Docket #0017 Date Filed: 12/20/2021

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re ALDRICH PUMP LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 20-30608 (JCW) (Jointly Administered)
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS Plaintiff, v. ALDRICH PUMP LLC, MURRAY BOILER LLC, TRANE TECHNOLOGIES COMPANY LLC, and TRANE U.S. INC. Defendants.	Adv. Pro. No. 21-03029 (JCW)

DEBTORS' MOTION TO DISMISS ADVERSARY COMPLAINT
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to the above-captioned adversary proceeding (the "Adversary Proceeding") pursuant to Federal Rule of Bankruptcy Procedure 7012(b), the above-captioned debtors and debtors in possession (the "Debtors") in the underlying chapter 11 cases, and defendants in the Adversary Proceeding, respectfully move this Court to dismiss the *Adversary Complaint* initiating this Adversary

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Aldrich Pump LLC ("Aldrich") (2290) and Murray Boiler LLC ("Murray") (0679). The Debtors' address is 800-E Beaty Street, Davidson, North Carolina 28036.

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Proceeding [Adv. Dkt. 1] (the "Complaint") filed by the official committee of asbestos personal injury claimants (the "ACC").[2]

INTRODUCTION

1. By its Complaint, the ACC seeks to substantively consolidate (a) Aldrich with non-debtor Trane Technologies Company LLC ("New Trane Technologies") and (b) Murray with non-debtor Trane U.S. Inc. ("New Trane" and, together with New Trane Technologies, the "Non-Debtors"). The law, both within this Circuit, and around the country, provides that substantive consolidation is a highly disfavored remedy to be used sparingly and only in the most extreme or extraordinary situations. This is particularly the case when a movant seeks to consolidate debtor and non-debtor entities (if such relief is ever available), as the Complaint requests here.

2. Far from demonstrating such an extraordinary situation, the ACC's Complaint fails to allege facts sufficient, or indeed any facts, to state a claim for substantive consolidation. This is no surprise, as this case bears no resemblance to cases where substantive consolidation has been sought, much less ordered. Instead, the Complaint merely petitions the Court to exercise some sort of "roving equity," under the purported guise of substantive consolidation, to invalidate a valid state law transaction, the May 2020 corporate restructuring (the "Corporate Restructuring"), because the Debtors' and Non-Debtors' assets and liabilities were combined in a single legal entity prior to that valid transaction. See Compl. ¶ 51. The ACC provides absolutely no authority for its position, which would allow a court to simply

[2] This Motion also responds, to the extent necessary, to the ACC's *Motion for Substantive Consolidation of Debtors' Estates with Certain Nondebtor Affiliates or, Alternatively, to Reallocate Debtors' Asbestos Liabilities to Those Affiliates* [Dkt. 851; Adv. Dkt. 2] (the "Substantive Consolidation Motion").

invalidate, through substantive consolidation, every legal divisional merger, spinoff, or similar corporate transaction that predated a bankruptcy case.

3. Given the ACC's unprecedented effort to utilize substantive consolidation in this way, it is hardly surprising that the Complaint lacks any allegations satisfying the elements courts in this Circuit and around the country have identified as necessary to state a claim. There are no allegations that the Debtors' and Non-Debtors' creditors dealt with these separate entities as a single economic unit or otherwise did not rely on their separate identity in extending credit. Instead, the Complaint merely recites facts that courts repeatedly have held do not state a claim for substantive consolidation, or facts that actually demonstrate the existence of separate entities, and thus support denying a request for substantive consolidation.

4. When boiled down to its essence, the Complaint is nothing more than yet another attempt by the ACC to attempt to dismiss these chapter 11 cases, without actually filing a motion to dismiss, by attempting to "undo" the Corporate Restructuring. But this is not a proper use of the extraordinary remedy of substantive consolidation. This Court should not permit the ACC to do indirectly that which it is unable to accomplish directly.[3] The Complaint fails to state a claim for substantive consolidation, and this Adversary Proceeding should therefore be dismissed.

LEGAL STANDARD

5. Where a plaintiff's "allegations, even if taken as true, fail to satisfy the elements" for the requested relief, "[t]he remedy for such failure under [Federal] Rule 12(b)(6) is

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[3] See *Findings of Fact and Conclusions of Law Regarding Order: (I) Declaring That The Automatic Stay Applies to Certain Actions Against Non-Debtors, (II) Preliminary Enjoining Such Actions, and (III) Granting in Part Denying in Part the Motion to Compel*, Adv. No. 20-03041 [Adv. Dkt. 308] at 7 (the "Injunction Findings and Conclusions") (An attempt to effectuate an indirect dismissal is "problematic because (1) there is no pending motion to dismiss, and (2) as Judge Beyer's recent Bestwall decision reflects, due to the Fourth Circuit's exacting Carolin standard, dismissal of a chapter 11 case – even one potentially filed in bad faith – is difficult to obtain in the early stages of the bankruptcy case.").

dismissal" of the complaint. Dunlap v. Educ. Credit Mgmt. Corp. and College Found., Inc. (In re Dunlap), 2016 WL 93805, at *1 (Bankr. W.D.N.C. Jan. 6, 2016).

6. When evaluating the sufficiency of a complaint to survive a Federal Rule 12(b)(6) challenge, courts in this District employ a two-step process: "'First, a court should separate the factual and legal elements of a claim, accepting the facts and disregarding the legal conclusions,' and second, 'a court should determine whether the remaining well-pled facts sufficiently show that the plaintiff has a plausible claim for relief.'" The Finley Grp. v. Roselli (In re RedF Mktg., LLC), 589 B.R. 534, 540 (Bankr. W.D.N.C. 2018) (quoting Holmes v. City of Wilmington, 79 F. Supp. 3d 497, 505 (D. Del. 2015)).

7. To survive a challenge asserted under Federal Rule 12(b)(6), "the factual allegations must 'be enough to raise a right to relief above the speculative level[.]'" Field v. Berman, 526 F. App'x 287, 289 (4th Cir. 2013) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The Court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." El-Bay v. Sycamore Grove HOA, Inc. (In re El-Bey), 2014 WL 2987380, at *2 (Bankr. W.D.N.C. July 1, 2014) (internal quotations omitted).

ARGUMENT

8. Substantive consolidation is not expressly authorized by the Bankruptcy Code and instead "is a product of judicial gloss." In re Augie/Restivo Baking Co., Ltd., 860 F.2d 515, 518 (2d Cir. 1988). Substantive consolidation, even among *debtor* entities in bankruptcy, is considered "extraordinary relief" that is "reserved for the rare situation." In re Eagle Creek Subdivision, LLC, 407 B.R. 206 (Bankr. E.D.N.C. 2008) (rejecting substantive consolidation). In particular, "because substantive consolidation is extreme . . . and imprecise, this 'rough justice' remedy should be . . . one of last resort . . . ." In re Owens Corning, 419 F.3d 195, 208-09, 211

(3d Cir. 2005) ("[T]here appears nearly unanimous consensus that [substantive consolidation] is a remedy to be used 'sparingly.'").[4]

9. In these cases, the Debtors are fully solvent. As such, substantive consolidation is nonsensical, since all of the Debtors' creditors will be paid in full without substantive consolidation. In fact, the Debtors are not aware of any case in which a court has granted substantive consolidation where the debtor was solvent. Nor would there be any reason to do so. For that reason alone, the Complaint should be dismissed. It also should be dismissed because it fails to allege any facts that support the remedy of substantive consolidation even ignoring the Debtors' solvency.

I. COUNT I SHOULD BE DISMISSED BECAUSE IT FAILS TO PLEAD FACTS NECESSARY TO STATE A CLAIM.

A. The Augie/Restivo Test.

10. The Fourth Circuit has not adopted a specific test for determining when substantive consolidation may be appropriate, but lower courts within the Fourth Circuit that have addressed substantive consolidation have used the test set forth by the Second Circuit in Augie/Restivo.[5]

11. Under the Augie/Restivo test, two entities may be consolidated where: (a) "creditors dealt with the entities as a single economic unit and did not rely on their separate

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4 See, e.g., In re Convalescent Ctr. of Roanoke Rapids, Inc., 2006 WL 3377055, at *2 (Bankr. E.D.N.C. Aug. 7, 2006) (substantive consolidation of debtors "should be used sparingly"); In re Fas Mart Convenience Stores, Inc., 320 B.R. 587, 594 (Bankr. E.D. Va. 2004) (same); In re Augie/Restivo, 860 F.2d at 518 ("Because of the dangers in forcing creditors of one debtor to share on a parity with creditors of a less solvent debtor, we have stressed that substantive consolidation 'is no mere instrument of procedural convenience . . . but a measure vitally affecting substantive rights,' to 'be used sparingly.'") (citations omitted).

5 See, e.g., In re City Loft Hotel, LLC, 465 B.R. 428, 433 (Bankr. D.S.C. 2012) (noting court's previous adoption of Augie/Restivo test); In re Tanglewood Farms, Inc. of Elizabeth City, 2011 WL 672060, at *2 (Bankr. E.D.N.C. Feb. 18, 2011) (noting with approval and adhering to court's previous adoption of Augie/Restivo test); In re Fas Mart, 320 B.R. at 594 (Eastern District of Virginia bankruptcy court applying the Augie/Restivo test).

identity in extending credit" or (b) "the affairs of the debtors are so entangled that consolidation will benefit all creditors." See Augie/Restivo, 860 F.2d at 518. Here, the ACC only seeks to plead its claim under the first prong of Augie/Restivo, that the Debtors' and Non-Debtors' creditors dealt with them as a single economic entity and did not rely on their separate existence in extending credit. See Sub. Con. Mot. ¶ 47. The Complaint fails to allege facts that would state a claim under this prong.

12. As an initial matter, the Complaint does not allege that any asbestos creditors "extended credit" to either the Debtors or the Non-Debtors. The purpose of the first prong of the Augie/Restivo test is to allow creditors who extended credit based on the justified belief that what were two entities actually was one to access the assets of both entities. See Owens Corning, 419 F.3d at 211 n. 19 (explaining that the "creditor reliance on disregard of corporate separateness" prong of the Owens Corning test "is meant to protect in bankruptcy the prepetition expectation of those creditors. The usual scenario is that creditors have been misled by debtors' actions (regardless whether those actions were intentional or inadvertent) and thus perceived incorrectly (and relied on this perception) that multiple entities were one."); see also In re Howland, 674 Fed.Appx 482, 489 (6th Cir. Jan. 3, 2017) ("While this allegation may show that the debtors and [non-debtor] acted as a single entity at times, it fails to allege any reliance by creditors, a necessary component to a substantive consolidation claim based on prepetition conduct.") citing Owens Corning, 419 F.3d at 211 (requiring that "their creditors relied on the breakdown of entity borders").[6]

[6] The Debtors are not aware of any cases where tort creditors have succeeded on a substantive consolidation claim based on the first prong of the Augie/Restivo test. This does not mean, however, that tort creditors can never satisfy the Augie/Restivo test. Instead, they would have to satisfy the second prong of the test: that the assets and liabilities of the entities sought to be consolidated are so entangled that substantive consolidated is warranted. However, here the ACC does not allege, because it cannot, that the second prong of the Augie/Restivo test applies.

13. Even putting aside this fatal flaw, the Complaint does not even attempt to allege facts to satisfy the remaining requirements of the first prong of the Augie/Restivo test. The first three sections of the Complaint merely describe:

(i) the history of asbestos litigation against the Debtors' predecessors (Section I);

(ii) the history of "Project Omega" (Section II); and

(iii) the implementation of the Corporate Restructuring (Section III).

See Compl. ¶¶ 21-32. None of these sections remotely touch on any alleged operations of the Debtors and the Non-Debtors as a "single economic unit."

14. Section IV, which recites the various agreements entered into between the Debtors and the Non-Debtors as part of the Corporate Restructuring (see Compl. ¶¶ 33-44), also fails to allege operations as a single economic unit, and actually demonstrates that the Debtors and Non-Debtors acted as separate legal entities at all times at and after the Corporate Restructuring. See, e.g., Howland, 674 F.App'x at 489 (dismissing substantive consolidation complaint where allegations that debtors had personally guaranteed loan and assigned farm to their own LLC indicated that "the parties held themselves out to the world as separate entities").

15. Finally, Section V, which merely asserts that the Debtors and Non-Debtors have overlapping officers, directors, and employees, does not demonstrate any commingling of assets, records, or otherwise, nor does it demonstrate that creditors dealt with the entities as a "single economic unit," and, thus, is insufficient to state a claim for the reasons described in cases such as In re American Camshaft Specialties, Inc., 410 B.R. 765, 787-89 (Bankr. E.D. Mich. 2009) and In re Cordia Commc'ns Corp., 2012 WL 379776, at *2 (Bankr. M.D. Fla. Feb. 2, 2012) cited and discussed below (see ¶¶ 21-22, 37, *infra*).

16. Ultimately, in the ACC's 23-page Complaint, that leaves two short allegations that even remotely speak to the question of whether or not the Debtors and

Non-Debtors acted as a "single economic entity" for purposes of the first prong of Augie/Restivo. Neither approaches stating a claim.

17. First, Paragraph 51 of the Complaint alleges:

> Before the Corporate Restructuring, which occurred only 49 days before the Petition Date, Aldrich and TTC were one legal entity—namely, Ingersoll-Rand. And Murray and "new" Trane were also one entity: "old" Trane. Neither Aldrich nor Murray existed.

See Compl. ¶51. In the Substantive Consolidation Motion, this is the **sole** basis the ACC uses to argue for substantive consolidation under the Augie/Restivo test. See Sub. Con. Mot. ¶ 47 (the sole paragraph in a 33-page motion where the ACC articulates its purported basis for substantive consolidation under the Augie/Restivo test). The gravamen of the ACC's Complaint, therefore, is that because the assets and liabilities of the Debtors and the Non-Debtors prior to the Corporate Restructuring were in the same legal entities, this Court should order substantive consolidation to "undo the Corporate Restructuring" and recreate those now dissolved legal entities. See Compl. ¶54.

18. There is absolutely no legal authority that supports the ACC's effort to utilize substantive consolidation in this way. While the ACC may not like the divisional mergers, the doctrine of substantive consolidation does not permit the Court to simply invalidate a valid state law transaction for that reason. Otherwise, substantive consolidation could be used to invalidate every divisional merger, spinoff, or similar corporate transaction that predated a bankruptcy case. The doctrine of substantive consolidation does not grant a court "roving equity" to simply invalidate valid corporate transactions simply because claimants do not like their effects. See Village of Rosemont v. Jaffe, 482 F.3d 926, 935-36 (7th Cir. 2007) ("Although expansively phrased, section 105(a) affords bankruptcy courts considerably less discretion than first meets the eye, and in no sense constitutes a roving commission to do equity"); In re Dairy

Mart Convenience Stores, Inc., 351 F.3d 86, 92 (2d Cir. 2003) (section 105(a) "does not constitute a roving commission to do equity"); Switzer v. Wal-Mart Stores, Inc., 52 F.3d 1294, 1302 (5th Cir. 1995) (stressing powers under bankruptcy statute "[do] not . . . constitute a roving commission to do equity").

19. Second, Paragraph 52 of the Complaint alleges:

> Following the Corporate Restructuring, the Debtors and Nondebtor Affiliates remain a part of the same enterprise group. In addition, TTC is an indirect parent of Trane and Murray. All of the Debtors' employees are seconded from the enterprise group. Similarly, the Debtors each have officers who are employees of the enterprise group and a board of managers composed of current and former employees of the Debtors' affiliates. The Debtors have no business operations of their own. Rather, they are special purpose entities that were formed specifically for these bankruptcy cases, are under common ownership, and are reliant on services and financial support from the Nondebtor Affiliates.

See Compl. ¶52. Likewise, nothing in this paragraph sets forth allegations necessary to state a claim under the first prong of the Augie/Restivo test. In particular, these allegations merely set forth how the Debtors and Non-Debtor have conducted affairs among themselves, rather than whether the creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit. See American Camshaft, 410 B.R. at 789-90 (allegations simply focusing on how debtor and non-debtors conducted business among themselves, including intercompany loans and exchanging employees, "is insufficient to prove that the Debtors and the non-debtors engaged in pre-petition conduct that…led their creditors to treat them as one legal entity.").

20. Indeed, courts around the country have repeatedly dismissed substantive consolidation claims with far more extensive allegations that the entities' creditors dealt with the parties as a single economic unit than are alleged in the Complaint here. Some examples follow.

In re American Camshaft Specialties Inc., 410 B.R. 765 (Bankr. E.D. Mich. 2009)

21. In American Camshaft, a chapter 7 trustee sought to substantively consolidate debtor and non-debtor entities. American Camshaft, 410 B.R. at 768-69. The complaint contained at least 30 paragraphs of allegations, including: the debtors and non-debtors had the same board of directors and did not have separate board meetings; the debtors and non-debtors transferred employees from one company to another on an as-needed basis without a written contract; and the debtors and non-debtors presented themselves to the outside world as one large company on their website. Id. at 787-78.

22. Notwithstanding the length of the allegations made in the complaint, the court granted the defendants' motion to dismiss. The court held that "[t]he fact that the Debtors and the non-debtors conducted their boards of directors meeting together does not by itself prove a disregard of the separateness of the entities at such meetings," particularly where the complaint does not allege that the boards disregarded the separateness of the entities at the meetings and instead just alleged that the meeting were conducted jointly. Id. at 789. Further, the court found that the fact that the board considered the impact of the debtors' bankruptcy filing upon non-debtors does not show a disregard of separateness and "instead may arguably tend to show a recognition that the entities were separate and distinct." Id. In addition, the complaint's allegation that the entities were managed as though they were divisions of one large company is not evidence of disregard of corporate separateness, because the labels of "managed" and "divisions" are not probative of a disregard of separateness in a way that misled creditors. Id.

23. The court went on to note that there were no allegations that the debtors and non-debtors failed to keep separate bank accounts, did not accurately record financial transactions with creditors in separate books and records, or that the entities disseminated information to their creditors that misled them as to which entity was liable for which debt. Id.

The court stated that the closest the complaint came to alleging that creditors were misled is the statement that the debtors and non-debtors presented themselves as one large company on their website, but the court found that the allegation did not specify what information on the website might mislead creditors into thinking the entities were not separate, and further, there was no allegation that any creditors believed these entities were not separate or relied on them as one single entity. Id.

In re Verestar, Inc., 343 B.R. 444 (Bankr. S.D.N.Y 2006)

24. In Verestar, an unsecured creditors' committee sought substantive consolidation of the debtors with their non-debtor parent. Verestar, 343 B.R. at 454-55. The court held that the first prong of the Augie/Restivo test was insufficiently pled. Id. at 463. While the complaint had conclusory allegations that the parent and its officers and directors held themselves out to creditors as generally indistinguishable from the debtor and "bald" allegations that the debtor's creditors relied on the assets of the non-debtor, there was no specific allegation of creditor confusion or that the debtor's creditors extended credit on the basis of consolidated financial statements. Id. The court found that such "bald" and conclusory allegations were simply insufficient to state a claim for substantive consolidation, especially since substantive consolidation is "a two-way street, at least in theory, and there is no basis for a finding that the creditors of [the parent] should as a result of substantive consolidation suddenly find themselves creditors of [the debtor]." Id.

In re Howland, 674 Fed.App'x 482 (6th Cir. Jan. 3, 2017)

25. In Howland, a married couple (the Howlands) purchased a farm and later assigned their interest in the farm to their newly-created LLC. Howland, 674 Fed.App'x at 483. The LLC later sold the farm to a third party for roughly half the original purchase price, and executed an agreement where the Howlands and the LLC rented the property from the third party

at well below market. Id. at 483-84. The Howlands later filed for bankruptcy, and the chapter 7 trustee alleged that the transfer of the farm to the third party was a fraudulent transfer undertaken to evade the Howlands' creditors. Id. at 484. The bankruptcy court denied the trustee's motion to amend the complaint to include a substantive consolidation action against the debtors and the LLC, noting that that the complaint failed to adequately plead the claim. Id. The trustee appealed.

26. On appeal, the Sixth Circuit affirmed the lower court's ruling. The court found that the allegations in the complaint "fall far short of demonstrating a significant disregard of corporate separateness" such that creditors treated the entities as a single unit. Id. at 488-89. The complaint also failed "to allege any reliance by creditors" that the entities were one unit. Id. at 489. While the complaint alleged that creditors treated the debtors and LLC as a single entity, the court noted that "such a formulaic recitation, standing alone, will not do." Id. Missing from the complaint were any allegations that entities "distributed misleading financial information to creditors, failed to accurately record their transactions with creditors, or otherwise mislead creditors into believing that they were dealing with them as one indistinguishable entity." Id.

In re Raymond, 529 B.R. 455 (Bankr. D. Mass. 2015)

27. In Raymond, the chapter 7 trustee filed a complaint against the debtor's children and various debtor-controlled trusts and LLCs asserting claims for, among other things, fraudulent transfer. Raymond, 529 B.R. at 457-58. The trustee then moved to amend the complaint to add the remedy of substantive consolidation, and the defendants filed a motion to dismiss. Id. In the complaint, the trustee generally alleged that the debtor treated assets held by the trusts and LLCs as if they were his own. Id. at 459-60. In support of substantive consolidation, the trustee alleged that (a) the debtor controlled the trusts and LLCs, (b) the assets

of the debtor and these affiliated entities were "hopelessly intermingled," and (c) the debtor used the affiliated entities to deceive his creditors. Id. at 492.

28. The court ruled that the latter two allegations were "conclusory" and the complaint did not explain "how the assets of the limited liabilities companies and the [] trusts were 'hopelessly intermingled' or how the Debtor used the assets of the various entities to deceive creditors… ." Id. In addition, the court noted that the trustee did not allege that creditors relied upon the trusts or LLCs as a single unit. Id. Furthermore, the complaint contained no allegation that the entities failed to observe corporate formalities and did not specifically identify any creditors who were deceived by, or who relied upon, the LLCs as a single entity. Id. As a result of "not set[ting] forth anything other than conclusory allegations that are insufficient," the court held that the trustee had failed to state a plausible claim for substantive consolidation and granted the motion to dismiss accordingly. Id. at 492-93.[7]

29. Here, the ACC advances substantially fewer factual allegations in support of its claim than the cases described above, where courts have dismissed substantive consolidation complaints for failure to state a claim under Augie/Restivo. The ACC's Complaint should be similarly dismissed.

B. The Auto-Train Test.

30. The ACC also spends several paragraphs of its motion arguing that substantive consolidation is warranted under the Auto-Train test, based on the D.C. circuit's

[7] See also Helena Chem. Co. v. Circle Land & Cattle Corp. (In re Circle Land & Cattle Corp.), 213 B.R. 870 (Bankr. D. Kan. 1997) (granting motion to dismiss substantive consolidation action against debtor and non-debtor farmer where complaint did not allege that general creditors dealt with the entities as a single economic unit, failed to address consolidation's effect on general creditors, and failed to argue that consolidation was necessary to avoid a harm or realize any particular benefit); In re R.H.N. Realty Corp., 84 B.R. 356, 358 (Bankr. S.D.N.Y. 1988) (granting motion to dismiss substantive consolidation action against debtor and non-debtor partnership where, among other things, despite the interrelationship between the debtor and non-debtor entities, the trustee failed to show that the relationship was "so hopelessly obscured" that the parties' financial affairs could not be unscrambled).

holding in In re Auto-Train Corp., 810 F.2d 270 (D.C. Cir. 1987). See Sub. Con. Mot. ¶¶ 48-58. While courts in some other circuits have adopted the Auto-Train test, there is no authority within the Fourth Circuit suggesting that Auto-Train applies. Instead, all of the authority states that Augie/Restivo applies. See ¶ 10 *supra*.

31. Nevertheless, even under the Auto-Train test (which does not apply), the Complaint fails to state a claim. In order for substantive consolidation to be granted under the Auto-Train standard:

> The proponent must show not only a substantial identity between the entities to be consolidated, but also that consolidation is necessary to avoid some harm or to realize some benefit. At this point, a creditor may object on the grounds that it relied on the separate credit of one of the entities and that it will be prejudiced by the consolidation. If a creditor makes such a showing, the court may order consolidation only if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm.

Auto-Train, 810 F.2d at 276 (internal citations omitted).

32. "Substantial identity" between entities does not mean, for instance, merely that the entities are affiliated. Otherwise, substantive consolidation would apply to all related companies.

33. Instead, "substantial identity" requires much more, and is typically based on a finding that: the entities are alter egos of one another (see In re Morfesis, 270 B.R. 28, 32 (Bankr. D.N.J. 2001)), cause exists to pierce the corporate veil (see In re Bull, 528 B.R. 473, 496 (M.D. Fla. 2015)), or assets were commingled or corporate formalities were disregarded in such a way that the entities treated themselves as one entity (see, e.g., Cordia Commc'ns, 2012 WL 379776, at *2). This analysis is similar to the "entanglement" analysis under the second prong of the Augie/Restivo test, which is notable since the ACC has not even moved for substantive consolidation under that prong. Compare Cordia Commc'ns, 2012 WL 379776, at *2 (finding

that substantial identity under Auto-Train was not sufficiently pled where complaint did not allege facts demonstrating that defendants disregarded corporate formalities or commingled assets) with Augie/Restivo, 860 F.2d at 519 (finding that entanglement prong involves cases where "there has been a commingling of two firms' assets and business functions.").

34. Courts have held that there is no substantial identity under the Auto-Train test where the entities maintained separate books, records, and accounts. For instance, the court in In re Bull found that there was no substantial identity where "[a]though the Debtor, David Bull, is its sole shareholder and controls its decisions, BCI [a non-debtor closely-held corporation] has maintained its separate corporate identity since its inception." Bull, 528 B.R. at 498. In addition, the non-debtor maintained separate bank accounts from the debtor, incurred debts to third parties that were not the debts of the debtor, filed corporate tax returns, and "ha[d] not transferred any property to the Debtors, other than the monthly payments for their expenses." Id.

35. As they have under Augie/Restivo, courts have not hesitated to grant motions to dismiss substantive consolidation actions under Auto-Train where the complaints fail to allege sufficient facts to state a claim. In In re Raymond, cited above, the court found that the complaint failed to state a claim under either Augie/Restivo or Auto-Train. See Raymond, 529 B.R. at 492-93 ("[U]nder any of the tests employed by the Courts of Appeal in Auto-Train, Augie/Restivo Baking Co., or Owens Corning, the Court concludes that the Trustee's Amended Complaint fails to state a plausible claim for relief.").

36. Similarly, in Cordia Communications, a creditor ("Thermo") executed two pre-petition agreements, each with two non-debtor affiliates (one of which was the publicly-held parent), whereby each non-debtor would sell receivables generated by debtor subsidiaries. See Cordia Commc'ns, 2012 WL 379776, at *1. Post-petition, Thermo alleged that both the debtors

and non-debtors should be held responsible for damages stemming from breach of these agreements and moved for substantive consolidation both among the debtors and as to the non-debtor entities. Id.

37. The Bankruptcy Court dismissed Thermo's claim for substantive consolidation and denied reconsideration of the same. The court noted that the first Auto-Train requirement, the "substantial identity" requirement, was "implausible given the allegations of the Complaint itself." Id. at *2. Specifically, while the entities shared some officers and directors, "[t]he Complaint pleads facts and attaches documents that demonstrate that the debtors were separate entities; they did not share a single corporate identity." Id. For example, the corporations maintained separate customers and separate accounts receivable. Id. In addition, Thermo alleged no facts demonstrating that the defendants disregarded corporate formalities or commingled assets. Id. Finally, the court held that Thermo's allegations of improper transfers by the debtors was "not relevant to this inquiry" because "substantive consolidation is not necessary to reach those alleged transfers." Id. Instead, Thermo presumably could file an action for fraudulent transfer to recover such transfers.

38. The ACC contends that there is a substantial identity between the Debtors and Non-Debtors by reciting the same insufficient facts that it uses to support its claim under Augie/Restivo. See ¶¶ 13-19, *supra*. These allegations are insufficient to plead "substantial identity" for purposes of Auto-Train because, like in Bull and Cordia Communications, they do not allege that the Debtors and Non-Debtors failed to maintain separate corporate records, have identical creditors, disregarded corporate formalities, commingled assets, or generally held themselves out as a single entity.

II. COUNT II FAILS TO STATE A CLAIM.

39. Count II of the Complaint, in the alternative, asserts that the various agreements effectuating the Corporate Restructuring should be deemed "unconscionable" and "unenforceable," and the Debtors' asbestos-related liabilities should be "reallocated" to the Non-Debtors. Compl. ¶¶ 55-60; see also Sub. Con. Mot. ¶¶ 66-68. Once again, the ACC simply grabs a label, this time "unconscionable," to have this Court use some undefined power of "roving equity" to invalidate a valid state law transaction that it does not like. The ACC's position is not supported by a single citation to legal authority. Nor could it be.

A. Unconscionability Is Not An Affirmative Cause of Action.

40. Count II first fails to state a claim under Federal Rule 12(b)(6) because unconscionability is not an affirmative cause of action but rather only an affirmative defense. See Kennedy v. Harber, No. 05-17-01217-CV, 2018 Tex. App. LEXIS 6166, at *10 (Tex. App. Aug. 7, 2018) ("Unconscionability is not an affirmative claim"); Rogers v. Specialized Loan Servs., No. SA-14-CA-499-FB, 2014 U.S. Dist. LEXIS 189301, at *46 (W.D. Tex. Oct. 10, 2014) (dismissing unconscionability claim with prejudice because "[t]here is no authority establishing 'unconscionability' as an independent cause of action"); Goldstein v. Bank of Am., N.A., No. 1:09cv329, 2010 U.S. Dist. LEXIS 28887, at *21 (W.D.N.C. Jan. 19, 2010) (dismissing unconscionability claim because "'[u]nconscionability' has never been recognized as a free-standing claim under North Carolina common law" but rather is "an affirmative defense . . . .).

B. The ACC Lacks Standing To Assert Unconscionability.

41. Even if unconscionability were a recognized cause of action, the ACC is not a party to nor third-party beneficiary of the various Corporate Restructuring documents it attacks, and therefore lacks standing to bring this (non-existent) claim. See, e.g., Ardmore, Inc.

v. Rex Group, Inc., 377 S.W.3d 45, 55 (Tex. App. 2012) ("[a] party must be in privity of contract or beneficiary of contract to have standing to complain about [the] contract.").

42. Accordingly, Count II should be dismissed for lack of standing under Federal Rule 12(b)(1) and 12(b)(6). See, e.g., Tobias v. Nationstar Mortg., LLC, No. 1:17CV486, 2018 U.S. Dist. LEXIS 48 at *4-8 (M.D.N.C. Jan. 2, 2018) (plaintiffs lacked standing to challenge the validity of contracts to which they were not parties).

C. Unconscionability In Any Case Does Not Apply to the Plans of Divisional Merger.

43. The only documents in the Corporate Restructuring pursuant to which asbestos liabilities were allocated were the Plans of Divisional Merger. These documents, however, are not contracts. Instead, they were corporate acts undertaken by single entities – the former Trane Technologies Company LLC, successor by merger to Ingersoll-Rand Company (a former New Jersey corporation) (collectively, "Old IRNJ"), and the former Trane U.S. Inc., ("Old Trane"). Under the Texas Business Organizations Code (the "TBOC"), which governs the divisional mergers, Old IRNJ was the sole party to its divisional merger and the sole entity that acted on the plan of divisional merger providing thereof. See Tex. Bus. Orgs. Code § 1.002(69) (defining a "party to the merger" to mean, "a domestic entity or non-code organization that under a plan of merger is divided or combined by a merger.") The same is true for Old Trane. As a result, the Plans of Divisional Merger used to effectuate Old IRNJ's and Old Trane's divisional mergers are not contracts between counterparties to which the doctrine of unconscionability might be applied, but instead are merely statutorily required instruments of a single entity used by that entity to effect a legally permissibly transaction in accordance with the express provisions of the TBOC.

44. Under Texas law, "[u]nconscionability is a contract doctrine… ." Corona v. BAC Home Loan Servicing, L.P., No. 11-CV-1856, 2012 U.S. Dist. LEXIS 205329, *18-19 (N.D. Tex. Sept. 25, 2012) citing BARBARA SLOTNIK, 14 TEX. JURISPRUDENCE. CONTRACTS. § 178 (3d ed. 2012). It thus "has no applicability" to matters other than contracts. Id.; see also Dinkins v. Deustche Bank Nat'l Trust Co., No. 12-CV-0133, 2012 US. Dist. LEXIS 208065, at *14 (N.D. Tex. Aug. 30, 2012) (same). Although Texas law may provide grounds upon which the Plans of Divisional Merger may be reviewed, the contract doctrine of unconscionability is not one of them.

45. Accordingly, for this additional reason, Count II fails to state a claim and should be dismissed.

D. The Complaint Fails to Plausibly Allege That The Restructuring Agreements Are Unconscionable.

46. Even if unconscionability were an affirmative cause of action (it is not), that the ACC had standing to assert such a claim (it does not), and that this doctrine could be applied to the Plans of Divisional Merger (it cannot), the claim nonetheless fails under Federal Rule 12(b)(6), because the Complaint does not allege facts sufficient to satisfy the high burden to establish unconscionability.

47. "The test for substantive unconscionability is whether . . . the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." Caballero v. Contreras, No. 13-10-00125-CV, 2010 Tex. App. LEXIS 7176, at *22 (Tex. App. Aug. 31, 2010) (citation omitted). "The grounds for substantive abuse must be sufficiently shocking or gross to compel the court to intercede." Muzquiz v. Para Todos, Inc., 624 S.W.3d 263, 276 (Tex. Ct. App. 2021) (citation omitted).

48. Here, the Complaint does not allege facts remotely sufficient to meet this high burden. In order to be unconscionable, the agreements have to be "so one-sided" so as to be "oppressive." Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., No. 5:97-CV-683- BR(2), 1999 U.S. Dist. LEXIS 23427, at *13 (E.D.N.C. June 8, 1999). The Complaint's own allegations demonstrate that the Plans of Divisional Merger were not "unduly oppressive" because, in connection therewith, under the Funding Agreements, New Trane Technologies and New Trane are obligated to pay the Debtors' asbestos-related liabilities in the event that the Debtors' assets are insufficient. Compl. ¶ 39; see also Weisfelner v. Blavatnik (In re Lyondell Chem. Co.), 585 B.R. 41, 50-54 (S.D.N.Y. Jan. 24, 2018) (although the debtor argued that there was an "allegedly one-sided negotiation process for the [agreement]," the agreement did not leave the debtor "worse off for having entered into the transaction" and "did not so favor [the parent company] as to render it unduly oppressive.") .

49. For this reason as well, Count II fails to state a claim and should be dismissed.[8]

III. THE REAL PURPOSE OF THE COMPLAINT IS TO DISMISS THE CHAPTER 11 CASES.

50. The ill-suited and unsupported nature of the ACC's requested remedies demonstrates that the Complaint is nothing more than another attempt to cause the dismissal of these cases without filing a dismissal motion. The ACC seems to believe that the prospect of forcing the Non-Debtors into bankruptcy will push the Debtors to voluntarily dismiss these chapter 11 cases. This tactic is not new. The ACC currently is pursuing the same goal through

[8] The various agreements executed in connection with the Corporate Restructuring, such as the Funding Agreements, as well as various services and support agreements, actually have the primary purpose of providing benefits to the Debtors. The Funding Agreements, in particular, do not obligate the Debtors to repay any funding provided to them thereunder. As a result, it is more than odd that the ACC seeks to actually avoid these agreements executed for the benefit of the Debtors as "unconscionable."

the derivative standing litigation, and this Court has also recognized that what the ACC sought by its "opposition to the Preliminary Injunction is an end to this Chapter 11 Case." Injunction Findings and Conclusions at 7. Once again, the ACC should not be permitted to pursue the indirect dismissal of these chapter 11 cases by pursuing a meritless claim for substantive consolidation that is both disfavored and ill-suited. Instead, if the ACC truly wants these chapter 11 cases dismissed, then it should file a dismissal motion and subject any dismissal argument to the appropriate Fourth Circuit Carolin standard. Regardless, the ACC's Complaint clearly demonstrates that substantive consolidation is not a proper vehicle for the ACC to pursue its agenda.

CONCLUSION

For all of these reasons, the Complaint fails to state a claim upon which relief can be granted, and this motion should be granted dismissing the Complaint in its entirety.

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Charlotte, North Carolina

Respectfully submitted,

/s/ John R. Miller, Jr.

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