UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
CHEMTURA CORPORATION, *et al.*,[1]	)	Case No. 09-11233 (REG)
Debtors.	)	Jointly Administered

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING THE OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF CHEMTURA CORPORATION, *ET AL*. TO THE COUNCIL FOR EDUCATION AND RESEARCH ON TOXICS' CLAIM NOS. 12051, 12053, AND 12055

In this contested matter in the jointly administered chapter 11 cases of Chemtura Corporation ("**Chemtura**") and its affiliated debtors and debtors in possession (the "**Debtors**"), the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al.* (the "**Creditors' Committee**"), joined by the Debtors and the Official Committee of Equity Security Holders (the "**Equity Committee**"), seeks to disallow and expunge in full three proofs of claim filed by the Council for Education and Research on Toxics ("**CERT**") totaling $9,000,000,000 (collectively, the "**Proofs of Claim**"). In support thereof, the Creditors' Committee, the Equity Committee and the Debtors filed the following:

(a) on February 16, 2010, the Creditors' Committee filed the Objection of the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al.*, to the Council for

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer-identification number, are: Chemtura Corporation (3153); A&M Cleaning Products, LLC (4712); Aqua Clear Industries, LLC (1394); ASCK, Inc. (4489); ASEPSIS, Inc. (6270); BioLab Company Store, LLC (0131); BioLab Franchise Company, LLC (6709); Bio-Lab, Inc. (8754); BioLab Textile Additives, LLC (4348); CNK Chemical Realty Corporation (5340); Crompton Colors Incorporated (3341); Crompton Holding Corporation (3342); Crompton Monochem, Inc. (3574); GLCC Laurel, LLC (5687); Great Lakes Chemical Corporation (5035); Great Lakes Chemical Global, Inc. (4486); GT Seed Treatment, Inc. (5292); HomeCare Labs, Inc. (5038); ISCI, Inc. (7696); Kem Manufacturing Corporation (0603); Laurel Industries Holdings, Inc. (3635); Monochem, Inc. (5612); Naugatuck Treatment Company (2035); Recreational Water Products, Inc. (8754); Uniroyal Chemical Company Limited (Delaware) (9910); Weber City Road LLC (4381); and WRL of Indiana, Inc. (9136).

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Education and Research on Toxics' Claim Nos. 12051, 12053 and 12055 (Docket No. 2001) (the "**Creditors' Committee Objection**");

(b) on March 22, 2010, the Debtors filed the Joinder of the Debtors to the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al.*'s Objection to the Council for Education and Research on Toxics' Claim Nos. 12051, 12053 and 12055 (Docket No. 2320) (the "**Debtors' Joinder**");

(c) on April 2, 2010, the Creditors' Committee filed the Reply of the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al.*, to the Memorandum of Points and Authorities in Opposition to the Objection of the Creditors' Committee to the Council for Education and Research on Toxics' Claim Nos. 12051, 12053, and 12055 (Docket No. 2386) (the "**Reply**");

(d) on April 2, 2010, the Debtors filed the Joinder of the Debtors to the Reply of the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al*. to the Memorandum of Points and Authorities in Opposition to the Objection of the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al*. to the Council for Education and Research on Toxics' (CERT's) Claim Nos. 12051, 12053, and 12055 (Docket No. 2388) (the "**Debtors' Second Joinder**");

(e) on April 2, 2010, the Debtors filed the Declaration of Robert Campbell in Support of Joinder of the Debtors to the Reply of the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al*. to the Memorandum of Points and Authorities in Opposition to the Objection of the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al*. to the Council for Education and Research on Toxics' (CERT's) Claim Nos. 12051, 12053, and 12055 (Docket No. 2389) (the "**Campbell Declaration**");

(f) on April 2, 2010, the Equity Committee filed the Reply of the Official Committee of Equity Security Holders to Memorandum by Council for Education and Research on Toxics and Joinder to Official Committee of Unsecured Creditors' Reply and Objection with Respect to Claim Nos. 12051, 12053, & 12055 (Docket No. 2390) (the "**Equity Committee Reply and Joinder**").

In response to the foregoing, CERT filed the following:

(a) on March 22, 2010, CERT filed its Memorandum of Points and Authorities in Opposition to the Objection of the Official Committee of Unsecured Creditors of Chemtura Corporation, *et al*. to the Council for Education and Research on Toxics' (CERT's) Claim Nos. 12051, 12053, 12055 (Docket No. 2294) (the "**Memorandum**") together with 19 declarations (Docket Nos. 2295-2298, 2301-2310, 2312-2316) (collectively, the "**Declarations**");

(b) on April 5, 2010, CERT filed (i) The Council for Education and Research on Toxics' Notice of Motion and Motion Seeking Leave to File a Sur-Reply to the Joinder Reply Briefs of the Official Committee of Equity Security Holders and Debtors Regarding

the Objection to Claim Numbers 12051, 12053, and 12055 and Request for Evidentiary Hearing (Docket No. 2398) (the "**Motion for Leave to File Sur-Reply**") and (ii) Sur-Reply of the Council for Education and Research on Toxics (CERT) to the Joinder Reply Briefs of the Official Committee of Equity Security Holders and Debtors Regarding the Objection to Claim Nos. 12051, 12053, and 12055 and Request for Evidentiary Hearing (the "**Sur-Reply**") (Docket No. 2401).

Because the Court concludes that (a) CERT lacks standing to bring a claim against the Debtors' estates, and (b) the equities weigh against allowing CERT to amend its Proofs of Claim to address the facial deficiencies addressed herein, the Creditors' Committee Objection is granted, and CERT's Proofs of Claim shall be disallowed and expunged in their entirety.

NOW, THEREFORE, it appearing to the Court that notice of the hearing held on April 7, 2010 on the Creditors' Committee Objection (the "**Hearing**") and the opportunity for any party in interest to be heard on the matter having been adequate and appropriate as to all parties affected or to be affected by this ruling; and the legal and factual bases set forth in the documents filed in support of the Creditors' Committee Objection and presented at the Hearing thereon establish just cause for the relief granted herein; and after due deliberation thereon and good cause appearing therefore, the Bankruptcy Court hereby makes and issues the following Findings of Fact, Conclusions of Law, and Order, which supplement the Court's oral ruling at the Hearing:

I. FINDINGS OF FACT

IT IS HEREBY DETERMINED, FOUND, ADJUDGED, DECREED, AND ORDERED THAT:

A. <u>The Debtors' Production of PBDEs</u>

1. Historically, the Debtors have produced an array of chemical products including, among other things, Penta brominated diphenyl ether ("**pentaBDE**") and Octa brominated diphenyl ether ("**octaBDE**" and, together with pentaBDE, the "**PBDEs**"). PBDEs are commercial chemical products used to prevent fires in a wide variety of products, such as electrical and electronic equipment (e.g., computer and TV set housings), transportation and

aeronautic equipment (e.g., car and plane parts), construction and building goods (e.g., wires, cables, pipes and carpets) and textiles (e.g., upholstery and furniture foam).

2. The Debtors voluntarily ceased production of the PBDEs in 2004.

B. The Debtors' Bar Date

3. On June 11, 2009, each Debtor filed a schedule of assets and liabilities and statement of financial affairs. By order dated August 21, 2009 (Docket No. 992), the Court established October 30, 2009 (the "**Bar Date**") as the deadline for each person or entity asserting a claim against any of the Debtors to file a written proof of claim against the specific Debtor as to which the claim is asserted.

4. More than 14,000 proofs of claim have been filed against the Debtors, totaling more than $10.1 billion in asserted unsecured liabilities other than funded debt claims. More than 8,000 of the 14,000 proofs of claim have been asserted in "unliquidated" amounts or contain an unliquidated component. Of the $10.1 billion in claims filed with an asserted claim amount (other than funded debt claims), $9 billion relates to the Proofs of Claim filed by CERT.

C. CERT's Proofs of Claim

5. CERT is a California public benefit corporation established for the stated purpose of educating and conducting research regarding toxic substances. On October 30, 2009, CERT filed the following Proofs of Claim against the Debtors' estates:

i. Proof of claim number 12051 filed on behalf of CERT for $3 billion against Great Lakes Chemical Corporation ("**GLCC**");

ii. Proof of claim number 12053 filed on behalf of CERT for $3 billion against Chemtura; and

iii. Proof of claim number 12055 filed on behalf of CERT for $3 billion against Great Lakes Chemical Global, Inc. ("**Great Lakes Global**").

6. In support of each of its claims, CERT attached a one page document ("**Attachment A**") alleging that the manufacture and distribution of PBDEs by Chemtura, GLCC and Great Lakes Global caused pollution, contamination and toxic injuries to both humans and animals.[2] Attachment A did not identify the specific legal claims allegedly held by CERT against the Debtors. Attachment A also did not disclose that CERT intended to pursue claims on account of alleged injuries suffered by CERT's members nor did it purport to seek injunctive relief against the Debtors.

D. The Creditors' Committee Objection and Subsequent Pleadings

7. On December 10, 2009, the Debtors filed their Motion for Entry of an Order Establishing Procedures for Objections to Claims (Docket No. 1580) (the "**Claims Procedures Motion**"). On January 20, 2010, the Court entered an order approving the Claims Procedures Motion (the "**Claims Procedures Order**") (Docket No. 1785). The Claims Procedures Order

[2] Attachment "A" states in full:

Creditor is the Council for Education and Research on Toxics (CERT), a California public benefit corporation whose charitable purposes are education and research regarding toxic substances. CERT maintains that it holds claims, on behalf of the public interest, against Debtors Chemtura Corporation, Great Lakes Chemical Corporation, and Great Lakes Chemical Global, Inc., for their manufacture and/or distribution of Penta and Octa brominated diphenyl ethers (pentaPBDE and octaBDE). These chemicals have resulted in pollution, contamination, and toxic injuries to animals and humans.

Penta and Octa brominated diphenyl ethers (pentaPBDE and octaBDE) are a class of synthetic halogenated organic compounds that were used in commercial and household products such as textiles, furniture, and electronics until production was stopped in 2004. The sole U.S. manufacturer of these chemicals was Great Lakes Chemical. Their persistence, bioaccumulation, and toxic potential in animals and in humans are of increasing concern, and they have accordingly been designated as persistent organic pollutants (POPs) by the Stockholm Convention in May 2009. In spite of this ban PBDE-containing-products will remain a reservoir for PBDE release and a threat to human and global environmental health for years to come.

In humans, PBDEs have caused thyroid effects, undescended testicles in infants (a condition associated with a higher cancer risk later in life), decreases in sperm quality and function, and alterations in the levels of male hormones. In animals, these chemicals have caused neurological and reproductive impairments, cancer, and endocrine disruption.

North America has dominated the world market demand PBDEs, consuming 95% of the penta-PBDE formulation. The oceans are global sinks for PBDEs, and higher levels are found in marine organisms than in terrestrial biota. Marine biota and people from North America have sustained the greatest injuries from Debtors' PBDE products because PBDE concentrations in North America are the highest in the world and increasing.

establishes procedures for filing and prosecuting objections to claims by the Debtors and the Creditors' Committee.

8. On February 16, 2010, the Creditors' Committee filed the Creditors' Committee Objection. On March 22, 2010, the Debtors filed the Debtors' Joinder to the Creditors' Committee Objection.

9. Also on March 22, 2010, CERT filed its Memorandum and Declarations.

10. On April 2, 2010, the Creditors' Committee filed its Reply. Shortly thereafter, the Debtors filed the Debtors' Second Joinder and the Equity Committee filed the Equity Committee Reply and Joinder.

11. On April 5, 2010, CERT filed (i) the Motion for Leave to File the Sur-Reply together with the Metzger Declaration and (ii) the Sur-Reply together with the Lesley Turner Declaration.

12. On April 6, 2010, the Court entered its Endorsed Order granting CERT leave to file the Sur-Reply but denied CERT's request for an evidentiary hearing (Docket No. 2408).[3]

13. CERT did not file a motion to amend the Proofs of Claim.

II. CONCLUSIONS OF LAW

A. CERT Lacks Standing to Bring Claims Against the Debtors' Estates

i. Creditors and Claims Under the Bankruptcy Code

14. Pursuant to Bankruptcy Code section 501(a), only creditors and indenture trustees may file proofs of claim in a debtor's chapter 11 proceeding. 11 U.S.C. § 501(a). Pursuant to Bankruptcy Code section 101(10), "creditor" is defined as –

[3] The Court has only considered the arguments in the Sur-Reply to the extent it addressed *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004), *Warth v. Seldin*, 422 U.S. 490 (1975) *and Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). The Court did not consider the Sur-Reply with respect to new arguments made by CERT, which new arguments the Court finds to be legally improper.

> (A) [an] entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
>
> (B) [an] entity that has a claim against the estate of a kind specified in section 348(d), 502 (f), 502(g), 502(h), or 502(i) of this title; or
>
> (C) [an] entity that has a community claim.

11 U.S.C. §101 (10).

15. Under subsection (A) of section 101(10), a "creditor" is defined as a holder of a prepetition claim against the debtor. The Bankruptcy Code defines "claim" broadly as a right to payment or a right to an equitable remedy for a breach of performance "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). The Bankruptcy Code's definition of "claim" is broad. *See F.C.C. v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302 (2003) ("We have said that 'claim' has the 'broadest available definition.'") (citing *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991)); *Browning v. MCI, Inc.* (*In re WorldCom, Inc.*), 546 F.3d 211, 216 (2nd Cir. 2008) ("Congress gave the term 'claim' 'the broadest available definition' in the Bankruptcy Code.'") (citing *F.C.C. v. NextWave Personal Commc'ns Inc.*, 537 U.S. at 302).

16. Notwithstanding the foregoing, there are limits as to what constitutes a claim under the Bankruptcy Code. A valid claim exists only where (i) the claim arose prepetition and (ii) the claimant possessed a right to payment. *Riverwood Int'l Corp. v. Olin Corp.* (*In re Manville Forest Prods. Corp.*), 225 B.R. 862, 866 (Bankr. S.D.N.Y. 1998), aff'd, 209 F.3d 125 (2d Cir. 2000). "A claim will be deemed to have arisen prepetition if the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation – a right to payment – under the relevant non-bankruptcy law." *Olin Corp. v. Riverwood Int'l Corp.* (*In re Manville Forest Prods. Corp.*), 209 F.3d 125, 128-29 (2d Cir. 2000)

(internal quotations omitted); see also *Epstein v. Official Comm. Of Unsecured Creditors* (*In re Piper Aircraft Corp.*), 58 F.3d 1573, 1577 (11th Cir. 1995) ("The debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct.").

ii. A Claimant Must Have Standing to Assert a Claim

17. As stated above, a claim must be predicated on an obligation enforceable against a debtor under relevant non-bankruptcy law. A claimant, therefore, cannot assert a claim against a debtor's estate if such claimant does not have standing to bring the underlying cause of action in a non-bankruptcy forum. The United States Supreme Court established a three-part test to determine whether a claimant has standing to pursue a given cause of action in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Under *Lujan*, (i) "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protection interest which is (a) concrete and particularized and (b) actual or imminent,' not 'conjectural' or 'hypothetical;'" (ii) "there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;" and (iii) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.*

iii. CERT is not a Creditor of the Debtors' Estates

18. As a threshold matter, CERT does not have standing under *Lujan* to bring a claim against any of the Debtor entities on its own behalf. While CERT has identified an unsubstantiated injury to humans and animals generally, CERT does not specifically identify an actual, particularized injury to CERT. *See* Attachment A. As a result, CERT lacks standing to sue the Debtors in a relevant non-bankruptcy forum, is not a creditor of the Debtors' estates

because it possesses no prepetition right to payment, and lacks authority to file proofs of claim in the Debtors' cases.

iv. CERT Does Not Satisfy Organizational Standing Requirements

19. Notwithstanding the fact that CERT does not satisfy the *Lujan* test and therefore cannot assert a claim on its own behalf, CERT maintains in its Memorandum that it has organizational standing to assert claims against the Debtors' estates on behalf of its members and the people of the State of California. CERT, however, also does not satisfy the organizational standing requirements outlined by the United States Supreme Court and the United States Court of Appeals for the Second Circuit.

20. The prerequisites for organizational standing to assert a claim are set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), and its progeny. *Hunt* provides that an organization only has standing to bring suit on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members . . . ." *Id.* All three prongs of the *Hunt* test must be satisfied in order for organizational standing to be obtained.

21. CERT cannot meet the third prong of the *Hunt* test as a matter of law. Consideration of the third prong of the *Hunt* test, whether the cause of action requires the participation of individual members, necessitates an examination of the form of relief sought by the association or organization. The United States Supreme Court in *Warth v. Seldin* held that an organization "seeking to recover damages on behalf of its members lack[s] standing because 'whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of the injury would require individualized proof.'" *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 515

(1975)). Organizational standing may only be appropriate, therefore, if the organization is seeking an injunction, declaration or other form of prospective relief:

> whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed in all of the cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Warth v. Seldin, 422 U.S. at 515. Similarly, in *Bano*, the Second Circuit denied standing to an organization seeking to assert claims for medical monitoring costs on behalf of its individual members because the organization could not meet the third prong of the *Hunt* test. The *Bano* Court stated that "we know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members." *Bano v. Union Carbide Corp.,* 361 F.3d at 714. The *Bano* Court went on to note that even where an organization asserts a claim for injunctive or declaratory relief, the organization does not automatically have standing to assert such claim. *Id.* at 714. "The organization lacks standing to assert claims of injunctive relief on behalf of its members where 'the fact and extent' of the injury that gives rise to the claims for injunctive relief 'would require individualized proof,' or where 'the relief requested [would] require[] the participation of individual members in the lawsuit.'" (*quoting Warth*, 422 U.S. at 515-16; *Hunt*, 432 U.S. at 343).

22. While *Bano* involved an effort to recover damages in a plenary litigation, the requirement that a claimant satisfy the third prong of the *Hunt* test is even more compelling when damages are sought in a bankruptcy context. It is particularly appropriate to consider carefully the injuries, if any, to the claimant in a bankruptcy case because any claimant's recovery comes at the expense of creditors with valid claims against the estate. Therefore, as an initial matter, a

claimant must show that it has a right to payment to recover on a claim in a bankruptcy case. Indeed, this principle is a fundamental one in bankruptcy law to both bankruptcy practitioners and judges.

23. CERT's Proofs of Claim seek an aggregate of $9 billion in monetary damages on account of injuries for "pollution, contamination, and toxic injuries to animals and humans" due to exposure to PBDEs. None of CERT's Proofs of Claim request any form of injunctive, declaratory or other prospective relief. Moreover, CERT's claims for injunctive relief as set forth in its memoranda and supporting declarations would require individualized proof of the participation of individual members. Thus, CERT has not satisfied the third prong of the *Hunt* test and lacks organization standing. In addition, because CERT lacks organizational standing, it would have no right to payment and, thus, no claim against the Debtors' estates.

24. Even if CERT met the third prong of the *Hunt* test, CERT has failed to demonstrate that the relief sought in its Proofs of Claim is "germane" to CERT's stated purposes and thus cannot meet the second prong. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. at 343. According to its papers, CERT "is a public benefit corporation whose charitable purposes are education and research regarding toxic substances." Memorandum at 1. In stark contrast to "education and research," the Proofs of Claim seek recovery of money damages for alleged physical injuries to humans, animals and the environment. *See* Attachment A. Recovery of monetary damages for physical injuries or for injury to the environment are not germane to education and research of toxic substances.

25. Accordingly, CERT cannot establish organizational standing.

B. CERT Has Failed to Demonstrate that It Should Be Granted Leave to Amend Its Proofs of Claim

26. By its Memorandum, CERT articulates for the first time four separate claims allegedly held on behalf of its members for damages related to the Debtors' production and distribution of PBDEs: (i) claims for medical monitoring costs; (ii) public nuisance claims; (iii) claims for restitution owed to members of CERT due to the Debtors' engagement in unfair business practices; and (iv) environmental claims arising under various federal statutes. These claims are predicated on a drastically different set of legal issues and factual underpinnings than the Proofs of Claim purporting to evidence CERT's own entitlement to $9 billion in money damages. Consideration of the Memorandum and Sur-Reply would therefore be akin to allowing CERT to amend its Proofs of Claim, notwithstanding that no motion for leave to amend is currently before the Court. Nevertheless, the Court finds that even if the Memorandum, Sur-Reply and statements made by CERT's counsel at the Hearing were to constitute a *de facto* request by CERT to amend its Proofs of Claim, CERT's request should be denied.

27. While neither the Bankruptcy Code nor the Bankruptcy Rules specifically define what constitutes an amendment to a proof of claim, the Court finds that claims asserted after the filing of a proof of claim are amendments to the original proof of claim where the subsequent claim is asserted in order to (i) correct a defect in the form of the original claim, (ii) describe the original claim with greater particularity or (iii) plead a new theory of recovery on the facts set forth in the original claim. *In re McLean Indus., Inc.*, 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990) (citing *In re G.L. Miller & Co.*, 45 F.2d 115, 116 (2d Cir. 1930)); *see also In re Enron Corp.*, 328 B.R. 75, 87 (Bankr. S.D.N.Y. 2005) (same) (citing *In re W.T. Grant Co.*, 53 B.R. 417, 420 (Bankr. S.D.N.Y. 1985)).

28. The Bankruptcy Code and Bankruptcy Rules are silent as to when amendments to proofs of claim should be allowed. Courts within the Southern District of New York and elsewhere, however, have held that creditors must obtain court approval to amend previously filed proofs of claim after the bar date has passed. *In re W.T. Grant Co*., 53 B.R. at 420; *see also*, *In re Wilson*, 136 B.R. 719 (Bankr. S.D. Ohio 1991) (party seeking to amend its claim after the bar date must obtain leave of court); *Bishop v. United States (In re Leonard),* 112 B.R. 67, 71 (Bankr. D. Conn. 1990) (leave of court is required to amend). Moreover, motions to amend should be filed separately with the court, with proper notice given to all parties in interest; they should not be implied in briefs responding to motions to disallow.

29. In determining whether to permit a requested amendment, courts typically apply a two part test. First, courts examine whether the proposed amendment is reasonably related to a timely filed claim. *Bishop v. United States (In re Leonard),* 112 B.R. at 71. An amendment will not be allowed if it is merely a thinly veiled attempt to file a new claim. *Bishop v. United States (In re Leonard),* 112 B.R. at 71 (internal citations omitted); *In re Enron Corp.*, No. 01-16034, 2007 WL 610404 at *4 (Bankr. S.D.N.Y. Feb. 23, 2007).

30. Second, courts question whether allowing the amendment would be equitable. *Bishop v. United States (In re Leonard),* 112 B.R. at 71 (citing *In re Black & Geddes, Inc.*, 58 B.R. 547, 553 (S.D.N.Y. 1983), and *In re Wilson*, 96 B.R. 257, 262 (B.A.P. 9th Cir. 1988)). Factors considered by courts under the second prong include: (i) undue prejudice to the opposing party; (ii) bad faith or dilatory behavior on the part of the claimant; (iii) whether other creditors would receive a windfall were the amendment not allowed; (iv) whether other claimants might be harmed or prejudiced; and (v) the justification for the inability to file the amended claim at the time the original claim was filed. *Maxwell Macmillan Realization Liquidating Trust v. Aboof* (*In*

re Macmillan, Inc.), 186 B.R. 35, 49 (Bankr. S.D.N.Y. 1995). In application, courts tend to look at all the facts and circumstances of a given case to determine whether allowing the amendment would be fair and equitable.

31. Upon application of the foregoing factors, courts in the Southern District of New York have repeatedly denied requests to amend proofs of claim after the bar date has passed. *In re Enron Corp.*, 2007 WL 610404; *Aristeia Capital v. Calpine Corp.* (*In re Calpine Corp.),* 2007 WL 4326738 (S.D.N.Y. Nov. 21, 2007); *In re Spiegel, Inc.*, 337 B.R. 816 (Bankr. S.D.N.Y. 2006); *Liddle v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 159 B.R. 420 (S.D.N.Y. 1993). In *Calpine*, the indenture trustee timely filed a proof of claim for payment owed on various convertible notes as well as a catch-all request for all unliquidated charges under the indenture. After the bar date, the indenture trustee filed a supplemental proof of claim including an additional claim to exercise the conversion rights under the notes or, in the alternative, to receive damages for the loss of such rights. The *Calpine* Court denied the indenture trustee leave to amend the proof of claim to add the new claim for conversion rights primarily because the request came more than seven months after the bar date. *Aristeia Capital v. Calpine Corp.* (*In re Calpine Corp.),* 2007 WL 4326738. The *Calpine* Court held that the original proof of claim did not provide the debtors with reasonable notice of the newly alleged conversion claim, and observed that "bar dates would be rendered meaningless if creditors were granted leave to amend to assert new novel claims based on broad language in a timely-filed proof of claim." *Id.*, at *5-6.

32. Courts in other jurisdictions similarly limit the ability of creditors to amend proofs of claim long after the bar date. The Southern District of Texas, for example, considered whether a creditor should be allowed to amend its claim nearly 100 days after the bar date in *In re North*

Bay Gen. Hosp., Inc. 404 B.R. 443, 456 (Bankr. S.D. Tex. 2009). In *North Bay Gen. Hosp., Inc.*, the creditor had filed a timely proof of claim, but had not provided sufficient documentation to substantiate its claim as is required by Fed. R. Bankr. P. 3001.[4] Nearly 100 days after the bar date, the debtor objected to the claim and sought to have it disallowed in full. In response, the creditor attempted to submit the supporting documentation required by Fed. R. Bankr. P. 3001, including documentation that would identify the individuals whose claims comprised the proof of claim in question. The court denied the creditor's efforts to further substantiate its claim, holding that because the original proof of claim (i) did not disclose the names of the individual claimants, and (ii) failed to attach the documents that formed the basis of each such claim, the debtor's objection to the proof of claim should be sustained. *Id.*

33. Applying the foregoing analysis to CERT's request for leave to amend its Proofs of Claim (assuming such a request has in fact been made), the Court finds that the facts before it do not justify authorizing the amendment. First, CERT's request for, among other things, injunctive relief and restitution is wholly inconsistent with the relief sought in its Proofs of Claim. Second, CERT's request (made almost 150 days after the Debtors' Bar Date) comes too late in these chapter 11 cases to warrant circumventing the established claims procedures. Third, CERT engaged in dilatory behavior by, among other things, failing to (a) substantiate its demand for $9,000,000,000 in money damages in its Proofs of Claim, and (b) adequately brief the standing issues identified by the Creditors' Committee, the Debtors and the Equity Committee. Fourth, consideration of the relief requested in the Memorandum would result in undue prejudice to all of the creditors and stakeholders in these cases. Finally, CERT has provided no legitimate

[4] Fed. R. Bankr. P. 3001(a) requires that a proof of claim conform substantially to the appropriate Official Form, which in this case is Official Form 10. Official Form 10 requires that creditors attach copies of any documents that support the claim.

justification as to why the relief requested in the Memorandum was not included in its initial Proofs of Claim; indeed, CERT's declarants maintain that the harms allegedly inflicted on humanity and the environment by PBDEs have been known to the scientific community for years. *See e.g., Declaration of Theodora Colborn, Ph.D.; Declaration of Susan Shaw, D.P.H.; Declaration of Ake Bergman, Ph.D.*

C. The Four Claims Asserted By CERT for the First Time in Its Memorandum Fail Due to a Number of Procedural Defects

34. Even if the Court were to grant CERT leave to amend its Proofs of Claim to incorporate all of the claims identified in, and supporting documentation attached to, its Memorandum, CERT's Proofs of Claim must still be disallowed because CERT has failed to state a claim for which it can seek relief. As set forth below, each of the new claims CERT purports to bring against the Debtors suffers from a number of legal and procedural defects.

(i) Medical Monitoring

35. Claims for medical monitoring seek to compensate an injured plaintiff for the extra medical checkups that the plaintiff expects to incur as a result of such plaintiff's exposure to, in this case, an allegedly toxic chemical. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 438 (1997). In *Buckley*, the Supreme Court considered whether a railroad worker who had been exposed to asbestos repeatedly over the course of his career but had not exhibited any symptoms of exposure should be entitled to recover the costs of medical monitoring. The Supreme Court declined to permit the award of such costs absent manifestations of an actual disease, noting that to hold otherwise in a case where the claimant had not exhibited an injury could "threaten both a 'flood' of less important cases (potentially absorbing resources better left available to those more seriously harmed […]) and the systematic harms that can accompany 'unlimited and unpredictable liability.'" *Id.* at 442. This is particularly true when one considers

that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Id.*

36. The Second Circuit considered whether an organization has standing to pursue medical monitoring claims on behalf of its members in *Bano v. Union Carbide Corp*., 361 F.3d 696 (2d Cir. 2004). In *Bano*, individuals in Bhopal were allegedly exposed to water that had been contaminated by a chemical manufacturing facility in India that was a partially-owned subsidiary of a U.S. corporation. *Id.* at 702. A lawsuit was brought by, among others, organizations whose members lived near the chemical manufacturing facility and who allegedly suffered personal injury and property damage as a result of the contaminated water. *Id.* at 705. Among the claims asserted by the organizations on behalf of their individual members were claims for medical monitoring costs. The Second Circuit declined to grant the organizations relief on this basis, concluding "that the organizations' claims seeking relief for their members in the form of reimbursement for the costs of medical monitoring of their physical condition were dismissible for lack of associational standing." *Id.* at 715. The Second Circuit went on to state that it could not "envision a medical monitoring program that would not require the participation of the organizations' individual members." *Id.* at 715.

37. The Supreme Court of California came to a similar conclusion in *Lockheed Martin Corp. v. Superior Court*, in which the court refused to certify a class of individual claimants seeking medical monitoring damages arising from the alleged contamination of a municipal water supply with toxic chemicals. *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096 (Cal. 2003). As in *Bano*, the *Lockheed* Court held that the plaintiffs failed to demonstrate that common issues predominate, because "each class member's actual toxic dosage would remain relevant to some degree," and "causation and damage issues raised by plaintiffs'

claims must be counted among those that would be litigated individually, even if the matter were to proceed on a class basis." *Id.* at 1109-1111. Although *Lockheed* did not address the question of whether an organization can obtain standing to assert a medical monitoring claim, the Supreme Court of California expressly found that the claims must be litigated individually because issues related to each individual's right to recovery are "numerous and substantial." *Id* at 1111.

38. Based on the foregoing, CERT's medical monitoring claims must be disallowed for lack of standing because medical monitoring claims require the participation of the affected individuals.

(ii) *Public Nuisance*

39. CERT alleges that it can properly assert public nuisance claims both "on behalf of the citizens of the State of California," and in a representational capacity to recover damages for the "special injuries" suffered by CERT's members.[5] For the reasons set forth below, the Court finds that CERT lacks standing to bring either public nuisance cause of action.

40. Public nuisance claims arising under California law are governed by section 731 of the California Code of Civil Procedure and section 3493 of the California Civil Code. Cal. Civ. Proc. Code §731 (2010); Cal. Civ. Code §3493 (2010). Section 731 requires that a party asserting a public nuisance claim be either (i) a person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, or (ii) the district attorney or the city

[5] At the Hearing, counsel for CERT cited California Code of Civil Procedure section 382 for the proposition that CERT could bring representational claims "where the question is one of public interest." Transcript of Oral Argument, Case No. 09-11233 (REG) (Apr. 7, 2010), at 110. California Code of Civil Procedure section 382 is a procedural rule that cannot override standing requirements contained in a particular statute. Accordingly, counsel's reliance on *Farm Sanctuary, Inc. v. Dept. of Food & Agriculture*, 63 Cal.App.4th (Cal. Ct. App. 1998), *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (Cal. Ct. App. 1973), and *Tenants Assoc. of Park Santa Anita v. Beverly Southers*, 222 Cal.App.3d 1293 (Cal. Ct. App. 1990) is misplaced.

attorney of any county, town or city in which such nuisance exists on behalf of the people of the State of California. Cal. Civ. Proc. Code §731 (2010). Section 731 also limits the remedies available to the district or city attorney pursuing a public nuisance claim to abatement, and does not authorize such entity to seek money or other damages. Cal. Civ. Proc. Code §731 (2010). Section 3493 allows a private person to maintain an action for public nuisance only where such person has suffered an "injury different in kind and not merely in degree from that suffered by the general public." Cal. Civ. Code §3493 (2010); *Mangini v. Aerojet-Gen. Corp.*, 230 Cal.App.3d 1125, 1137 (Cal. Ct. App. 1991).

41. Turning first to CERT's asserted claim on behalf of the people of the State of California, CERT maintains that the facts of this case authorize CERT to bring a public nuisance cause of action for the restitution of California's water supply. By the plain language of section 731, however, claims "on behalf of the people of the State of California" may be brought only by either the district attorney or the city attorney of any county, town or city in which the alleged nuisance exists. As CERT is neither a district attorney or city attorney, CERT lacks standing under California law to assert a claim for public nuisance on behalf of the people of the State of California. Moreover, public entities are authorized under section 731 of the California Code of Civil Procedure to seek only abatement of the alleged nuisance, and cannot recover money damages.

42. CERT also alleges that it has authority to bring a public nuisance claim against the Debtors because certain of its members have suffered "special injuries," thus satisfying the standing requirement embodied in California Code of Civil Procedure section 731. CERT's theory must fail. First, CERT has not demonstrated that an organization has standing under California law to bring a public nuisance claim on behalf of an individual whose person or

property has suffered an injury. While CERT maintains that "public nuisance actions can be pursued on a representational basis," and cites to *Mangini* for this proposition, the court in *Mangini* simply acknowledged that an individual can bring an action for public nuisance. The *Mangini* Court never addressed whether an organization purporting to act as a representative for that same individual has standing to assert a claim in lieu of the individual under section 731.

43. Second, CERT's contention that it can bring an action for public nuisance in a representative capacity is directly contradicted by the plain language of the statute, which requires the entity bringing the action to be the one whose property has been injuriously affected. *See* Cal. Code Civ. Proc. § 731. Indeed, CERT fails to cite any legal precedent in which a California court has recognized that an organization has standing to sue for its individual members' specific injuries under a public nuisance theory. As CERT has also not alleged that it has itself suffered an injury attributable to the "nuisance" perpetrated by the Debtors, CERT lacks standing to bring a claim for public nuisance under California law.

(iii) California Business and Professions Code

44. CERT alleges that it can assert a representative claim against the Debtors for unfair business practices pursuant to California's Business and Professions Code section 17200, et seq. for injunctive relief and restitution. Memorandum at 12. However, under section 17203 of California's Business and Professions Code, a private party may bring an unfair competition action on behalf of others if the individual can demonstrate "injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. Prof. Code §§ 17203, 17204. As described below, the statute was recently amended to prevent the continued abuse of its provisions.

45. In 2004, the State of California passed Proposition 64 in an effort to curb the filing of frivolous suits commenced "on behalf of the public interest" by plaintiffs firms who sought to recover attorneys' fees under section 17200. See 2004 Cal. Legis. Serv. Prop. 64. Proposition 64 amended the citizen suit standing requirement of section 17200 to require that the entity bringing the claim must itself have suffered an injury in fact. See Cal. Bus. & Prof. Code § 17204; *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 209 P.3d 937, 944 (Cal. 2009). "In approving Proposition 64, the voters found and declared that the amendments were necessary to prevent abusive actions by attorneys whose clients had not been 'injured in fact' or used the defendant's product or service, and to ensure 'that only the California Attorney General and local public officials [are] authorized to file and prosecute actions on behalf of the general public.'" *Buckland v. Threshold Enter., Ltd.*, 155 Cal.App.4th 798, 812-13 (Cal. Ct. App. 2007) (internal citations omitted).

46. In requiring each individual or organization alleging an unfair business practices claim to demonstrate that it has an "injury in fact" before obtaining standing, the California legislature expressly elected not to incorporate the federal associational standing requirements outlined in *Hunt* for claims brought under section 17200, et seq. *See Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 209 P.3d at 944 ("This standing requirement [in Proposition 64] is inconsistent with the federal doctrine of associational standing. The *Hunt* doctrine applies only when the plaintiff association has not itself suffered actual injury but is seeking to act on behalf of its members who have sustained such injury.") (internal citations omitted). Stated differently, Proposition 64 imposes a substantially higher standing threshold than that adopted by the Supreme Court in *Hunt* by requiring an association to itself have sustained an injury, rather than relying on the injuries allegedly sustained by its members to

obtain standing. Because CERT does not allege that it has suffered an injury in fact as a result of the Debtors' alleged unfair business practices, CERT does not have standing to bring a claim for unfair business practices against the Debtors.

(iv) Federal Environmental Statutes

47. While CERT alleges in its Memorandum that it has viable claims under a number of federal environmental statutes including the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Safe Drinking Water Act and the Endangered Species Act (collectively, the "**Environmental Statutes**"), CERT never explains how it could invoke any of the Environmental Statutes against the Debtors to entitle it to any form of relief. Memorandum at 16. CERT instead makes the blanket statement that the Environmental Statutes permit private individuals to pursue actions against any person or organization for violating the Environmental Statutes. Although CERT is accurate in stating that private individuals are permitted to pursue actions under the citizen enforcement provisions of the Environmental Statutes, the United States Supreme Court has held that these provisions cannot be invoked to sue for past violations. *See Friends of the Earth Inc., v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167 (2000) (holding that individuals lack standing under the citizen enforcement provision of the Clean Water Act to sue for violations that have ceased by the time the complaint is filed). Accordingly, because the Debtors are no longer producing or distributing the PBDEs identified in CERT's proof of claim materials, any action brought by CERT against the Debtors for violation of the Environmental Statutes would therefore relate to alleged past violations of such statutes and is expressly precluded by the Supreme Court.

48. Further, CERT's remedies under the Environmental Statutes are limited to injunctive relief and civil penalties. Civil penalties awarded under the Environmental Statutes

are paid to the United States Treasury. *See Ailor v. City of Maynardville, Tenn.*, 368 F.3d 587, 590 (6th Cir. 2004) (remedies available under the Clean Water Act are limited to injunctive relief and civil penalties which are payable to the United States Treasury); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (noting that the legislative history of citizen enforcement suits provides that they are limited to injunctive relief); *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 307 F.3d 1318, 1326 (11th Cir. 2002) ("[C]itizen suits under the Endangered Species Act may only seek equitable relief, damages are not available."). As previously stated, the Debtors are no longer engaged in conduct that CERT could seek to enjoin or for which the assessment of civil penalties would be appropriate. *See Laidlaw*, 528 U.S. at 174-75 (recognizing that civil penalties are intended to deter a defendant from future violations). Any civil penalties imposed on the Debtors would be paid to the United States Treasury in any event, and would not be recoverable by CERT or its attorneys. Accordingly, CERT cannot establish a right to payment under the Environmental Statutes or under any other applicable law and, therefore, cannot assert a claim in the Debtors' bankruptcy cases. 11 U.S.C. § 101(5).

Based upon the foregoing, it is hereby **ORDERED** that**:**

1. The Creditors' Committee Objection is granted to the extent set forth herein.

2. The findings of fact and the conclusions of law stated herein shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to the proceeding by Bankruptcy Rule 9014. To the extent any finding of fact shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law shall be determined to be a finding of fact, it shall be so deemed.

3. CERT's *de facto* request to amend its Proofs of Claim is denied.

4. The Proofs of Claim filed by CERT are hereby disallowed and expunged in their entirety.

5. The Creditors' Committee and/or the Debtors, as appropriate, are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

6. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. To the extent this Order is inconsistent with any prior order or pleading with respect to the Creditors' Committee Objection in these chapter 11 cases, the terms of the Order shall govern.

8. Consistent with the Court's oral ruling, the Creditors' Committee, the Equity Committee, and the Debtors reserve their rights to seek sanctions against CERT in connection with the filing of its Proofs of Claim.

9. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

Dated: New York, New York
May ***17***, 2010

s/ Robert E. Gerber
HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE