UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	:	Chapter 11
DBMP LLC,[1] Debtor.	:	Case No. 20-30080 (JCW)
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS, and SANDER L. ESSERMAN, in his capacity as Legal Representative for Future Asbestos Claimants, each on behalf of the estate of DBMP LLC,	:	Adv. Pro. No. 22-03000 (JCW)
Plaintiffs,	:	
v.	:	
CERTAINTEED LLC, CERTAINTEED HOLDING CORPORATION, and SAINT-GOBAIN CORPORATION,	:	
Defendants.	:	

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT AND BRIEF IN SUPPORT

[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.

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CertainTeed LLC ("New CT"), CertainTeed Holding Corporation ("CT Holding") and Saint-Gobain Corporation ("SGC," and with New CT and CT Holding, the "Defendants") respectfully move this Court (this "Motion") to dismiss the Amended Complaint filed, on behalf of the estate of DBMP LLC ("DBMP" or the "Debtor") based upon a grant of derivative standing,[1] by the official committee of asbestos personal injury claimants (the "ACC") and Sander L. Esserman as the legal representative for future asbestos claimants (the "FCR" and, together with the ACC, the "Plaintiffs") in the above-captioned adversary proceeding.

PRELIMINARY STATEMENT

1. Plaintiffs' theory underpinning the Amended Complaint is that CertainTeed LLC ("Old CT") should not be able to use the Texas Business Organizations Code (the "TBOC") and the bankruptcy system to seek a full, fair, and final resolution of current and future asbestos claims. There is nothing improper or illegal about utilizing a divisional merger statute or about filing for bankruptcy to address asbestos-related liabilities. The bankruptcy system provides an appropriate framework for resolving enterprise-threatening mass tort liability. Judge Kaplan's recent decision in *In re LTL, Management, LLC* supports this proposition:

> Let's be clear, the filing of a chapter 11 case with the expressed aim of addressing the present and future liabilities associated with ongoing global personal injury claims to preserve corporate value is unquestionably a proper purpose under the Bankruptcy Code. . . .
>
> * * *
>
> There is nothing to fear in the migration of tort litigation out of the tort system and into the bankruptcy system. Rather, this Court regards the chapter 11 process as a meaningful opportunity for justice, which can produce comprehensive, equitable and timely recoveries for injured parties.

[1] *See Order Granting in part, Denying in part Motion of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants Representative for Entry of an Order (I) Granting Leave, Standing, and Authority to Investigate, Commence, Prosecute, and to Settle Certain Causes of Action, and (II) to Conduct Relevant Examinations* [Case No. 20-30080 (JCW), Dkt. 1197].

In re LTL Management, LLC, 637 B.R. 396, 407-15 (Bankr. D.N.J. 2022).

2. Old CT's implementation of the TBOC, DBMP's exercise of its federal right to file a voluntary chapter 11 case, the establishment of the Funding Agreement[2] and the procedural and substantive protections afforded asbestos claimants under the law, permits no grounds to state a claim for either intentional or constructive fraudulent transfer.

3. The Amended Complaint is filled with fundamental pleading errors and, at its core, based wholly upon conclusory legal statements and not specific allegations of fact; together, these infirmities require its dismissal with prejudice for failure to state a claim.

4. **First**, there is no viable ***estate*** claim. The Amended Complaint is brought on "behalf of the estate of the debtor, DBMP," and seeks to avoid the Corporate Restructuring (as defined in the Amended Complaint) as an intentional or constructive fraudulent transfer. Yet, critically, Plaintiffs fail to identify any single transfer of property by DBMP or debt incurred by DBMP that they seek to avoid. This is a fatal flaw of the Amended Complaint.

5. Under the Bankruptcy Code, Uniform Fraudulent Transfer Act ("UFTA"), and Uniform Voidable Transactions Act ("UVTA")[3] a fraudulent transfer claim requires specification of a transfer of property of the debtor, or incurrence of an obligation by the debtor, to be avoided. Here, Plaintiffs have failed to specify any such avoidable transfer, or incurrence of debt by DBMP (Plaintiffs cannot be said to be seeking (and do not seek) to avoid their claims against DBMP). As such, the Amended Complaint should be dismissed in its entirety.

6. **Second**, even if there was an identified transfer or an incurrence of an obligation

[2] Amended and Restated Funding Agreement dated as of October 23, 2019 (the "Funding Agreement"). A copy of the Funding Agreement, without its Schedule 2, which includes confidential bank account information, is attached to the First Day Declaration as Annex 2.

[3] Plaintiffs assert intentional fraudulent transfer and constructive fraudulent transfer claims under both the UFTA, as adopted by Texas ("TUFTA") and Delaware ("DUFTA"), and UVTA, as adopted by Pennsylvania ("PUVTA") and North Carolina ("NCUVTA," and together with the TUFTA, DUFTA, PUTA, the "State Statutes").

by DBMP, Plaintiffs have failed to plead with the required specificity that any such transfer, or DBMP's incurrence of an obligation, was in fact with actual intent to hinder, delay or defraud creditors. While Plaintiffs decry the actions taken by Old CT—authorized and implemented in accordance with the TBOC—Old CT is not a debtor in this case. Old CT did, as the TBOC expressly permits, allocate its assets and liabilities among DBMP and New CT. And, DBMP, validly exercised its right to commence a chapter 11 case. Plaintiffs plead no facts to support the plausible inference that DBMP sought to: (i) escape liability to asbestos claimants; (ii) remove a source of recovery from the asbestos claimants' reach; (iii) conceal facts or assets, or (iv) do anything other than find an alternative to the broken tort system to resolve asbestos claims.

7. Accordingly, the Amended Complaint fails to state a claim for intentional fraudulent transfer and Counts I and II of the Amended Complaint should be dismissed with prejudice.

8. **Third**, the Account Receivable[4] owed to DBMP by New CT and the Funding Agreement defeats any allegation of lack of reasonable equivalent value, insolvency or intent not to pay the asbestos claims and obviates the utility of the Amended Complaint as a recovery source for Plaintiffs. By reason of the Account Receivable and Funding Agreement, New CT's assets are fully available to satisfy allowed claims of asbestos claimants of DBMP in a fair, equitable and

[4] As an integral part of Old CT's Divisional Merger (as defined below), New CT acknowledged and recorded a long term funding obligation of approximately $496 million owing to DBMP and DBMP recorded on its books and records a corresponding receivable from New CT in an amount of approximately $494 million (the "Account Receivable"). *See* DBMP-BR_0148997 (CertainTeed LLC Consolidated Balance Sheet as of Oct. 23, 2019 reflecting a "[l]ong-term funding obligation" of approximately $496 million); DBMP-BR_0148984 (DBMP, LLC balance sheet as of Oct. 23, 2019 reflecting a "Funding Agreement Receivable" of approximately $494 million). *Cf.* Rebuttal Expert Report of Stephen Coulombe dated October 26, 2020 at ¶ 3 ("The chart below, which uses the same figures referenced in Mr. Diaz's chart, is a more accurate depiction of the assets and liabilities of DBMP and New CT following the Corporate Restructuring and Old CT prior to the Corporate Restructuring. This chart, unlike the one in the Diaz Report, includes the $494M Funding Agreement receivable on DBMP's books, plus the potential additional value of the Funding Agreement ($2.35B) based on New CT's assets and liabilities at the time of the Corporate Restructuring."). *See also* Deposition of Sean Knapp 265:20-23 ("So, at the time of DBMP's creation, not only were the liabilities contributed, but a long-term receivable due from CertainTeed LLC was also contributed.").

efficient process under the Bankruptcy Code and as overseen by this Court. Thus, the appropriate remedy is not only within the infrastructure of the chapter 11 case, but is also within the control of the asbestos claimants as they must approve any trust under Bankruptcy Code Section 524(g) by a supermajority vote.

9. As a matter of law, the Amended Complaint cannot accomplish the same. The sole statutory remedy for any viable fraudulent transfer claim is the avoidance of the transfer or debt incurred. In the case of an avoided property transfer, the recovery is that of the property itself or its value—to the extent of the value of the allowed claims of the asbestos claimants. Currently, the value of asbestos claimants' claims is unknown until the conclusion of the estimation proceedings. Funding is available pursuant to the Account Receivable and under the Funding Agreement for full payment of allowed asbestos claims. The Court cannot as a matter of law based upon the Amended Complaint, and as a factual matter need not and cannot, fashion a more appropriate and effective remedy.

10. **Fourth**, Plaintiffs' claims for constructive fraudulent transfer based upon DBMP's incurrence of the liabilities to the asbestos claimants (Counts III and IV) fare no better. They fail because reasonably equivalent value was exchanged in connection with the incurrence of such liabilities by DBMP's receipt of assets in the divisional merger (the "Divisional Merger") including, most importantly, the Account Receivable and the Funding Agreement. In exchange for DBMP assuming such liabilities it received, *inter alia*, (i) ownership of Millwork & Panel LLC ("Millwork & Panel"); (ii) the Account Receivable; and (iii) the Funding Agreement. This is reasonably equivalent value as evidenced by the fact that: (i) New CT is solvent;[5] and (ii) DBMP is solvent by reason that the combined value of its ownership interest in Millwork & Panel, the

[5] Plaintiffs do not make any plausible allegations in the Amended Complaint concerning the insolvency of New CT.

Account Receivable and the Funding Agreement equals or exceeds the value of the allowed claims of the asbestos claimants. Accordingly, the Amended Complaint fails to state a claim for constructive fraudulent transfer and Counts III and IV of the Amended Complaint should be dismissed with prejudice.

11. **Fifth**, Plaintiffs' allegation that the Defendants are alter egos of DBMP, and that Defendants should be liable for the intentional fraudulent transfer claims is inadequate for at least four reasons: (i) the alter ego allegations are not tethered to a claim that imposes liability on any alleged dominated entity as DBMP did not transfer any property and Plaintiffs do not seek to avoid the asbestos claims incurred by DBMP; (ii) allegations in the Amended Complaint do not seek relief as against DBMP and fall far short of what is necessary to plead a basis to pierce DBMP's corporate veil to reach the Defendants; (iii) it is impossible to determine from the Amended Complaint which Defendant is alleged to exert improper domination and control over DBMP; and (iv) the Amended Complaint lacks allegations sufficient to impose horizontal or indirect veil piercing.

12. Use of the TBOC and filing for bankruptcy is not indicia of DBMP's fraudulent intent. DBMP's actual intent here, established by the record and not plausibly contradicted by Plaintiffs, is not to hinder, delay or defraud anyone but to: (i) determine the amount of the asbestos claims as allowed under the law; (ii) pay those claims in full; (iii) bring closure and recoveries to claimants earlier than would be the case through the tort system; and (iv) preserve the value of New CT so it can fund the claims by allowing it to operate in the ordinary course of business without the cost, delay, uncertainty, and distraction of its own chapter 11. Dismissing the Amended Complaint with prejudice does not create incentives for wrongdoing. In fact, as Judge Kaplan noted:

> Congress placed the tort claimants in a strong position by

> implementing a 75% super majority class voting requirement to confirm a plan with a section 524(g) trust. This leverage comes with responsibility, however, to engage in good faith and pursue the best interests of the collective class. In exchange, this court will endeavor to ensure that those who are suffering currently, and in the future, have their day in court—this Court—and receive fair compensation under a comprehensive and transparent distribution scheme.

LTL, 637 B.R. at 426.

13. The Amended Complaint is long on conclusory allegations that are all untethered from both the pleading requirements establishing the elements of the asserted claims and facts. That is only natural because it was entirely appropriate, and an exercise of its fiduciary duty, for Old CT to investigate, document and implement a pathway to resolve the asbestos claims in a manner that will fairly and efficiently compensate asbestos claimants. Long before this bankruptcy case, in 2004, President George W. Bush's Economic Report highlighted that the tort system's treatment of asbestos cases demonstrates how the system falls short, with current and future claimants bearing the brunt (citing that only 43 percent of the money spent on asbestos litigation is recovered by claimants—the rest goes to lawyers and administrative costs).[6] The inability of the tort system to effectively and equitably resolve asbestos claims is well established and has only been exacerbated during the COVID-19 pandemic.

14. Bankruptcy courts have long been a forum for companies seeking the resolution of pending and threatened mass tort liability. Congress enacted a specific provision of the Bankruptcy Code—Section 524(g)—to permit entities impacted by asbestos-related claims to permanently resolve such claims through the establishment of a trust. Therefore, it is a gross overstatement to suggest, as the Amended Complaint does, that DBMP's estate has been minimized to the direct detriment of creditor constituents. The efficient, orderly and fair

[6] ECONOMIC REPORT OF THE PRESIDENT, H.R. Doc. No. 108-145, at 219 (2004).

distribution of assets are the chief hallmarks and purposes of the bankruptcy laws. Section 524(g) and decades of asbestos-related caselaw make a bankruptcy resolution of this case not only possible, but also preferred.

15. Plaintiffs have conducted extensive and expensive discovery without any "smoking gun" or credible evidence to support their fraudulent transfer theories. Despite spending millions of dollars on legal fees and expenses and years of delay, it is clear that Plaintiffs' fraudulent transfer theories have not improved since the "first day" hearing in DBMP's chapter 11 case. This is evidenced by the Amended Complaint itself, which cannot, and does not, demonstrate that DBMP transferred any property, or incurred an obligation that the Plaintiffs seek to avoid, let alone harbored an actual intent to hinder, delay or defraud creditors.

16. Accordingly, the Amended Complaint should be dismissed in its entirety with prejudice.

BACKGROUND

I. ASBESTOS LITIGATION AGAINST OLD CT

17. New CT is a subsidiary of CT Holding, whose U.S. parent company is SGC. Compagnie de Saint-Gobain S.A. is the ultimate parent company of the Defendants and is located in Paris, France.[7]

18. From the 1930s until 1993, Old CT manufactured and sold asbestos-containing products.[8] Since the 1970s, Old CT has faced hundreds of thousands of asbestos-related claims.[9] Indeed, at the time of the Divisional Merger, Old CT was a defendant in approximately 60,000

[7] Am. Compl. ¶ 22.

[8] Am. Compl. ¶ 25.

[9] Am. Compl. ¶ 26.

pending asbestos cases[10] (of which approximately 32,700 were on active dockets).[11] Between 2002 and 2019, Old CT incurred approximately $2 billion in costs defending and resolving more than 300,000 asbestos claims, out of which approximately $1.5 billion constituted "out-of-pocket" expenditures.[12] Old CT's annual indemnity and defense costs ranged from approximately $80 million to over $160 million per year.[13] Since 2001, defense costs alone for Old CT were between approximately $20 million and $30 million per year.[14] Old CT was keenly aware that its asbestos liabilities would continue far into the future.[15] Since 2002, Old CT has faced approximately 1,400 new mesothelioma claims annually,[16] and a future with ever-increasing volume of claims with highly variable outcomes.[17]

II. DIVISIONAL MERGER

19. It is estimated that Old CT would face tens of thousands of additional asbestos-related claims in the decades to come but for the chapter 11 case.[18] Old CT determined that pursuing an equitable resolution through a divisional merger under applicable law and providing for the possibility of a chapter 11 filing was the only feasible option to address the asbestos

[10] Am. Compl. ¶ 27.

[11] *Declaration of Robert J. Panaro in Support of First Day Pleadings* ¶ 28 [Case No. 20-30080 (JCW), Dkt. 24] (the "First Day Declaration").

[12] Am. Compl. ¶ 27.

[13] Am. Compl. ¶ 27.

[14] First Day Decl. ¶ 32.

[15] Am. Compl. ¶ 29.

[16] *Informational Brief of DBMP LLC* at p. 17 [Case No. 20-30080 (JCW), Dkt. 22] (the "Informational Brief").

[17] *See* First Day Decl. ¶ 34 ("The Debtor's asbestos litigation, and its associated burdens and costs, are anticipated to continue for the foreseeable future. The Debtor's primary competitors have all filed for bankruptcy to resolve their asbestos liabilities, including all but one U.S.-based company with a limited history of manufacturing AC Pipe. As other co-defendants continue to file for bankruptcy, trend lines indicate that the asbestos tort claimants will attempt to seek even higher recoveries from fewer remaining defendants in the tort system. Under these circumstances, there is no predictable end in sight to the extraordinary and unflagging costs of litigating, defending and resolving asbestos claims.").

[18] First Day Decl. ¶ 28.

claims.[19] Beginning in 2018, Old CT began preparing for the Divisional Merger to facilitate the ability for a Section 524(g) trust resolution in bankruptcy court, without subjecting the entire Old CT enterprise to chapter 11.[20] To implement the Divisional Merger, Old CT relied heavily on attorneys for guidance and planning, and reviewed the details of Old CT's experience in the tort system and the proceedings in the chapter 11 cases of *In re Garlock Sealing Technologies LLC*, No. 10-31607 (Bankr. W.D.N.C.), and *In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C.).[21]

20. Old CT implemented the Divisional Merger to address the massive number of asbestos-related claims it was facing.[22] A key element of the Divisional Merger was the creation of DBMP and provision of funding to DBMP to ensure it has the ability to pay its asbestos liabilities. The Divisional Merger provided DBMP with the same ability to fund the costs of defending and resolving present and future asbestos claims as Old CT had prior to the Divisional Merger.[23] This is achieved via the Account Receivable and an uncapped Funding Agreement.[24]

21. The Divisional Merger occurred pursuant to the Texas divisional merger statute.[25] As further described in the First Day Declaration,[26] Old CT implemented a corporate restructuring on October 22 and 23, 2019. As a result thereof, Old CT ceased to exist and both DBMP and New CT were created.[27] DBMP was allocated asbestos-related liabilities of Old CT and certain assets, including, *inter alia*, ownership of Millwork & Panel (which had received a North Carolina bank

[19] First Day Decl. ¶ 36.

[20] Am. Compl. ¶ 30.

[21] Am. Compl. ¶ 30, 39.

[22] First Day Decl. ¶ 36.

[23] First Day Decl. ¶ 15.

[24] First Day Decl. ¶ 15.

[25] Am. Compl. ¶ 42.

[26] First Day Decl. ¶¶ 16-18.

[27] First Day Decl. ¶¶ 16-18.

account containing approximately $30 million in cash from Old CT),[28] three bank accounts containing approximately $25 million in cash, and the rights and interests as payee under the Funding Agreement and the Account Receivable.[29] New CT was allocated all of Old CT's other assets and liabilities.[30] Plaintiffs do not assert, as they cannot, that the Divisional Merger was not implemented in full compliance with the TBOC.

22. On January 22, 2020, DBMP's board of managers authorized the filing of DBMP's chapter 11 case.[31] On January 23, 2020 (the "Petition Date"), DBMP filed its chapter 11 petition in the United States Bankruptcy Court for the Western District of North Carolina.[32]

23. As of the Petition Date, DBMP's value was comprised of the sum of: (i) approximately $175 million (the sum of its cash on hand and the value ascribed to the ownership interest in Millwork & Panel); (ii) an Account Receivable of approximately $494 million; and (iii) an uncapped Funding Agreement.[33]

III. FUNDING AGREEMENT

24. The design of the Divisional Merger ensures that DBMP has the same ability to fund the costs of defending and resolving asbestos-related claims as Old CT had prior to the Divisional Merger.[34] In addition to assets received by DBMP, its ability to pay allowed claims is supported by the Account Receivable and the Funding Agreement for the full value of New CT.[35]

[28] First Day Decl. ¶ 16. DBMP estimated the fair market value of its interest in Millwork & Panel to be approximately $150 million, including cash on hand, as of the Petition Date (as defined herein). First Day Decl. ¶ 20.

[29] First Day Decl. ¶ 18; DBMP-BR_0148984.

[30] First Day Decl. ¶ 19.

[31] Am. Compl. ¶ 91.

[32] Am. Compl. ¶ 92.

[33] First Day Decl. ¶ 15, 18, 20; DBMP-BR_0148984.

[34] First Day Decl. ¶ 20.

[35] First Day Decl. ¶ 20-21; DBMP-BR_0148984.

25. The Funding Agreement requires New CT to fund amounts necessary to satisfy DBMP's asbestos-related liabilities at any time when there is no bankruptcy case.[36] And, in the event of a chapter 11 filing, the Funding Agreement provides funding for a Section 524(g) trust. In both situations, the funding made available to DBMP is to the extent that DBMP's assets are insufficient.[37] Moreover, the Funding Agreement provides various limitations on New CT's actions thereby underscoring the credit support of the Funding Agreement.

26. Further evidencing the intent and purpose of the Funding Agreement, on January 5, 2022, DBMP and New CT entered into the Funding Agreement Stipulation,[38] whereby DBMP and New CT agreed to the terms of the Second Amended Funding Agreement,[39] and stipulated that the Second Amended Funding Agreement is a valid contract, enforceable on its terms.[40]

27. Funding under the Second Amended Funding Agreement will be available for a Section 524(g) plan of reorganization, "regardless of whether such plan of reorganization provides that [New CT] will receive the protection of section 524(g) of the Bankruptcy Code and regardless of whether [New CT] supports such plan of reorganization."[41] Moreover, funding will be available for the payment of "any and all costs and expenses of [DBMP] incurred in connection with the pursuit of available remedies to collect any unfunded Payments due and owing to [DBMP] or

[36] *See* Funding Agr. § 1, at 6 (New CT agreed to provide "the funding of any amounts necessary or appropriate to satisfy . . . [DBMP's] Asbestos Related Liabilities established by a judgment of a court of competent jurisdiction or final settlement thereof at any time when there is no proceeding under the Bankruptcy Code pending with respect to [DBMP] . . . .").

[37] First Day Decl. ¶ 21; Am. Compl. ¶ 61.

[38] *Stipulation Between the Debtor and CertainTeed LLC Regarding Second Amended Funding Agreement* [Case No. 20-30080 (JCW), Dkt. 1279] (the "Funding Agreement Stipulation").

[39] Second Amended and Restated Funding Agreement dated as of September 15, 2021 (the "Second Amended Funding Agreement"). A true and correct copy of the Second Amended Funding Agreement (without Schedule 2 thereto) is attached to the Funding Agreement Stipulation as Exhibit A.

[40] Funding Agr. Stip. ¶ 2.

[41] Second Am. Funding Agr. § 1, at 6.

otherwise to enforce the performance by [New CT] of any provision of this Agreement."[42]

28. Section 5 of the Second Amended Funding Agreement provides that DBMP's obligations to perform its indemnification obligations to New CT are subject to the automatic stay in the chapter 11 case, such that DBMP is not obligated to indemnify New CT during the pendency of this chapter 11 case as a condition to obtain funding.[43]

29. The Second Amended Funding Agreement bars New CT from issuing dividends,[44] forgiving intercompany debt,[45] and entering into agreements prohibiting payments under the Second Amended Funding Agreement.[46]

30. Since the time the Funding Agreement (and now the Second Amended Funding Agreement) became effective, New CT has fully complied with its obligations thereunder.[47]

STANDARD OF REVIEW

31. To survive a motion to dismiss under Rule 12(b)(6), which is made applicable to this proceeding under Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, Plaintiffs must allege sufficient facts that, if accepted as true, state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 663. A pleading based on "labels and conclusions," "formulaic recitation of the elements of a cause of action," or "naked assertions devoid of further

[42] Second Am. Funding Agr. § 1, at 6.

[43] Second Am. Funding Agr. § 5.

[44] Second Am. Funding Agr. § 4(c)(i).

[45] Second Am. Funding Agr. § 4(c)(ii).

[46] Second Am. Funding Agr. § 4(d).

[47] *In re DBMP LLC*, No. 20-30080, 2021 WL 3552350, at *17 (Bankr. W.D.N.C. Aug. 11, 2021) ("To this point, New CertainTeed has performed under the Funding Agreement. As of February 18, 2021, DBMP has made requests for funding—mostly the administrative costs of DBMP's bankruptcy case—in the aggregate amount of $64.5 million; all such requests have been funded by New CertainTeed.").

factual enhancement" will not suffice. *Id*. at 678 (internal quotations omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57 (2007). Simply stated, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Iqbal*, 556 U.S. at 678 (explaining that merely conclusory allegations are "not entitled to be assumed true"). "While [the court] must take the facts in the light most favorable to the plaintiff, [the court] need not accept the legal conclusions drawn from the facts." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000).[48]

32. Rule 9(b) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy Rule 7009, imposes a heightened particularity pleading standard in cases where the plaintiff alleges fraud. *Angell v. BER Care, Inc. (In re Caremerica, Inc.),* 409 B.R. 737, 755 (Bankr. E.D.N.C. 2009). Rule 9(b) requires the plaintiff to state the "who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).

33. "A claim alleging an actual fraudulent transfer under § 548 must satisfy the particularity requirement of Rule 9(b)." *Cook v. Roberts (In re Yahweh Center, Inc.)*, 2019 WL 1325032, at *6 (Bankr. E.D. N.C. March 22, 2019) (citations omitted). While intent may be pled generally, the plaintiff must "allege facts that give rise to a strong inference of fraudulent intent." *See JPMorgan Chase Bank, N.A. v. Ballard*, 213 A.3d 1211, 1245 (Del. Ch. 2019) (citation omitted).

[48] In deciding a motion to dismiss, the Court should consider the allegations in the complaint, documents incorporated into the complaint by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint so long as they are integral to the complaint and authentic. *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO IDENTIFY ANY TRANSFER OF DBMP'S PROPERTY TO BE AVOIDED, OR ANY INCURRENCE OF AN OBLIGATION BY DBMP THAT PLAINTIFFS SEEK TO AVOID.

34. The Amended Complaint fails to state a claim under Bankruptcy Code Section 548 and the State Statutes because Plaintiffs fail to identify: (i) any transfer of DBMP's property to be avoided; or (ii) an incurrence by DBMP of an obligation that Plaintiffs seek to avoid. Thus, under either Rule 8's general pleading standard or Rule 9(b)'s heightened pleading requirements, Plaintiffs have failed to state a claim, and all Counts (I-IV) should be dismissed with prejudice.

A. Failure To Identify Any Transfer Of DBMP's Property.

35. The Amended Complaint contains ***no allegations*** of a transfer of any of DBMP's property to any of the Defendants.

36. To establish a claim for either an intentional or constructive fraudulent transfer, Plaintiffs ***must*** demonstrate that ***a transfer***[49] was made or an ***obligation*** incurred by the ***debtor***. *See* 11 U.S.C. § 548(a);[50] TEX. BUS. & COM. CODE § 24.005(a)(1);[51] N.C. GEN. STAT. § 39-

[49] Bankruptcy Code Section 101(54) defines "transfer" to include: (i) "creation of lien"; (ii) "retention of title as a security interest"; (iii) "foreclosure of a debtor's equity of redemption"; and (iv) "indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with – [(a)] property; or [b] an interest in property." 11 U.S.C § 101(54). Section 548 requires that the transaction in question "not only conform to the definition of 'transfer' found in Section 101(54), but that it also be a transfer of an 'interest of the debtor in property,'" as defined in Bankruptcy Code Section 541(a)(1). 5 COLLIER ON BANKRUPTCY ¶ 548.03[2] (16th ed. 2021). TUFTA and DUFTA define a "transfer" as: "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance. . . ." TEX. BUS. & COM. CODE § 24.005(a); DEL. CODE tit. 6, § 1301(13). PUVTA defines "transfer" as: "[e]very mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset. The term includes payment of money, release, lease, license and creation of a lien or other encumbrance." 12 PA. CONS. STAT. § 5101(b). NCUVTA similarly defines "transfer" as: "[e]very mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, license, and creation of a lien or other encumbrance." N.C. GEN. STAT. § 39-23.1(a).

[50] 11 U.S.C. § 548(a) ("The trustee may avoid any ***transfer . . . of an interest of the debtor in property***, ***or any obligation*** . . . ***incurred by the debtor*** . . . .) (emphasis added).

[51] TEX. BUS. & COM. CODE § 24.005(a) ("***A transfer made or obligation incurred by a debtor*** is fraudulent as to a creditor. . . .) (emphasis added).

23.4(b);[52] DEL. CODE tit. 6, § 1304(a);[53] 12 PA. CONS. STAT. § 5104(a).[54]

37. With respect to the intentional fraudulent transfer claim under the State Statutes (Count II), the requirement that the transfer or debt incurrence to be avoided must be of the debtor is underscored by Section 544: "The trustee … may avoid any ***transfer of property of the debtor*** or any obligation ***incurred by the debtor*** that is voidable by. . . ." 11 U.S.C. § 544(a).

38. By the Amended Complaint, the Plaintiffs seek generally to avoid the Corporate Restructuring.[55] Plaintiffs use the term Corporate Restructuring to define three separate acts:

- create DBMP;
- create CertainTeed LLC; and
- file a bankruptcy petition for DBMP on January 23, 2020.[56]

39. None of these acts constitute a transfer of DBMP's property.[57] As is unequivocally established by that certain Plan of Divisional Merger dated as of October 23, 2019 (the "Plan of Divisional Merger")[58] and acknowledged by Plaintiffs, Old CT (not DBMP) created DBMP and New CT.

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[52] N.C. GEN. STAT. § 39-23.4(a) ("***A transfer made or obligation incurred by a debtor*** is voidable as to a creditor. . . .) (emphasis added).

[53] DEL. CODE tit. 6, § 1304(a) ("***A transfer made or obligation incurred by a debtor*** is fraudulent as to a creditor. . . .) (emphasis added).

[54] 12 PA. CONS. STAT. § 5104(a) ("***A transfer made or obligation incurred by a debtor*** is voidable as to a creditor. . . .) (emphasis added).

[55] *See* Am. Compl. ¶ A, at 41 ("Plaintiffs demand judgment in their favor against each of the Defendants: [a]voiding the Corporate Restructuring that separated Old CertainTeed's asbestos liabilities from Defendants' assets. . . .").

[56] Am. Compl. ¶ 1.

[57] The FCR has previously admitted that "***DBMP does not itself appear to have any basis to avoid Old CT's transfer of assets to New CT***" because (i) "***DBMP is not the party who transferred assets to New CT for inadequate consideration***" and (ii) DBMP [is not] a creditor of Old CT who was defrauded by the transfer of assets to New CT." *The Future Claimants' Representative's Supplemental Submission Regarding the Texas Divisional-Merger Statute* at pp. 6-7 [Adv. Pro. No. 20-03004 (JCW), Dkt. 312] (the "FCR TBOC Supplement") (emphasis added).

[58] A copy of the Plan of Divisional Merger is attached as Exhibit 5 to the *Substantive Consolidation Complaint*. *See Off. Comm. of Asbestos Pers. Inj. Claimants, et al. v. DBMP LLC, et. al.* [Adv. Pro. No. 21-03023 (JCW), Dkt. 1, Ex. 5] (Bankr. W.D.N.C. Aug. 23, 2021).

40. DBMP's filing of its chapter 11 case is not a transfer of property,[59] and Plaintiffs do not seek to avoid the filing of DBMP's chapter 11 case as a fraudulent transfer.[60]

41. Therefore, Plaintiffs fail to plead the required fundamental element for any intentional or constructive fraudulent transfer claim: the transfer of the debtor's property, or the incurrence of an obligation by the debtor, that can be avoided.

42. While Plaintiffs decry the actions of Old CT, Old CT is not a debtor. DBMP came into legal existence on October 23, 2019. Following its formation, DBMP did not transfer any property to any of the Defendants, and Plaintiffs do not identify any transfer of property by DBMP as an alleged fraudulent transfer. Instead, DBMP received certain assets from Old CT and thereafter operated in the ordinary course of its business, including receiving funding under the Funding Agreement and paying asbestos liabilities.

43. Old CT's creation of New CT and allocation[61] of certain Old CT assets to New CT could not as a legal or factual matter be a transfer of DBMP's property. DBMP never held an interest in any of the assets of Old CT allocated to New CT pursuant to the Divisional Merger. In fact, DBMP could not have transferred Old CT's assets to New CT because DBMP did not exist at the time Old CT effectuated the Divisional Merger. Indeed, Plaintiffs admit that the Divisional

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[59] Upon the filing of a petition for relief under the Bankruptcy Code, any claims and assets belonging to the company pre-petition automatically, by operation of law, become property of the bankruptcy estate. 11 U.S.C. § 541(a)(1) (providing that upon the filing of a petition a bankruptcy estate is created comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case"). It is well established that filling for chapter 11 does not create an entity (*i.e.*, the estate) that is separate and distinct from the debtor. *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) **(**finding that the "debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code."). As such, DBMP filing for chapter 11 was not a transfer of property.

[60] Plaintiffs have assiduously avoided seeking to dismiss DBMP's chapter 11 case as a bad faith filing thus accepting the statutory propriety of the chapter 11 filing itself. Any effort to challenge the propriety of DBMP's chapter 11 filing must be pursued under the appropriate section of the Bankruptcy Code and not through fraudulent transfer claims.

[61] Notably, under TBOC, a divisive merger occurs "without . . . any transfer or assignment having occurred." TEX. BUS. ORGS. CODE § 10.008(a)(2)(C). As such, Old CT's creation allocation of certain Old CT assets and liabilities between New CT and DBMP is not a transfer under the TBOC.

Merger "effectuated a transfer of substantially all ***of Old CertainTeed's assets***."[62] There is nothing in the 154 paragraphs of the Amended Complaint that identifies a single asset of DBMP that was transferred as part of the Divisional Merger.

44. The fact that DBMP filed chapter 11 to seek a fair and equitable resolution of asbestos claims is clearly not a transfer of DBMP's property. Plaintiffs may not like that Congress granted DBMP the right to file chapter 11 to resolve asbestos liabilities and may contest the adequacy of the Funding Agreement; however, these actions do not evidence a transfer of DBMP's property, and provide no basis to conclude that if there was a property transfer such transfer was an intentional fraudulent transfer.

45. Courts interpreting Bankruptcy Code Section 548,[63] the UFTA[64] and the UVTA[65]

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[62] Am. Compl. ¶¶ 124, 138 (emphasis added).

[63] *See e.g.*, *In re McCurnin*, 590 B.R. 729, 743 (Bankr. E.D. Va. 2018) (dismissing intentional and constructive fraudulent transfer claims under the Bankruptcy Code on the grounds that the assets transferred were not property of the debtors, but rather property of a corporation owned by the debtors); *Miner v. Bay Bank & Trust Co,* (*In re Miner*), 185 B.R. 362, 367 (N.D. Fla. 1995), *aff'd sub nom*. *Miner v. Bay Bank & Tr. Co.*, 83 F.3d 436 (11th Cir. 1996) (holding that since the debtor had no interest in the property transferred, no constructive fraudulent transfer claim under Section 548 existed as a matter of law); *In re NewStarcom Holdings, Inc.*, 608 B.R. 614, 621 (D. Del. 2019), *aff'd sub nom. In re NewStarcom Holdings Inc.*, 816 F. App'x 675 (3d Cir. 2020) (dismissing fraudulent transfer claims under the Bankruptcy Code on the ground that the complaint lacked any well pled assertion concerning the debtor's transfer of an interest in property); *Estes v. N & D Properties, Inc. (In re N & D Properties, Inc.)*, 799 F.2d 726, 733 (11th Cir. 1986) (dismissing the plaintiff's fraudulent transfer claims under the Bankruptcy Code because the property transferred was pledged by the transferee and never belonged to the debtor).

[64] *See e.g.*, *Salvex, Inc. v. Transfair N. Am. Int'l Freight Servs., Inc.*, No. 4:18-CV-1175, 2021 WL 3686266, at *5 (S.D. Tex. Aug. 2, 2021), *report and recommendation adopted*, No. 4:18-CV-1175, 2021 WL 3682719 (S.D. Tex. Aug. 19, 2021) ("[t]o prove a fraudulent transfer claim under TUFTA a creditor must show the debtor made a 'transfer' of an 'asset'"); *Ingalls v. SMTC Corp. (In re SMTC Mfg. of Tex.)*, 421 B.R. 251, 295 (Bankr. W.D. Tex. 2009) ("Court finds that on and after March 1, 2003, there was no equity in the Debtor's property and that the Lehman Loan lien fully encumbered the Debtor's property. Thus, no 'asset' was 'transferred' as those terms are used under TUFTA, in any conveyance made by the Debtor on or after March 1, 2003."); *Crystallex Int'l Corp. v. Petróleos de Venez., S.A.*, 879 F.3d 79, 81 (3d Cir. 2018) (holding that "[a]transfer by a non-debtor cannot be a 'fraudulent transfer.'"); *In re Wickes Trust*, No. Civ. A. 2515-VCS, 2008 WL 4698477, at *7–8 (Del. Ch. Oct. 16, 2008) ("in order to have a fraudulent transfer claim, one must have a valid claim against the person . . . alleged to have fraudulently made the transfer.").

[65] *See e.g.*, *Phila. Entm't & Dev. Partners, LP v. Pennsylvania* (*In re Phila. Entm't & Dev. Partners, L.P.*), 611 B.R. 51, 71 (Bankr. E.D. Pa. 2019) (subsequent history omitted) (finding that a debtor's slot machine license did not constitute an asset of the debtor, and thus the liquidation trustee failed to state a claim under PUFTA in connection with the state's prepetition revocation of the license); *Harden v. Harrison* (*In re Harrison*), 627 B.R. 832, 840 (Bankr. E.D.N.C. 2021) (dismissing a complaint for failing to state a claim under the NCUVTA after finding the plaintiff did not identify an interest of the debtor in property that was transferred).

have consistently held that a transfer ***may not be avoided*** if the debtor had no interest in the property transferred.

46. In sum, Counts I and II fail to state a claim because Plaintiffs fail to identify a transfer of DBMP's property that they seek to avoid under the Bankruptcy Code, the UFTA and/or the UVTA. *See e.g.*, *Brandt v. B.A. Capital Co.* (*In re Plassein Int'l Corp.*), 366 B.R. 318, 326 (Bankr. D. Del. 2007), *aff'd*, 388 B.R. 46 (D. Del. 2008), *aff'd*, 590 F.3d 252 (3d Cir. 2009) (holding that the complaint failed to state a claim for avoidance of a fraudulent conveyance under DUFTA because the plaintiff did not allege that any debtor made any transfers to third-parties); *McCurnin*, 590 B.R. at 743 (holding: "[i]n failing to show a transfer of property of the Debtors, the Trustees have not established all the elements of §§ 548(a)(1) and 544(b)(1) and thus have not stated a claim upon which relief may be granted pursuant to those sections"). Therefore, Counts I and II of the Amended Complaint should be dismissed with prejudice for failure to state a claim.

B. Plaintiffs Fail To Identify An Obligation Incurred To Be Avoided As They Are Not Seeking To Avoid Their Claims.

47. Plaintiffs plead that the incurrence of the asbestos liabilities is a predicate for their intentional and constructive fraudulent transfer claims.[66]

48. The Amended Complaint alleges that DBMP incurred Old CT's asbestos liabilities as a result of the Divisional Merger.[67] Plaintiffs, not surprisingly, are not seeking to avoid their own claims against DBMP as that would be wholly counterintuitive. *See e.g.*, *King v. Export Dev. Can. (In re Zetta Jet United States, Inc.*) No. 2:17-BK-21386-SK, 2021 WL 3721477, at *14 (Bankr. C.D. Cal. Aug. 17, 2021) ("avoiding an obligation would mean that the debtor is not bound by the agreement or contract"); *Geltzer v. Mooney (In re MacMenamin's Grill Ltd.)*, 450 B.R. 414,

[66] *See* Am. Compl. ¶¶144, 151.

[67] *See, e.g.*, Am. Compl. ¶¶1, 46.

429 (Bankr. S.D.N.Y. 2011) (if an obligation is avoided, it reduces "dollar for dollar the claims that the estate must pay"); 5 COLLIER ON BANKRUPTCY ¶ 548.03[4][a] ("[j]ust as avoiding a transfer brings back assets to the estates to increase distributions, avoiding an obligation decreases the claims against the already existing estate assets, which then proportionately increases creditor dividends").[68]

49. Plaintiffs have not identified an incurrence by DBMP of an obligation that they seek to avoid. Accordingly, all of the Counts in the Amended Complaint with respect to DBMP's incurrence of the asbestos liabilities should be dismissed with prejudice.

II. THE AMENDED COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM FOR INTENTIONAL FRAUDULENT TRANSFER AGAINST THE DEFENDANTS BECAUSE THERE CAN BE NO INFERENCE FROM THE AMENDED COMPLAINT THAT DBMP TRANSFERRED ANY PROPERTY OR INCURRED ANY DEBT WITH AN INTENT TO HINDER, DELAY, OR DEFRAUD THE ASBESTOS CLAIMANTS.

50. The Amended Complaint seeks to avoid the Corporate Restructuring as an intentional fraudulent transfer under Bankruptcy Code Section 548(a)(1)(A),[69] and the State Statutes.[70] Under Section 548(a)(1)(A) and the State Statutes, a transfer of property, or the incurrence of an obligation, may be avoided as an intentional fraudulent transfer if the debtor made the transfer, or incurred the obligation, with the intent to hinder, delay, or defraud the debtor's creditors.[71]

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[68] The FCR previously recognized that seeking to avoid the asbestos claims it incurred would be counterproductive because "avoiding the incurrence of those obligations would not bring any assets into the estate for the collective benefit of asbestos claimants[;] . . . [r]ather, avoiding DBMP's asbestos obligations just sends asbestos claimants back to state court to try to recapture the assets Old CT transferred to New CT—exactly where claimants already are absent the injunction." FCR TBOC Supplement, at p. 6.

[69] Am. Compl. Count I.

[70] Am. Compl. Count II.

[71] N.C. GEN. STAT. § 39-23.4(a)(1); TEX. BUS. & COM. CODE § 24.005(a)(1); DEL. CODE tit. 6, § 1304(a)(1); 12 PA. CONS. STAT. § 5104(a)(1).

51. As the Amended Complaint fails to allege the predicate element that DBMP made any transfers of property or incurred an obligation the Plaintiffs are seeking to avoid, the Court need not examine the Amended Complaint to determine if it plausibly alleges DBMP had the requisite intent with respect to any property transfer or incurrence of an obligation. Assuming *arguendo* that the Divisional Merger can be considered a transfer by DBMP of its property the Amended Complaint nonetheless fails to plausibly allege, under the heightened standard of Rule 9(b), any intent of DBMP to hinder, delay or defraud creditors, or any basis to conclude that the Defendants caused: (i) DBMP to make such improper transfer of DBMP's property; (ii) received DBMP's property; or (iii) aided and abetted any transfer by DBMP. Similarly, while DBMP incurred the asbestos liabilities under the Divisional Merger, the Amended Complaint nonetheless fails to plausibly allege any intent of DBMP in incurring the liability to hinder, delay or defraud creditors. Thus, the intentional fraudulent transfer claims (Count I and II) should be dismissed with prejudice.

A. The Divisional Merger Does Not Show Intent By DBMP To Hinder, Delay or Defraud Creditors.

52. The Plaintiffs deride the Divisional Merger implemented by Old CT and DBMP's bankruptcy filing by labeling it the "Texas two-step."[72] This attempt to cast aspersions upon duly enacted Texas law disregards that other states have analogous statutes permitting divisional

[72] Am. Compl. ¶1

mergers, and that a corporation's division of its assets and liabilities to another entity may be accomplished just as legally under state law by other means.[73]

53. Moreover, Plaintiffs' efforts to discredit Texas law gives short shrift to the fact that the TBOC preserves the rights of creditors of Old CT.[74] But, the preservation of rights of creditors of Old CT as to Old CT is irrelevant to whether the Plaintiffs, standing in the shoes of the DBMP estate, have adequately pled an intentional fraudulent transfer claim.

54. Old CT's allocation of asbestos liabilities to DBMP was authorized under the TBOC, and Old CT's decision to undergo a restructuring that allowed the company to seek a resolution of the asbestos claims through a chapter 11 reorganization without subjecting the entire Old CT enterprise to a bankruptcy proceeding was not only proper, but was also the correct action for Old CT to undertake. *LTL*, 637 B.R. at 407-8. Subjecting all of Old CT and its many stakeholders to a value-destructive, complex and exponentially more expensive bankruptcy would benefit no one. Plaintiffs do not make any allegations that credibly dispute the unequivocal value

[73] *See* TEX. BUS. ORGS. CODE §§ 10.001(b), 10.002, 10.003, 10.151; DEL. CODE tit. 6, § 18-217(b)-(c); 15 PA. CONS. STAT. § 361; ARIZ. REV. STAT. § 29-260. This is not the first case to involve a divisional merger or similar restructuring that separated mass tort liabilities from other assets and liabilities shortly before a chapter 11 filing. In the *Garlock Sealing Technologies LLC, et al*. bankruptcy, Coltec (Garlock's parent company), transferred most of its assets to "NewCo," while its asbestos liabilities, a consulting business, certain insurance rights, and rights under a "Keepwell" agreement remained in or were provided to "OldCo," which then filed for chapter 11. The explicit purpose of the restructuring was to afford an opportunity for a Section 524(g) plan while "avoid[ing] disruption and damage to" the broader business. *Disclosure Statement For Modified Joint Plan Of Reorganization Of Garlock Sealing Technologies LLC, et al. And Oldco, LLC, Proposed Successor By Merger To Coltec Industries Inc*. at pp. 12-34 [Case No. 10-31607 (JCW), Dkt. 5444]. The claimant representatives supported the restructuring and ultimate plan, which was confirmed by the bankruptcy and district courts. Likewise, in *Paddock Enterprises, LLC*, Owens-Corning Illinois underwent a corporate restructuring immediately before *Paddock* filed bankruptcy to "structurally separate the legacy [asbestos] liabilities . . . from the active operations of Owens-Illinois, Inc.'s subsidiaries, while fully maintaining the Debtor's ability to access the value of those operations to support its legacy liabilities." *Decl. of David J. Gordon, President and Chief Restructuring Officer of the Debtor, in Support of Chapter 11 Petition and First Day Pleadings*, *In re Paddock Enters. LLC* ¶ 24 [Case No. 20-10028 (LSS), Dkt. 2] (Bankr. D. Del. Jan. 6, 2020). Moreover, as observed by Judge Kaplan, "*G-I Holdings*, *Inc.* (Case No. 01-30135 (RG)) . . . was filed by a successor-in-interest entity which assumed liability for over 100,000 then pending asbestos-related lawsuits." *LTL*, 637 B.R. at 424.

[74] *See* TEX. BUS. ORGS. CODE § 10.901 ("This code does not affect, nullify, or repeal the antitrust laws or abridge any right or rights of any creditor under existing laws."); *see also Debtor's Post-Hearing Brief Regarding Texas Divisional Merger Statute* at pp. 3-4 [Adv. Pro. No. 20-003004 (JCW), Dkt. 310] (discussing the preservation of creditor's rights under Texas divisive merger provisions).

destruction that would be imposed upon Old CT if it filed chapter 11, but rather argue that Old CT should not be allowed to use Texas law and chapter 11 to seek to resolve asbestos claims through creation of a Section 524(g) trust. This policy argument is not a fraudulent transfer claim, as much as Plaintiffs try and dress it up to be one. And this policy argument is not a claim that falls under either Section 548 or Section 544 of the Bankruptcy Code.[75]

55. The Amended Complaint alleges that DBMP's bankruptcy allows Defendants to gain leverage against asbestos claimants because of the automatic stay and claims estimation process; and that DBMP's bankruptcy deprives asbestos creditors from any recovery until they consent to a chapter 11 plan that resolves DBMP's asbestos liabilities for less than what it would pay outside bankruptcy.[76] These conclusory allegations are unsupportable as a matter of law and irrelevant to a claim to avoid a transfer of DBMP's property, or avoid DBMP's incurrence of the asbestos liabilities.

56. Plaintiffs fail to acknowledge that any bankruptcy of Old CT would have the same automatic stay, preliminary injunction and need for a chapter 11 plan of reorganization, thus belying any allegation that the Divisional Merger and DBMP's subsequent bankruptcy proceeding in any way hindered, delayed or defrauded any asbestos claimant. If Old CT had filed for

[75] Section 544 does not grant the estate a roving right of equity to bring any cause of action that a creditor may have. *See Official Committee Of Unsecured Creditors of HH Liquidation, LLC v. Comvest Group Holdings, LLC (In re HH Liquidation, LLC)*, 590 B.R. 211, 261–62 (Bankr. D. Del. 2018) (recognizing that "[f]radulent transfer is a legal, not an equitable, remedy.") (citing *Boston Trading Grp., Inc. v. Burnazos*, 835 F.2d 1504, 1508 (1st Cir. 1987)); *see also Savage & Associates, P.C. v. BLR Servs. SAS (In re Teligent, Inc.)*, 307 B.R. 744, 749 (Bankr. S.D.N.Y. 2004) (finding that "Section 544(b) does not . . . clothe the trustee with *all* of the rights held by the creditors prior to bankruptcy") (emphasis in original); *Jones v. Hyatt Legal Servs. (In re Dow)*, 132 B.R. 853, 861 (Bankr. S.D. Ohio 1991) (emphasizing that Section 544 does not empower the estate "the right to pursue *all* actions") (emphasis in original). Rather, Section 544 is limited. Section 544(a) only vests in the estate state law rights to avoid transfers of property or incurrence of obligations of a debtor, that can be avoided under state law by (i) a judicial lien creditor, (ii) a creditor with an unsatisfied execution, and (iii) a bona fide purchaser of real property. And Section 544(b) only vests in the estate the rights of an unsecured creditor to avoid a debtor's transfer of its property or incurrence of an obligation. *See Savage*, 307 B.R. at 749 (emphasizing that Section 544(b) only empowers the estate "to avoid" a transfer or obligation and "does not extend beyond" that).

[76] *See e.g.*, Am. Compl. ¶ 5 ("DBMP's bankruptcy was equally essential to Defendants' scheme. . . ."); Am. Compl. ¶ 106.

bankruptcy, the assets available to pay those claims would be no greater (given the Funding Agreement), and the sole issue in the case would still be resolution of asbestos claims. Furthermore, Plaintiffs ignore the fact that the timing of an estimation hearing and negotiating a plan of reorganization (where the asbestos claimants' supermajority vote is required) is within the control of the Plaintiffs. Moreover, Plaintiffs' arguments about timing also fail to account for the fact that with respect to future asbestos claimants, DBMP's chapter 11 cases accelerates the resolution of their claims as compared to the tort system which would not address future claims until they arise over the next several decades.

57. Similarly, Plaintiffs fail to plead with any particularity how DBMP filing for bankruptcy effectuated a fraudulent transfer of DBMP's property. DBMP's chapter 11 case was filed for the proper purpose of bringing tens to hundreds of thousands of pending and future asbestos claims into one forum for an efficient and equitable resolution. Section 524(g) and decades of asbestos related caselaw make a bankruptcy resolution of this case not only possible, but also preferred. *See LTL*, 637 B.R. at 428. Attempting to resolve asbestos claims through Section 524(g) is a valid reorganizational purpose. *In re Bestwall LLC*, 605 B.R. 43, 51 (Bankr. W.D.N.C. 2019). Conversely, a just and efficient resolution of asbestos claims has often eluded the traditional tort system. *In re Federal-Mogul Global*, 684 F.3d 355, 357 (3d Cir. 2012). A Section 524(g) trust, compared to the tort system, reduces transaction costs (particularly attorneys' fees that come out of claimants' recoveries), and increases efficiencies and equities for all claimants.

58. Plaintiffs' conclusory allegations and policy arguments addressed to the propriety of the Divisional Merger and DBMP filing for chapter 11 do not meet the particularity requirements under Rule 9(b) for adequately pleading a plausible claim for an intentional

fraudulent transfer. Accordingly, the Plaintiffs' intentional fraudulent transfer claims (Counts I and II) should be dismissed with prejudice.

B. The Funding Agreement Resoundingly Defeats Plaintiffs' Argument That DBMP Transferred Property, Or Incurred An Obligation, With An Intent To Hinder, Delay or Defraud Creditors.

59. The Funding Agreement and the Account Receivable are powerful uncontroverted evidence of DBMP's and the Defendants' intentions. The Divisional Merger and DBMP's chapter 11 filing provide a transparent legal framework to make funds available to the asbestos claimants to fully satisfy the asbestos claims through a global resolution achieved under the umbrella of the procedural and substantive due process protections of the Bankruptcy Code.

60. The impact of asbestos liabilities on New CT has not been eliminated, but instead, has been preserved, as reflected by the Funding Agreement and the Account Receivable. Through the Account Receivable and the Funding Agreement, DBMP has direct access to the assets and liquidity of New CT and that access is *pari passu* with the claims of other unsecured creditors of New CT —the same as was true of the asbestos claims against Old CT prior to the Divisional Merger.[77] The Account Receivable of approximately $494 million on DBMP's balance sheet is further demonstrable evidence of the intent to fully pay the allowed asbestos claims. This construct includes none of the hallmarks of an intent to hinder, delay or defraud asbestos claimants.[78]

[77] Plaintiffs' attacks on the Funding Agreement are unsubstantiated and purely speculative. Plaintiffs have not provided any reason to believe that asbestos claimants would be "severely impacted" by not being "direct creditors of the company," or any reason why the Funding Agreement is insufficient to protect claimants' interests. In fact, New CT and DBMP have agreed to amendments to the Funding Agreement to address professed concerns by the Court and the Plaintiffs. *See* Funding Agr. Stip. Moreover, the Plaintiffs cannot establish that the Funding Agreement has no value. Indeed, New CT's acknowledgment of its approximate $494 million accounts payable to DBMP undermines any such proposition.

[78] Contrary to the Plaintiffs' conclusory allegations, the intercompany agreements are not indicia of the Defendants attempting to eliminate or seek to reduce obligations to asbestos claimants. Like the Funding Agreement, the intercompany agreements provide the support and framework for a successful chapter 11 case to resolve DBMP's asbestos liabilities. Moreover, while the Plaintiffs allege that the intercompany agreements were not negotiated or entered into at arm's length, the Plaintiffs do not allege with specificity that the terms and conditions of the intercompany agreements are not market, unfair, or not consistent with other intercompany agreements entered into among the Defendants and their affiliates.

Rather, it is a voluntary assumption of a liability within a structure to allow for the full, fair and efficient payment of the liability.

61. The Divisional Merger did not "block" or "remove" assets "from the reach" of asbestos claimants. To the contrary, the Funding Agreement ensures that DBMP has the same ability to satisfy asbestos claims as Old CT had prior to the Divisional Merger. Moreover, DBMP's chapter 11 filing may stay litigation, but it puts squarely in the hands of the asbestos claimants the vote (and thus control) to allow DBMP to reorganize consensually and fully fund a Section 524(g) trust. Similar funding agreements have been used in at least five other mass tort bankruptcies (*Garlock Sealing Technologies LLC, et al*., *Paddock Enterprises, LLC*, *Bestwall LLC*, *Aldrich Pump LLC, et al*. and *LTL Management LLC*). Plaintiffs do not and cannot cite to a single instance where the payor under any of these funding agreements has failed to honor its obligations.[79]

62. Here, prior to judgment, Old CT's assets were not subject to the claims of the asbestos claimants. Prior to the Divisional Merger, asbestos claimants: (i) did not have the ability to limit Old CT from layering on additional senior debt; (ii) were not in a position to require Old CT to provide detailed financial statements; (iii) did not have the ability to demand collateral or guarantees from any of Old CT's affiliates; and (iv) did not have the ability to prohibit dividends or other distributions of value from Old CT to equity holders. Indeed, as contingent creditors, asbestos claimants did not have a direct claim to the assets of Old CT, they had an indirect claim when and if a judgment was obtained and not paid.

63. In contrast, under the Funding Agreement, New CT is subject to restrictions that Old CT was not subject to, thus enhancing the source of potential recovery for the asbestos

[79] As Judge Kaplan found with respect to Johnson & Johnson, it would be irrational to think that New CT would "bear the brunt of public and judicial scrutiny, as well as the time and costs to implement this integrated transaction, simply to stall claimants or walk away from its financial commitments under the Funding Agreement." *LTL*, 637 B.R. at 416.

claimants. By reason of the chapter 11 case, the Account Receivable and the Funding Agreement, New CT has created a direct claim against its assets to fund all contingent and future asbestos creditors. The asbestos claimants' rights are preserved and enhanced by the chapter 11 case creating a mechanism for determining claims in accordance with the law, including future claims, by requiring adherence to due process, absolute priority, and the supermajority voting rights granted to the asbestos claimants under the Bankruptcy Code. *See In re W.R. Grace & Co.*, 729 F.3d 311, 324 (3d Cir. 2013) ("Therefore, as long as a court correctly determines that § 524(g)'s requirements are satisfied, present and future claims can be channeled to a § 524(g) trust without violating due process."). Further, the absolute priority rule requires that the asbestos claims, as determined under the law, be paid in full (absent their consent) before a distribution can be made to New CT. The Bankruptcy Code's payment in full requirement eviscerates Plaintiffs' proposition that DBMP's chapter 11 case prejudices their recovery. It is uncontroverted that the Funding Agreement would, as an asset of DBMP's estate, be under the purview and oversight of the Court, subjecting New CT to remedies in this Court should it fail to honor its obligations under the Funding Agreement. This is hardly placing assets "beyond the reach of creditors." Rather, it puts New CT's assets front and center to enable a global resolution of DBMP's asbestos liabilities.

64. Accordingly, the Plaintiffs' intentional fraudulent transfer claims (Counts I and II) should be dismissed with prejudice.

C. The Amended Complaint's Repetition That Defendants Perpetuated A Scheme Does Not Support A Plausible Inference That DBMP Transferred Property, or Incurred An Obligation, That Is A Fraudulent Transfer.

65. The Amended Complaint repeats the refrain that the Corporate Restructuring was a "scheme" to intentionally harm asbestos claimants.[80] The term "scheme" is used in the Amended Complaint no less than ten times.[81] But the naked assertion of a "scheme" is not an adequately pled articulation of a transfer of DBMP's property, or the incurrence of an obligation, which is avoidable as an intentional fraudulent transfer. Not only does the Amended Complaint fail to identify a transfer or debt incurrence to be avoided, but it fails to append to such transfer or debt incurrence allegations of specific facts, actions or occurrences that evidence such property transfer or debt incurrence was intentionally fraudulent. *See e.g.*, *Angell v. First Eastern, LLC (In re Caremerica, Inc.)*, 06-02913-8-JRL, 2009 WL 2253241, at *6 (Bankr. E.D.N.C. July 28, 2009) (dismissing the intentional fraudulent transfer claims for failure to "describe [with particularity] the conduct constituting fraud"). Instead, Plaintiffs merely attack the Divisional Merger as fraudulent (even though it was a lawful exercise under the TBOC) and complain about DBMP exercising its Congressionally granted right to file for bankruptcy. These policy arguments do not substitute for the exacting pleading requirements under Rule 9(b) to state an intentional fraudulent transfer claim.

[80] A the same time, and undermining their theory of the case, Plaintiffs acknowledge that the Divisional Merger and DBMP's chapter 11 filing were intended by the Defendants to implement a Section 524(g) trust. The Amended Complaint states: (i) "Old CertainTeed . . . stated that it engaged in the Corporate Restructuring '[t]o facilitate its ability to pursue a section 524(g) resolution' in bankruptcy 'without subjecting the entire [CertainTeed/Saint-Gobain] enterprise to chapter 11'"; (ii) under the Funding Agreement, New CT is required to pay "amounts necessary to satisfy DBMP's 'Asbestos Related Liabilities' in connection with funding a § 524(g) trust"; and (iii) "New CertainTeed is obligated to fund a § 524(g) trust only if DBMP's 'other assets are insufficient to fund amounts necessary or appropriate to satisfy . . . Asbestos Liabilities in connection with the funding of such trust.'" Am. Compl. ¶¶ 30, 60-61.

[81] *See* Am. Compl. ¶¶ 3 -5, 29-30, 38, 40, 94.

66. The absence of the required pleading specificity is highlighted by Plaintiffs' description of the Corporate Restructuring as one carried out by "Defendants," accompanied by no identification of the specific officers who purportedly had fraudulent intent to be imputed to a specific instance of DBMP's property transfer or debt incurrence to be avoided.[82]

67. Indeed, the Amended Complaint does not state that DBMP appointed uninformed officers for the purpose of blindly filing chapter 11. *Cf. Tronox v. Anadarko Petroleum Corp. (In re Tronox Inc.)*, 429 B.R. 73, 95 (Bankr. S.D.N.Y. 2010). Nor are there allegations that DBMP made materially false or misleading statements to induce parties to enter into any transactions. *Holliday v. K Road Power Mgmt., LLC (In re Boston Generating LLC)*, 617 B.R. 442, 472-73 (Bankr. S.D.N.Y. 2020). At bottom, the Amended Complaint is devoid of allegations that DBMP's actions were motivated by fraud. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 10 F.4th 147 (2d Cir. 2021), *cert. denied sub nom. Kirschner v. Fitzsimons*, No. 142 S. Ct. 1128 (2022) (affirming dismissal of intentional fraudulent transfer claims where many badges of fraud were not alleged, but affirming denial of dismissal with respect to one defendant who received fees from the debtor for a solvency opinion that employed non-industry standards and was the highest fee it had ever charged for such opinion).

68. Contrary to the improper and fraudulent activities found in the cases cited above, the Divisional Merger is alleged in the Amended Complaint to have been predicated upon precedent, the lawful application of the TBOC and filing a chapter 11 bankruptcy petition to efficiently resolve Old CT's asbestos liabilities.

[82] *See e.g.*, Am. Compl. ¶ 4 ("The divisional merger was essential to Defendants' scheme . . ."), ¶ 30 ("Old CertainTeed, whose actions were directed by the Defendants and their professionals, stated that it engaged in the Corporate Restructuring '[t]o facilitate its ability to pursue a section 524(g) resolution' in bankruptcy 'without subjecting the entire [Old CT] enterprise to chapter 11.'").

69. The Amended Complaint does not plead sufficient facts for this Court to draw an inference that DBMP had actual intent to hinder, delay or defraud the asbestos claimants. Rather, the Amended Complaint shows that DBMP (and the Defendants) were motivated to equitably and efficiently resolve asbestos claims.

70. Accordingly, the Plaintiffs' intentional fraudulent transfer claims (Counts I and II) should be dismissed with prejudice.

D. The Amended Complaint Fails To Plead Plausible Badges of Fraud.

71. The Amended Complaint's generalized statements are not enough to state a claim under Rule 9(b) for intentional fraudulent transfer under the commonly known badges of fraud.

72. Under the Bankruptcy Code and the State Statutes, courts evaluate the following badges of fraud to determine whether the plaintiff has plausibly alleged the debtor's fraudulent intent:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor;[83]

[83] This badge is not applicable to this case.

(12) the debtor made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due;

(13) the debtor transferred the assets in the course of legitimate estate or tax planning;[84] and

(14) the general chronology of events and transactions under inquiry. [85]

73. The existence of a single badge of fraud is not conclusive, but multiple badges may often give rise to an inference of fraud. *In re Boyd*, Adv. Pro. No. 12-05107, 2012 WL 5199141, at n.4 (Bankr. W.D. Tex. Oct. 22, 2012) (proof of four to five badges of fraud is sufficient to establish actual fraud); *Tronox*, 429 B.R. at 95 ("The existence of several badges of fraud can constitute clear and convincing evidence of actual intent.") (quoting *In re Actrade Fin. Techs. Ltd.*, 337 B.R. 791, 809 (Bankr. S.D.N.Y. 2005)).

74. The Amended Complaint fails to sufficiently allege the presence of ***any*** badges to support an inference that the Corporate Restructuring was implemented with the intent to hinder, delay or defraud creditors.

75. **Insider Status**. The first badge of fraud tests whether the transfer or debt incurrence was made to or for the benefit of an insider. *Tavenner v. ULX Partners, LLC, et. al. (In re LeClairRyan PLLC)*, 2021 WL 5177368, at *5 (Bankr. E.D. Va. 2021). This factor is relevant to help the court determine the *bona fides* of the property transfer or debt incurrence, where a "debtor, faced with impending insolvency, transfers property to a business partner or

[84] This badge is not applicable to this case.

[85] *Cook,* 2019 WL 1325032, at *6-7 (Bankr. E.D. N.C. Mar. 22, 2019) (applying North Carolina law); see also N.C. GEN. STAT. § 39-23.4(b). *Dershaw v. Ciardi (In re Rite Way Elec., Inc.)*, 510 B.R. 471, 481 (Bankr. E.D. Pa. 2014); *see also* 12 PA. CONS. STAT. § 5104(b); *see also* TEX. BUS. & COM. CODE § 24.005; DEL. CODE tit. 6, § 1304(b); *see also Beskrone v. Opengate Capital Grp., LLC (In re Pennysaver USA Publ'g, LLC)*, 602 B.R. 256, 270–71 (Bankr. D. Del. 2019); *Meherrin*, 2013 WL 1405729, at *9 (Bankr. E.D.N.C. Apr. 8, 2013) (badges of fraud under Section 548(a)(1)(A) of the Bankruptcy Code are similar to those under N.C. GEN. STAT. § 39-23.4(b)). Badges 1 through 11 are identified in all of the State Statutes. Badges 12 and 13 are only identified in the North Carolina statute. Badge 14 appears to be unique to consideration under Section 548(a)(1)(A) of the Bankruptcy Code. *See Meherrin,* 2013 WL 1405729, at n. 9 (listing badges under Bankruptcy Code Section 548(a)(1)(A)).

relative to place it *beyond* the reach of his creditors." *Ritchie Cap. Mgmt, LLC v. Stoebner*, 779 F.3d 857, 864 (8th Cir. 2015) (emphasis added).

76. Under the Bankruptcy Code, an "insider" includes a director, officer, and "person in control of the debtor." 11 U.S.C. § 101(a)(31). As set forth below, the Amended Complaint fails to set forth a basis to infer that any Defendant is or was in control of DBMP.

77. Moreover, this is not a case where a debtor transfers any property, let alone property to insiders to bypass creditors or avoid judicial process. *Harman v. First Am. Bank of Md. (In re Jeffrey Bigelow Design Grp., Inc.)*, 127 B.R. 580, 583 (D. Md. 1991), *aff'd*, 956 F.2d 479, 583 (4th Cir. 1992) ("Although the evidence clearly demonstrates that the transactions at issue in this case involved insiders, the trustee presented no evidence that the parties chose this particular financial arrangement to hinder, delay, or defraud other creditors."). The Account Receivable and the Funding Agreement reflect New CT's funding obligation, which is consistent with DBMP's intent to pay the asbestos liabilities as determined under the law.

78. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

79. **Retention Of The Property Transferred**. The second badge tests whether the debtor retained an interest in the property transferred. This badge focuses on whether the at-issue transfer was a *bona fide* conveyance (in form and substance), or whether it was in name only (title and form, but not substance) such that the property transferred should be deemed an asset of the debtor. *See Murphey v. Crater (In re Crater)*, 286 B.R. 756, 764 n.10 (Bankr. D. Az. 2002) ("Transfer without change of possession was considered fraudulent at the inception of fraudulent conveyance law over 400 years ago." (citing *Twyne's Case*, 3 Coke Rep. 80b (1601)).

80. In the Amended Complaint, Plaintiffs do not allege that DBMP transferred any property, let alone retained possession or control of any property allegedly transferred to another.

For example, there are no allegations in the Amended Complaint that DBMP owned or transferred the assets now owned by New CT, or retained any rights to operate the assets that are now owned by New CT.[86]

81. Accordingly, this badge provides no support for an inference of DBMP's transfer of property with an intent to hinder, delay, or defraud asbestos claimants.

82. **Concealment Of The Transfer**. The third badge tests whether the debtor concealed the transfer at issue. *See In re 1701 Commerce, LLC*, 511 B.R. 812, 837 (Bankr. S.D. Tex. 2014) (concluding that the purported fraudulent transfer (a deed in lieu of foreclosure agreement) was not concealed where the agreement was executed early February, and was referenced in public SEC filings in mid-March, and was recorded in public records).

83. Plaintiffs allege that "[t]here was no notice of the Corporate Restructuring provided to Old CertainTeed's asbestos creditors;"[87] that "the Corporate Restructuring was actively concealed from asbestos victims and their families;"[88] and that the "Corporate Restructuring was intentionally concealed from people both outside and within Defendants' organizations."[89] Plaintiffs further allege that in order to work on Project Horizon, employees were "required to sign nondisclosure agreements so as to keep the project under a veil of secrecy."[90]

84. Notably, Plaintiffs do not allege that the implementation of the Corporate Restructuring was concealed, and concede that they were made aware of the Corporate

[86] *See e.g.*, Am. Compl. ¶ 45 ("No operating business was received by DBMP apart from its Millwork & Panel subsidiary.").

[87] Am. Compl. ¶ 123.

[88] Am. Compl. ¶ 125.

[89] Am. Compl. ¶ 140.

[90] Am. Compl ¶¶ 36, 123, 137.

Restructuring when it was implemented.[91] There is nothing in the law that required Old CT to notify its contingent tort claimants of its strategy, analysis or consideration of the Corporate Restructuring, which was like any other corporate business decision that was within the purview of the Old CT board.[92]

85. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

86. **Pending or Threatened Lawsuits**. The fourth badge tests whether the debtor was sued or threatened with lawsuits before the transfer was made, or the debt incurred. This factor focuses on the debtor's engagement in the purportedly fraudulent transfer as a reaction to a threatened or actual lawsuit and an effort to thwart the litigation. *See, e.g.*, *United States v. Key*, 837 F. App'x 348 (6th Cir. 2020) (defendant that was threatened with criminal prosecution who then transferred assets to her spouse supported a finding of fraudulent intent); *see also Bakst v. Bank Leumi, USA (In re D.I.T., Inc.)*, 561 B.R. 793, 802 (Bankr. S.D. Fla. 2016) ("This badge of fraud is aimed at transfers where assets are moved away from the debtor's control so as to conceal them from creditors.").

87. Plaintiffs allege that, prior to the Corporate Restructuring, Old CT had been sued or was actively defending thousands of asbestos lawsuits.[93] Indeed, Old CT faced such lawsuits since the 1970s.[94] While the Corporate Restructuring was implemented to address the asbestos

[91] Am. Compl ¶ 93 ("Through the Corporate Restructuring, liability associated with such lawsuits had been purportedly transferred to the Debtor.").

[92] *See, e.g.*, *LTL*, 637 B.R. at 426 (referring to the strategy "to employ the divisional merger" as a justifiable "business decision" in the face of mass tort liability from talc cancer claimants and the market value loss, operation disruptions and "excessive administrative costs associated with independent chapter 11 filings"); *see also Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 88 (2d Cir. 2001) (finding that the "decision to spin-off" a division of a company "was, at its core, a corporate business decision").

[93] Am. Compl. ¶¶ 123, 135, 137, 140.

[94] Am. Compl. ¶¶ 22–29.

liabilities (current and future) impacting Old CT, the Corporate Restructuring did not result in assets being concealed from creditors, nor does it thwart creditors efforts to be paid in full on their claims. This proposition is belied by the Account Receivable and the Funding Agreement, and the procedural and substantive protections provided to the asbestos claimants under the Bankruptcy Code (including voting rights and absolute priority payment rights). The Divisional Merger's structuring to provide for a full funding mechanism for the asbestos claims and DBMP's decision to subject itself to the rigors of the chapter 11 process demonstrate that the Corporate Restructuring was not a reactionary measure to disadvantage asbestos claimants by concealing assets. Rather it is the opposite. The Divisional Merger and the chapter 11 filing is an attempt to find a structure under the bankruptcy system to consensually and equitably resolve Old CT's asbestos liabilities.

88. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

89. **Transfer Of Substantially All Of The Debtor's Assets**. The fifth badge tests whether the transfer was of substantially all of the debtor's assets. As noted above, the Corporate Restructuring is not even a "transfer" that can be avoided; nor did the Corporation Restructuring effect a transfer of any of DBMP's assets.

90. It is the transfer of assets without regard to the transferor's liabilities that makes this factor relevant to a fraudulent transfer analysis. *See, e.g.*, *Tronox*, 429 B.R. at 289 (analysis focused on the assets that could have been used to satisfy the tort creditors, resulting in the application of "85 years of legacy liabilities on a fraction of the assets").

91. Plaintiffs allege that, as a result of the Divisional Merger, New CT was allocated 97% of Old CT's assets, whereas DBMP received 3% of Old CT's assets.[95] While the overall

[95] Am. Compl. ¶ 1.

result of the Divisional Merger is that almost all of Old CT's assets were allocated to New CT (and thereby made available to DBMP's creditors under the Funding Agreement), that in and of itself is irrelevant because DBMP did not allocate Old CT's assets – Old CT did. DBMP has full access to the assets that were transferred to New CT, and such access is senior in priority to the equity interests of New CT. Thus, current and future asbestos claimants may benefit from this value available to satisfy allowed asbestos claims against DBMP under a Section 524(g) plan.

92. Accordingly, this badge provides no support for an inference of DBMP's transfer of property with an intent to hinder, delay, or defraud asbestos claimants.

93. **The Debtor Absconded**. The sixth badge tests whether the debtor absconded. *See, e.g.*, *Whitaker v. Mortg. Miracles, Inc. (In re Summit Place, LLC)*, 298 B.R. 62, 70 (Bankr. W.D.N.C. 2002). There are no allegations in the Amended Complaint that the Debtor absconded. To "abscond" is to "1. To depart secretly or suddenly, especially to avoid arrest, prosecution, or service of process. 2. To leave a place, usually hurriedly, with another's money or property." BLACK'S LAW DICTIONARY (11th Ed. 2019). There are no allegations that DBMP has fled or is seeking to avoid judicial process. Rather, DBMP voluntarily entered chapter 11, with all of its attendant procedural and substantive due process protections, to obtain an equitable resolution of the asbestos claims.

94. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

95. **The Debtor Removed Or Concealed Assets**. The seventh badge tests whether the debtor removed or concealed assets. The Amended Complaint does not allege that DBMP removed or failed to disclose the nature and location of assets. *Cf. Branch Banking & Trust Co. v. Evans* (*In re Evans*), 538 B.R. 268 (Bankr. W.D. Va. 2015) (in a discharge denial proceeding,

explaining "courts may infer a debtor's intent to hinder, delay or defraud when the debtor conceals his property interest from his bankruptcy case").

96. The details of the Corporate Restructuring were public and well known. Through the Funding Agreement and the Account Receivable, the assets of Old CT are neither removed nor concealed from access by the asbestos claimants, but rather, they are fully available to satisfy allowed asbestos claims against DBMP. *See LTL*, 637 B.R. at 416 ("The record before the Court does not reflect assets that have been ring-fenced, concealed, or removed. Neither J&J nor New JJCI (nor any J&J affiliate for that matter) are to be released from liability, or their assets placed out of reach of creditors, absent a negotiated settlement under a plan in which J&J's and New JJCI's roles and funding contributions warrant a release as a matter of both law and fact.").

97. Accordingly, this badge provides no support for an inference of DBMP's transfer of property with an intent to hinder, delay, or defraud asbestos claimants.

98. **Consideration Received**. The eighth badge tests whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. *See Havis v. AIG Sunamerica Life Assurance Co. (In re Bossart),* No. 05-34015-H4-7, 2007 WL 4561300, at *14 (Bankr. S.D. Tex. Dec. 21, 2007) (subsequent history omitted). As DBMP transferred no assets, this badge has no relevancy in that regard. As to DBMP's incurrence of the asbestos liabilities, as described in Article III.A hereof, reasonably equivalent value was received in exchange based upon, among other things, the Account Receivable and the Funding Agreement. Plaintiffs plead no particular facts to plausibly conclude otherwise.

99. Plaintiffs' sole argument on the issue of lack of reasonably equivalent value is that the legal structure of the Funding Agreement is subject to criticism.[96] Such criticisms, many of which have been addressed by the Second Funding Agreement,[97] have no bearing on the intent of the Funding Agreement. Moreover, such criticisms establish nothing about the value of the Funding Agreement and ignore the Account Receivable.[98] The Amended Complaint makes no specific allegations supporting the plausibility of concluding that DBMP did not receive reasonably equivalent value in exchange for incurring the asbestos liabilities.

100. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

101. **Insolvency**. The ninth badge tests whether the debtor was insolvent or became insolvent shortly after the transfer was made or the debt was incurred.[99] The Amended Complaint does not plead any basis to plausibly conclude that DBMP is insolvent. *Cf. Tronox*, 429 B.R. at 87 (complaint alleged that as a result of the spin-off, the debtor was "insolvent and severely undercapitalized," and was "destined to fail."). Plaintiffs' solvency theory is the same as their lack of reasonably equivalent value theory. That theory, as explained above and in Article III B hereof, finds no basis for such a plausible inference that DBMP is insolvent. Moreover, Plaintiffs make

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[96] *See* Am. Compl. ¶¶ 60–73.

[97] *See supra* ¶¶ 27-29.

[98] Furthermore, the Amended Complaint is inconsistent on DBMP's solvency as it implies that the Funding Agreement renders DBMP solvent. *See* Am. Compl. ¶73 ("[i]t is indisputable that, *absent the contingent rights* under Funding Agreement, DBMP was rendered insolvent as a result of the Corporate Restructuring.") (emphasis added). Moreover, in its opposition to the *Debtor's Motion for Pending Mesothelioma Claims Bar Date* [Case No. 20-30080 (JCW), Dkt. 1294], Plaintiffs argued that DBMP is ***solvent***. *See Objection of the Official Committee of Asbestos Personal Injury Claimants to Debtor's Motion for Pending Mesothelioma Claims Bar Date* ¶ 32 [Case No. 20-30080 (JCW), Dkt. 1311]; *see also Objection of the Future Claimants' Representative to Debtor's Motion for Pending Mesothelioma Claims Bar Date* at p. 2 [Case No. 20-30080 (JCW), Dkt. 1312]. At the February 10, 2022 hearing on the same motion, this Court spotted the Plaintiffs' inconsistent stance on DBMP's solvency: "I would also note that the [Plaintiffs] argued in the preliminary injunction hearing with some success that the debtors were insolvent and the funding agreements were unreliable. Now they're arguing that it's a solvent debtor. So I understand why you're doing it, but it would be nice that we only had one position on that." Feb. 10, 2022 Hr'g Tr. 171:11-16.

[99] N.C. GEN. STAT § 39-23.4(b).

no allegations as to the amount of the asbestos liabilities as to which a comparison of DBMP's liquidity sources and value can be compared. This failure is fatal to Plaintiffs' insolvency allegation.

102. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

103. **Transfer Occurred Shortly Before A Substantial Debt Was Incurred**. The tenth badge tests whether the transfer, or debt incurrence, occurred shortly before a substantial debt was incurred. While the Corporate Restructuring was effectuated to fairly and equitably address the asbestos claims against Old CT, the asbestos liabilities were not incurred "shortly" before the Corporate Restructuring. Indeed, the Plaintiffs' acknowledge that Old CT has faced asbestos litigation since the 1970s, not that the Corporate Restructuring was a reaction to a particular anticipated liability.[100] *Cf., In re Ritz*, 567 B.R. 715, 750–51 (Bankr. S.D. Tex. 2017) (where transfers in question occurred two months before the incurrence of substantial debt, this badge was satisfied).

104. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

105. **Reasonably Equivalent Value; Ability To Pay Debts As They Come Due**. This badge tests the equivalency of the value received in exchange for the transfer made or the debt incurred and the debtor's belief that it would incur debts beyond its ability to pay them as they became due. As discussed herein, the Amended Complaint fails to provide a plausible basis to conclude that the Account Receivable and the Funding Agreement are not reasonably equivalent

[100] Am. Compl. ¶¶ 26-27.

value for the incurrence of the asbestos liabilities that DBMP lacks sufficient liquidity sources to pay the asbestos liabilities as they come due.[101]

106. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

107. **Chronology of Events**. The final badge tests whether the chronology of events overall suggest fraud. *See Lafarge North Am., Inc. v. Poffenberger* (*In re Poffenberger*), 471 B.R. 807, 816 (Bankr. D. Md. 2012) (noting that the timeline of events was critical to its determination that indicia of fraud were present). There is nothing in the Amended Complaint to suggest that the overall chronology gives rise to an inference of fraud with respect to the Divisional Merger and DBMP filing chapter 11. *Cf. In re All Am. Petroleum Corp.*, 259 B.R. 6, 19 (Bankr. E.D.N.Y. 2001) (finding intent to defraud where the debtor's business declined, then transferred assets for no consideration).

108. Accordingly, this badge provides no support for an inference of DBMP's transfer of property, or incurrence of debt, with an intent to hinder, delay, or defraud asbestos claimants.

109. As a result, the intentional fraudulent transfer claims (Count I and II) should be dismissed with prejudice.

[101] Any allegation that DBMP received less than reasonably equivalent value is factually incorrect and, standing alone, are legally irrelevant to the issue of scienter. *See Nisselson v. Softbank AM Corp. f/k/a Softbank Finance Corp. et al. (In re MarketXT Holdings Corp.)*, 361 B.R. 369, 397 (Bankr. S.D.N.Y. 2007) (dismissing actual intent claim despite allegations of insolvency and lack of "adequate consideration."). "The [lack of reasonably equivalent value and insolvency] standing alone are never enough to establish actual fraud because lack of reasonably equivalent value and insolvency are elements of constructive fraud . . . if the elements of constructive fraud were enough to demonstrate actual fraud, the constructive fraud provisions would be superfluous." *CLC Creditors' Granter Trust v. Howard Sav. Bank (In re Com. Loan Corp.)*, 396 B.R. 730, 747 (Bankr. N.D. Ill. 2008).

E. The Legitimate Purpose Of The Corporate Restructuring Further Demonstrates Lack of Intent To Hinder, Delay, or Defraud Creditors.

110. The presence of multiple badges that creates a presumption of fraud "may be rebutted if a legitimate purpose exists for the transfer." *1701 Commerce,* 511 B.R. at 841 and n. 231 (applying Texas law). "Courts have accepted a number of purposes as legitimate, including raising capital, restructuring financial obligations, releasing guaranties, seizing upon good investment opportunities, and encouraging management's financial commitment to an enterprise." *Id.*[102] *See also In re Tribune Co. Fraudulent Conveyance Litig.*, 11-md-2296, 2019 WL 294807, at *10 (S.D.N.Y. Jan. 23, 2019) ("[w]hile '[t]he presence of a single badge of fraud may spur mere suspicion, the confluence of several can constitute conclusive evidence of an actual intent to defraud, absent 'significantly clear evidence of a legitimate supervening purpose.") (citation omitted). The burden is on the defendant to prove "a legitimate supervening purpose for the 'manner in which the transfer was structured.'" *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.),* 503 B.R. 239, 289 (Bankr. S.D.N.Y 2013) (quoting *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 392 (S.D. Tex. 2008)) (such case, "*Tronox II*").

111. In *Tronox II*, Judge Gropper illustrated the difference between a *legitimate* business purpose and a simple "reason" for the challenged transfers. *Tronox II*, 503 B.R. at 289. Judge Gropper noted that the "reason" the parties engaged in the spin-off was to make Kerr-McGee a

[102] *Id.* at n. 231; *Kelly v. Armstrong*, 206 F.3d 794, 799 (8th Cir. 2000) (holding that four prepetition transfers by the debtors had legitimate purposes, including selling and leasing back a house to raise investment capital and pledging assets as collateral for a business loan and as an incentive for a business borrower to produce income and repay the loan); *Moreno v. Ashworth (In re Moreno)*, 892 F.2d 417, 420–21 (5th Cir. 1990) (holding that a debtor's sale of his equity interest in a closely held private company within three months of filing for bankruptcy was not fraudulent because the purpose for the arm's-length sale was to raise cash and obtain releases from guarantees of the company's debt); *Ingalls*, 421 B.R. at 300 (Bankr. W.D. Tex. 2009) (concluding that certain post-default transfers of cash and equipment had legitimate purposes as part "of the Debtor's effort to operate in a tough economic climate for as long as possible and then to orderly shut down"); *ASARCO LLC*, 396 B.R. at 392 (noting that the debtor's sale of stock was a legitimate means to restructure debt).

more attractive merger candidate. By placing all of the environmental liabilities on Tronox, they were able to sell the E&P Business for $18 billion. *Id.* But this sort of transaction, where 85 years of legacy liabilities were imposed on Tronox, without leaving Tronox any ability to satisfy those obligations was the basis for the Court's refusal to find a legitimate supervening purpose for the spinoff. *Id.*

112. Here, the Corporate Restructuring served a legitimate purpose—to facilitate an equitable resolution of current and future asbestos claims through a Section 524(g) trust, with the financial support of New CT via the Funding Agreement and the Account Receivable. Unlike the tort system, which is (in the Plaintiffs' own words) "exceedingly costly,"[103] a Section 524(g) trust established through the chapter 11 process will streamline the estimation of and distributions for allowed asbestos claims against DBMP.

113. Accordingly, the intentional fraudulent transfer claims (Count I and II) should be dismissed with prejudice.

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR CONSTRUCTIVE FRAUDULENT TRANSFER AGAINST THE DEFENDANTS.

114. The constructive fraudulent transfer claims (Counts III and IV) against Defendants should be dismissed with prejudice for failure to state a claim.

115. To adequately plead a constructive fraud claim under Section 548(a)(1)(B), the Amended Complaint must show that DBMP made a transfer or incurred an obligation and: "(i) received less than reasonably equivalent value in exchange for such transfer or obligation; and (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining

[103] Am. Compl. ¶ 40.

with the debtor was an unreasonably small capital; [or] (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured." 11 U.S.C. § 548(a)(1)(B).

116. The State Statutes set forth similar requirements to plead a claim for constructive fraudulent transfer.[104]

117. The Amended Complaint asserts constructive fraud solely with respect to DBMP's incurrence of the asbestos liabilities as a result of the Divisional Merger. [105] But Plaintiffs do not seek to avoid these claims, thus rending Counts III and IV superfluous. Moreover, as a factual matter, Counts III and IV add nothing to support Plaintiffs' conclusory allegations as they largely set forth the relevant statutory language of Section 548 and the State Statutes.

118. Furthermore, even if Plaintiffs are seeking to avoid the asbestos liabilities incurred by DBMP as a result of the Divisional Merger, the Defendants are not the appropriate targets of such claims since the Defendants do not hold any asbestos claims against DBMP's bankruptcy

[104] Under TUFTA and DUFTA, in order to assert constructive fraudulent transfer claims, the Amended Complaint must adequately plead that DBMP made a transfer or incurred an obligation (i) "without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." TEX. BUS. & COM. CODE § 24.005(a)(2); DEL. CODE tit. 6, § 1304(a)(2). TUFTA and DUFTA further provide that a debtor's transfer is fraudulent as to only creditors whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation "[(i)] without receiving reasonably equivalent value in exchange for the transfer or obligation and [ii] the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." TEX. BUS. & COM. CODE § 24.006(a); DEL. CODE tit. 6, § 1305(a). Under NCUVTA and PUVTA, in order to assert constructive fraudulent transfer claims, the Amended Complaint must adequately allege that DBMP incurred an obligation or made a transfer "without receiving reasonably equivalent value in exchange for the transfer or obligation" and (ii) the debtor (a) "was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;" or (b) was "intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." N.C. GEN. STAT. § 39-23.4(a)(2); 12 PA. CON. STAT. § 5104(a)(2). Similar to TUFTA and DUFTA, the NCUVTA and PUVTA also provide that a debtor's transfer is voidable as to only creditors whose claims arose before the transfer was made or the obligation was incurred if the "debtor made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." N.C. GEN. STAT. § 39-23.5(a); 12 PA. CON. STAT. § 5105(a).

[105] *See, e.g.*, Am. Compl. ¶¶ 144, 151.

estate. *Cf. Cox v. Grube* (*In re Grube*), 500 B.R. 764, 772 (Bankr. C.D. Ill. 2013) ("It is recognized that where lien avoidance is the desired remedy, rather than recovery of transferred property or its value, the lienholder is the appropriate defendant) (citing *In re Burns*, 322 F.3d 421 (6th Cir. 2003).

119. Accordingly, for the foregoing and following reasons, the constructive fraudulent transfer claims (Counts III and IV) should be dismissed with prejudice.

A. The Amended Complaint Does Not Adequately Plead Lack Of Reasonably Equivalent Value.

120. On a motion to dismiss, the court should consider whether the complaint "contains sufficient facts to support a plausible belief that the debtor did not receive reasonably equivalent value in exchange for" the transfer of property or for the obligation incurred. *Angell v. Endcom, Inc. (In re Tanglewood Farms, Inc.)*, 487 B.R. 705, 709 (Bankr. E.D.N.C. 2013); *Beaman v. Barth (In re AmerLink, Ltd.)*, 2011 WL 1048848, at *3 (Bankr. E.D.N.C. Mar. 18, 2011) (observing that "[a]dequate pleadings under § 548(a)(1)(B) include . . . information concerning why the consideration was not equivalent in value."); *Angell*, 409 B.R. at 756 (dismissing a constructive fraudulent transfer claim because the trustee failed to identify "the consideration received by each transferor, information as to why the value of such consideration was less than the amount transferred, and facts supporting the debtors' insolvency at the time of the transfer").

121. The Bankruptcy Code does not define the term "reasonably equivalent value,"[106] leaving courts with discretion to consider all of the facts and circumstances surrounding the transaction. *See Cooper v. Ashley* Commc'ns *Inc. (In re Morris Commc'ns NC, Inc.)*, 914 F.2d 458, 466 (4th Cir. 1990) ("Section 548 provides no definition to guide the Court in the application

[106] Out of the State Statutes, only TUFTA defines "reasonable equivalent value." *See* TEX. BUS. & COM. CODE. § 24.004(d) ("[r]easonably equivalent value" includes without limitation, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's length transaction.").

of the term 'reasonably equivalent value.' Congress left to the courts the obligation of marking the scope and meaning of such term.").

122. Courts generally construe the term 'value' broadly for purposes of the Bankruptcy Code, and the mere "opportunity" to receive an economic benefit in the future constitutes "value." *Templeton v. O'Cheskey (In re Am. Hous. Found.)*, 785 F.3d 143, 163 (5th Cir. 2015); *Pension Transfer Corp. v. Beneficiaries Under the Third Amendment to Fruehauf Trailer Corp. Ret. Plan No. 003 (In re Fruehauf Trailer Corp.)*, 444 F.3d 203, 212 (3d Cir. 2006) ("We have interpreted 'value' to include any benefit, . . . whether direct or indirect . . . . [T]he mere opportunity to receive an economic benefit in the future constitutes 'value' under the Bankruptcy Code.").

123. The Fourth Circuit has emphasized that "[t]he focus is on the consideration received by the debtor, not on the value given by the transferee. The purpose of fraudulent transfer law is the preservation of the debtor's estate for the benefit of its unsecured creditors." *Harman v. First Am. Bank of Md. (In re Jeffrey Bigelow Design Grp., Inc.)*, 956 F.2d 479, 485 (4th Cir. 1992) (holding that "what constitutes reasonably equivalent value must be determined from the standpoint of the debtor's creditors. . . .") (citation omitted). As such, as long as the unsecured creditors are "no worse off" under the exchange of value, "no fraudulent transfer has occurred." *Id*.

124. The Amended Complaint fails to allege adequate facts to plausibly establish that DBMP did not receive "reasonably equivalent value" for incurring the asbestos liabilities. The Plaintiffs' conclusory allegations that DBMP did not receive reasonably equivalent value is

completely undercut by the Funding Agreement and the Account Receivable.[107] *See Angell*, 409 B.R. at 756 (holding that, on its own, the allegation that the debtor did not receive reasonably equivalent value for the transfer at issue does not meet the pleading requirements under *Iqbal*); *Cook,* 2019 WL 1325032, at *5 (same).

125. The Amended Complaint makes no factual demonstration plausibly showing that the Account Receivable and the Funding Agreement are not reasonably equivalent value. By providing access to the full value of New CT, the Funding Agreement entirely belies any allegation that a constructive fraudulent transfer has occurred. *LTL*, 637 B.R. at 423 (finding that a comparable funding agreement between the debtor and its affiliated entities was "unlikely" to impair the tort claimants from recovering on their liquidated and fixed claims). The Plaintiffs' unsupported statement that "the Funding Agreement is of little value to asbestos claimants" is not an allegation of fact that can support a plausible conclusion of a lack of reasonable equivalent value.[108] The Plaintiffs asserting that the Funding Agreement has no value does not make it so. Rather, the Plaintiffs have to allege specific facts allowing for the plausible conclusion that the Funding Agreement has no value. The Plaintiffs have not done and cannot do this.[109]

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[107] Apparently, this pleading approach is intentional as the Plaintiffs' constructive fraudulent transfer theory is based on the erroneous proposition that the initial Funding Agreement is legally deficient and has no value. Apr. 7, 2022 Hr'g Tr. 109:5-10 (Mr. Neier: "[a]n analysis as to whether or not the [initial] funding agreement was as good as an absolute, unconditional, without reservations or rights guarantee that had been written by the, the parent and affiliates of DBMP and it's clearly not that. That is the basis for our fraudulent transfer argument."). This legal conclusion, which this Court should not accept as true, is contrary to undisputed facts: (i) the existence of the Account Receivable; (ii) the existence of the Funding Agreement; and (iii) New CT's actions in honoring the Funding Agreement. Plaintiffs' legal conclusion also ignores the Second Funding Agreement which, as further evidence of the parties' intent, most assuredly is relevant in interpreting the intent of the initial Funding Agreement, including its scope, terms and provisions. *See e.g.*, *In re Foreclosure of Fortescue*, 75 N.C. App. 127, 130 (1985) ("Where a second contract involves the same subject matter as the first, but where no rescission has occurred, the contracts must be construed together in identifying the intent of the parties. . . .").

[108] *See* Am. Compl. ¶ 73. The Amended Complaint actually implies that the Funding Agreement has significant value: "[i]t is indisputable that, ***absent the contingent rights under Funding Agreement***, DBMP was rendered insolvent as a result of the Corporate Restructuring." Am. Compl. ¶ 73 (emphasis added).

[109] The Court should not consider Plaintiffs' legal conclusion regarding the Funding Agreement on a motion to dismiss. *E. Shore Mkts., Inc.*, 213 F.3d 175 at 180 ("While [the court] must take the facts in the light most favorable to the plaintiff, [the court] need not accept the legal conclusions drawn from the facts.").

126. The Funding Agreement's uncapped value ensures that DBMP has the same financial wherewithal as Old CT had to satisfy allowed asbestos claims. The Account Receivable, and the corresponding account payable on New CT's books and records, is a demonstrative acknowledgment of New CT's funding obligation. The Funding Agreement is a contractual obligation requiring New CT to fund without any corresponding repayment obligation: (i) the cost of the chapter 11 case, if and to the extent that cash distributions received by DBMP from its non-debtor subsidiary are insufficient to pay these costs and expenses; and (ii) a Section 524(g) trust established under a confirmed plan of reorganization, if and to the extent DBMP's assets are insufficient to provide the requisite trust funding. The Funding Agreement imposes no repayment obligation on DBMP. Funding will be available for a Section 524(g) trust, regardless of whether such plan of reorganization provides that New CT will receive the protection of Section 524(g) and regardless of whether New CT supports the plan.

127. DBMP's benefits from the Funding Agreement and Account Receivable, which constitute reasonably equivalent value. Because the Funding Agreement provides uncapped value to satisfy all of DBMP's allowed asbestos liabilities, the asbestos claimants are no worse off by reason of the Divisional Merger. *See In re Bestwall LLC*, 606 B.R. 243, 252 (Bankr. W.D.N.C. 2019) ("because of the [f]unding [a]greement, the [d]ebtor's ability to pay valid Bestwall [a]sbestos [c]laims after the 2017 [c]orporate [r]estructuring is identical to Old GP's ability to pay before the restructuring"); *LTL*, 637 B.R. at 424 (finding that tort claimants have not been placed in a "worse position" due to either a divisional merger under Texas law or the implementation of a funding agreement).

128. Accordingly, the Plaintiffs' constructive fraudulent transfer claims (Counts III and IV) should be dismissed with prejudice.

B. The Amended Complaint Fails To Adequately Plead Insolvency Or Unreasonably Small Capital.

129. The Plaintiffs have not adequately pled DBMP was rendered insolvent or undercapitalized as a result of the incurrence of the asbestos liabilities.

130. Courts in the Fourth Circuit apply the "balance sheet test" when assessing a debtor's insolvency. *Angell v. Meherrin Agricultural & Chemical Company (In re Tanglewood Farms, Inc.)* 2013 WL 1405729, at *5 (Bankr. E.D.N.C. Apr. 8, 2013). The "balance sheet test" requires a determination of whether the debtor was insolvent on the date of the transfer, which involves comparing the fair market value of the debtor's assets at the time of the transfer with the liabilities on the same date. *Id*. (citing *Ruby v. Ryan (In re Ryan)*, 472 B.R. 714, 727 (Bankr. E. D. Va. 2012).

131. The "[u]nreasonably small capital" test is met when the debtor was engaged in, or about to be engaged in, a business or transaction for which any property remaining with the debtor was unreasonably small capital." *Whitaker*, 298 B.R. at 74 (citing *Huennekens v. The Gilcom Corp. of Va. (In re SunSport, Inc.)*, 260 B.R. 88, 116 (Bankr. E.D. Va. 2000)). "[T]he test for unreasonably small 'capital' should include . . . all reasonably anticipated sources of operating funds, which may include new equity infusions, cash from operations, or cash from secured or unsecured loans over the relevant time period." *Moody v. Security Pacific Business Credit, Inc.*, 971 F.2d 1056, 1067 n.24 (3d Cir. 1992).

132. The Amended Complaint's allegations concerning DBMP's solvency are purely conclusory. For example, the Amended Complaint simply alleges the conclusion that DBMP was rendered insolvent by the Divisional Merger and/or the Divisional Merger left DBMP with an

unreasonably small capital in relation to its liabilities.[110] Fatally, the Amended Complaint pleads no facts comparing the fair value of DBMP's material assets with DBMP's liabilities at the time of the Divisional Merger.

133. Courts have routinely held that access to financing, ***let alone uncapped funding***, should be considered in analyzing whether the transferor was rendered insolvent or undercapitalized as a result of the transaction. *See e.g.*, *Burtch v. Opus, LLC (In re Opus East, LLC),* 528 B.R. 30, 55 (Bankr. D. Del. 2015) ("In determining whether a company has adequate capital, the Court must consider its assets, access to borrowing (both third party and affiliate), and equity."); *Adelphia Recovery Trust v. FPL Grp., Inc. (In re Adelphia Commc'ns Corp.)*, 652 Fed. Appx. 19, 21 (2d Cir. 2016) (same); *Whitaker*, 298 B.R at 74 (finding valuable real estate asset and a loan commitment supported finding that debtor would be able to pay debts as they became due and did not have unreasonably small assets).

134. The Plaintiffs' threadbare allegations—which simply parrot the legal standard—fall far short of the pleading burden. *See e.g.*, *Thimbler, Inc. v. Unique Sols. Design, Ltd.*, No. 5:12-CV-695-BR, 2013 WL 4854514, at *8 (E.D.N.C. Sept. 11, 2013) (dismissing fraudulent transfer claims where plaintiff repeated statutory language and failed to plead any facts regarding the defendant's financial condition); *Global Link Liquidating Trust v. Avantel, S.A. (In re Global Link Telecom Corp.)*, 327 B.R. 711, 718 (Bankr. D. Del. 2005) (same); *Marwil v. Oncale (In re Life Fund 5.1 LLC)*, No. 10-A-42, 2010 WL 2650024, at *7 (Bankr. N.D. Ill. June 30, 2010) ("[b]ecause the complaint alleges no facts suggesting insolvency, the claims . . . based on insolvency will be dismissed").

[110] *See* Am. Compl. ¶¶ 6, 72, 73, 107, 114, 141, 151.

135. Accordingly, the constructive fraudulent transfer claims (Count III and IV) should be dismissed with prejudice.

C. The Amended Complaint Fails To Adequately Plead That DBMP Intended Or Believed That It Would Incur Debts Beyond Its Ability To Pay As They Matured.

136. The Amended Complaint makes only conclusory allegations that DBMP believed or reasonably should have believed that it would incur debts beyond its ability to pay as the debts became due.[111]

137. The Funding Agreement contradicts any allegation that DBMP believed it would incur debts beyond its ability to pay as the debts became due. The *Bestwall* and *LTL* decisions are instructive. In *LTL* and *Bestwall*, both Courts observed that the funding agreements provided the debtors with an ability to satisfy present and future asbestos claims identical to their pre-divisional merger capacity. *See Bestwall*, 606 B.R. at 252 ("because of the [f]unding [a]greement, the [d]ebtor's ability to pay valid Bestwall [a]sbestos [c]laims after the 2017 [c]orporate [r]estructuring is ***identical*** to Old GP's ability to pay before the restructuring") (emphasis added); *LTL*, 637 B.R., at 423 ("under the Funding Agreement, all creditors, including talc claimants, maintain the ability to enforce any liquidated and fixed claims against LTL, with the added benefit of having both J&J and New JJCI backstop such obligations . . . Thus, as a result of the 2021 Corporate Restructuring, [d]ebtor would have the funding available to satisfy present and future claims against Old JJCI.").

138. The Corporate Restructuring did not alter DBMP's ability to satisfy its obligations as they became due. As a result, the constructive fraudulent transfer claims (Count III and IV) should be dismissed with prejudice.

[111] *See e.g.*, Am. Compl. ¶¶ 6, 107, 113, 127, 141, 149, 150, 151.

IV. INTENTIONAL FRAUDULENT TRANSFER AND CONSTRUCTIVE FRAUDULENT TRANSFER CLAIMS DO NOT PRECIPITATE A GENERAL DAMAGE RECOVERY.

139. Assuming *arguendo* that the Plaintiffs have appropriately pled either an intentional or constructive fraudulent transfer clam, those claims do not give rise to a claim for general damages, but only recovery of the property transferred (or its value) or the avoidance of the obligation incurred.

140. The "appropriate remedy" for a fraudulent transfer under the Bankruptcy Code is "the recovery of the property transferred" or "the value of such property." *In re Hanckel*, 512 B.R. 539, 551–52 (Bankr. D.S.C. 2014), *order aff'd, appeal dismissed sub nom*. *In re Richardson Miles Hanckel, III*, 2:14-CV-2898, 2015 WL 7251714, at *1 (D.S.C. Mar. 10, 2015); *Official Committee of Unsecured Creditors of Fedders North America, Inc. v. Goldman Sachs Credit Partners L.P. (In re Fedders N.A., Inc.)*, 405 B.R. 527, 547 (Bankr. D. Del. 2009). Similarly, under the UFTA and UVTA, "[t]he proper remedy in a fraudulent conveyance claim is to rescind, or set aside, the allegedly fraudulent transfer, and cause the transferee to return the transferred property to the transferor." *Grace v. Bank Leumi Tr. Co. of NY*, 443 F.3d 180, 189 (2d Cir. 2006) (finding that the purpose of a fraudulent conveyance action under the UFTA was to permit the debtor to recover the property transferred); *In re Amp'd Mobile, Inc.*, 404 B.R. 118, 125 (Bankr. D. Del. 2009) (finding same under Delaware law).

141. The Amended Complaint's prayer for relief is to avoid the Corporate Restructuring in its entirety, to award attorneys' fees and costs, and punitive damages with post-judgment interest for alleged malicious conduct.[112] Avoiding the Corporate Restructuring is not a remedy for a fraudulent transfer claim. Without a remedy, the action must be dismissed. *See e.g.*, *Gordon v.*

[112] Am. Compl. ¶¶ A-C.

Shenbanjo (In re Taylor), 16-69706-PMB, 2019 WL 1028508, at *3-5 (Bankr. N.D. Ga. Mar. 1, 2019) (holding that the complaint did not state a plausible claim for relief where the plaintiff, *inter alia*, failed to identify the transfer of the debtor to be avoided and sought a remedy that the court could not fashion for an avoidance of an incurred obligation); *Gierum v. Glick (In re Glick)*, 568 B.R. 634, 661–62 (Bankr. N.D. Ill. 2017) (dismissing reverse veil piercing claims where the remedy requested in the complaint was, among other things, not recognized under applicable state law).

142. Punitive damages are also an improper remedy for a fraudulent transfer action because it goes against the purpose of fraudulent transfer law which is remedial rather than punitive. *See Tronox, Inc. v. Anadarko Petroleum Corp. (In re Tronox* Inc.*)*, 464 B.R. 606, 618 (Bankr. S.D.N.Y. 2012) ("Beyond the specific limitations in § 550, courts have recognized that the purpose of fraudulent conveyance law is remedial rather than punitive."); *In re Keeley and Grabanski Land Partn.*, 531 B.R. 771, 777 (Bankr. App. 8th Cir. 2015), *aff'd*, 832 F.3d 853 (8th Cir. 2016) (same); *ASARCO*, 396 B.R. at 422 (noting that "the Bankruptcy Code does not provide for punitive damages").

143. To allow the recovery of punitive damages in fraudulent transfer actions would lead to absurd results. Indeed, courts have found that position is "flatly wrong." *See In re Canyon Systems Corp.*, 343 B.R. 615, 656 (Bankr. S.D. Ohio 2006); *see also Kleven v. Stewart (In re Myers)*, 320 B.R. 667, 669 (Bankr. N.D. Ind. 2005). Accordingly, a damages award would expand remedies beyond the scope of Section 550 "in a way that would circumvent or undermine the specific remedy legislated by Congress for the avoidance of a fraudulent transfer." *Tronox*, 429 B.R. at 103.

144. The Plaintiffs assert that awarding exemplary damages for an avoidance action is permitted under Texas and Pennsylvania law, but disregard long standing contrary authority under

the Bankruptcy Code.[113] For example, in *Sherman v. FSC Realty LLC (In re Brentwood Lexford Partners, LLC)*, the court awarded the recovery of transfers totaling $627,000, but denied recovery of exemplary damages under Texas law because "Section 550 does not provide for the recovery of exemplary damages." *Sherman v. FSC Realty LLC (In re Brentwood Lexford Partners, LLC),* 292 B.R. 255, 275 (Bankr. N.D. Tex. 2003).

145. The remedy for avoiding obligations under Section 548 is distinct from that of avoiding a transfer. Section 550 does not mention obligations.[114] If successful in avoiding an obligation, the proper remedy is rendering that obligation unenforceable; "there is nothing to return [to the estate] and § 550 affords no remedy." *In re Asia Glob. Crossing, Ltd.*, 333 B.R. 199, 202 (Bankr. S.D.N.Y. 2005); *see also Geltzer*, 450 B.R. 414 at 429 (noting that if an obligation is avoided, it reduces "dollar for dollar the claims that the estate must pay" but there is nothing to preserve or bring back into the estate).

146. The Plaintiffs do not include avoidance of any obligations in their prayer for relief.[115] If the Amended Complaint is read to seek avoidance of DBMP's obligations under the Corporate Restructuring, the Plaintiffs are pleading a claim for avoidance of their own claims against DBMP. That cannot be the case, and therefore Plaintiffs seek a remedy that does not and cannot exist.

147. Accordingly, if the Court cannot award a remedy, the action must be dismissed.

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[113] Am. Compl. ¶¶ 131, 133.

[114] "Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544 [or] . . . 548 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property . . . . " 11 U.S.C. § 550(a).

[115] *See* Am. Compl. ¶¶ 107, 117, 127, 142, 145, 152, A-C.

V. PLAINTIFFS DO NOT SUFFICIENTLY PLEAD AN ALTER EGO OR VEIL PIERCING CLAIM.

148. The Amended Complaint's alter ego allegations and fraudulent transfer claims are primarily based on the same operative facts. As such, the heightened pleading standard of Rule 9(b) should apply to the Plaintiffs' alter ego allegations. *See e.g.*, *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 Civ. 8472 (JFK), 2008 WL 2594819, at *8 (S.D.N.Y. June 26, 2008) (applying Rule 9(b) to non-fraud claims that "indisputably [were] based on plaintiffs' allegations of Defendant's fraudulent conduct"); *Kitchen v. Farrell Log Structures LLC*, No. 1:07CV219, 2008 WL 11508995, at *2 (W.D.N.C. Nov. 13, 2008) (applying Rule 9(b) to allegations of fraudulent conduct in the context of an alter ego claim).

149. The Plaintiffs allege that DBMP and Defendants are alter egos, and that Defendants should be liable for the intentional fraudulent transfer claims asserted in the Amended Complaint.[116] However, as explained in Article IV hereof, the remedy for an intentional fraudulent transfer is avoiding the transfer of the property and recovering the property transferred or its value from the transferee, and the remedy for incurring a debt is to avoid the debt. Even if the Defendants were the alter ego of DBMP (which they are not),[117] DBMP is not the transferee, or obligee, as to which a remedy would issue on account of the alleged fraudulent transfers. As such, the proposition that Defendants are the alter ego of DBMP has no bearing on the Amended Complaint for at least four reasons.

150. **First,** a claim for alter ego must be tethered to a claim that imposes liability on the alleged dominated entity. *Window World of Baton Rouge, LLC v. Window World, Inc.,* No. 15 CVS 1, 2017 WL 2979142, at *5 (N.C. Super. July 12, 2017) ("evidence of domination and control

[116] Am. Compl. ¶¶ 108-117.

[117] The FCR previously admitted that New CT is not an alter ego of DBMP: "New CT is not a continuation of DBMP's business, nor is it 'one and the same' as DBMP." FCR TBOC Supplement, at p. 7.

alone is insufficient; there must also be a wrong—'an underlying legal claim [**against the dominated entity**] to which liability may attach[,]'") (emphasis added) (quoting *Green v. Freeman*, 367 N.C. 136, 146 (2013)).

151. Here, the Amended Complaint asserts no claim against DBMP. Accordingly, there is no legal basis as alleged in the Amended Complaint to impose alter ego liability. *See Green*, 367 N.C. at 145 ("The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form."); *see also Butler v. Enhanced Equity Fund II, LP (In re American Ambulette & Ambulance Service, Inc.)*, 560 B.R. 256, 271 (Bankr. E.D.N.C. 2016) (claim for veil piercing as to defendants who were also defendants on fraudulent transfer claims, "is not the type of situation to which a veil piercing claim was meant to apply, nor is it necessary in this case.").

152. **Second**, the allegations in the Amended Complaint fall far short of what is necessary to plead a plausible basis to pierce the corporate veil. Piercing the corporate veil is an extraordinary remedy, "to be exercised reluctantly and cautiously." *In re Cty. Green Ltd. P'ship*, 604 F.2d 289, 292 (4th Cir. 1979) (citing *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.,* 540 F.2d 681, 683 (4th Cir. 1976).[118] North Carolina courts will "extend liability for

[118] Under North Carolina choice of law principles, this court should apply the law of the state of incorporation of the entity whose veil is to be pierced. *Butler*, 560 B.R. at 269–70. Although "the choice of law rule applicable to piercing the corporate veil is an 'unresolved' issue," it appears that the law of the state of incorporation should apply to a veil piercing claim. *Id*. *See Robinson v. Brooks*, 2020 U.S. Dist. LEXIS 258121, at *18 (M.D.N.C. Oct. 30, 2020) ("[I]f the North Carolina Supreme Court were faced with a choice of law question for piercing the corporate veil, it would adopt the internal affairs doctrine and apply the law of the state of incorporation."). Here, Plaintiffs seek to pierce the corporate veil of DBMP—a North Carolina limited liability company. Nevertheless, the analysis of whether to pierce the corporate veil under Texas and Delaware law is substantially similar, and does not change the result. *See Burtch,* 528 B.R. 30 at 57 ("Under Delaware law, to prevail on an alter ego claim the Trustee must show that [the entities in question] operated as a single economic entity that resulted in an overall element of injustice or unfairness"); *Durham v. Accardi*, 587 S.W.3d 179, 184 (Tex. App. 2019) ("Alter ego veil piercing is appropriate (1) where a corporation is organized and operated as a mere tool or business conduit of another, (2) there is such 'unity between corporation and individual that the separateness of the corporation has ceased, and (3) holding only the corporation or the individual liable would result in injustice.").

corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 453 (1985) (citation omitted). Under North Carolina's instrumentality rule, the plaintiff must plead and prove three elements: (i) complete domination and control; (ii) such control was used to perpetrate a fraud or breach some other legal duty; and (iii) such control and breach proximately caused the injury or loss complained of. *Glenn*, 313 N.C. at 455 (citation omitted). Courts consider the following factors under the instrumentality test: (i) complete domination and control of the corporation such that it has no independent identity; (ii) inadequate capitalization; (iii) lack of compliance with corporate formalities; and (iv) excessive fragmentation. *Gen. Fid. Ins. Co. v. WFT, Inc.*, 269 N.C. App. 181, 189 (2020) (citing *Estate of Hurst v. Moorehead I, LLC*, 228 N.C. App. 571, 578 (2013)).

153. At best, Plaintiffs plead overlapping corporate governance structures which has long been held to be insufficient to establish alter ego or to pierce the corporate veil. *See Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999) ("One-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying an alter ego theory to pierce the corporate veil.") (citation and internal quotation marks omitted), *abrogated on other grounds* by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

154. Nor are any of the traditional factors that would support a veil piercing claim sufficiently alleged. Plaintiffs have failed to adequately plead inadequate capitalization for all of the reasons stated above in Article III.B. They also fail to adequately allege non-compliance with

corporate formalities,[119] excessive fragmentation,[120] or that the purported control was used to perpetrate a fraud or breach a legal duty.

155. **Third**, it is impossible to determine from the Amended Complaint which Defendant is alleged to exert improper domination and control over DBMP. The Amended Complaint is filled with conclusory allegations that the "Defendants" exerted control over DBMP, but does not identify which specific Defendant engaged in what specific acts of domination. These pleading deficiencies support dismissal of alter ego or piercing the veil claims against the Defendants. *See Gerber v. A&L Plastics Corp.*, 2021 WL 3616179, at *5 (D.N.J. Aug. 16, 2021) (dismissing veil piercing claim for failure to identify "which entity or individual is primarily liable for the conduct underlying each claim.").

156. **Fourth**, the Amended Complaint lacks allegations sufficient to impose horizontal or indirect veil piercing. Each Defendant has a different corporate relationship with DBMP. New CT (as sister of DBMP) and SGC (as indirect parent of DBMP) could only be reached via alter ego and veil piercing theories if Plaintiffs allege that the intermediary veils should be pierced. *Capmark Financial Grp. Inc. v. Goldman Sachs Credit Partners L.P.*, 491 B.R. 335, 349 (S.D.N.Y. 2013) ("the veils separating each entity from the shared corporate parent must be pierced.") (citations omitted); *see also Dill v. Rembrandt Grp., Inc.*, 474 P.3d 176, 185 (Col. App. 2020) (horizontal veil piercing is appropriate only if "(1) the entities share a parent or common owners in the ownership chain and (2) the veils separating each entity from the parent or common owners are first pierced to find that each sister entity is the alter ego of its owners.").

[119] *See In re ES2 Sports & Leisure, LLC*, 544 B.R. 833, 842 (Bankr. M.D. N.C. 2015) (failure to comply with corporate formalities included failure to file annual report with the state, failure to maintain current/active registered agent, and failure to maintain current/active business address with Secretary of State).

[120] Excessive fragmentation "implies division which ***does not serve a substantial legitimate business purpose***." *Insight Health Corp. v. Marquis Diagnostic Imaging of N. Carolina, LLC*, 14 CVS 1783, 2018 WL 2728782, at *5 (N.C. Super. June 5, 2018) (emphasis added).

157. The Amended Complaint is devoid of allegations sufficient to establish that: (i) CT Holding, the direct parent of DBMP, is the alter ego of DBMP or DBMP's veil should be pierced as to CT Holding; (ii) New CT, a sister corporation of DBMP, is the alter ego of CT Holding or New CT's veil should be pierced as to CT Holding; or (iii) SGC, the direct parent of CT Holding, is the alter ego of CT Holding or CT Holding's veil should be pierced as to SGC. Indeed, no factual allegations of dominion and control are alleged in the Amended Complaint as to these specific and varying corporate relationships. The general and conclusory nature of the Amended Complaint does not show a plausible basis to infer the requisite dominion and control over DBMP among the horizontal and vertical corporate relationships.

158. Therefore, the Amended Complaint fails to establish any basis for finding that the Defendants are the alter ego of DBMP given their indirect corporate relationship with DBMP.

CONCLUSION

For the reasons set forth herein, the Amended Complaint fails to state a claim upon which relief can be granted and the Motion should be granted, dismissing the Amended Complaint in its entirety with prejudice.

Dated: May 6, 2022

Respectfully submitted,

/s/ John R. Miller, Jr.

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Attorneys for the Defendants

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	:	Chapter 11
DBMP LLC,[1] Debtor.	:	Case No. 20-30080 (JCW)
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS, and SANDER L. ESSERMAN, in his capacity as Legal Representative for Future Asbestos Claimants, each on behalf of the estate of DBMP LLC,	:	Adv. Pro. No. 22-03000
Plaintiffs,	:	
v.	:	
CERTAINTEED LLC, CERTAINTEED HOLDING CORPORATION, and SAINT-GOBAIN CORPORATION,	:	
Defendants.	:	

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that CertainTeed LLC, CertainTeed Holding Corporation and Saint-Gobain Corporation has filed Defendants' Motion to Dismiss Amended Complaint and Brief in Support (the "Motion").

If a copy of the Motion is not included with this Notice, a copy may be viewed at the Court's website, *www.ncwb.uscourts.gov* under the Debtor's name and case number or you may request in writing a copy from the undersigned party.

[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.

YOUR RIGHTS MAY BE AFFECTED. YOU SHOULD READ THESE PAPERS CAREFULLY AND DISCUSS THEM WITH YOUR ATTORNEY, IF YOU HAVE ONE IN THIS BANKRUPTCY CASE. (IF YOU DO NOT HAVE AN ATTORNEY, YOU MAY WISH TO CONSULT ONE.)

IF YOU DO NOT WANT THE COURT TO GRANT THE RELIEF REQUESTED IN THE MOTION, OR IF YOU WANT THE COURT TO CONSIDER YOUR VIEWS ON THE MOTION, THEN ON OR BEFORE FRIDAY, JUNE 3, 2022 YOU MUST:

(1) A. File with the Bankruptcy Court a written objection at:

Clerk, United States Bankruptcy Court
401 W. Trade Street
Charlotte, North Carolina 28202

B. If you have your attorney file a written objection then the objection should be filed with the Bankruptcy Court by electronic means through the Court's website, *www.ncwb.uscourts.gov* under the jointly administered name and case number shown above.

(2) You must also serve a copy of such request to the parties shown below and any other parties as required by law or orders of the Court on or before the date described above:

John R. Miller, Jr.
Rayburn Cooper & Durham, P.A.
1200 Carillon, 227 W. Trade Street
Charlotte, NC 28202

Office of Bankruptcy Administrator
402 W. Trade St., Suite 200
Charlotte, NC 28202

(3) Attend the hearing scheduled for June 21, 2022 at 9:30 a.m. EDT or as soon thereafter as the matter can be heard in the Bankruptcy Courtroom 2B, 401 West Trade Street, Charlotte, North Carolina. You should attend this hearing if you file an objection.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought and may enter an Order granting the relief requested. No further notice of that hearing will be given.

This the 6th day of May, 2022.

RAYBURN COOPER & DURHAM, P.A.

/s/ John R. Miller, Jr.

John R. Miller, Jr. (NC 28689)
RAYBURN COOPER & DURHAM, P.A.
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Michael H. Goldstein (admitted *pro hac vice*)
Howard S. Steel (admitted *pro hac vice*)
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Attorneys for the Defendants