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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	:	**Chapter 11**
HOPEMAN BROTHERS, INC.,	:	**Case No. 24-32428 (KLP)**
Debtor.	:	

RESPONSE TO SECOND MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER (I) EXTENDING THE EXCLUSIVITY PERIODS TO FILE AND SOLICIT A PLAN AND (II) GRANTING RELATED RELIEF

Century Indemnity Company and Westchester Fire Insurance Company (together, the "Chubb Insurers") hereby respond to the Second Motion of the Debtor for Entry of an Order (I) Extending the Exclusivity Periods to File and Solicit a Plan and (II) Granting Related Relief (Dkt. No. 577) (the "Exclusivity Motion"). The Chubb Insurers currently do not take any position as to the specific relief requested in Debtor's Exclusivity Motion but submit this Response (i) to address factual allegations and arguments presented in the Exclusivity Motion that are ***false,*** and (ii) raise broader concerns regarding the status of Debtor's bankruptcy case, the Committee's failure to honor its fiduciary duties to Debtor's creditors, and the ongoing waste of assets that defies the Debtor's stated purpose for filing this Chapter 11 bankruptcy case.

FACTUAL BACKGROUND

I. Hopeman is a Defunct Company that Filed this Bankruptcy Case because it has Insufficient Assets to Continue Funding its Share of Defense and Indemnity Costs for Asbestos-Related Claims.

At the outset of this case, the Debtor's president, Christopher Lascell, testified that since 2003, "Hopeman has had no business operations and exists solely to defend and, when appropriate, settle [ ] Asbestos-Related Claims." Dkt. No. 8 ¶ 18. More recently, Mr. Lascell testified that since he became President of Hopeman in 2016, Hopeman has made no money and has been "burning cash" because of the shortfall between the total indemnity costs and defense spending for Asbestos-Related Claims compared to the amount it recovered from insurers.[1] Tr. 12/16/24, p. 27:5-13. In 2023, "net of insurance recoveries, Hopeman used its own cash to pay approximately 35.12% of claim payments and 57.33% of defense costs" for Asbestos-Related Claims, "resulting in an annual cash burn of approximately $5.5 million."[2] Dkt. No. 8 ¶ 35.

Because Hopeman could not manage the defense and resolution of Asbestos-Related Claims once its remaining cash was depleted, Hopeman determined that it was in its best interest, as well as the best interest of holders of Asbestos-Related Claims, to commence this Chapter 11 proceeding "to seek approval and implementation of an efficient, value maximizing process to

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[1] Hopeman's insurance policies are reimbursement policies, meaning that Hopeman advances the costs to defend against Asbestos-Related Claims and to resolve claims where appropriate and then "recovers a portion of the amount that they paid" from its insurers. Tr. 12/16/24, p. 61:17-24 (Testimony of Ron Van Epps, Hopeman's insurance and financial consultant since 2004).

[2] Pursuant to prior coverage-in-place settlement agreements and the Wellington Agreement (*see* Dkt. No. 8 ¶¶ 32, 36), the Chubb Insurers collectively were responsible for reimbursing Hopeman for approximately 33.52% of its claim payments, and Century (not Westchester) was responsible for reimbursing Hopeman for approximately 17.51% of its defense costs under certain, but not all, Century policies. *See* Disclosure Statement with Respect to the Plan of Liquidation of Hopeman Brothers, Inc. Under Chapter 11 of the Bankruptcy Code, Dkt. No. 57, p. 12.

monetize the remaining available insurance and distribute those proceeds equitably to valid holders of Asbestos-Related Claims." *Id*. at ¶ 37. To that end, "in the months leading up to the commencement of this chapter 11 case, the Debtor conducted extensive, good faith negotiations with the Chubb Insurers . . . with the purpose of resolving the Debtor's unexhausted insurance coverage under policies issued by the Chubb Insurers," which resulted in "a settlement agreement that monetizes the applicable insurance policies in the amount of $31,500,000 (the "Chubb Insurer Settlement"). *Id*. at ¶ 38. Debtor also "actively engaged in discussions with other Insurers" pre-petition "with the goal of negotiating, and ultimately entering into, additional settlement agreements with such Insurers." *Id*. at ¶ 40.

II. Relevant Events in Debtor's Bankruptcy Case.

A. The Insurance Settlement Motions

Debtor filed its Chapter 11 petition on June 30, 2024. At the same time, Debtor filed its motion seeking approval of the Chubb Insurers' Settlement. *See* Dkt. No. 9. On July 10, 2024, Debtor filed a motion seeking approval of a settlement with certain other Hopeman insurers (the "Certain Insurers' Settlement") (together with the Motion to Approve the Chubb Insurers' Settlement, the "Insurance Settlement Motions"). *See* Dkt. No. 53. The Certain Insurers' Settlement mirrors the Chubb Insurers' Settlement in substance and form, and the Rule 9019/§ 363 relief requested by Debtor with respect to the Certain Insurers' Settlement is substantively the same as the relief Debtor requested with respect to the Chubb Insurers' Settlement.

Under both settlements, Hopeman covenanted and agreed to "use its best efforts to obtain entry of the Approval Order as a Final Order, including (but not limited to) using best efforts to resolve or defeat any objections that may be raised by any holder of Asbestos Claims or their counsel . . . ." Dkt. No. 9, p. 34 of 77; Dkt. No. 53, p. 34 of 80. Consistent with those obligations, on July 10, 2024, Debtor moved to establish procedures for noticing the Insurance Settlement

Motions and to schedule a hearing date for the Insurance Settlement Motions to be heard at the same time. *See* Dkt. No. 54.

B. Debtor's Proposed Plan of Liquidation

On July 12, 2024, Debtor filed its Plan of Liquidation and Disclosure Statement thereto. *See* Dkt Nos. 56, 57. According to Debtor, it "believes that the Plan provides the best method of maximizing the recoveries for the holders of Claims against the Debtor," and "confirmation of the Plan will ensure a fair and equitable distribution among holders of Asbestos PI Claims" through a Liquidating Trust funded with the Chubb Insurers Settlement payment of $31.5 million, the Certain Insurers Settlement payment of $18.395 million, and the collection of payments from non-settling insurers. *See* Dkt. No. 57, pp. 1, 6 of 148. Debtor explained that the Plan "provides for an orderly wind-down of Hopeman, which has had no business operations since 2003 and has existed, as of the Petition Date, solely to defend and settle (when appropriate) Asbestos PI Claims." *Id.* at pp. 6-7 of 148.

Debtor further explained that:

> [t]he fact that the Debtor no longer maintains any business operations suggests that a reorganization or liquidation on terms substantially different than those currently proposed under the Plan may be improbable or infeasible. As a result, any attempt to propose an alternative plan containing different terms for any of these parties may not be confirmable and could delay and/or dilute distributions to creditors.

Dkt. No. 57, 32 of 148. Mr. Van Epps, Debtor's insurance consultant and financial advisor since 2004 (*see* Tr. 12/16/24, p. 58:18-25), confirmed that Debtor pursued the Chubb Insurers' and Certain Insurers' settlements totaling $50 million, and filed its liquidating plan, because "[w]e don't see an avenue that allows this to go on forever. ***The debtor doesn't have money***. ***They don't have a source of future income***." *Id*. at 103:21-23 (emphasis added). Mr. Van Epps testified that the $50 million to be obtained from the Chubb Insurers' and Certain Insurers' settlements was "enough funds to take care of all of the claimants that would hit" in a "three-to-five-year period" (*id*. at 103:24-104:3) – *i.e.*, all claims pending as of June 23, 2024 along with "likely-to-be asserted prepetition asbestos-related personal injury claims against the Debtor" (*see* Dkt. No. 74 ¶ 9).

C. The Committee's Appointment and Activity Pertaining to the Insurance Settlement Motions

The Unsecured Creditors Committee (the "Committee") was appointed on July 22, 2024. *See* Dkt. No. 69. The Committee consists of five holders of Asbestos-Related Claims, represented by five different law firms. *See id*. Following its appointment, the Committee asserted that it needed to "vet[ ] the proposed insurance settlements for the benefit of those creditors for whom it is an estate fiduciary." Dkt. No. 120, p. 14. Tellingly, before that "vetting" even began, the Committee took the position that "the proposed settlement amounts are unreasonably low" because the settling insurers "would pay . . . at best a mere fraction of the total available coverage." *Id*. at 7-8, ¶ 19.

Debtor and the Committee agreed to a discovery/briefing schedule regarding the Insurance Settlement Motions and the hearing date thereon. *See* Dkt. No. 247. Debtor and the Committee agreed to a second order amending that schedule and setting the hearing on both Insurance Settlement Motions for December 16, 2024. *See* Dkt. No. 376.

Unbeknownst to the Chubb Insurers at the time, Debtor and the Committee entered into a Settlement Term Sheet on November 29, 2024 to "set forth certain essential terms for addressing the Insurer Settlement Motions . . . and of a potential Plan that would settle the liability of the Debtor for Channeled Asbestos Claims." *See* Dkt. No. 417, Ex. 1 (the "Term Sheet"). Notwithstanding Debtor's agreement to use best efforts to seek entry of an order approving the Chubb Insurers' Settlement and defeat any objections to approval of the settlement, Debtor and the Committee agreed that (i) the Committee would not oppose the Certain Insurers' Settlement approval motion (which is substantively the same as the Chubb Insurers' Motion), (ii) the Debtor would request that the Court adjourn the hearing ***only*** as to the Chubb Insurers' Settlement approval motion and "indefinitely" suspend the related dates and deadlines, and (iii) Debtor and the Committee would jointly request "that the Court order mediation for the purpose of attempting to reach a consensual resolution of the Chubb Motion" that included the Chubb Insurers. *Id*. at Ex. 1, Art. C.

The Term Sheet requires Debtor and the Committee to "negotiate in good faith over the terms of a Plan that would propose to create a Trust pursuant to § 524(g) of the Bankruptcy Code, including the proposed individual to serve as the legal representative ('FCR') for purposes of protecting the rights of persons that might subsequently asserts Demands" – *i.e*., persons who are not yet current creditors of the Debtor. *Id*. at Ex. 1, Art. D. As explained in Response Section II, below, pursuing a § 524(g) reorganization plan is a waste of estate assets because it is patently unconfirmable in the context of a defunct Debtor. The Committee's (at least, the individual Committee members' counsel's) insistence on pursuing such a plan breaches the Committee's fiduciary duty to current holders of Asbestos-Related Claims because it necessarily diminishes their recoveries.

D. The Chubb Insurers' Settlement is Stayed while the Certain Insurers' Settlement is Approved, though *Both* Settlements Should be Approved for the Same Reasons and Evidence Presented Regarding the Certain Insurers' Settlement.

On December 17, 2024, the Court endorsed the Debtor's and Committee's Agreed Order Continuing Hearing and Deadlines Solely as to Chubb Insurers Settlement Motion. *See* Dkt. No. 437. The hearing on the Certain Insurers Settlement Motion went forward on December 16, 2024. The Committee did not object to approval of the Certain Insurers Settlement Motion, notwithstanding its previously expressed "concern[]" that the Certain Insurers' settlement amount was “unreasonably low.” Dkt. No. 120 ¶ 19. As the Committee’s counsel explained during the hearing, that is only because Debtor’s estate has “very limited liquidity” such that “stepping down with respect to this particular settlement . . . [is] the better path.” Tr. 12/16/24 ,p. 13:13-18. As the facts now make clear, the Committee needed to secure a source of funding to try to resurrect this defunct Debtor through a § 524(g) plan and leverage a bigger settlement from the Chubb Insurers.

Despite the Committee’s assertion that the Chubb Insurers’ Settlement somehow “has more issues connected with it,” the only different “issue” the Committee has identified is that the Chubb Insurers’ Settlement amount is “bigger.”[3] *Id*. at 13:9-15. In fact, Hopeman made the same arguments in support of approving both Insurance Settlement Motions. That is because the terms of the Chubb Insurers’ Settlement agreement and the Certain Insurers’ Settlement agreement are, for all relevant purposes, the same. *See* Tr. 12/16/24, p. 88:5-7, 89:20-22. (Mr. Van Epps confirming that the Certain Insurers’ agreement was “modeled after the form that was the Chubb Agreement,” including that it is structured as a settlement and buyback agreement.) Given those same arguments, the evidence presented by Debtor in support of the Certain Insurers Settlement Motion pertains equally to the Chubb Insurers’ Settlement.

Specifically, Mr. Van Epps testified that:

- there is a “myriad” of “complicated” disputed issues between Hopeman and its excess insurers, including the Chubb Insurers (Tr. 12/16/24 Tr., p. 59:14-61:10);
- “depending on the claim[,] forty to fifty percent of the [Asbestos-Related Claim] settlements have to be funded by [Hopeman] in the way of previous [insurance] settlements that they’ve done. So as you burn through that cash every year you’re eating into that settlement fund” (*id*. at 62:4-8);

[3] The Chubb Insurers may have more policy limits at issue, but this does not change the standards for approving the settlement under Rule 9019 and § 363. The Chubb Insurers’ Settlement amount reflects that there were additional limits potentially exposed. There was no lesser proportionate exposure overall to the Certain Insurers, just slightly lower limits as reflected in the ultimate settlement amounts.

- significant "holes" in Hopeman's coverage block created by now-insolvent carriers mean that "Hopeman[ ] has got to figure out a way to pay" the limits of those policies "before it can ever access any of the coverage" above those policies (*id*. at 68:1-69:7);

- just because there is a "lot of coverage" available under a policy "doesn't mean I can access it and I can get to it" because issues regarding underlying exhaustion and policy terms affect the amount of coverage ultimately available (*id*. at 64:22-65:16);

- "[t]here's no right in the polic[ies]" to accelerate an insurer's coverage by asking the insurer to "cash me out" for the remaining available policy limits (*id*. at 82:5-7);

- if Hopeman rejects its pre-petition coverage in place agreements, "all those fights [resolved by the agreement] come back in" with respect to coverage. "So now you got to prove exhaustion of the underlying. You got to prove defense coverage. You got to prove all these other issues." These considerations are what led to Hopeman pursuing a "Chapter 11 with the possibility of a liquidating trust being funded by insurance settlements" (*id*. at 81:16-82:4); and

- once Hopeman decided to pursue its bankruptcy case and establish a liquidating trust funded by insurance settlements, Mr. Van Epps "had a pretty good idea of what this coverage [issued by the Chubb Insurers and the Certain Insurers] was worth." Between the Chubb Insurers' Settlement of $31.5 million and the Certain Insurers' Settlement of $18.5 million, Hopeman achieved the $50 million total settlement it was seeking (*id*. at 85:4-14).

Based on this "uncontroverted" evidence, the Court approved the Certain Insurers' Settlement Motion (*see* Dkt. No. 442), concluding that, "the debtor[ ] have met their burden of showing that the settlement is reasonable and beneficial to the estate, the debtor, and its creditors, and that it's in the best interest of the creditors." 12/16/24 Tr. at 197:17-20. The Court explained that

> it is in the best interest of the creditors, in particular the asbestos claimants as a group, to approve this settlement, because ***it will yield a certain amount of money that will provide for a liquidating trust*** and cover other expenses of the debtor that would benefit the asbestos claimants. It would do so expeditiously, without all of the attendant litigation and uncertainty, and it will enable ***the debtor, that is currently not generating any income***, to potentially obtain a confirmed Chapter 11 plan that does create a trust for the benefit of creditors.

Id. at 196:20-197:6 (emphasis added).

The evidence underlying the Court's conclusions regarding the Certain Insurers' Settlement is the same that would be submitted by Hopeman regarding the Chubb Insurers' Settlement. There is no principled basis for arguing, much less concluding, that the same facts warranting approval of the Certain Insurers' Settlement should yield a different result with respect to the Chubb Insurers' Settlement.

E. The Chubb Insurers have been Excluded from the Vast Majority of the Ostensible "Chubb Insurers' Mediation."

On December 11, 2024, Debtor and the Committee jointly moved for entry of an order "to mediate the relief sought in the Chubb Insurers Settlement Motion [ ] and for the appointment of a judicial mediator." Dkt. No. 419 at ¶ 1. Debtor and the Committee advised the Court that "participation in mediation concerning the Chubb Insurers Settlement Motion may aid in their attempts to reach a consensual resolution of the Chubb Insurers Settlement Motion," and that "it is necessary that the [Chubb Insurers] should be ordered to participate in the mediation." *Id*. at ¶¶ 14, 16. On December 20, 2024, the Court entered the Order Authorizing Mediation of Chubb Insurers Settlement Motion, appointing Judge Huennekens as a judicial mediator "concerning the Chubb[ ] Insurers Settlement Motion" and directing that Debtor, the Committee, and the Chubb Insurers "shall participate in the Mediation" with an "individual with final authority to settle the matter and to bind the Party . . . ." Dkt. No. 443 at ¶¶ 2-4.

Notwithstanding that (i) the Committee had never filed an objection to the Chubb Insurers' Settlement Motion and (ii) Debtor and the Committee requested mediation without the Chubb Insurers' involvement, the Chubb Insurers set out to mediate issues regarding the Chubb Insurers' Settlement in good faith, with the understanding that the Committee and Debtor would do the same. That is why the Chubb Insurers did not object to Debtor's request to bifurcate consideration of the Insurance Settlement Motions or to the Debtor's and Committee's mediation request.

The parties held an in-person mediation on January 22, 2025, at Debtor's counsel's office in Richmond, Viginia. The Chubb Insurers' in-house counsel traveled from Philadelphia, Pennsylvania to attend the mediation in person, along with the Chubb Insurers' bankruptcy counsel from New York, New York. *See* Declaration of Leslie A. Davis in Support of Chubb Insurers' Response ("Davis Decl.") ¶¶ 3-4. The Chubb Insurers' Director of Claims and longtime coverage counsel participated remotely. *Id*. ¶ 4. That in-person mediation session did not result in a resolution of the Chubb Insurers' Settlement Motion, but the Chubb Insurers left the mediation with the understanding that further mediation efforts involving the Chubb Insurers would take place. *Id*. ¶ 5.

That did not happen. Since the initial mediation session on January 22, 2025, the Committee has engaged in ***zero*** substantive discussions with the Chubb Insurers. *Id*. ¶ 6. The Chubb Insurers learned that Debtor and the Committee engaged in discussions with the Mediator, but the Chubb Insurers were not asked to participate in any of them. *Id*.

RESPONSE TO DEBTOR'S EXCLUSIVITY MOTION

I. The Asserted Grounds for Granting Debtor's Exclusivity Motion Do Not Exist because the Chubb Insurers have been Frozen Out of the Mediation.

Debtor's Exclusivity Motion asserts that "***the parties*** continue to be ***actively involved*** in the mediation, which have included both negotiations of the Chubb Insurers Settlement Motion and the formation of a revised Plan." Dkt. No. 577 at ¶ 15 (emphasis added). Debtor further asserts that "approval of the Insurer Settlement Motions is an integral part of the Debtor's Plan to provide funding for the trust," and that it seeks another extension of its Exclusivity Periods "while it continues to mediate the Chubb Insurers Settlement Motion." *Id*. at ¶ 20. Debtor argues that it seeks to extend the Exclusivity Periods "to give the Debtor reasonable time and opportunity to ***complete the mediation of the Chubb Insurers Settlement Motion***" because it allegedly has been "engaged in ongoing mediation of the Chubb Insurers Settlement Motion" with "more that needs to be done to complete the mediation and conclude negotiations with the Committee and other parties in interest on the Plan." *Id.* at ¶ 27.

Debtor's representations as to the status of the "ongoing mediation of the Chubb Insurers Settlement Motion" are untrue. Debtor's and the Committee's joint request that the Court order the Chubb Insurers to "participate in the mediation" recognizes that the ***Chubb Insurers*** are necessary for resolving issues regarding the ***Chubb Insurers*** Settlement Motion. Dkt. No. 419 ¶ 16. There cannot be any legitimate "ongoing mediation of the Chubb Insurers Settlement Motion" without the Chubb Insurers, yet the Chubb Insurers have been excluded from these apparently "ongoing" mediation efforts since the parties' initial in-person session on January 22, 2025. *See supra* at 10. Debtor's position that further extending the Exclusivity Periods is warranted because "***the parties***" are "actively involved" in the mediation of the Chubb Insurers' Settlement Motion thus is not accurate. Those purported "factual" allegations should be disregarded in considering whether "cause" exists to grant the Exclusivity Motion.

II. The Pursuit of a § 524(g) Plan Wastes Estate Assets and Breaches the Committee's Fiduciary Duty to its Constituency

Debtor's and the Committee's November 29, 2024 Term Sheet requires the parties to "negotiate in good faith and work cooperatively to consider proposing a Plan" satisfying the requirements of 11 U.S.C. § 524(g) that would establish a Trust to which current Asbestos-Related Claims and future Demands would be channeled for resolution and payment. Dkt. 437 at Ex. 1. Debtor's and the Committee's fee applications for January 2025 reflect that they are doing exactly that. *See, e.g.*, Dkt. No. 582, 20 of 25 (fee application of Committee's special insurance counsel); Dkt. No. 585, p. 24 (fee application of Debtor's counsel).

A. Pursuing Confirmation of a §524(g) Plan will Needlessly Waste Estate Assets Because it Cannot Result in a Confirmable Plan.

Pursuing confirmation of a § 524(g) plan is a colossal waste of estate assets that will diminish creditors' recoveries because it cannot result in a confirmable plan, for several reasons.

First and foremost, Debtor has had ***no*** business operations for over 20 years and has generated ***no*** operating income since 2003. *See* Factual Background § I. As a result, Debtor ***is not eligible*** for § 524(g) relief, which requires a reorganizing debtor with ongoing business operations that can "emerg[e] from a chapter 11 reorganization as a going-concern cleansed of asbestos liability" to "provide the asbestos personal injury trust with an 'evergreen' source of funding." *In re Combustion Eng'g. Inc.*, 391 F.3d 190, 234 (3d Cir. 2004).

Congress modeled § 524(g) after the *Johns-Manville* case, explaining that "[a]sbestos claimants would have a stake in Johns-Manville's successful reorganization, because the company's success would increase both the value of the stock held by the trust and the company profits set aside for it." H.R. Rep. 103-835 at 40, 1994 U.S.C.C.A.N. 3349. According to the court in *Johns-Manville*, the plan must "provide for the continuation of some form of responsive, ongoing entity post-confirmation, from which to glean assets with which to pay [future claimants]." *In re Johns-Manville Corp.*, 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985). By its own admissions, that is not this Debtor. *See, e.g.*, Dkt. No. 8 ¶ 2 ("Hopeman exited [its business as a 'ship joiner' contractor] in the 1980s and following the sale of substantially all of its assets in 2003, Hopeman has had no ongoing business operations.")

Debtor cannot satisfy the "ongoing business" requirement by buying or starting a brand-new business. Practically, the Debtor has no assets to do either; thus, it could only create an "ongoing business" by using money from the Certain Insurers' Settlement payment if it is made. But even if it did, Debtor would not be eligible for § 524(g) relief. The Fourth Circuit has made clear that a discharge under § 1141 is available only where there is a "*continuation* of *a pre-petition* business" following confirmation. *In re Grausz*, 63 F. App'x 647, 650 (4th Cir. 2003) (emphasis in original). Debtor ***has no pre-petition business*** to continue post-confirmation, so it is not eligible for a discharge injunction under § 524. Accordingly, Debtor cannot obtain a § 524(g) injunction, which "***supplement[s]*** the injunctive effect of a discharge" under § 524. 11 U.S.C. § 524(g)(1)(A) (emphasis added).

Furthermore, the concept of resurrecting a long-defunct debtor through a brand-new business in attempt to take advantage of the § 524(g) trust/injunction mechanism turns the Bankruptcy Code and this Court's authority on its head. The two recognized policies of Chapter 11 are "preserving going concerns and maximizing property available to satisfy creditors." *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle Street P'ship,* 526 U.S. 434, 435 (1999). As the Fourth Circuit explained in *Carolin Corp. v. Miller*, "if there is not a ***potentially viable business in place*** worthy of protection and rehabilitation, the Chapter 11 effort has lost its *raison d'etre*...." *Carolin Corp. v. Miller,* 886 F.2d 693, 698 (4th Cir. 1989) (emphasis added).

Accordingly, courts reject efforts to use the provisions of Chapter 11 to "create and organize a new business, not to reorganize or rehabilitate an existing enterprise, or to preserve going concern values of a viable or existing business." *In re SR Real Est. Holdings, LLC*, 506 B.R. 121, 126 (Bankr. S.D. Cal. 2014). *See also In re Gyro-Trac (USA), Inc.*, 441 B.R. 470, 485 (Bankr. D.S.C. 2010) ("BMO argues that the purpose of chapter 11 is to reorganize, not to create a new business. To the extent BMO argues that chapter 11 does not allow a debtor to completely abandon its old business and embark on a new and entirely different business venture, the Court agrees."); *In re Royalty Properties, LLC,* 604 B.R. 742, 751 (Bankr. N.D. Ill. 2019) (dismissing Chapter 11 case where "the Debtor is not reorganizing a business, but starting a new business when chapter 11 is designed to reorganize existing businesses").

Debtor was not a going concern with a "potentially viable business in place" on the petition date. It cannot be converted into one post-petition, or resort to Chapter 11 as a means of trying to become one, just because the Committee insists on pursuing a § 524(g) Trust to generate fees for the Committee members' counsel who may represent future claimants that today do not hold claims against the Debtor.

Second, a § 524(g) plan requires the appointment of a FCR, which will significantly increase estate expenses. Like the Committee, the FCR would need to retain at least one set of counsel and professionals to assist with his or her due diligence and negotiations. In the ordinary context of a reorganizing debtor with business operations, that is not problematic. But here, Debtor has no business operations from which to generate revenues to pay its administrative expenses. Debtor's estate ***already*** is administratively insolvent from the fees and expenses of Debtor's and the Committee's counsel. The estate will remain administratively insolvent unless and until (i) the Certain Insurers' Settlement payment is made and (ii) Debtor receives authorization from the Court to use those proceeds to pay its administrative costs.

As of January 31, 2025, Debtor had $1.1 million in cash and owed $5,975,553 in post-petition payables, with a month end net worth of ***negative $4,525,645***. *See* Dkt. No. 581, p. 2. The fee applications submitted by the Debtor's and Committee's professionals thus far for January 2025 already total nearly $500,000. *See* Dkt. Nos. 582, 585-589. Those monthly fees necessarily multiply if a FCR is appointed.

These multi-million-dollar administrative expenses reduce, dollar-for-dollar, the amounts available from the Certain Insurers' Settlement to pay current Asbestos-Related Creditors.

Diminishing creditors' recoveries by increasing administrative costs in this way cannot possibly be in the best interests of the estate or of creditors when they will be expended in connection with a § 524(g) plan that is patently unconfirmable because Debtor is ineligible for that relief. That is precisely why Debtor filed its pending Plan of Liquidation. *See* Dkt. No. 57, p. 32 of 148 ("the fact that the Debtor no longer maintains any business operations suggests that a reorganization . . . may be improbable or infeasible. As a result, any attempt to propose an alternative plan . . . may not be confirmable and could delay and/or dilute distributions to creditors.").

Third, if a FCR were appointed as provided in the Term Sheet (and there should not be for the reasons set forth above), the § 524(g) plan that followed would be unconfirmable. The Term Sheet provides that upon reaching agreement "that a Plan pursuant to section 524(g) is the preferred path for the Debtor, the Debtor and the Committee will jointly move for entry of an order ***appointing an individual mutually acceptable to the Committee and the Debtor as the FCR***." Dkt. No. 437, Ex. 1, Art. D (emphasis added).

Section 524(g) requires this Court, not the Debtor and the Committee, to select who serves as the FCR. *See* 11 U.S.C. § 524(g)(4)(B)(i); *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 372 (3d Cir. 2022) ("Under § 524, the bankruptcy court itself must make the appointment" of the FCR). Thus, "the procedure for appointment of a future claimants' representative permits nominations from any party in interest in the case and contemplates an independent inquiry by the Court." *In re Fairbanks Co.*, 601 B.R. 831, 837 (Bankr. N.D. Ga. 2019). As the *Fairbanks* court emphasized, "in no way is [selecting the FCR] the exclusive province of the debtor (or the present claimants). To that end . . . a debtor's or committee's choice is not entitled to deference." *Id*. at 838.

The Committee's attempt to skirt the requisite procedure by impermissibly conditioning FCR appointment on the Debtor's and Committee's "mutual[ ] accepta[nce]" of the individual who serves in that role is emblematic of its approach to this case, including its insistence that Debtor pursue a §524(g) plan that cannot be confirmed under the Code and applicable law.

B. **The Committee's Pursuit of a §524(g) Plan Breaches its Fiduciary Duties to Current Holders of Asbestos-Related Claims**

The Committee acknowledges that it owes a fiduciary duty to the estate's current unsecured creditors, *i.e.*, holders of Asbestos-Related Claims asserted against Hopeman. *See* Dkt. No. 120 ¶ 18. "Among these duties are fiduciary duties of undivided loyalty and impartial service to all creditors represented by the committee." *In re Fas Mart Convenience Stores, Inc.*, 265 B.R. 427, 432 (Bankr. E.D. Va. 2001). The Committee's actions in this case reflect that it is not honoring that obligation, which itself renders any plan sponsored by this Committee unconfirmable. The most obvious evidence of this is the Committee's refusal to allow the Chubb Insurers' Settlement Motion to be heard because the Committee – or at least counsel representing the Committee members – wants to pursue a § 524(g) plan.

Approving the Chubb Insurers' Settlement Motion would infuse $31.5 million into the estate. Combined with the Certain Insurers' Settlement payment, there would be "enough funds to take care of all of the claimants" with claims pending as of the petition date – *i.e.*, the unsecured creditors that the Committee is charged with representing – through Debtor's pending Plan of Liquidation. Tr. 12/16/24 Tr., p. 103:24-104: Dkt. No. 74 9. That starkly contrasts with what would occur in a § 524(g) context, where whatever remains of the Certain Insurers' Settlement payment (if it is made) after paying the estate's multi-million-dollar (and growing) administrative expenses will be the only monetary asset funding the Trust. Based on what we know today, the most that could be is approximately $13.4 million (the $18.375 million settlement amount less $5 million in known post-petition obligations that were incurred through 1/31/25). That amount will be substantially less if (i) an FCR is appointed and (ii) proceeds of the Certain Insurers Settlement are used to procure an operating business in attempt to satisfy the "ongoing business" requirement of § 524(g). *See* Response §§ II.A, II.B, *supra*.

Critically, § 524(g) requires that a trust "will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner." 11 U.S.C. § 524(g)(2)(B)(V). This necessarily means that current holders of Asbestos-Related Claims would receive less for their claims under a § 524(g) plan because the § 524(g) Trust must preserve assets for the benefit of future claimants. No current Asbestos-Related Claimant's best interest is served in that scenario.

Thus, the Committee's pursuit of a §524(g) plan to ensure recoveries for future claimants is *prima facie* evidence that the Committee is not honoring its fiduciary duty to its constituency of current creditors. It has long been recognized that current claimants' and future claimants' interests are conflicted. "[F]or the currently injured, the critical goal is generous immediate payments," which "tugs against the interest of [future claimants] in ensuring an ample, inflation-protected fund for the future." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997). *See also Johns-Manville*, 36 B.R. at 749 (current claimants' "stake in maximizing recovery from the reorganizing Manville may be antithetical to the expectations of future interests," presenting a "conflict-of-interest problem" that precludes a current creditors' committee from also representing the interests of future claimants); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 772 (E.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) ("the interests of present and future claimants are in conflict. Hence no present claimant can serve as an adequate representative of future claimants."); *Fairbanks*, 601 B.R. at 839 (FCR in a § 524(g) case "must be an advocate because other parties (***primarily the present claimants***) have adverse interests in the same property") (emphasis added).

At a minimum, before this case proceeds any further, individual holders of existing Asbestos-Related Claims should be asked to weigh in on the threshold issue of whether Debtor's currently proposed Plan of Liquidation, premised on approval of both the Certain Insurers' Settlement and the Chubb Insurers' Settlement and payment of those settlement proceeds totaling $50 million to fund a Liquidating Trust, is preferable to a § 524(g) plan (for which the Debtor does not even qualify) that substantially diminishes those creditors' recoveries so assets can be preserved for unknown, unidentified and hypothetical future claimants.

CONCLUSION

Debtor's Chapter 11 case currently dangles on a dangerous precipice. For the reasons set forth above, proceeding with a § 524(g) plan as contemplated by the Term Sheet cannot be in the best interest of Debtor's estate or its creditors, yet that appears to be exactly the path that the Committee has coopted the Debtor into pursuing. As a result of the Committee members' attorneys pursuing their own interests that conflict with those of the current creditors, this bankruptcy case has been dragged out, with millions of dollars of unnecessary legal and consulting fees that are depleting and will continue to deplete Debtor's scarce assets that should be preserved for current creditors. As a further result of the conflict between the Committee members' attorneys and the Committee's constituency, the Committee apparently seeks to use its contemplated § 524(g) plan as a means of extracting more money from the Chubb Insurers to make up for the millions of dollars in wasted fees and establish a nest egg for the Committee members' attorneys going forward. This is an abuse of the bankruptcy process and contrary to the well-established purposes of Chapter 11 of the Bankruptcy Code, and the Court should immediately put a stop to it.

Dated: March 2, 2025

Respectfully submitted,

/s/ Dabney J. Carr

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 2, 2025, a true and correct copy of the foregoing Response to Second Motion of the Debtor for Entry of an Order (I) Extending the Exclusivity Periods to File and Solicit a Plan and (II) Granting Related Relief was served upon all parties receiving electronic notice through the Court's ECF notification system.

/s/ Dabney J. Carr
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	:	**Chapter 11**
HOPEMAN BROTHERS, INC.,	:	**Case No. 24-32428 (KLP)**
Debtor.	:	

DECLARATION OF LESLIE A. DAVIS IN SUPPORT OF CHUBB INSURERS' RESPONSE TO SECOND MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER (I) EXTENDING THE EXCLUSIVITY PERIODS TO FILE AND SOLICIT A PLAN AND (II) GRANTING RELATED RELIEF

I, Leslie A. Davis, declare as follows:

1. I am a partner at Troutman Pepper Locke LLP. I am a member of the District of Columbia and Maryland bars and admitted *pro hac vice* in this case. I am counsel for Century Indemnity Company and Westchester Fire Insurance Company (together, the "Chubb Insurers"), who are Debtor's insurers and parties in interest in Debtor's case.

2. I submit this declaration in support of the Chubb Insurers' Response to the Second Motion of the Debtor for Entry of an Order (I) Extending the Exclusivity Periods to File and Solicit a Plan and (II) Granting Related Relief. I make this declaration based on personal knowledge.

3. Pursuant to the Court's Order Authorizing Mediation of Chubb Insurers Settlement Motion (Dkt. No. 443), the Chubb Insurers attended an in-person mediation session with Judge Huennekens, Debtor, and the Committee on January 22, 2025, at Debtor's counsel's office in Richmond, VA.

4. I traveled from New York, NY to attend the January 22, 2025 mediation session in person. The Chubb Insurers' in-house counsel, Sandra Hourahan, traveled from Philadelphia, PA to attend the mediation in person. The Chubb Insurers' Director of Claims, Edward Sluke, participated in the mediation by videoconference, as did the Chubb Insurers' longtime outside coverage counsel, Patricia Santelle of White & Williams LLP.

5. The January 22, 2025 in-person mediation session did not result in a resolution of the Chubb Insurers' Settlement Motion. My clients, Ms. Santelle, and I left that mediation session with the understanding that further mediation efforts involving the Chubb Insurers would take place after that in-person session. In that regard, the Chubb Insurers agreed to a three-week extension of the mediation period, until February 21, 2025.

6. Since the initial mediation session on January 22, 2025, the Committee has not engaged in any substantive discussions with the Chubb Insurers. After reaching out to Debtor's bankruptcy counsel and then Judge Huennekens, Ms. Santelle and I learned that Debtor and the Committee had engaged in further mediation discussions with Judge Huennekens, but the Chubb Insurers were not asked to participate in any of them.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 2, 2025, in New York, NY.

Leslie A Davis

Leslie A. Davis