § 101(31)(A) (defining “insider” in reference to when “the debtor is an

²¹ <https://www.merriam-webster.com/dictionary/support> (last visited June 21, 2026).

²² *Id.* (emphasis added).

²³ *Id.* (emphasis added); *see also* WEBSTER’S NEW WORLD COLLECTION DICTIONARY (4th ed. 2004) (defining “support” as “to maintain or provide for (a person, *institution*, etc.) with money or subsistence” (emphasis added)).

²⁴ 11 U.S.C. § 101(13) (defining “debtor”), (41) (defining “person”).

individual”); 11 U.S.C. § 109(e) (providing that “[o]nly an individual with regular income . . . may be a debtor under chapter 13”); 11 U.S.C. § 330(a)(4)(B) (authorizing compensation to debtor’s counsel “in a chapter 12 or chapter 13 case in which the debtor is an individual”); 11 U.S.C. § 523(a) (excepting from discharge certain debts owed by “an individual debtor”); 11 U.S.C. § 707(b)(1) (providing that court may dismiss a case “filed by an individual debtor . . . whose debts are primarily consumer debts”); 11 U.S.C. § 1129(a)(15) (providing additional requirements for plan confirmation when “the debtor is an individual”). The fact that Congress did not specify an “individual debtor” in 11 U.S.C. § 548(d)(2)(A) shows that the exclusion of an “unperformed promise to furnish support” applies equally to corporate debtors as to individuals—and thus necessarily extends beyond familial support. *See NISH v. Cohen*, 247 F.3d 197, 203-04 (4th Cir. 2001) (“The omission by Congress of language in one section of a statute that is included in another section of the same statute generally reflects Congress’s intentional and purposeful exclusion in the former section.” (citation omitted)).

32. This point is further supported by the UFTA and the UVTA. Unlike § 548(d)(2)(A), the applicable UFTA and UVTA provisions do not use the term “relative.” Instead, their “value” exclusions refer to an “unperformed promise made . . . to furnish support *to the debtor or another person*.” UFTA § 3(a) (emphasis added); UVTA § 3(a) (emphasis added).²⁵ Moreover, like the Bankruptcy Code, the UFTA and UVTA do not limit the term *debtor* to only individuals or natural persons. Instead, the UFTA defines *debtor* as “a *person* who is liable on a claim.” UFTA § 1(6) (emphasis added).²⁶ The UVTA’s definition is virtually identical. *See* UVTA § 1(6) (defining

²⁵ DEL. CODE ANN. tit. 6, § 1303(a) (emphasis added); N.C. GEN. STAT. ANN. § 39-23.3(a) (emphasis added); 12 PA. STAT. AND CONS. STAT. ANN. § 5103(a) (emphasis added); TEX. BUS. & COM. CODE ANN. § 24.004(a) (emphasis added).

²⁶ DEL. CODE ANN. tit. 6, § 1301(6) (emphasis added); TEX. BUS. & COM. CODE ANN. § 24.002(6) (emphasis added).

debtor as “a *person* that is liable on a claim” (emphasis added)).²⁷ And the UFTA defines *person* to include “an individual, partnership, corporation, . . . or any other legal or commercial entity.” UFTA § 1(9).²⁸ The UVTA takes the same approach. See UVTA § 1(11) (defining *person* to include “an individual, . . . business or nonprofit entity, . . . or other legal or commercial entity”).²⁹

33. Furthermore, the applicable UFTA and UVTA language specifies that, to be excluded from *value*, the “unperformed promise” must be “made *otherwise than in the ordinary course of the promisor’s business* to furnish support.” UFTA § 3(a) (emphasis added); UVTA § 3(a) (emphasis added).³⁰ The language referring to outside “the ordinary course of the promisor’s business” further demonstrates that the exclusion is not confined to familial promises or commitments. Defendants’ arguments to the contrary are unsupported by the statutory text and lack merit. As an unperformed promise to furnish support to DBMP at the time of the Corporate Restructuring, the Funding Agreement falls outside the statutory definitions of “value.”

2. *Defendants’ Reliance on “Legislative History” and “Commentary” Is Misplaced*

34. Defendants next resort to “legislative history” in the form of a 1973 report issued by a “Congressional Commission studying the Bankruptcy Laws.” Opp. ¶ 64-69. Defendants patch together some general statements in the commission report about the definition of *value* and then argue that the report “underscore[es]” how the focus of the *unperformed promise* exclusion

²⁷ N.C. GEN. STAT. ANN. § 39-23.1(6) (emphasis added); 12 PA. STAT. AND CONS. STAT. ANN. § 5101(b) (emphasis added).

²⁸ DEL. CODE ANN. tit. 6, § 1301(9); N.C. GEN. STAT. ANN. § 39-23.1(9); TEX. BUS. & COM. CODE ANN. § 24.002(9).

²⁹ 12 PA. STAT. AND CONS. STAT. ANN. § 5101(b) (“An individual, . . . business or nonprofit entity, . . . or other legal entity.”).

³⁰ DEL. CODE ANN. tit. 6, § 1303(a) (emphasis added); N.C. GEN. STAT. ANN. § 39-23.3(a) (emphasis added); 12 PA. STAT. AND CONS. STAT. ANN. § 5103(a) (emphasis added); TEX. BUS. & COM. CODE ANN. § 24.004(a) (emphasis added).

is “on familial support.” Opp. ¶ 69 (footnote omitted). Even putting aside the fact that statements from the 1973 commission report cited by Defendants say nothing about “familial support,” the commission report is of no moment. As a threshold matter, the Fourth Circuit has long held that courts should look to legislative history in construing a statute “only if the meaning of a statute is unclear” and “legislative history should *never* be used to create doubt if the language of a statute is plain on its face.” *Matala v. Consolidation Coal Co.*, 647 F.2d 427, 429 (4th Cir. 1981) (emphasis added); *see also Ctr. for Env’t Health v. Regan*, 103 F.4th 1027, 1038 n.12 (4th Cir. 2024) (rejecting proposed use of legislative history in support of petitioners’ argument because “[l]egislative history is irrelevant to the interpretation of an unambiguous statute” (citing *In re Moore*, 907 F.2d 1476, 1478-79 (4th Cir. 1990))). Defendants have failed to identify any ambiguity in the statutory language, so the 1973 commission report is irrelevant and should be disregarded on that basis alone.

35. In addition, as Defendants themselves concede, the report is “*not authoritative*.” Opp. ¶ 69, n.98 (emphasis added). Nor is the report even relevant “legislative history” in the first place. According to the 1978 Senate Judiciary report, § 548 of the Bankruptcy Code is “derived in large part from section 67d of the Bankruptcy Act,” *not* from the commission report. S. Rep. No. 95-989, at 89 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5875. Courts have rejected similar attempts to invoke the commission report as authoritative where, like here, the relevant Code provision was based not on the report but on a provision in the former Bankruptcy Act. *See, e.g., In re Bloomingdale Partners*, 170 B.R. 984, 990 (Bankr. N.D. Ill. 1994) (“[Code] § 1122 is based upon Act §§ 597 and 751, not upon this section of the Commission’s Report. Accordingly, the Commission’s Report is not relevant legislative history for this purpose.”); *In re Cont’l Airlines Corp.*, 64 B.R. 865, 873 (Bankr. S.D. Tex. 1986) (refusing to rely upon commission report when

interpreting § 502(b)(7) because the report “is *not part of the legislative history of the 1978 Bankruptcy Code at all*”). The Court should therefore reject Defendants’ attempt to invoke the commission report as authoritative or even relevant.

36. Defendants’ resort to the “comments” to the UFTA (Opp. ¶¶ 70-72) fares no better. Once again, they cite a source that is not even legislative history—it was written by the Uniform Law Commission, not any state legislature. *See, e.g., Allied Home Mortg. Cap. Corp. v. Mark*, No. CIV.A. 12-10158-GAO, 2014 WL 4964728, at *10 (D. Mass. Sept. 30, 2014) (interpreting the UFTA and looking to the commentary only when there was ambiguity in the statute as statutory interpretation “always starts with the language of the statute itself ‘[R]esort to extrinsic aids’ . . . is appropriate ‘only when the wording of the statute is freighted with ambiguity or leads to an unreasonable result’”); *see also In re Amberson*, 54 F.4th 240, 257-58 (5th Cir. 2022) (distinguishing a uniform act’s official comments from statutes enacted by the legislature and noting that the “court will consider official comments but reject them if they are not a convincing explanation of the law’s text” (citation omitted)). And in any event, Defendants’ argument is refuted by the unambiguous statutory text of the UFTA and the UFTA. *See supra* ¶¶ 32-33. Among other things, that statutory text does not use the term “relative,” and it defines *debtor* to include business entities. *Id.* Moreover, the comment observing that courts have recognized unperformed promises as having value “in a variety of circumstances” (Opp. ¶ 71) does not negate the statutory exclusion from “value” of unperformed promises *to furnish support*. Because the statutory text establishes unambiguously that the exclusion from *value* is not limited to familial support, there is no basis to consider any “comments” to the UFTA or the UFTA.

3. *Defendants’ Attempts to Label the Funding Agreement as an “Account Receivable,” “Property,” or “Enforceable” Fail to Shift the Analysis in Their Favor*

a. “Enforceable Property Rights”

37. Defendants attempt to muddy the waters by calling the Funding Agreement an “Account Receivable” and thus “property” or an “enforceable property right[].” *E.g.*, Opp. ¶¶ 1, 3, 20, 103. But their sleight-of-hand labels cannot shield the Funding Agreement from the “unperformed promise” exclusion. *Even if*, for the sake of argument, the Funding Agreement is “property,” it is still statutorily excluded from “value.” Section 548 in fact expressly provides in relevant part that “‘value’ means property . . . but *does not include* an unperformed promise to furnish support to the debtor.” § 548(d)(2)(A) (emphasis added); *accord* UFTA § 3(a); UVTA § 3(a).³¹ Where a statute sets out a broad category for inclusion, it may “except[] from the statute’s coverage” a subset of that category “by saying the term does not include” that subset. *Brown v. Waddell*, 50 F.3d 285, 290 n.6 (4th Cir. 1995) (citation modified) (interpreting 18 U.S.C. § 3127(3)). That is precisely the case here. Section 548(d)(2)(A) defines “value” as inclusive of the broad set of “property” but then excludes from that broad set—to the extent it constitutes property at all—any “unperformed promise to furnish support to the debtor.” The Court need not determine on summary judgment whether the Funding Agreement constitutes “property” because it can hold, as a matter of law, that *even if* the Funding Agreement is property, it is still excluded from “value” as “an unperformed promise to furnish support to the debtor.”³²

³¹ DEL. CODE ANN. tit. 6, § 1303(a); N.C. GEN. STAT. ANN. § 39-23.3(a); 12 PA. STAT. AND CONS. STAT. ANN. § 5103(a); TEX. BUS. & COM. CODE ANN. § 24.004(a).

³² In their preliminary statement, Defendants elicit the Third Circuit’s comparison of “a similar agreement” to “a funding backstop.” Opp. ¶ 3 (citing *In re LTL Mgmt., LLC*, 64 F.4th 84, 109 (3d Cir. 2023)). But *LTL* dismissed the debtor’s bankruptcy filing as not done in good faith; the court had no reason to evaluate whether the funding agreement constituted “value” for purposes of fraudulent transfer law. The fact that a court in a different circuit dismissed a Texas Two-Step case on a threshold issue provides no assistance to Defendants here.

38. Defendants also seek to read additional qualifications into the statute, insisting that the “unperformed promise” exclusion applies only to a gratuitous, illusory, or familial promise, and not to enforceable commercial agreements. *E.g.*, Opp. ¶¶ 4, 63, 68, 91. But section 548(d)(2)(A) of the Bankruptcy Code and its state-law counterparts do not use the words “gratuitous,” “illusory,” “familial,” or even “unenforceable.” Defendants attempt to graft additional language to the statutory text, which is impermissible. Courts “ordinarily resist reading words or elements into a statute that do not appear on its face.” *Dean v. United States*, 556 U.S. 568, 572 (2009) (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)). This Court should do the same and decline Defendants’ invitation to read non-existent words into the statutory text.

39. Moreover, courts have applied the “unperformed promise” exclusion to enforceable commercial agreements. For instance, in *Schaefer*, the court held that a contractual promise to pay health insurance benefits under a written employment agreement was an unperformed promise to furnish support within the meaning of section 684.3 of Iowa’s Uniform Fraudulent Transfer Act and therefore did not constitute “value” as a matter of law. *In re Schaefer*, 331 B.R. 401, 420 (Bankr. N.D. Iowa 2005). Accordingly, whether the Funding Agreement is “enforceable” has no bearing on the statutory exclusion, which considers only whether the Funding Agreement is an “unperformed promise to furnish support to the debtor.” § 548(d)(2)(A); *accord* UFTA § 3(a); UFTA § 3(a).³³ As explained in the Motion, the Funding Agreement was such an “unperformed promise” when the Corporate Restructuring occurred and therefore cannot constitute “value” under the applicable statutes. Mot. ¶¶ 26-36.

³³ DEL. CODE ANN. tit. 6, § 1303(a); N.C. GEN. STAT. ANN. § 39-23.3(a); 12 PA. STAT. AND CONS. STAT. ANN. § 5103(a); TEX. BUS. & COM. CODE ANN. § 24.004(a).

b. Cashier's Checks and Guaranties

40. Defendants' attempts to characterize the Funding Agreement as a "\$1 billion cashier's check" or a "guaranty" (Opp. ¶¶ 19, 55-58) must also fail. For starters, the Funding Agreement is not equivalent to a cashier's check because no bank is required to promptly pay DBMP any liquidated amount from the Funding Agreement out of its own resources upon presentment.³⁴

41. Defendants' insistence that the Funding Agreement is "akin to a guaranty" is even further off the mark. At the outset, it is remarkable that Defendants are comparing the Funding Agreement with a guaranty when the Debtor in its First Day Declaration insisted that the Funding Agreement is not a debt instrument. *See* First Day Decl. ¶ 21 ("Significantly, the Funding Agreement imposes no repayment obligation on the Debtor; it is not a loan.").

42. Even more important, the Funding Agreement lacks the tripartite arrangement that is necessary for guaranties or suretyship, "whereby one party (the surety) becomes liable for the principal's or obligor's debt or duty *to the third party obligee*." *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1160 (Fed. Cir. 1985) (emphasis added and citation omitted); *see also Com. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 338 (6th Cir. 2007) (same). "[N]o suretyship *exists* in the absence of any of the three parties." *Balboa Ins. Co.*, 775 F.2d at 1160.³⁵ The Funding Agreement is between CertainTeed and DBMP. There is no third party serving in a capacity equivalent to an obligee or lender. Defendants might argue that the asbestos claimants as a class

³⁴ A cashier's check is a "bill of exchange drawn by a bank upon itself, accepted in advance by the act of issuance" and which the bank must honor "upon presentment for payment." *Ross v. Peck Iron & Metal Co.*, 264 F.2d 262 (4th Cir. 1959).

³⁵ According to the Restatement, guaranties and suretyship contracts are the "two most common contractual mechanisms resulting in suretyship status," and despite certain technical distinctions between the two that "often blur," "the rights associated with [suretyship] status are the same for sureties as for guarantors" and "both are governed by the principles set forth in this Restatement." Restatement (Third) of Suretyship & Guaranty § 1 cmt. c (1996).

serve the function of an obligee. But a true obligee has enforcement or collection rights against the guarantor, either under the guaranty or equivalent document, and section 15 of the Funding Agreement itself asserts that no such rights exist for the asbestos claimants or anyone else: “This Agreement shall not confer any rights or remedies upon any Person other than the parties hereto and their respective successors and permitted assigns.”³⁶ Defendants allude to Plaintiffs’ “ability to enforce the Funding Agreement,” Opp. ¶ 38, but this is nothing more than an uncited reference to the post-petition funding agreement stipulation, which falls well short of the direct enforcement right required of a true obligee and also occurred only post-transfer.³⁷ In sum, the Funding Agreement is not “akin to a guaranty” at all.

43. In any event, the question of whether the Funding Agreement is “akin” to a cashier’s check or a guaranty is beside the point. The only question that matters is whether the Funding Agreement falls within the statutory exclusion from *value*—i.e., whether it is an “unperformed promise to furnish support to the debtor.” § 548(d)(2)(A). Defendants fail to cite a single case to show why their failed analogy to a cashier’s check would answer that question, and their cases in support of their unfounded guaranty analogy fail to even consider when a guaranty might or might not constitute “value.”³⁸ Defendants instead merely contend that, when a debtor *issues* a guaranty

³⁶ Funding Agreement § 15, Ex. K to Mot.

³⁷ The funding agreement stipulation is irrelevant for determining the Funding Agreement’s “value” as it was not in effect on the date of the Corporate Restructuring. See Opp. Ex. 5 (filed two years after the petition date). Moreover, it provides no means for asbestos claimants to sue directly under the Funding Agreement and instead merely promises that CertainTeed “will not oppose a request” by such claimants to act “on behalf [of] the [Debtor] to pursue remedies in this Court.” *Id.* ¶ 6. At most, this is an offer to not oppose a request for derivative standing. It is not a contractual basis to directly enforce a guaranty—a necessary precondition. See *BMO Harris Bank NA v. Superior Hauling LLC*, No. 8:22-CV-01252-JDA, 2023 WL 11889464, at *4 (D.S.C. July 7, 2023) (“Under an absolute guaranty of payment, the creditor may maintain an action against the guarantor immediately upon default of the debtor.”).

³⁸ Defendants cite to only one case where the debtor received a guaranty at all. See Opp. ¶ 68 n.96 (citing *Williams v. Twin City Co.*, 251 F.2d 678 (9th Cir. 1958)). It is irrelevant for two reasons. First, it is not a case under the Bankruptcy Code and thus is not concerned with the definition of “value” from § 548. Second, the debtor there transferred stock and future accounts receivable to a trust for the benefit of his

for cash payment or for a reasonable business opportunity, such a payment or opportunity might constitute value.³⁹ But they fail to explain why, *even if* the Funding Agreement could be characterized as a guaranty (and it cannot), it would not *also* be an unperformed promise to furnish support and thus excluded from “value.” *See supra* ¶¶ 37-39.

c. Economic Benefits, Contract Rights, and Services

44. To establish that the Funding Agreement is a “property interest with value,” Defendants highlight cases recognizing that certain other unperformed promises *may* constitute value. Opp. ¶ 54. But those cases are inapposite and fail to address the fundamental point that, even if the Funding Agreement is “property,” it still fits within the statutory exclusion as an “unperformed promise to furnish support to the debtor” at the time of the Corporate Restructuring. Essentially, Defendants miss the dispositive distinction: whatever treatment courts have given other future promises, Congress and applicable state laws expressly exclude from “value” unperformed promises to furnish *support*. The Funding Agreement falls squarely within that exclusion.

45. Defendants try to avoid this conclusion by arguing that “the mere opportunity to receive an economic benefit in the future constitutes ‘value’ under the Bankruptcy Code.” Opp. ¶ 51 (citation modified) (citing *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 212 (3d Cir. 2006)).

guarantor, but the guarantor also promptly secured that guaranty to pay third-party creditors on an antecedent debt. Thus, not only is this case irrelevant for purposes of interpreting § 548, under the facts presented, it is unlikely the court would have found such a guaranty “unperformed” as of the transfer even if § 548 applied.

³⁹ *See In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1126 (5th Cir. 1993) (finding the benefits of allowing an affiliate to pursue a sale reasonably equivalent to the debtor-issued guaranty necessary for such opportunity); *Mellon Bank, N.A. v. Metro Commc’ns, Inc.*, 945 F.2d 635, 647 (3d Cir. 1991) (finding the indirect benefits of the debtor-issued guaranty, including the ability to obtain new credit and to foment new business synergies, could constitute value); *In re Chase & Sanborn Corp.*, 904 F.2d 588, 594-95 (11th Cir. 1990) (debtor-issued guaranty in exchange for cash payment where the guaranty was low-risk is reasonably equivalent value).

But their non-binding caselaw plainly diverges from the text of § 548(d)(2)(A) and should not be adopted. If Defendants are relying on caselaw to assert that any *opportunity* to receive an economic benefit *necessarily* constitutes “value,” they are asking this Court to rewrite § 548(d)(2)(A). “The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there.” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citation modified). If Congress intended for any potential economic benefit to constitute value, including the potential to receive economic or pecuniary “support,” it could have said as much. It did not. Instead, it categorically *excluded* from value any “unperformed promise to furnish support.” § 548(d)(2)(A). Defendants provide no basis for departing from the statute’s plain terms.

46. Defendants similarly rely on *R.M.L.* to assert that “even a slim chance of obtaining a substantial economic benefit in the future could constitute value, provided the expectation was legitimate and reasonable at the time of the transfer.” Opp. ¶ 54 n.65 (citing *In re R.M.L., Inc.*, 92 F.3d 139, 152-53 (3d Cir. 1996)). This assertion fails for the same reasons set forth in the paragraph above. Moreover, at issue in *R.M.L.* was whether a commitment letter issued by a bank in connection with a contemplated \$53-million loan conferred “reasonably equivalent value” in exchange for the substantial commitment fees the debtor paid to the bank. *R.M.L.*, 92 F.3d at 142. The Third Circuit affirmed the bankruptcy court’s finding that, because “the commitment letter was so conditional that the chances of the loan closing were minimal,” the debtor did not receive value reasonably equivalent to the fees paid to the bank. *Id.* In its ruling, the Third Circuit did not even consider the “unperformed promise” exclusion in § 548(d)(2)(A) or whether the commitment letter could constitute “support.” Instead, the Third Circuit held, as a threshold matter, that “the bankruptcy court’s implicit determination that the letter” constituted some value was “not clearly

erroneous.” *Id.* at 153. *R.M.L.* did not even address the “support” issue and had no reason to disturb the lower court’s “implicit” finding because it ultimately held that the commitment letter was not reasonably equivalent value for the fees paid to the bank.

47. Defendants also attempt to analogize the Funding Agreement to contract rights and services. Opp. ¶ 54. Defendants, for example, rely on *Denison* for the proposition that “contract rights to future consideration can provide reasonably equivalent value in exchange for a challenged transfer.” Opp. ¶ 54 n.64 (citing *In re Denison*, 292 B.R. 150, 156 (E.D. Mich. 2003)). In *Denison*, the debtor made a down payment to buy a mobile home from her mother. 292 B.R. at 152. Under the sale agreement, the mother promised to convey the mobile home’s title on the debtor’s completion of monthly installment payments. *Id.* at 152-53. In the meantime, the debtor and her children were permitted to live in the mobile home. *Id.* at 153. The chapter 7 trustee seeking to avoid and recover the down payment argued that the mother’s actions in selling the mobile home to the debtor in exchange for future installment payments constituted “future support” prohibited by § 548. *Id.* at 156. The district court on appeal rejected that argument, holding that the debtor had “secured a present interest” in the mobile home—i.e., “part performance” in the sale—in exchange for the down payment. *Id.* The mother’s promise to sell the mobile home was *not* wholly unperformed and therefore not subject to the “unperformed promise” exclusion. *Denison* therefore is inapposite: here, no such payment was made.

48. Defendants rely on *HDD Rotary Sales* in their next attempt to bolster their argument that a contract right to receive a future payment constitutes “value.” Opp. ¶ 54 n.64 (citing *In re HDD Rotary Sales, LLC*, 512 B.R. 877, 890 (Bankr. S.D. Tex. 2014)). But that case is even further afield. There, a shareholder of the debtor promised that *the debtor would pay* a bonus to the debtor’s sales agent based on the amount of sales the agent generated. *HDD Rotary Sales*, 512

B.R. at 884. In other words, the promise at issue in *HDD Rotary* was not a promise to “furnish support to the debtor” that the statutory exclusion requires. *See, e.g.*, § 548(d)(2)(A). Additionally, because the sales agent, in part as consideration for the promised bonus, generated sales of HDD’s inventory and equipment, the court found that the debtor’s payment of this bonus in exchange for the induced sales efforts was nothing more than payment of an antecedent debt, which constituted reasonably equivalent value. *HDD Rotary Sales*, 512 B.R. at 890; *see also In re Pringle*, 495 B.R. 447, 464 (B.A.P. 9th Cir. 2013) (“Although an executory promise of future support is not value, the satisfaction of an existing valid debt for past support is.”). Defendants’ reliance on *HDD Rotary Sales* is therefore misplaced.

49. Defendants then turn to the world of gambling, arguing that a contractual right to receive payment on a winning bet—no matter how remote the chances of winning are—constitutes “value.” *Opp.* ¶ 54 n.65 (citing *In re Chomakos*, 69 F.3d 769, 771 (6th Cir. 1995)). But the right to recover on a winning bet is not an “unperformed promise to furnish support,” nor do Defendants cite any law to support that conclusion. *Chomakos* is therefore irrelevant.

50. Defendants next try to analogize the Funding Agreement to service agreements. *See Opp.* ¶ 54 n.65. But first, this again misses the critical fact that the statute only excludes unperformed promises to furnish *support*.⁴⁰ In *Castle Trading*, for example, the chapter 7 trustee pursuing an avoidance action against a law firm argued that a fee agreement between the law firm and the debtor, whereby the law firm promised to provide legal services in the future, was not *value* because the agreement fell within the “unperformed promise” exclusion. *In re Castle*

⁴⁰ “An unperformed promise to provide support is the only consideration that does not constitute value as a matter of law.” *In re Schaefer*, 331 B.R. at 419. “Whether another form of consideration” to include a different type of unperformed promise, i.e., one not for support, “constitutes value must be determined in light of the purpose of the statute.” *Id.* The Motion does not assert that the Funding Agreement lacks value merely because it is an unperformed promise. Instead, the Funding Agreement is an unperformed promise of *support*, the type excluded from value as a matter of law.

Trading, Inc., No. 2:14-AP-01022-BB, 2017 WL 2375493, at *5 (B.A.P. 9th Cir. May 31, 2017). The court disagreed, finding that the fee agreement constituted value because it was “not a promise to furnish support” and thus not subject to the exclusion under § 548(d)(2)(A). *Id.* at *5-6. The court did not, however, rely upon this finding because the issue had not been raised before the bankruptcy court and was thus forfeited. *Id.* As a result, the analysis on this issue was both *dicta* and limited, but the court does refer to the corresponding state statute, CAL. CIV. CODE § 3439.03, which includes the “ordinary course of business” exception. *Id.* While the court’s reasoning is unclear, it is critical that the fee agreement at issue was well within the firm’s ordinary course of business. And here, there is no basis to find that the Corporate Restructuring was in the ordinary course. *See infra* ¶¶ 52-60. Instead, CertainTeed promised to make payments to DBMP to cover, among other things, the Debtor’s chapter 11 administrative expenses and thereby sustain the Debtor in its bankruptcy (an inherently non-ordinary course event, *id.*). That is also the essence of support.

51. Perhaps recognizing the weakness of their caselaw, Defendants tout Judge Beyer’s pronouncement in *Bestwall* that the funding agreement there was “enforceable” and “cannot be disregarded.” Opp. ¶ 56 (quoting *In re Bestwall LLC*, 605 B.R. 43, 49 (Bankr. W.D.N.C. 2019)). But Judge Beyer’s statement was made in the context of a motion to dismiss the case for bad faith under 11 U.S.C. § 1112(b). In other words, an adversary proceeding seeking to avoid and recover a fraudulent transfer under §§ 544(b) and 548 was not at issue. Judge Beyer was not asked to interpret the definition of “value” under § 548(d)(2)(A) and applicable state law. What constitutes “value” under fraudulent transfer law was not even mentioned. Accordingly, it is neither appropriate nor prudent for this Court to rely on Judge Beyer’s inapposite statement to decide whether *this* Funding Agreement is excluded from the statutory definition of “value.” For the

reasons stated above, *this* Funding Agreement is so excluded as a matter of law under controlling authority.

B. This Court Can and Should Rule as a Matter of Law That CertainTeed's Promise to Support DBMP Was Made Outside the Ordinary Course of CertainTeed's Business

52. As noted above, the UFTA and UVTA exclude from their definitions of *value* “an unperformed promise *made otherwise than in the ordinary course of the promisor's business* to furnish support to the debtor or another person.” UFTA § 3(a) (emphasis added); *accord* UVTA § 3(a).⁴¹ Defendants contend that applying the “ordinary course” language must defeat partial summary judgment because “ordinary course” is a “question of fact.” Opp. ¶ 99. But that contention is unavailing. Under the Funding Agreement, CertainTeed made a promise, which was unperformed at the time of the Corporate Restructuring, to furnish support to DBMP. CertainTeed is thus the *promisor* under the applicable statutes. And it is undisputed that manufacturing and selling building products was the “ordinary course” of CertainTeed's business.⁴²

53. Defendants nevertheless try to manufacture a factual issue by contending that “DBMP's chapter 11 bankruptcy is not the first of its kind, and certainly not the first case to use bankruptcy to resolve asbestos claims.” Opp. ¶ 104 (footnotes omitted). But Defendants' argument is without merit because filing for bankruptcy is *never* “an action that is in the ordinary course of business for a company.” *In re Karben4 Brewing, LLC*, 661 B.R. 392, 398 (Bankr. W.D.

⁴¹ DEL. CODE ANN. tit. 6, § 1303(a); N.C. GEN. STAT. ANN. § 39-23.3(a); 12 PA. STAT. AND CONS. STAT. ANN. § 5103(a); TEX. BUS. & COM. CODE ANN. § 24.004(a).

⁴² Defendants attempt to obscure this clear fact by fighting a strawman. *See* Opp. ¶¶ 100-103 (arguing “that the ordinary course language only applies to an unperformed promise of support – not enforceable property rights”). It is true that “otherwise than in the ordinary course of the promisor's business” applies to unperformed promises of support. But, for the reasons stated *supra*, ¶¶ 37-39, nothing in the statute categorically excludes enforceable property rights from any unperformed promise of support—something can be an enforceable property right *and* an unperformed promise of support. Where this occurs, and where that promise is *also* not made in the ordinary course of business, it is excluded from the definition of “value” under the express language of both the UFTA and UVTA. *See* UFTA § 3(a); UVTA § 3(a).

Wis. 2024); *see also In re Zaragosa Props., Inc.*, 156 B.R. 310, 312 (Bankr. M.D. Fla. 1993) (“[F]iling a Petition for Relief under Title 11 is not the ordinary course of anyone’s business.”).

54. Nor are corporate restructurings—whether in the form of mergers or the shifting of operating assets from one entity to another—in the ordinary course of business. *Cf. United States v. Goodstein*, 883 F.2d 1362, 1370 (7th Cir. 1989) (holding that “[i]t is not a routine or ordinary event to transfer control of one manufacturing company to another, effectively merging the two companies, or to relocate substantial portions of a company’s equipment and inventory to the premises of another”); *In re Am. Dev. Corp.*, 95 B.R. 735, 737 (Bankr. C.D. Cal. 1989) (holding that “[a] transfer of all the assets of an entity to a subsidiary is not a matter in the ordinary course of business”).

55. It is also beside the point that the Funding Agreement might be “part” of such a restructuring. Opp. ¶ 104. Simply put, Defendants have presented no evidence that the Texas Two-Step transaction was common practice in CertainTeed’s industry or that it is the type of transaction that is so routine that its creditors would “reasonably expect[]” CertainTeed to engage in a divisional merger in the ordinary course. *See In re Merry-Go-Round Enters., Inc.*, 400 F.3d 219, 226 (4th Cir. 2005) (affirming district court’s holding that there was no evidence that the transactions were “common practice in its industry” or that “a creditor would have reasonably expected” the debtor to enter into such transactions). Judge Whitley recognized that the Corporate Restructuring was outside the ordinary course of CertainTeed’s business when he found: “Undertaking such a Corporate Restructuring followed almost immediately by one of the two newly created entities filing bankruptcy is *an unorthodox strategy [W]e are unaware of any . . . business reason for such a transaction.*”⁴³

⁴³ Injunction Order ¶ 59 (emphasis added).

56. Moreover, “[i]n considering whether a debt was incurred in the ordinary course of a debtor’s business, a court must determine whether or not the debt was incurred in a typical, arms-length commercial transaction that occurred in the marketplace, or whether it was incurred as an insider arrangement with a closely-held entity.” *In re Cox Motor Express of Greensboro, Inc.*, No. 14-10468, 2016 WL 4259801, at *12 (Bankr. M.D.N.C. Aug. 9, 2016) (citation modified). The undisputed facts show that the Funding Agreement falls into the latter category because: (1) the Funding Agreement is between “new” CertainTeed and DBMP;⁴⁴ (2) “new” CertainTeed and DBMP are affiliates and wholly owned by the same parent, CertainTeed Holding Corporation;⁴⁵ and (3) the terms of the Funding Agreement were not negotiated at arm’s length.⁴⁶

57. Defendants contend that the “relevant question” is “not whether the Divisional Merger was in the ordinary course” but rather whether the Funding Agreement “is the type of instrument routinely used in Defendants’ broader business operations.” Opp. ¶ 99. But Defendants have presented *no* evidence that the Funding Agreement is such an instrument “routinely used” in CertainTeed’s “broader business operations,” despite claiming that “it plainly is.” *Id.* Indeed, it strains credulity for Defendants to suggest, without evidence,⁴⁷ that CertainTeed “routinely” makes

⁴⁴ Mot. ¶ 18 n.27.

⁴⁵ Mot. ¶¶ 12, 16 and accompanying footnotes.

⁴⁶ See, e.g., DBMP 30(b)(6) Dep. (Starczewski) 165:12-17, Dec. 15, 2020 (“Q. You previously testified that [the Funding Agreement], like the other documents, was not the result of an arm’s length negotiation; is that right? A. That is correct. Not a traditional arm’s length negotiation.”); *id.* at 196:13-19 (testifying that “there was no traditional third-party arm’s length type negotiation”); *id.* at 199:15-18 (“Q. Okay. And neither . . . [the indemnification agreement] nor the funding agreement were subject to an arm’s length negotiation; right? A. That’s correct, yes.”); *id.* at 202:11-19 (“Q. And like the other documents . . . [the secondment agreement] was not an arm’s length negotiation between the parties; is that right? A. Correct. I would not describe it as an arm’s length negotiation.”); see also Starczewski Dep. 226:17-227:5, Oct. 1, 2020 (same); *id.* at 246:18-247:6 (same regarding indemnification agreement); *id.* at 264:13-265:5 (same regarding secondment agreement). The foregoing deposition excerpts are annexed hereto as **Exhibit O**.

⁴⁷ See *Anderson*, 477 U.S. at 256 (“Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.”).

promises in its “broader business operations” to furnish support to affiliates *in bankruptcy*, especially when, as established above, bankruptcy is never considered “ordinary course.”

58. Defendants proffer *no evidence* to suggest that the Funding Agreement represents more than a one-time arrangement to furnish support to a bankrupt affiliate. In *Apex Automotive*, the court held in a preferential transfer case that intercompany advances from affiliated entities were transactions outside the ordinary course of one of the debtors’ businesses because that debtor “was in the business of selling automotive parts and accessories” and “not in the business of lending money.” *In re Apex Auto. Warehouse, L.P.*, 238 B.R. 758, 765 (Bankr. N.D. Ill. 1999). Similarly, in *Blessing Industries*, the court held that a line of credit extended as a one-time postpetition loan by a minority investor in the debtor was outside the ordinary course because “prior to this one-time loan, Bolger was not involved with the business on a day-to-day basis. No security was taken for the loan but, instead, Bolger took the risk that the Court would treat the advance as an administrative expense.” *In re Blessing Indus., Inc.*, 263 B.R. 268, 273 (Bankr. N.D. Iowa 2001). As with *Apex Automotive* and *Blessing Industries*, the one-time nature of CertainTeed’s Funding Agreement is dispositive of the fact that it falls outside the ordinary course.

59. Defendants’ attempts to distinguish *Merry-Go-Round* and *Southeast Hotel Properties* are unavailing. Opp. ¶ 105.⁴⁸ In *Merry-Go Round*, the Fourth Circuit left intact the lower court’s findings that there was no evidence that “obtaining life insurance policy loans in the

⁴⁸ On the other hand, *In re Fresh Acquisitions, LLC*, 671 B.R. 171 (Bankr. N.D. Tex. 2025) and *In re Kaypro*, 218 F.3d 1070, 1073 (9th Cir. 2000), both cited at Opp. ¶ 106, are readily distinguishable. Beyond being out of circuit, *Fresh Acquisitions* did not involve any dispute regarding whether the relevant transactions were undertaken in the ordinary course of business. 671 B.R. at 207 (mentioning the exception only in describing the state of the law). In *Kaypro*, also out of circuit, the court specifically noted that there *was* evidence presented in a declaration that the debtor “routinely enter[ed] into workout or debt restructuring agreements” of the type at issue, and deposition testimony that those agreements were “sometimes” an “ordinary requirement.” 218 F.3d at 1074-75. On this basis, the court held that there were “genuine issues of material fact.” *Id.* at 1076. Defendants have presented no similar evidence here, nor could they.

maximum amount” fell within “the operation of retail clothing stores,” or that creditors would expect such loans. 400 F.3d at 224, 226. In *Southeast Hotel Properties*, the Fourth Circuit *affirmed summary judgment* on the basis that there remained “no genuine issues of material fact as to whether the transfer was in the ordinary course of the debtors’ businesses” because the defendant presented “no evidence suggesting that it is common practice in the hotel industry for owners to lease hospitality suites and services at race tracks or other sporting events.” *In re Se. Hotel Props. Ltd. P’ship*, 99 F.3d 151, 158 (4th Cir. 1996). As in *Merry-Go-Round*, Defendants have presented no evidence that promising to furnish financial support to a debtor in bankruptcy is part and parcel of operating a building-products business or that CertainTeed’s creditors should have anticipated such practices as part of CertainTeed’s ordinary activities. And, as in *Southeast Hotel Properties*, Defendants have no evidence that the Funding Agreement is “common practice” in the building-products industry. The supposed “questions of fact surrounding the Funding Agreement” that are proffered by Defendants—such as “the circumstances under which the Funding Agreement was negotiated and executed, [and] the individuals involved in its development and approval” (Opp. ¶ 105 & n.115)—are irrelevant to whether CertainTeed’s promise to furnish support to DBMP in bankruptcy was made in the ordinary course of CertainTeed’s business.

60. For all these reasons, this Court can and should determine as a matter of law that the Funding Agreement was “an unperformed promise made otherwise than in the ordinary course of [CertainTeed’s] business to furnish support to [DBMP].” UFTA § 3(a); UVTA § 3(a).⁴⁹

⁴⁹ DEL. CODE ANN. tit. 6, § 1303(a); TEX. BUS. & COM. CODE ANN. § 24.004(a); N.C. GEN. STAT. ANN. § 39-23.3(a); 12 PA. STAT. AND CONS. STAT. ANN. § 5103(a).

C. Defendants’ Untenable Reading of the Caselaw Cannot Rescue the Funding Agreement from the “Unperformed Promise” Exclusion

61. Defendants’ efforts to distinguish and minimize the significance of the cases addressed in the Motion are unavailing. Opp. ¶¶ 73-89. As noted above, the statutory text controls the analysis. Thus, contrary to Defendants’ assertions, the critical inquiry into whether a promise constitutes *value* is not whether it is “vague,” “speculative,” or “unenforceable,” but whether it is an “unperformed promise” to “furnish support” to “the debtor.” § 548(d)(2)(A); UFTA § 3(a); UFTA § 3(a).⁵⁰ That is all the statutes require. And the Funding Agreement fits within those statutory terms.

62. Defendants contend that the *Reisner* decision stands for the idea “that the statutory focus is on an ***unenforceable*** unperformed promise of support.” Opp. ¶ 74 (citing *In re Reisner*, 357 B.R. 206, 213-14 (Bankr. E.D.N.Y. 2006)). *Reisner* says nothing of the kind. Although *Reisner* analyzed a prior case where a promise carried out “substantially before the bankruptcy” added value to creditors (and was not avoided as a fraudulent transfer), the court determined “there was no such performance” in *Reisner* and thus no need to address the debate any further. So too, here, there is no need for this Court to address the topic given that all payments made under the Funding Agreement indisputably occurred *after* the Debtor filed chapter 11.

63. Defendants try to reframe *Adler* as excluding only “hypothetical or speculative” promises from the definition of value. Opp. ¶¶ 75-80 (citing *In re Adler, Coleman Clearing Corp.*, 263 B.R. 406, 467-68 (S.D.N.Y. 2001)). That is not *Adler*’s holding. *Adler* addressed several proffered sources of value and rejected them all. See 263 B.R. at 465 (listing four alleged sources of value received by the debtor). One was the supposed opportunity for the debtor to partake in a

⁵⁰ DEL. CODE ANN. tit. 6, § 1303(a); TEX. BUS. & COM. CODE ANN. § 24.004(a); N.C. GEN. STAT. ANN. § 39-23.3(a); 12 PA. STAT. AND CONS. STAT. ANN. § 5103(a).

risky and “speculative” stock transaction that arose out of the challenged transfer. This the *Adler* court rejected, not because it was speculative,⁵¹ but because it was not an “actual or current” benefit the parties contemplated at the time of the transaction and therefore could not count as contemporaneous value. *See Adler*, 263 B.R. at 467-68. The Funding Agreement is also not contemporaneous value—not because the parties failed to contemplate it at the time of the transaction, but for the much simpler reason that it was not performed until after the Corporate Restructuring.

64. Far more critical in *Adler* is the court’s rejection of “value” arising out of the transferee’s “purported promise or obligation to pay for [certain stocks].” *Id.* The court assumed the enforceability of this promise but nevertheless held that, “even if [it is] enforceable, [it] does not equate to ‘reasonably equivalent’ value measured as of the time of the exchange.” *Id.* So too, here, regardless of whether the Funding Agreement is enforceable, it cannot overcome its prime defect of having been unperformed at the time of the Corporate Restructuring. *See id.* at 466-67 (“An unperformed promise to pay or to deliver securities in the future, after the debtor has completed the transfer or incurred the obligation, cannot satisfy the concept of a fair exchange.”).

65. Defendants’ characterization of *Simione* (Opp. ¶¶ 81-82) is incorrect for two reasons. First, Defendants ignore that the court in *Simione* found that an agreement failed to provide value despite being neither vague nor speculative. *In re Simione*, 229 B.R. 329, 331, 334 (Bankr. W.D. Pa. 1999) (noting that details of the support were outlined in a written agreement). Second, Defendants commit the logical fallacy of causal oversimplification: they assume that, because the case holds that a familial executory promise of personal care qualifies as “support”

⁵¹ The *Adler* court suggested, but did not hold, that the business risk was something less than legitimate and reasonable. *See Adler*, 263 B.R. at 467-68.

under § 548(d)(2)(A), all “support” must necessarily be familial. Opp. ¶ 82 (reading “the Support Phrase as one cabined to familial support”). But, as explained above, the statutory exclusion of an “unperformed promise to furnish support” does not, by its terms, limit “support” to only familial support; nor does the exclusion apply to only individual debtors. *See supra* ¶¶ 29-33; *see also*, e.g., *In re Wes Dor, Inc.*, 996 F.2d 237, 243 n.8 (10th Cir. 1993) (speculating that a bank’s promise of future funding could constitute an unperformed promise to furnish support to the debtor).

66. Ironically, the next case Defendants try to distinguish, *National Gypsum*, refused to recognize “value” from a promised \$100 million contribution to an asbestos settlement trust because it was, “at most, an unenforceable, unperformed promise to furnish support.” Opp. ¶ 83 (quoting *In re Nat’l Gypsum Co.*, 257 B.R. 184, 202 (Bankr. N.D. Tex. 2000)). Defendants skip the fact that *National Gypsum* finds that “support” can include a promise to furnish funds to cover asbestos liabilities, 257 B.R. at 202, thus undermining Defendants’ argument that “support” means only familial support. They instead fixate on the fact that the court in *National Gypsum* called the promise to contribute \$100 million “unenforceable,” among other things. *Id.* But, as noted above, the statutory text does not require a promise to be “unenforceable” to fall within the “unperformed promise” exclusion. *See supra* ¶¶ 37-39. *National Gypsum* does not hold otherwise.

67. Defendants’ efforts to recharacterize the *MarketXT* case are similarly unavailing. Opp. ¶¶ 85-89. At *summary judgment*, the *MarketXT* court held that the debtor lacked a “legitimate and reasonable” expectation to benefit from a promise. *In re MarketXT Holdings Corp.*, 376 B.R. 390, 414 (Bankr. S.D.N.Y. 2007). The issue preserved for trial was whether the transferee, as consideration for the transfer, assisted the debtor in completing a separate transaction. *Id.* at 415. But, despite the transferee’s argument being “rejected in the summary judgment decision,” the transferee “continued to rely on the [promise] as evidence of value” at trial. *In re MarketXT*

Holdings Corp., 426 B.R. 467, 471 (Bankr. S.D.N.Y. 2010). As a result, the *MarketXT* court affirmed that the trial record did not change its conclusion on summary judgment. *Id.* Defendants brush aside the court’s adherence to its summary-judgment ruling and suggest (incorrectly) that *MarketXT* necessitated a trial as to whether the promise in question was vague and speculative—it did not. Long before trial, the *MarketXT* court sided with the same interpretation of “[t]he language of § 548(d)(2)(A)” that Plaintiffs advance here to dismiss as a matter of law the transferee’s assertion that the promise constituted value. *MarketXT*, 376 B.R. at 412-14 (citations omitted). Similarly, here, no trial is necessary for this Court to find that the Funding Agreement is an “unperformed promise to furnish support” and is therefore excluded from the definition of *value* under § 548(d)(2)(A) and its state-law counterparts.

D. Value Must Be Assessed at the Time of the Transfer, Not by Reference to Post-Transfer Events

68. Defendants devote significant effort to arguing that the Funding Agreement had “present value” because it was “executed and delivered” at the time of the Corporate Restructuring and that its value is “coextensive with the amount of the asbestos liabilities.” Opp. ¶ 93. But this argument incorrectly equates execution and delivery of a document with its value. The mere delivery of a signed agreement does not automatically establish value under § 548(d)(2)(A) and its state-law counterparts. What matters is whether the Funding Agreement constituted “value” as that term is defined by statute—and it did not, as set out above.⁵²

⁵² Defendants point out that “the commercial value of property consists in the expectation of income from it.” Opp. ¶ 91 n.109 (quoting *Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 526 (1941)). But it is not clear how the commercial (i.e., market) valuation of property is relevant to a non-transferrable agreement that was never negotiated at arm’s length—i.e., an agreement that is not the product of, nor designed to be traded in, the open market. What is relevant is that Congress made “a policy choice that certain promises, enforceable under nonbankruptcy law, may be too ephemeral or malleable to count as value when the debtor gives up property creditors potentially could look to for satisfaction of their debts.” *In re Downs*, No. AP 17-80193, 2019 WL 654295, at *9 (Bankr. W.D. Mich. Feb. 15, 2019) (quoting Collier on Bankruptcy ¶ 548.03[5] & n.71-72 (Richard Levin & Henry J. Sommer eds., 16th ed. 2018)). It is

69. The Fourth Circuit’s decision in *Morris Communications* is directly on point and dispositive. See *In re Morris Commc’ns NC, Inc.*, 914 F.2d 458, 468, 475 (4th Cir. 1990). There, the Fourth Circuit rejected the argument that subsequent appreciation in asset value could retroactively establish value, holding that stock in a corporation whose sole asset was an application for a cellular license must be evaluated *at the time of the transfer*—even though the stock later appreciated to considerably more than the amount originally spent. *Id.* at 468, 475. The parallel is direct. Defendants argue that the Funding Agreement qualifies as “value” because it was later performed—just as the stock in *Morris* later appreciated in value. But the Fourth Circuit rejected that logic, stating that “[t]he critical time is when the transfer is made.” *Id.* at 466 (citation omitted).⁵³ So it is here.

70. Defendants’ effort to recharacterize *Adler* as contrary to this basic point is flawed. See Opp. ¶¶ 94-97. As noted, *Adler* faced multiple alleged sources of value. See *supra* ¶¶ 63-64. One was certain “House Stocks” whose value had been propped up by rampant fraud. To value the House Stocks at the time of the fraudulent transfer, the bankruptcy court had to back out that portion of the value attributable to the fraud. See *Adler*, 263 B.R. at 466. That calculation was necessarily informed by the value leftover when the charade collapsed a week later, but that

difficult to imagine how a promise of “support,” devoid of any business opportunity or market incentive, would arise under typical market conditions—but that is exactly the issue Congress wished to curtail.

⁵³ Courts and commentators outside the Fourth Circuit also broadly agree that “value” must be assessed when the transfer is made and that neither subsequent depreciation nor appreciation in value should affect the question of whether reasonably equivalent value was given. See, e.g., *In re M. Fabrikant & Sons, Inc.*, No. 06-12737, Adv. Nos. 07-02780, 08-01734, 2009 WL 3806683, at *13 (Bankr. S.D.N.Y. Nov. 10, 2009)) (“The fraudulent nature of each transfer, including the value that the transferor received, must be determined at the time of the transfer without the benefit of hindsight.”); *In re Singh*, 434 B.R. 298, 309 (Bankr. E.D.N.Y. 2010) (“[T]hese payments to the Debtor, which occurred subsequent to the Transfer, cannot constitute fair consideration for the Transfer for the purposes of § 548 or the DCL.”). As the Tenth Circuit also recently confirmed, courts “assess value ‘as of the date of the transfer [or obligation]’ . . . without the benefit of hindsight.” *In re White*, 144 F.4th 1216, 1231 (10th Cir. 2025) (quoting *In re Red Eagle Oil, Inc.*, 567 B.R. 615, 627 (Bankr. D. Wyo. 2017)).

leftover value was a mere proxy for the true value at the time of the transaction. *Id.* at 469 (noting the bankruptcy court “adopted House Stock prices recorded on February 27, 1995 as the most accurate reflection of the House Stocks’ fair market worth as of February 16 for § 548(a)(1)(B) purposes”). Such fact-based value calculation is irrelevant where, as here, the thing conferred lacks *any* value as a matter of law.⁵⁴

71. Defendants’ attack on *Simione* tries—and fails—to overcomplicate a simple point. Opp. ¶ 97. The question before the *Simione* court was whether the exchange constituted value “at the time of the Transfer.” *In re Simione*, 229 B.R. at 335. The fact that value and not timing was at issue there does not change the fact that it followed the same simple rule established in *Morris*: value is determined at the date of transfer. 914 F.2d at 468, 475. Here, that is the date of the Corporate Restructuring.

72. It is undisputed that CertainTeed’s payments under the Funding Agreement occurred *after* the Corporate Restructuring and thus cannot retroactively establish “value” on the transfer date. Nor can the postpetition Second Amended and Restated Funding Agreement salvage the Funding Agreement from the “unperformed promise” exclusion because that second amended agreement did not exist when the Corporate Restructuring was completed.⁵⁵ The Second Amended

⁵⁴ Moreover, Defendants’ implication that “the [*Adler*] court’s analysis was driven by its view of the value that was allegedly delivered,” and thus not dependent upon its House Stock valuation analysis, is incorrect. See Opp. ¶ 95. The court’s valuation of the House Stock, for which it needed to back out any fraud-based inflation, was one element of value received. But the opportunity to “buy-in” to risky stock transactions was an entirely separate alleged source of value which required its own analysis—and was ultimately rejected as not in the contemplation of the parties at the time of the transaction. See *supra* ¶ 63. Far from “driv[ing]” the analysis, the buy-in was but one component of the court’s determination of whether reasonably equivalent value was contemporaneously exchanged at the time of the transfer.

⁵⁵ The Debtor and CertainTeed entered into the Second Amended and Restated Funding Agreement on January 5, 2022. See Stipulation Between the Debtor and CertainTeed Regarding Second Amended and Restated Funding Agreement ¶ 1, *In re DBMP LLC*, No. 3:20-bk-30080 (Bankr. W.D.N.C. Jan. 5, 2022), Dkt. No. 1279.

and Restated Funding Agreement is thus irrelevant to the “value” analysis, and Defendants’ arguments to the contrary should be rejected.

II. The Debtor Did Not Receive Reasonably Equivalent Value in the Corporate Restructuring Because, Among Other Things, the Funding Agreement Does Not Satisfy the Statutory Definition of “Value”

73. “The test used to determine reasonably equivalent value in the context of a fraudulent conveyance requires the court to determine the value of what was transferred and to compare it to what was received.” *In re Renegade Holdings, Inc.*, 457 B.R. 441, 446 (Bankr. M.D.N.C. 2011) (quotation omitted). As a general matter, “[a] large or significant disparity between what the debtor gave and what it received in exchange typically *precludes* a finding that the debtor received reasonably equivalent value.” *In re Tanglewood Farms, Inc. of Elizabeth City*, 487 B.R. 705, 710 (Bankr. E.D.N.C. 2013) (emphasis added).⁵⁶

74. As a result of the Corporate Restructuring, the Debtor was deprived of at least [REDACTED] (or 97%) of “old” CertainTeed’s assets (which went to “new” CertainTeed). Ex. G to Mot. (CertainTeed LLC Consolidated Balance Sheets).⁵⁷ In exchange, the Debtor received approximately [REDACTED] of “old” CertainTeed’s assets and the Funding Agreement (*id.*), which, as demonstrated above, does not constitute value under the plain statutory definitions. *See supra* ¶¶ 29-33. The [REDACTED] that the Debtor received is based on the \$25 million in cash and the equity interest in Millwork & Panel worth about [REDACTED] that were allocated to DBMP on

⁵⁶ Defendants purport to distinguish *Tanglewood Farms* on the basis that it was decided on a motion to dismiss, not summary judgment (Opp. ¶ 132 n.123), but the court’s statement regarding what constitutes reasonably equivalent value (or not) is a statement of law, not a fact-bound ruling.

⁵⁷ *See also* Mot. ¶¶ 14-15 and accompanying notes. Alternatively, DBMP, as successor to “old” CertainTeed, transferred to “new” CertainTeed assets worth at least [REDACTED]. *See* Hr’g Tr. 22:16-18, 22:23-23:1 (Whitley, J.), July 7, 2022 (“[Y]ou can look at this two different ways . . . these are potential fraudulent conveyances because these would be assets of the debtor had they not been transferred” or “you can alternatively view this as a fraudulent conveyance effectively by Old CertainTeed with the present debtor standing in the shoes of the old company.”).

October 23, 2019 (the Corporate Restructuring date), according to the Debtor's *own balance sheet*. See Ex. H to Mot. If Defendants' preferred valuation of the Millwork & Panel interests is used (\$150 million) (Opp. ¶¶ 18, 23, 33), then the Debtor received \$175 million (i.e., \$25 million in cash plus \$150 million) in the Corporate Restructuring.

75. Whether the correct amount is [REDACTED] or \$175 million, either amount still pales in comparison to the at least [REDACTED] that DBMP was deprived of.⁵⁸ This large and significant disparity between what the Debtor gave and what it received necessarily *precludes* any finding that the Debtor received reasonably equivalent value. *Tanglewood Farms*, 487 B.R. at 710. Accordingly, the Court should grant partial summary judgment in Plaintiffs' favor on the basis that DBMP did not receive reasonably equivalent value.

A. The Existing Record Is Sufficient to Decide That the Debtor Did Not Receive Reasonably Equivalent Value

76. Defendants make a generic argument that the existing factual record is allegedly "undeveloped" and that all the numbers or dollar amounts going to reasonably equivalent value (or lack thereof) "must be adjudicated at trial on a complete record." Opp. ¶¶ 107, 108. Their argument is without merit. As shown above, the dollar amounts used to demonstrate lack of reasonably equivalent value are drawn from the balance sheets that DBMP and CertainTeed produced in discovery. See Exs. G & H to Mot. In other words, these are DBMP's and CertainTeed's *own numbers*, which Defendants cannot run from or disavow. As also shown above, even if Defendants' preferred valuation of the \$150 million for Millwork & Panel is accepted, the valuation still does not change the analysis in their favor.⁵⁹ Thus, contrary to their assertion (Opp.

⁵⁸ Defendants do not dispute that "new" CertainTeed received assets in the amount of at least [REDACTED]. See Opp. ¶ 115.

⁵⁹ It matters not that Plaintiffs "do not know the fair value of M&P." Opp. ¶ 122. In its First Day Declaration, the *Debtor* valued the Millwork & Panel interest at \$150 million. First Day Decl. ¶ 20.

¶ 121), their preferred valuation does not create a genuine dispute of material fact. *See Anderson*, 477 U.S. at 248 (“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”). Even when DBMP’s and CertainTeed’s *own numbers* are used, the large and significant disparity between what the Debtor gave and what it received shows that the Debtor failed to receive reasonably equivalent value in the Corporate Restructuring.

77. Defendants contend that the “Account Receivable, if challenged by Plaintiffs, is a disputed issue of fact” (Opp. ¶ 120), but the “Account Receivable” is a mirage and does not warrant consideration by the Court for at least two reasons. First, it is clear from Defendants’ own definition and the deposition testimony of DBMP’s president, Joseph Bondi, that the “Account Receivable” is simply another term for the Funding Agreement. Opp. ¶ 20 & n.23 (“Q: And when you say the receivable from the Document 69, you are referring to the receivable that is under the funding agreement, so the receivable is part of the value of the funding agreement to DBMP; correct? A: Yes.”); *see also* Ex. H to Mot. ([REDACTED]

[REDACTED]). Second, the Debtor’s own First Day Declaration does not identify a separate “Account Receivable” among the assets that the Debtor received in the Corporate Restructuring. *See* First Day Decl. ¶¶ 18-20. The declaration simply refers to “the value of the Funding Agreement with New CT,” in addition to the cash and Millwork & Panel interest that the Debtor received. *Id.* ¶ 18. Because the Funding Agreement is excluded from the statutory definition of “value,” the amount of the “Account Receivable” must be zero as a matter of law.

78. Defendants argue that “reasonably equivalent value will require the determination of the asbestos liabilities” (Opp. ¶ 108), but this is incorrect. Defendants insist that the

determination is necessary because they repeatedly assert that “the value of the Funding Agreement is coextensive with the amount of the asbestos liabilities.” Opp. ¶ 93. But the Funding Agreement is excluded from the statutory definition of “value.” The Funding Agreement therefore has no value as a matter of law, so “the amount of the asbestos liabilities,” whatever it may be, is immaterial and irrelevant to the matters raised by Counts III and IV of the Amended Complaint and in the portions of Defendants’ Fourth, Fifth, and Sixth Affirmative Defenses that allege that reasonably equivalent value was exchanged in connection with the Corporate Restructuring, for which Plaintiffs seek partial summary judgment.

79. Nor do the asbestos liabilities need to be evaluated as a satisfied “antecedent debt of the debtor.” § 548(d)(2)(A); *see also* Opp. ¶ 67 (quoting the Commission Report’s comment on an earlier iteration of a similar concept). While the “satisfaction” or reduction of a debtor’s antecedent debts may constitute value, the undisputed evidence is that DBMP took the entirety of “old” CertainTeed’s asbestos liabilities as they were (and still are).⁶⁰ Accordingly, this Court can and should grant the Motion without first needing to determine the asbestos liabilities.

80. In a similar vein, Defendants argue that the Court cannot determine reasonably equivalent value without calculating the “net effect” of the Corporate Restructuring on DBMP’s estate, which would require, *inter alia*, estimating “the magnitude of the asbestos liabilities DBMP assumed.” Opp. ¶ 114; *see also id.* ¶ 126. Defendants’ argument is without merit because the “net effect” of the Corporate Restructuring does not rest on the “magnitude” of the asbestos liabilities. As Defendants themselves concede, the “focus is on the net effect of the transfers on the debtor’s estate, [meaning] the *funds available to the unsecured creditors.*” Opp. ¶ 110 (emphasis added)

⁶⁰ *See, e.g.*, First Day Decl. ¶ 18 (“Pursuant to the divisional merger, the Debtor became *solely responsible* for Old CT’s liability arising from asbestos-related claims against it (other than claims for which the exclusive remedy is provided under a workers’ compensation statute or similar laws), and the defense of those claims.” (emphasis added)).

(quoting *In re Jeffrey Bigelow Design Grp.*, 956 F.2d 479, 484 (4th Cir. 1992)). But by statute an unperformed promise of support is not the type of “value” considered available to unsecured creditors. Once that promise is removed from the equation, no one can dispute that unsecured creditors—with liabilities in excess of the \$175 million valuation Defendants attribute to the remaining assets at issue—are significantly worse off than they were before the Corporate Restructuring. This leaves the “net effect of the transfers” without genuine dispute.

81. The cases cited by Defendants in support of their “net effect” argument (Opp. ¶ 126) are unavailing because they either merely reiterate the “net effect” rule in other contexts or are irrelevant.⁶¹ In addition, Defendants’ reliance on *Terry Properties* is misplaced. There, the court found that there “was no depletion of the bankruptcy estate” due to the recordation of liens on real property because the property was already encumbered by those liens when the debtor took it and became the obligor on the corresponding debt. The *Terry Properties* debtor “never owned an unencumbered real estate” and never would have received the property if it had not become an obligor on the secured debt. 2017 WL 507277, at *5. Here, by contrast, the Corporate Restructuring resulted in a depletion of DBMP’s bankruptcy estate to the tune of at least

See Ex. G to Mot.

82. Additionally, *Fresh Acquisitions* is neither instructive nor on point. The plaintiff there “ignore[d] evidence in the summary judgment record” of the consideration the debtor received in exchange for the relevant transfer—namely, a verbal promise to “repatriate” certain

⁶¹ See *LandAmerica Fin. Grp., Inc. v. S. Cal. Edison Co.*, 525 B.R. 308, 315 (E.D. Va. 2015) (finding net effect was that reasonably equivalent value was transferred where debtor received millions more than was transferred, notwithstanding commingling of funds and non-contemporaneous nature of transfers); *In re Terry Props., LLC*, No. 16-71449, 2017 WL 507277, at *5 (Bankr. W.D. Va. Feb. 3, 2017) (granting summary judgment on fraudulent transfer claim because “[t]here has not been a transfer of an interest of the debtor in property that was subject to being administered in this case” and, “because the Debtor never owned an unencumbered real estate, there was no depletion of the bankruptcy estate” (citation modified)).

sale proceeds back to the debtors, something that was not argued to be, nor could reasonably be considered, “support.” 671 B.R at 205-208. The plaintiff argued that the statute of frauds or the parol evidence rule would preclude the defendant from introducing evidence of that valuable promise and that it should thus be disregarded as a matter of law, but the court disagreed. *Id.* at 208. Faced with a factual dispute over whether a potentially valuable verbal promise existed, the court denied summary judgment as to reasonably equivalent value. *Id.* Here, by contrast, Plaintiffs are relying on the Debtor’s and CertainTeed’s own valuations to establish the absence of reasonably equivalent value and there is no dispute as to the relevant contours of the Funding Agreement. *See* Exs. G & H to Mot. Here, the record is sufficient to decide the Motion, and there is no *genuine* dispute of *material* fact. Accordingly, the Court should grant the Motion.

B. The Morris Factors Favor Partial Summary Judgment

83. Defendants’ arguments regarding the *Morris Communications* factors are unavailing. As to the first factor (good faith), Defendants challenge Judge Whitley’s statements in his Rule 12(b)(6) ruling as not authoritative on summary judgment. *Opp.* ¶ 131. But the Motion quotes Judge Whitley’s statements for the simple purpose of showing that “old” CertainTeed and DBMP could be viewed as a transferor and transferee in a fraudulent transfer analysis. *Mot.* ¶ 41. The more dispositive point—which Defendants fail to address—is that none of Defendants is a good-faith transferee akin to an unknowing bona fide purchaser; the Corporate Restructuring was a transaction orchestrated and executed by insiders. *Id.* ¶ 41 & n.49. The first *Morris* factor therefore favors partial summary judgment.

84. As to the second and third *Morris* factors (amount paid and ratio of amount paid to fair market value), Defendants repeat their arguments that the record is allegedly “undeveloped,” that the Funding Agreement has value, and the valuation of Millwork & Panel and the asbestos liabilities constitute one massive ball of factual issues. *Opp.* ¶ 132. None of these arguments has

merit. As established above, the Funding Agreement has no value under the relevant statutes and so, for purposes of the Motion, estimation of the asbestos liabilities is unnecessary. In addition, Plaintiffs are pointing to the Debtor's and CertainTeed's own balance-sheet valuations for purposes of the Motion only. Defendants do not dispute those valuations, nor could they. These undisputed facts show that the difference between the value DBMP gave and the value it received was so large and disproportionate that it precludes any possible finding that reasonably equivalent value was exchanged. The second and third *Morris* factors thus favor partial summary judgment.

85. As to the fourth *Morris* factor (arm's length transaction between willing parties), Defendants resort to a hyperbolic slippery-slope argument that is patently without merit. Defendants contend that, if the Court were to rule that the Corporate Restructuring lacked the exchange of reasonably equivalent value, then "every intra-group transaction . . . could be challenged as a constructively fraudulent transfer," which would "strike at the foundation of how integrated enterprises are organized and operate." Opp. ¶ 133. Defendants' argument *tacitly admits* that the Corporate Restructuring was not an arm's length transaction between willing parties. The undisputed facts support that tacit admission. For example, in its Rule 30(b)(6) deposition, the Debtor admitted that the terms of the Funding Agreement were not negotiated.⁶² In addition, Defendants' forecasted doom of "intra-group transactions" ignores facts and circumstances specific to the Corporate Restructuring, including that the Funding Agreement is excluded from the statutory definition of value and that, consequently, DBMP received at most \$175 million in exchange for the at least [REDACTED] transferred away from it. Accordingly, all four *Morris* factors favor partial summary judgment. The Court should therefore grant the Motion.

⁶² See DBMP 30(b)(6) Dep. 165:12-17, 196:13-19, 199:15-18, 202:11-19 (Starczewski).

III. Because Partial Summary Judgment Should Be Granted on Counts III and IV of the Amended Complaint, the Court Should Strike Defendants’ Corresponding Affirmative Defenses

86. For the reasons shown, the Funding Agreement cannot constitute “value” for purposes of § 548 or under state fraudulent transfer law, and thus Defendants cannot show that the Corporate Restructuring was done for “reasonably equivalent value.” These assertions are true *as a matter of law* and despite drawing all “permissible inference[s]” in favor of Defendants. *See Sylvia Dev. Corp.*, 48 F.3d at 818. Nevertheless, Defendants assert that their affirmative defenses, which rely on the alleged exchange of reasonably equivalent value, remain subject to disputes of material fact. *See* Opp. ¶¶ 135, 136. They are wrong.

87. The affirmative defenses at issue include portions of Defendants’ asserted Fourth, Fifth and Sixth Affirmative Defenses. *See* Mot. ¶ 7 (citing Answer at 35-36, Dkt. No. 93). These concern, respectively, Defendants’ assertions: (1) in their Fourth Affirmative Defense that the property is not avoidable because it was taken “for value”; (2) in their Fifth Affirmative Defense that the transfer was “taken for value”; and (3) the entirety of their Sixth Affirmative Defense that “reasonably equivalent value was exchanged in good faith in or in connection with the Corporate Restructuring.” *Id.* For the reasons stated herein, once the Court determines that the Funding Agreement does not constitute value, it necessarily follows—even granting the Debtor’s and CertainTeed’s own valuations for the remaining assets transferred—that there was no reasonably equivalent value exchanged as a matter of law. *See supra* ¶¶ 73-75. Regardless of whether factual disputes remain on the margins regarding “valuation, enforceability, creditworthiness,” or another dispute raised by Defendants, none of these amounts to a *material* dispute because, after the Funding Agreement is removed from the value assessment, none of them could change the outcome of this Court’s determination regarding reasonably equivalent value. *See Anderson*, 477 U.S. at 248. Accordingly, the indicated Affirmative Defenses—which each rely upon a finding

contrary to what this Court should reach as a matter of law—should be dismissed or stricken on summary judgment.

CONCLUSION

For the reasons set forth in the Motion and above, this Court should grant the Motion and enter partial summary judgment in Plaintiffs’ favor on Counts III and IV, and on the portions of Defendants’ Fourth, Fifth, and Sixth Affirmative Defenses that allege that reasonably equivalent value was exchanged in connection with the Corporate Restructuring. In doing so, the Court should hold that (a) the Funding Agreement is excluded from the definition of “value” under applicable law, and (b) in the Corporate Restructuring, the Debtor was stripped of most of “old” CertainTeed’s assets and incurred all of “old” CertainTeed’s asbestos liabilities without receiving reasonably equivalent value in exchange.

Respectfully submitted,

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