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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.	:	

REPLY IN SUPPORT OF MOTION IN *LIMINE* OF THE DEBTOR TO EXCLUDE THE EXPERT TESTIMONY OF MARC C. SCARCELLA

Hopeman Brothers, Inc., the debtor and debtor in possession in the above-captioned chapter 11 case (the "Debtor"),[1] hereby submits this reply (the "Reply") in support of the *Motion in Limine of the Debtor to Exclude the Expert Testimony of Marc C. Scarcella* [Docket No. 1089] (the "Motion in *Limine*") and in response to the opposition to the Motion in *Limine* [Docket No. 1121] (the "Objection") filed by the Chubb Insurers:

REPLY

1. The Motion in *Limine* is not, as the Chubb Insurers suggest, a challenge to the *methodology* of Mr. Scarcella's estimation work. Nor do the points in the Motion in *Limine* on the irrelevancy of his work go merely to the *weight* that should be accorded to his proposed

[1] Capitalized terms not otherwise defined herein shall have the meanings set forth in the Motion in *Limine*.

testimony. Moreover, the Motion does not seek to eliminate the Best Interests Test issue in the case, only to eliminate irrelevant testimony. The Motion in *Limine* is a targeted attack on Mr. Scarcella's assumption – at the suggestion of counsel, not based on any opinion of Mr. Scarcella – that a three-year bar date artificially should be imposed on claims to be addressed in the Plan and in a hypothetical Chapter 7. There is, of course, no three-year bar date in the Plan, and no such bar date properly can be assumed in a Chapter 7 involving the Asbestos Claims addressed by the Plan. Having applied that completely wrong assumption to his work, his opinions are useless to the Court in determining satisfaction of the Best Interests Test.

2. Contrary to the arguments in the Objection, it is entirely appropriate for this Court to end now the otherwise expensive and time-consuming distraction of having to address Mr. Scarcella's unhelpful analysis during the confirmation hearing. Their plea to have this Court defer a decision on Mr. Scarcella testifying until confirmation is just an effort to dodge the undeniable fact that his work does not address the issues the Court must decide at confirmation. The Court can readily determine that now.[2]

3. The obvious irony of the Chubb Insurers' arguments on the Best Interests Test, and their efforts to support those arguments through irrelevant testimony, is that they are doing so under the pretense of looking out for one small group of Class 4 asbestos claimants who voted not to accept the Plan (just seven voting claimants, out of over 2,416 votes cast in Class 4, all represented by one law firm) but did not object to the Plan. The Chubb Insurers – not the dissenting

[2] Contrary to the unfounded suggestion in FN 19 of the Objection, the Plan Proponents did not use the late disclosure of an expert by the Chubb Insurers as a pretext for more time to prepare for confirmation. The Debtor and the Court were misled. Upon learning of a new witness after discovery had concluded, the Plan Proponents needed time to understand the purported expert testimony being offered and to prepare a rebuttal report. Upon digesting the proposed expert report, and then deposing Mr. Scarcella, it became readily apparent that his opinions were not worth rebutting since he applied the wrong test as a matter of law.

Class 4 members themselves – say Class 4 members will do better under a Chapter 7 than under the proposed Plan. The Chubb Insurers do not have claims in Class 4, or claims at all in this case, and are not the parties who would suffer from any purported shortfall in Plan recoveries compared to Chapter 7 recoveries, so why are they arguing for those asbestos claimants to get more? They aren't, of course. The Chubb Insurers know they will pay less on their insurance policies if claimants cannot make claims if they have not manifested a pleural disease by now, or within a three year bar date. That is why the Plan does not contain such a bar date, and why Mr. Scarcella's work is meaningless and not helpful in the Court's analysis.

4. The Chubb Insurers argue that the Court should only consider "current" claims in the Best Interest Test. The incorrectness of that position is fully explained in the Plan Proponent's Supplemental Memorandum in Support of Confirmation, filed on August 18, [Docket No. 1119], at ¶¶ 15-29.

5. In sum, the operative qualifier on which the Chubb Insurers rely — "***current*** Claims" — appears nowhere in section 1129(a)(7). Even those claimants who have yet to manifest an injury after being exposed to asbestos attributable to Hopeman ***do*** hold claims. Courts in the Fourth Circuit follow the "conduct" test, adopted in *Grady v. A.H. Robins Co.*, 839 F.2d 198, 202 (4th Cir. 1998), which "focuses on the actual act that gives rise to a state or federal claim . . . not the contingency that gives rise to the right of payment." *In re Schechter*, No. 10-72175-FJS, 2012 WL 3555414, at *5 (Bankr. E.D. Va. Aug. 16, 2012) (internal citations and quotation marks omitted).

6. Under the conduct test "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code." *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's, Inc.)*, 607 F.3d 114, 125

(3d Cir. 2010) (rejecting the accrual test and adopting *Grady*'s conduct test). As the *Grossman* court recognized, "bankruptcy courts have followed a form of the conduct test when considering the existence of an asbestos-related claim." *Id.* (collecting cases).

7. Without addressing this applicable test, the Chubb Insurers argue that "unknown 'individuals who have not yet manifested an injury as a result of exposure to asbestos' ***are not*** 'creditors' of Debtor." (Objection, ¶ 26 (emphasis in original)). That position cannot be sustained under *Grady*. A creditor is merely an entity that held a "claim" against the debtor that arose on or before the Petition Date. Under *Grady*, an individual exposed to asbestos prepetition who has yet to manifest an injury from such exposure, nonetheless holds a "claim" within the meaning of section 101(5), which, in turn, means such individuals are creditors. Those claims arising from pre-petition exposure, therefore, must be considered in a Chapter 7 comparison of recoveries for creditors against a plan that contemplates participation in the subject class by those same creditors.

8. Furthermore, contrary to the Chubb Insurers' argument, caselaw recognizes that a statutory interpretation that makes the terms "demand" (as defined in section 524(g)(5)) and "claim" (as defined in section § 101(5)) as mutually exclusive would render "the qualifier 'present or future [demand]' in [section] 524(g)(5) [ ] superfluous." *In re Flintkote Co.*, 446 B.R. 99, 123 (Bankr. D. Del. 2012) (internal citation omitted). That, of course, would contravene "'a well known canon of statutory interpretation that courts should construe statutory language to avoid interpretations that would render any phrase superfluous.'" *Id.* (quoting *United States v. Cooper*, 396 F.3d 308, 312 (3d Cir. 2005)). Thus, courts have, instead, recognized such terms are essentially overlapping, and rejected the mutual-exclusivity argument the Chubb Insurers advance here because such an "interpretation of [section 524(g)] with respect to 'claims' and 'demands' defeats the purpose of the statute by removing the protections for 'exposed yet unimpaired'

asbestos creditors and depriving them of just compensation for their future injuries and illnesses, which was the primary goal behind the enactment of [section] 524(g)." *Flintkote*, 446 B.R. at 123 (emphasis added); *see also In re W.R. Grace & Co.*, 446 B.R. at 127 (rejecting mutual exclusivity argument), *aff'd* 729 F.3d 332, 339-342 (3d Cir. 2013) (rejecting argument that claims and demands are mutually exclusive, and reasoning that such a theory "would effectively read the category of present demands out of the statute.").

9. Simply put, the Chubb Insurers take a position rejected by courts in the context of an asbestos reorganization plan under §524(g). Reading §1129(a)(7) as narrowly as the Chubb Insurers suggest would lead to absurd results in the context of a §524(g) plan.[3]

10. Courts expressly have recognized that "it is appropriate to take the value of future Asbestos Personal Injury Claims into account in determining the Claims that would be required to be paid in a liquidation under Chapter 7 of the Bankruptcy Code." *See, e.g.*, *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 275 (S.D. Ohio 1996); *see also In re W.R. Grace & Co.*, 446 B.R. 96, 127 (Bankr. D. Del. 2011) (recognizing, in addressing an argument that the Best Interests Test was not satisfied, that "[i]n this bankruptcy case, in addition to the current Libby claims that remain to be liquidated there will be future demands due to the nature of asbestos disease.") (emphasis added).[4]

[3] Practically, the Chubb Insurers' interpretation would lead to most §524(g) plans failing the Best Interests Test if only the recoveries by current creditors were to be paid from assets in the hypothetical Chapter 7 context but in the §524(g) plan context, the same assets were to be distributed to both current claimants and those creditors who first manifest an asbestos-related disease decades after confirmation. The Plan, of course, provides for both types of claims to be addressed and to have equal avenues to share in the assets, including coverage rights, transferred to the Trust and the funding to be made to the Trust over time.

[4] In considering the best interests of creditors, this Court also will need to consider the reality that addressing asbestos claims in a Chapter 7 context is not the quick and easy process the Chubb Insurers envision. Nothing Mr. Scarcella has done in his assumed three-year bar date addresses the realities of how a Chapter 7 liquidation will work and how that will impact the Best Interests Test. As the district court in *W.R. Grace & Co.* correctly observed:

11. Finally, the lack of experience or other qualification of Mr. Scarcella to testify on the issues presented by the liquidation analysis, or the Best Interests Test, is not, as the Objection suggests, merely due to the fact that this would be his first time testifying in court on the subject. It is that Mr. Scarcella revealed in his deposition that he could not think of any Chapter 7 case he has been involved in,[5] that he does not know how a Chapter 7 liquidation would work in this context,[6] and has never before been asked to prepare a liquidation analysis, let alone testify on the subject.[7] This Court, of course, has a thorough understanding of how Chapter 7 works and how an asbestos case would not fit into the paradigm Mr. Scarcella envisions. Simply put, the Court does not need Mr. Scarcella's assistance on these issues, and he is not qualified to give it. Mr. Scarcella's expertise is in claim estimation, but he did not estimate *all* the claims that would be addressed by the Plan, only those that would be filed in three years from the Petition Date. That is not the analysis required, and he lacks the experience to even know that was the wrong analysis.

> creditors' claims in a Chapter 7 proceeding would be put into a pool that would not distribute payments until all claims in the class were liquidated and all assets were reduced to cash value. Given the latent nature of asbestos-related pleural diseases, excessive time could pass until all future claims are ascertained. Thus, a Chapter 7 liquidation would need to be held open for a seemingly indefinite amount of time while all personal injury claimants pursued jury trials and settlements in the tort system. Such a process would result in inevitable delay and disparate—or, even worse, unavailable—recovery amongst personal injury claimants. ***Such uncertainty is certainly not within the creditors' best interests***.

475 B.R. 34, 144-45 (D. Del. 2012) (emphasis added); s*ee also In re W.R. Grace & Co.*, 446 B.R. at 127 ("The latency period can be decades and if distribution cannot be made until all claims are liquidated, the entire bankruptcy process could be long-delayed while all claimants and future demand holders proved their claims were liquidated.") (citing *Grossman's*, 607 F.3d at 125).

[5] *See* Exh. A to Motion in Limine, Scarcella Dep. Tr. at 120:2 – 121:6.

[6] Mr. Scarcella testified in his deposition that he contemplated that a Chapter 7 trustee could appoint a liquidation trust to take over the insurance and liquidate asbestos claims, like the Debtor had proposed in its original liquidation plan. Id. at 110:2 – 112:6.

[7] *Id*. at 54:2 – 56:12.

CONCLUSION

12. For these reasons, and those stated in the Motion in *Limine* and the Plan Proponent's Supplemental Memorandum, the Court should grant the Motion in *Limine*, overrule the Objection, and grant such other relief as this Court determines just and proper.

Dated: August 20, 2025
Richmond, Virginia

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