UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re:	:	Case No. 10-31607
GARLOCK SEALING TECHNOLOGIES LLC, *et al.*,	:	Chapter 11
Debtors.[1]	:	Jointly Administered

OBJECTIONS OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS TO CONFIRMATION OF THE DEBTORS' SECOND AMENDED PLAN

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Dated: October 6, 2015

[1] The Debtors are Garlock Sealing Technologies LLC ("**GST**"), Garrison Litigation Management Group, Ltd. ("**Garrison**," and together with GST, "**Garlock**"), and The Anchor Packing Company ("**Anchor**").

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The Official Committee of Asbestos Personal Injury Claimants ("**ACC**"), by and through its undersigned counsel, hereby objects to confirmation of the Debtors' Second Amended Plan of Reorganization, dated January 14, 2015 (as revised and updated on April 13, 2015) [Dkt. No. 4547-1] ("**Plan**").[2] Under the schedule for confirmation proceedings ordered by this Court, objections to confirmation of the Plan that do not depend on the results of voting are due on October 6, 2015 (hereinafter, "**First Set of Objections**"), and confirmation objections that depend on such results are due on December 18, 2015 ("**Second Set of Objections**"). The ACC's First Set of Objections and the grounds therefore are stated below.[3]

OVERVIEW

Garlock's proposed Plan is a blatant attempt to abuse the bankruptcy process. It would strip Garlock's asbestos creditors of the protections they are afforded under state law in the tort system, substitute Garlock's own one-sided compensation rules, and pay far less to asbestos victims than Garlock could realistically expect to pay outside of bankruptcy. The Plan would

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[2] As used herein, capitalized terms not otherwise defined have the meanings ascribed to them in the Plan.

[3] This submission builds upon the Preliminary Confirmation Objections of the Official Committee of Asbestos Personal Injury Claimants to the Debtors' Second Amended Plan of Reorganization, dated Apr. 30, 2015 [Dkt. No. 4586] (the "**Preliminary Objections**"). The Preliminary Objections are incorporated by reference as if fully set forth herein. The ACC also reserves the right to supplement these confirmation objections after discovery and conform them to the evidence received in the confirmation hearing.

Nothing herein shall constitute, or be deemed to constitute, a waiver of (1) any argument, factual or legal, pertaining to the Second Set of Objections; (2) any argument, factual or legal, that will arise if the Order Estimating Aggregate Liability, *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014), is rejected by a reviewing court; and (3) any arguments, factual or legal, pertaining to whether the Future Claimants' Representative ("**FCR**") has the legal authority and capacity to cast a ballot on behalf of holders of Class 5 Future GST Asbestos Claims, as those arguments have been expressly preserved by the Court. *See* Order Approving Disclosure Statement and Establishing Asbestos Claims Bar Date and Procedures for Solicitation ¶ 15, at 8, entered Apr. 10, 2015 [Dkt. No. 4542] (the "**DS & Solicitation Procs. Order**").

afford protection from asbestos claims to Garlock's nondebtor Affiliates without complying with the requirements imposed by the Code, and would cap the liability of Garlock and its Affiliates for such claims while equity retains hundreds of millions in value, thus shifting the risk of inadequate Plan funding from the equity holders to the asbestos victims.

Under the Plan, asbestos claimants would be offered inadequate and arbitrary settlements for their claims, the amounts of which would be determined by the application of a matrix devised by Garlock, and which would be far below the settlement values that Garlock would be able to achieve in the tort system. Implicitly acknowledging that claimants would find the proposed settlement amounts insufficient, Garlock has included in its Plan numerous provisions designed to coerce claimants to accept those inadequate settlements by ratcheting up the burdens and costs of litigation for the claimants and compounding settlement pressures on them, while insulating Reorganized Garrison from litigation risk and settlement pressures. This result is not consistent with the objectives and purposes of the Code. Moreover, the Plan purports to override state law in violation of the constitutional principles of federalism and separation of powers and fundamental principles of bankruptcy law, and would impose measures beyond this Court's authority under the Rules Enabling Act to adopt.

Also embedded in the Plan is an arrangement, known as the "Parent Settlement," that would release and enjoin a broad spectrum of claims, both known and unknown, against the nonbankrupt Affiliates—all avoidance claims, all derivative liability claims, and even some claims for Affiliates' own asbestos torts—and would do so for a fraction of their potential worth. In addition to settling estate-held claims, the Parent Settlement purports to release and enjoin claims that do not even belong to the estate, but rather to individual asbestos claimants, in violation of § 1123(b)(3)(A) of the Code. Furthermore, the Parent Settlement is the product of

self-dealing insofar as it originates in a scheme struck between related parties—namely, the Debtors and Coltec—to extinguish claims against EnPro and Coltec, who control and dominate the Debtors. Thus, the Parent Settlement would constitute a breach of the Debtors' fiduciary duties to their creditors.

The Parent Settlement is neither fair nor equitable to Garlock's asbestos creditors; rather, it would benefit Garlock's parent companies and Affiliates at the expense of those creditors. The Supreme Court has instructed that "[w]hether a company is solvent or insolvent . . . any arrangement of the parties by which the subordinate rights and interest of the stockholders are attempted to be secured at the expense of the prior rights of creditors comes within judicial denunciation." *Consolidated Rock Prods. Co. v. DuBois*, 312 U.S. 510, 527 (1941) (internal quotation marks and citation omitted).

Garlock could not achieve these results under § 524(g) of the Bankruptcy Code, which was adopted by Congress specifically to deal with the unique problems presented by asbestos-driven bankruptcies. A reorganization plan such as the one proposed by Garlock here, which would channel current and future asbestos claims to a trust and enjoin such claims against a debtor and its affiliates, must satisfy the requirements of § 524(g). Garlock's proposed Plan is a strained attempt to circumvent the protections afforded asbestos creditors by that statute.

The Plan would shield the Debtors' Affiliates from asbestos claims through an injunction and declaratory provision that are intended to provide the same protections as a channeling injunction under § 524(g), without complying with the requirements of that statute. Among other things, as a prerequisite for obtaining the benefits of an asbestos-related channeling injunction, § 524(g) requires that there be a finding by the court that the contributions to be provided by or on behalf of protected nondebtors are fair and equitable in light of the benefits to

be conferred on those nondebtors. Under the Plan, the contributions to be made on behalf of the Debtors' parent companies and other Affiliates would be inadequate and largely illusory, particularly in comparison to the extraordinary injunctive and declaratory protections that the Plan would confer on them.

Section 524(g) also requires approval of the plan by a supermajority vote of the current asbestos claimants. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). Garlock's Plan would disregard the votes of asbestos claimants, on the pretense that they are not impaired. But asbestos claims are obviously and profoundly impaired by the Plan. Among other things, claimants would no longer have recourse against Garlock's assets in the tort system. Rather, claimants who choose to resolve their claims through litigation would have to pursue Reorganized Garrison, and the funds available to compensate claimants would be artificially capped. The Debtors' assets would be insulated from judgment to the extent that the amount of any judgments, plus defense costs and Reorganized Garrison's litigation and management fees, exceed the amount in the Litigation Fund. The Plan, in other words, would impose on asbestos claimants the risk that the funding of the Plan will not suffice to pay the allowed amounts of all asbestos claims, but would permit the Debtors' ultimate parent company, EnPro, to retain value without ensuring that the creditors will be paid in full.

If the Court finds that the current asbestos claims in Class 4 are impaired and the holders of those claims are entitled to have their votes counted, the Plan contemplates relying on the accepting vote of the FCR to cramdown the Plan on the dissenting current claimants. The ACC has already registered its objection to the Plan's assumption that the FCR is entitled to cast a

ballot,[4] and the Court has specifically reserved that issue.[5] At the appropriate time, the ACC will brief that issue and demonstrate that the FCR's ballot is *ultra vires* and unlawful. In this First Set of Objections, however, the ACC demonstrates that, as a structural and legal matter, the FCR labors under limitations that make it impossible for him to be an adequate representative of future claimants in matters of individual rights and inappropriate for him to purport to dispose of such rights rather than protecting the shared interests of his constituency as a whole. We also show that, as a factual matter, the FCR has abandoned many members of his constituency by endorsing a Plan that would violate the rights and interests of those persons and leave them ineligible for compensation from the Debtors or unable to obtain such compensation as a practical matter, even though they possess legitimate claims. As a result, the Court will be unable to make a finding at the confirmation hearing that "the FCR has adequately represented Future GST Asbestos Claimants." Plan § 7.8.1(2). Because such a finding is an express prerequisite to confirmation (*id.*), the Plan must fail.

The Debtors have not made all the required disclosures and showings with respect to individuals who will serve in controlling positions post-confirmation, in violation of § 1129(a)(5). Nor can the Debtors meet their burden of demonstrating that the Plan satisfies the "best interest of creditors" test under § 1129(a)(7), or that the Plan is feasible, as required by § 1129(a)(11), or that the Plan could be imposed over the rejection of Class 4 claimants under

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[4] Preliminary Objections, ¶ 30, at 6; *see also* Limited Reply of the Official Committee of Asbestos Personal Injury Claimants to the Future Claimants' Representative's and the Debtors' Statements in Response to Asbestos Committee's Preliminary Confirmation Objections, dated June 15, 2015 [Dkt. No. 4659].

[5] DS & Solicitation Procs. Order ¶ 15, at 8.

§ 1129(b)(2)(B).[6] The Plan would also violate Bankruptcy Code §§ 524(g) and 1141(d) by discharging present and future asbestos claims against Anchor. That defunct company is to be liquidated and dissolved under state law and is therefore ineligible for a Chapter 11 discharge.

The Plan is deeply and pervasively flawed. Taken as a whole, it represents a radical and unprecedented effort by longtime asbestos defendants to trump the tort system through bankruptcy and cap their tort liability, while shifting the risk of inadequate Plan funding from the equity holders to the tort creditors. The Code will not allow this, and the Plan cannot be confirmed.

ARGUMENT

I. The Debtors' Plan Cannot Be Confirmed Because It Is Proposed in Bad Faith and by Means Forbidden by Law, Contrary to Bankruptcy Code § 1129(a)(3)

Bankruptcy Code § 1129(a)(3) provides that a plan cannot be confirmed unless it "has been proposed in good faith." In other words, the plan must "fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Madison Hotel Assocs.,* 749 F.2d 410, 425 (7th Cir. 1984); *accord In re Am. Capital Equip., LLC,* 688 F.3d 145, 156 (3d. Cir. 2012). These objectives and purposes include "preserving going concerns and maximizing property available to satisfy creditors," "giving debtors a fresh start in life," "discourag[ing] debtor misconduct," "the expeditious liquidation and distribution of the bankruptcy estate to its creditors," and "achieving fundamental fairness and justice." *In re W.R. Grace & Co.,* 729 F.3d 332, 346 (3d. Cir. 2013) (quoting *In re Am. Capital Equip., LLC,* 688 F.3d at 156-57).

To demonstrate that the Plan is proposed in good faith under § 1129(a)(3), Garlock must show that the Plan is likely to provide "maximum recovery by and fair distribution to creditors."

[6] This point will be fully briefed in the ACC's Second Set of Objections, which is not due under the Case Management Order until after the results of the vote have been tabulated.

In re Fiesta Homes of Ga., Inc., 125 B.R. 321, 325 (Bankr. S.D. Ga. 1990). Garlock cannot meet this burden. Instead of seeking to maximize the recovery of Garlock's asbestos victims, the Debtors have put forward a plan designed to minimize the victims' recoveries by coercing them into accepting arbitrary settlement values that are far below what Garlock could achieve in the tort system without special bankruptcy protections. Even so, the Disclosure Statement admits there is risk that the Plan funding will prove insufficient to pay all Allowed GST Asbestos Claims.[7]

Chapter 11 is not intended to be a weapon by which a debtor can coerce creditors into accepting minimal compensation for their claims in order to salvage value for its controlling shareholder over creditors' objections. But that is precisely what the Debtors' Plan would achieve if confirmed. Instead of dealing with asbestos creditors fairly and in good faith, the Debtors have proposed a Plan that would devalue their claims far below what they would be worth in the tort system without the extraordinary protections of this Plan. The Debtors' Plan sacrifices the interests of tort creditors and serves only the Debtors' interests and that of their nondebtor, controlling parent companies. Yet, as debtor-in-possession, Garlock owes its primary duty to the estate and its creditors. "A debtor-in-possession's authority is constrained by its fiduciary responsibility to act in the best interest of the creditors of the estate, and not in its own interest." *In re Furley's Transp., Inc.*, 272 B.R. 161, 176 (Bankr. D. Md. 2001), *aff'd,* 306 B.R. 514 (D. Md. 2002) (citations omitted); *Cf. In re Piece Goods Shops Co, L.P.*, 188 B.R. 778, 791

[7] Disclosure Statement for Debtor's Second Amended Plan of Reorganization § 8.2, at 90, dated Apr. 13, 2015 [Dkt. No. 4548-1] (the "**Disclosure Statement**") ("There can be no absolute guarantee, however, the Settlement Facility and the Litigation Fund will be able to pay in full Allowed GST Claims for which they are responsible.").

(Bankr. M.D.N.C. 1995) (finding it evidence of good faith that the plan did not "sacrifice the interests of creditors for the benefit of the Debtors").

Courts have held that, where there is a valid reorganizational purpose, it is not bad faith to file bankruptcy to take advantage of provisions of the Bankruptcy Code.[8] But if a solvent defendant files bankruptcy without a valid reorganizational purpose, and solely to gain tactical advantage in nonbankruptcy disputes, its petition is subject to dismissal for bad faith under § 1112(b). *See, e.g., Carolin Corp. v. Miller*, 886 F.2d 693, 701 (4th Cir. 1989) (concluding that petition should be dismissed where it would not achieve the goal of "resuscitating a financially troubled debtor," and where the debtor's real motivation was "to abuse the reorganization process" and "to cause hardship or to delay creditors"); *In re Coleman*, 426 F.3d 719, 728 (4th Cir. 2005) (same); *In re Antelope Techs., Inc.*, 431 Fed. App'x 272, 275 (5th Cir. 2011) (per curiam); *In re 15375 Memorial Corp.*, 589 F.3d 605, 618-19 (3d. Cir. 2009); *In re SGL Carbon Corp.*, 200 F.3d 154, 163-69 (3d. Cir. 1999). By the same token, a plan that abuses the bankruptcy process to trump the outcomes to be expected in tort suits if they were handled by nonbankruptcy courts under nonbankruptcy law fails the test of good faith under § 1129(a)(3). It is bad faith to propose a plan that seeks to achieve a result that could not be properly accomplished under, and is not contemplated by, the Bankruptcy Code, and that runs counter to bedrock principles of bankruptcy law. A debtor should not receive "a windfall merely by reason of the happenstance of the bankruptcy." *Butner v United States*, 440 U.S. 48, 55 (1979) (citation omitted). Yet, that is precisely the outcome Garlock seeks through its Plan, which would substitute Garlock's own rules for those under which claims would be valued in the tort system

[8] *See, e.g., In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197, 211-12 (3d. Cir. 2003); *In re James Wilson Assoc.*, 965 F.2d 160, 170-71 (7th Cir. 1992).

and would cap the funds available to pay claimants in an amount far below what Garlock would realistically expect to pay outside of bankruptcy.

The Supreme Court has repeatedly emphasized that "[t]he 'basic federal rule' in bankruptcy is that state law governs the substance of claims." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) (quoting *Butner*, 440 U.S. at 57). The Supreme Court has also instructed that bankruptcy courts should afford creditors "the same protection [they] would have under state law if no bankruptcy had ensued." *Butner*, 440 U.S. at 56. Yet, from the outset of this case, Garlock has urged this Court to defy that mandate, claiming hyperbolically that the tort system is "irredeemably defective," has "failed to provide a rational means for adjudicating asbestos-related liabilities," and, thus, should be disregarded. Information Brief of Garlock Sealing Technologies LLC at 2, dated June 7, 2010 [Dkt. No. 24]. The Plan before the Court is the culmination of Garlock's audacious attempt to escape the tort system, impose its own one-sided rules for asbestos tort liability and compensation, strip claimants of many of the protections they are afforded by state law in the tort system, and pay them far less than they could realistically expect to receive outside of bankruptcy. This scheme conflicts with fundamental premises of the Bankruptcy Code and epitimizes the bad faith that, under § 1129(a)(3), precludes confirmation.

A. The Plan Is Fundamentally Unfair: It Is Designed to Coerce Asbestos Claimants to Accept Unrealistic and Unfair Settlements in Order to Tamp Down Garlock's Liabilities and Preserve Equity for Garlock's Parent Companies

The Plan calls for asbestos victims holding unliquidated claims to make a choice between having their claims against Garlock resolved and liquidated through a settlement process with the Settlement Facility ("**Settlement Option**") or by litigation against Reorganized Garrison, which would pay judgments out of the capped Litigation Fund ("**Litigation Option**"). As will be shown at the confirmation hearing, under the Settlement Option, claimants would be offered

settlements that are much lower than what Garlock would be able to achieve in the tort system without the protections of the Plan. The Plan would exert powerful duress upon claimants to accept these artificially depressed settlement values by increasing the costs and burdens they would incur by selecting the Litigation Option and giving unfair advantages to Reorganized Garrison as the litigating defendant. But, as shown in part I.B below, Garlock is not entitled to use bankruptcy to obtain a litigation advantage over adverse parties and deprive them of the benefits and protection of state law, rather than to achieve valid reorganizational purposes.

1. The CRP settlement values are arbitrary and unrealistic, and could not be achieved in the tort system

Garlock has predicted that qualified mesothelioma victims who elect the Settlement Option would be paid an average of $20,000 under the matrix provided in the Claims Resolution Procedures (Plan Ex. A, Annex. A) ("**CRP**") that will govern the Settlement Option.[9] Many mesothelioma victims with proof of disease and exposure to Garlock products would be offered far less. And many other cancer victims would be offered only $750 (*see* CRP App. I. § I.D, at I-10 – I-12), while those with asbestosis would be offered only $500. *See id.* at I-13. The evidence will demonstrate that the Settlement Option severely undervalues asbestos claims in comparison to what Garlock would have to pay to resolve them in the tort system. Moreover, the Plan would authorize the Trustee of the Settlement Facility to reduce the matrix values even further, underscoring that holders of meritorious asbestos claims could not rely on full payment in any meaningful sense. *See* CRP ¶ 4.1(b)(1). In other words, in depicting the Plan as paying allowed claims in full, the Debtors are engaging in a pretense that depends on measuring "payment in full" by a changeable standard, rather than a fixed or absolute one.

[9] Hr'g Tr. at 23:1-3 (Mr. Cassada) (Jan. 21, 2015).

The CRP includes a matrix that sets out maximum settlement offers, keyed to the claimant's occupation and industry, classified as Contact Groups. The Debtors contend that the Contact Groups account for the potential frequency and intensity of the claimant's contact with Garlock's products, as well as probable exposures to other asbestos sources. *See* CRP App. I § I.A, at I-2 – I-3. These assumptions are arbitrary and make no allowance for variations in fact patterns among claimants within the Contact Groups. The CRP gives claimants no means to challenge their assignment to a particular Contact Group, other than to choose the Litigation Option, which, as shown below, is itself inadequate and unfair.

Moreover, the CRP's evidentiary requirements are significantly more stringent than criteria Garlock could maintain for settlements in the tort system and even more stringent than what nonbankruptcy courts would require for trial. Thus, many holders of valid asbestos claims would not be eligible for any settlement offer at all under the CRP because they could not meet the Plan's rigid and unrealistic medical and exposure criteria.[10]

For example, to qualify for a settlement under the CRP, a mesothelioma claimant would have to demonstrate at least six months of GST Product Contact. *Id.* ¶ 4.5(c)(1). No jurisdiction applies any such requirement for mesothelioma, which notoriously can be caused by brief exposures to asbestos.[11] The CRP also would require any claimant asserting "bystander" contact

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[10] Claimants with certain asbestos-related illnesses—including pericardial mesothelioma, testicular mesothelioma, asbestos-induced pleural plaques, or asbestos-induced pleural effusions—would not be eligible for the Settlement Option at all and could recover only by litigating their claims to a final judgment. *See* CRP App. I & II.

[11] *See, e.g.*, *McAskill v. Am. Marine Holding Co.*, 9 So.3d 264, 268 (La. App. 2009) (holding that "brief exposures to asbestos have caused mesothelioma" and "every non-trivial exposure to asbestos contributes to and constitutes a cause of mesothelioma"); *Jones v. John Crane, Inc.*, 35 Cal. Rptr. 3d 144, 151 (Ct. App. 2005) ("The testimony of the experts provided substantial evidence that Jones's lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors contributing to his risk of injury."). *See*

(Footnote continued on next page.)

to demonstrate that he worked within 10 feet of a worker who was scraping, brushing, or cutting Garlock gaskets or packing. CRP ¶ 4.5(c)(1). No such arbitrary boundary is prescribed by law. The Trustee would apply these baseless standards under exacting documentation rules (*see id.* ¶¶ 4.5(a); 4.5(c)(2); 4.5(6)) that would potentially override well-established rules under which courts recognize that claimants can prove asbestos exposure by circumstantial evidence rather than direct proof. *See Roehling v. Nat'l Gypsum Co. Gold Bond Bldg. Prods.*, 786 F.2d 1225, 1228 (4th Cir. 1986) ("The evidence, circumstantial as it may be, need only establish that [plaintiff] was in the same vicinity as witnesses who can identify the products causing the asbestos dust that all people in that area, not just the product handlers, inhaled. This case includes such evidence and a jury can reasonably infer therefrom that plaintiff was injured by defendants' products."); *see also O'Brien v. Nat'l Gypsum Co.*, 944 F.2d 69, 72 (2d. Cir. 1991) ("It is beyond any doubt that circumstantial evidence alone may suffice to prove adjudicative facts."); *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 771 (N.D. Ill. 2014) ("[P]laintiffs in asbestos cases may have to rely on circumstantial evidence, especially given the long latency periods for diseases like mesothelioma."). Such circumstantial evidence sometimes comes from the defendant's own personnel, *see, e.g.*, *Berkowitz v. A.C.&S., Inc.*, 733 N.Y.S.2d 410, 411 (N.Y. App. Div. 2001), yet claimants electing the Settlement Option under Garlock's Plan would not have access to the Debtors' personnel with knowledge of Garlock's asbestos-containing products and how and where they were used or to the Debtors' books and records, as they would in discovery.

(Footnote continued from previous page.)
also, e.g., Morin v. AutoZone NE, Inc., 943 N.E. 2d 485, 499 (Mass. App. Ct. 2011) ("Evidence will be sufficient to reach the fact finder if it permits the reasonable inference of the presence at a work site of both the plaintiff and the defendant's asbestos-containing product for an appreciable period of exposure.").

To qualify for a settlement of more than $750 under the Plan, a claimant suffering from asbestos-related lung cancer or asbestos-related laryngeal cancer would have to provide "credible evidence that the Injured Party never smoked or used tobacco products." CRP App. II § II.A.1, at II-3 & II-5. Apart from the manifest unfairness of requiring cancer victims to prove a negative, the underlying premise—that smoking is the sole cause of cancer in a person exposed to asbestos—is contrary to medical opinions that there is "a strong synergistic effect" between smoking and asbestos exposure, each of which amplifies the risk of cancer created by the other. E. Cuyler Hammond *et al*., *Asbestos Exposure, Cigarette Smoking and Death Rates*, 330 Annals N.Y. Academy of Sciences 473, 488 (1979). In the tort system, as the evidence will show, lung cancer claimants who smoked receive substantial recoveries, far in excess of $750. Also unfair is the provision of the Settlement Option that would limit persons suffering reduced breathing capacity from asbestosis to fixed payments of $500, regardless of the degree of their physical impairment. CRP App. I § I.D at I-13 – I-14. And for the chance to gain these paltry amounts the Plan would require injured persons to pay $250 to submit their claims to the Settlement Facility to evaluate their claims, with refunds only for claims the Trustee decided to allow. *Id*. ¶ 3.3.

2. The Litigation Option would increase burdens and costs on the claimants, while giving Reorganized Garrison unfair litigation advantages, in order to coerce claimants to accept the arbitrary settlement values of the CRP

The Plan purports to preserve claimants' rights to jury trial, but would not provide a fair litigation alternative to claimants dissatisfied with the proposed settlement values. Claimants would not be able to litigate their claims against Garlock under the same substantive rules and the same conditions that they would face outside of bankruptcy. Instead, they would be required to litigate against Reorganized Garrison under a litigation process that has been fundamentally

skewed to the Debtors' advantage. The Plan would impose costs and burdens on the claimants that they would not face in the tort system and shift to them burdens of investigation and prosecution that the defendant would bear under nonbankruptcy law with respect to claims against other potentially responsible persons. It would dramatically alter for Garrison's unilateral advantage the settlement pressures that exist in the tort system and effectively insulate Garrison from the severe litigation risk it would run if it were to adhere to its settlement matrix in the tort system.

The proposed Case Management Order (Plan Ex. B) ("**CMO**") provides that the District Court for the Western District of North Carolina (the "**District Court**") would exercise jurisdiction over all Litigation Option claims and could allocate pretrial proceedings for such claims between the District Court and the Bankruptcy Court. Trials of any such claims would take place in the District Court or another federal district court designated by the District Court. Garlock's tort victims are scattered throughout the country; for the vast majority, the Western District of North Carolina would not be a convenient forum and would impose additional costs and burdens that the claimants would not have faced in the venue of their choice in the tort system.

As noted in part IV below, if only a small portion of the tens of thousands of asbestos claimants choose the Litigation Option, the demands of pretrial proceedings and trials would quickly threaten to overtax the resources of the District Court and this Court. In the *Babcock & Wilcox* case, District Judge Vance correctly recognized that it would take decades of the court's time to deal with summary judgment motions and myriad issues that would arise in objections to thousands of individual asbestos claims, and pronounced herself "awe-struck" at the debtor's suggestion that she should undertake any such allowance process in a mass tort bankruptcy.

Hr'g Tr. at 11, *In re Babcock & Wilcox.*, No. 00-cv-558 (E.D. La. Jan. 25, 2002) (Ex. 3 to the Memorandum of the Official Committee of Asbestos Personal Injury Claimants in Opposition to the Future Asbestos Claimants' Representative's Motion for an Asbestos Claims Bar Date and Related Relief, dated Jan. 9, 2015 [Dkt. No. 4295-3]). Faced with Judge Vance's incredulity, the debtors negotiated a consensual plan of reorganization with the asbestos claimants' committee. *See In re Babcock & Wilcox Co.*, 2004 WL 4945985 (Bankr. E.D. La. Nov. 9, 2004), *order vacated by* 2005 WL 4982365 (E.D. La. Dec. 28, 2005).

The backlog of claims would cause significant delays for claimants, many of whom would die while waiting for trial—mesothelioma victims rarely live more than two years after diagnosis. Regardless of the inevitable delays, all Litigation Option claimants would be required to prepare their cases as though they were on trial queue, even though their cases would not be likely to go to trial for years. The deadlines for discovery and pretrial proceedings that would be imposed under the CMO are far more onerous and burdensome than claimants would face in the tort system, where claimants typically are not required to prepare for trial until their cases are actually set for trial. Thus, claimants would be deprived of prerogatives they ordinarily would have in state court under state law. Moreover, the CMO seems to contemplate that claimants would bring their claims twice—once against Reorganized Garrison under the CMO and then against solvent defendants elsewhere. This would cause claimants great inconvenience and expense and cause additional delays.

The CMO would also require claimants who choose the Litigation Option, and their attorneys, to certify that they have investigated whether the claimant has any claims available against asbestos bankruptcy trusts ("**Trust Claims**") and that the claimant has filed "any and all" available Trust Claims. CMO ¶ 7(a), (b). "Good faith" compliance with these requirements

within 180 days of filing a proof of claim would be a precondition to proceeding to trial. *Id*. ¶ 7(b).[12]

The proposed claim filing and certification requirement would shift to claimants burdens and costs that typically would be borne by defendants in the tort system. In most jurisdictions, a defendant seeking to lay off liability on another party has the burden of investigating and proving the fault of that other party. *See infra* note 16. The CMO, however, would relieve Reorganized Garrison of this burden and shift it to claimants, saddling them with the not-inconsequential costs of investigating all possible sources of asbestos exposure in order to determine if a Trust Claim is available, regardless of whether the potential recovery from each trust would justify the costs of investigation.

The Plan would significantly alter settlement pressures to force claimants into the Settlement Option. The CRP provides that if a claimant selected the Litigation Option,

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[12] The CMO provides:

> Within 180 days after filing a Proof of Claim, the Litigation Option Claimant shall serve on Garrison:
>
> > a. A certification by the Litigation Option Claimant under penalty of perjury attesting that the Litigation Option Claimant has filed any and all claims against asbestos bankruptcy trusts ("Trust Claims") that are available to him or her;
> >
> > b. A certification from the Litigation Option Claimant's attorney that (i) he has conducted a good faith investigation of all Trust Claims that may be available to the Litigation Option Claimant, (ii) to his knowledge all such claims have been filed, (iii) he has consulted with all other attorneys representing the Claimant in asbestos litigation or in making claims against trusts, and (iv) such other attorneys reported no additional Trust Claims available to the Litigation Option Claimant . . . .
>
> No Litigation Option Claim will be scheduled for trial absent good faith compliance with these requirements.

CMO ¶ 7.

Reorganized Garrison would not be authorized to settle the claim for more than its arbitrary and unrealistic CRP value minus allocated defense costs, regardless of the risks to Garrison posed by proceeding to trial. CRP ¶ 2.4. For most claims pursued seriously in litigation, the CRP value would be quickly exceeded by Reorganized Garrison's defense costs. Thus, the Plan is structured to make Garrison essentially indifferent to trial risk, since it would have no financial responsibility for any judgments exceeding the capped Litigation Fund. It would also be largely indifferent to costs of defense, since the capped Litigation Fund would be responsible for paying those costs (over and above the CRP matrix values), as well as any judgments. Plan § 1.1.84. As a practical matter, then, there would be no possibility of settlement once a claimant chooses the Litigation Option. Garrison's attorneys would have every incentive to engage in "scorched earth" litigation tactics that would be ruinous to any defendant in the tort system without the extraordinary protections of the Plan. The whole one-sided system would be antithetical to the policy of encouraging settlement to conserve judicial resources and minimize litigation expense.

The Plan's obvious goal is to force claimants to knuckle under and accept unfair settlements, rather than litigate their claims. But while the Court may encourage or facilitate settlement, it cannot coerce a litigant to settle.[13] And it cannot do so indirectly by confirming a plan that would coerce claimants to settle their claims. Garlock's Plan is a heavy-handed effort to rearrange the incentives and burdens of asbestos claims resolution so as to yield far better

[13] *Newton v. A.C.&S., Inc.*, 918 F.2d 1121, 1128 (3d. Cir. 1990) ("Although the facilitation of settlements is a laudable goal, pressure tactics to coerce settlement simply are not permissible. The court should never work to coerce or compel a litigant to make a settlement.") (internal citations and quotation marks omitted); *see also Goss Graphics Sys., Inc., v. DEV Indus., Inc.*, 267 F.3d 624, 627 (7th Cir. 2001) (stating that "federal courts . . . have no authority to force a settlement"); *In re Ashcroft*, 888 F.2d 546, 547 (8th Cir. 1989) (the "law does not countenance attempts by courts to coerce settlements"); *Dawson v. United States*, 68 F.3d 886, 897 (5th Cir. 1995) (noting that the district court "had no power to, and should not, coerce a settlement").

results for the defendant than it could hope to achieve in the tort system. It is antithetical to the proper purposes of the Code, and cannot be approved.

B. The Plan Is Proposed by Means Forbidden by Law Because the Proposed CMO Is Beyond the Constitutional and Statutory Authority of the Court

The proposed CMO would impose on claimants burdensome requirements and barriers to trial that are not authorized by federal law or rule and that are inconsistent with substantive state law, in violation of constitutional principles of federalism and separation of powers, and fundamental principles of bankruptcy law. Thus, the Plan is proposed "by . . . means forbidden by law," and fails the test of § 1129(a)(3). *See, e.g.*, *In re Manchester Oaks Homeowners Ass'n, Inc.*, 2014 WL 961167, at *11-12 (Bankr. E.D. Va. Mar. 12, 2014) (rejecting a plan that violated applicable law).

1. The proposed CMO would override substantive state law, in violation of constitutional principles of federalism and the separation of powers, and fundamental principles of bankruptcy law

Constitutional principles of federalism and separation of powers prohibit the District Court from overriding state law and substituting its own substantive rules, as Garlock would have the Court do in the proposed CMO. In *Erie Railroad v. Tompkins*, the Supreme Court laid down that, in the absence of an overriding federal interest, a federal court sitting in diversity cannot displace substantive state law with federal common law. 304 U.S. 64, 78 (1938). The same is true in bankruptcy. The Supreme Court has repeatedly emphasized that courts do not have unfettered equitable powers to fashion substantive rules for bankruptcy cases where Congress has not acted; only Congress, and not the courts, may make policy choices between competing interests. *See Raleigh*, 530 U.S. at 24-25 ("Bankruptcy courts are not authorized in the name of equity to make wholesale substitutions of underlying law controlling the validity of

creditors' entitlements, but are limited to what the Bankruptcy Code itself provides."); *United States v. Noland*, 517 U.S. 535, 540-43 (1996) (explaining that courts may not use equitable powers in bankruptcy to make policy decisions, which are for Congress); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 229 (1996) (same).

"The 'basic federal rule' in bankruptcy is that state law governs the substance of claims." *Raleigh*, 530 U.S. at 20 (quoting *Butner*, 440 U.S. at 57). "Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." *Id.*; *accord Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450-51 (2007). Federal courts sitting in bankruptcy cannot displace state law based on "undefined considerations of equity." *Butner*, 440 U.S. at 56.[14] "Uniform treatment of property interests by both state and federal courts within a State," the Supreme Court has noted, "serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy." *Butner*, 440 U.S. at 55 (internal citation and quotation marks omitted). Thus, the Court has instructed, bankruptcy courts "should take whatever steps are necessary to ensure that [creditors are] afforded in federal bankruptcy court the same protection [they] would have under state law if no bankruptcy had ensued." *Id*. at 56.

Rather than ensure that Garlock's asbestos creditors are "afforded the same protection [they] would have under state law," the CMO would deprive the creditors of those protections. As noted above, paragraph 7 of Garlock's proposed CMO would require Litigation Option

[14] *See also In re Walker*, 51 F.3d 562, 567 (5th Cir. 1995) (holding that court could not create a federal right of contribution among joint violators of automatic stay as a matter of federal common law, and noting that "although bankruptcy might seem to be a 'uniquely federal interest,'" it is "not an area where the courts have wide discretion to fashion new causes of action") (citation omitted).

claimants and their attorneys to certify, as a condition of proceeding to trial, that they have investigated and filed "any and all" available Trust Claims. CMO ¶ 7(a) & (b).[15] Thus, Garlock's proposed CMO would shift to claimants the burden of investigating and prosecuting exposures to other manufacturers' products. In the tort system generally, if a defendant in an asbestos case wishes to lay off liability on another party, it is up to the defendant to prove that the plaintiff was exposed to asbestos of that other party, and that the other party was at fault.[16] The CMO's filing and certification requirement is not authorized by any federal law or rule, and would be inconsistent with applicable state law. It thus offends constitutional limits on the Court's power, and defies fundamental teachings of the Supreme Court.[17]

The Trust Claim filing and certification requirement is not merely a matter of procedure; it has a significant impact on litigants' rights under substantive state law. The Supreme Court has instructed that the burden of proof is a matter of substantive law, and thus is governed by state law in bankruptcy allowance proceedings. *See Raleigh*, 530 U.S. at 20. And, just as the burden of proof is "a critical aspect—albeit one that deals with *how* a right is enforced—of a

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15 *See supra* note 12.

16 *See, e.g.*, *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 74 (Ky. 2010) (holding that when a defendant seeks to prove the fault of another entity, "[t]he burden of proof in such a case is effectively shifted, since it is the participating defendant, not the plaintiff, who seeks to show that the empty-chair defendant is responsible," and "a participating defendant must . . . prove liability on the part of the tortfeasor onto whom it seeks to shift some of the blame."); *Sparks v. Owens-Illinois, Inc.*, 38 Cal. Rptr. 2d 739, 749-50 (Ct. App. 1995) (the named defendant bears the burden of persuading the finder of fact that another entity is responsible, in whole or part, for the alleged injury); *McGraw v. Sanders Co. Plumbing and Heating, Inc.*, 667 P.2d 289, 295 (Kan. 1983) (a defendant who seeks to reduce his percentage of fault by comparing the fault of a party joined pursuant to Kansas' comparative fault statute "has the burden of proving the joined party's fault by a preponderance of the evidence").

17 Moreover, to the extent application of the Trust Claim filing and certification requirement resulted in the disallowance of claims, it would violate § 502(b)(1) of the Code.

State's framework of rights and remedies,"[18] so too is the burden of investigation and prosecution. As Justice Jackson observed in *Hickman v. Taylor*, "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. 495, 516 (1947) (Jackson, J., concurring). Outside of bankruptcy, defendants cannot conscript plaintiffs or their attorneys into preparing defenses to their claims. They cannot properly do so in bankruptcy either.

The CMO's Trust Claim filing and certification requirement also undermines claimants' prerogatives as masters of their own cases. A "litigant is not required to sue all those whom he charges with wrongful conduct . . . . It is hornbook law that an aggrieved party is not compelled to sue all tortfeasors. He may sue one or more or all of them, at his discretion." *Gen. Transistor Corp. v. Prawdzik*, 21 F.R.D. 1, 2 (S.D.N.Y. 1957) (citations and internal quotations omitted); *see also Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1988). Garlock cannot use bankruptcy to escape from the burdens, and deprive plaintiffs of the advantages and protection, of state law. *See Butner*, 440 U.S. at 56 (creditors should be afforded the same protection they would have under state law outside of bankruptcy); *see also In re Coudert Bros., LLP*, 673 F.3d 180, 191 (2d. Cir. 2012) (holding that bankruptcy court must apply choice-of-law rules of state where prepetition complaint underlying claim was filed, so that creditor would not be deprived of state-law advantages of his choice of forum).

The CMO's premise is that it would somehow be unfair if Litigation Option claimants were not required to assert Trust Claims before trial. But if, after suffering a verdict, Garrison believed that it had paid the liability share attributable to other trusts, it could file "indirect

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[18] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 425 n.9 (2010) (Stevens, J., concurring in part and concurring in the judgment) (emphasis in original).

claims" for contribution with the relevant trusts. *See, e.g.*, WRG Asbestos PI Trust Distribution Procedures § 5.6, http://wrgraceasbestostrust.com/wp-content/uploads/2014/02/WRG-TDP.pdf, (last visited Oct. 6, 2015). If it did, it would have the burden of substantiating its claim. *See id*. The District Court has no authority to require the claimants to assert all available Trust Claims in order to enable Reorganized Garrison to perform an end-run around that process, to spare Reorganized Garrison the burden of filing its own Trust Claims, and to shift to claimants the costs and burdens of investigating exposures to other asbestos-containing products.[19]

Whether a plaintiff should be required to file Trust Claims before pursuing claims against solvent defendants is a matter of public policy to be determined by the legislature. The vast majority of state legislatures have not imposed such a requirement. *See, e.g.*, *Barabin v. AstenJohnson, Inc.*, 2010 WL 3699979, at *5 (W.D. Wash. Sept. 13, 2010) (noting that Washington law does not require plaintiffs to file Trust Claims before pursuing solvent defendants, and observing that any risk that plaintiffs may receive double compensation by delaying the filing of Trust Claims is an issue "for the legislature and not for this Court to resolve"); *see also Paulus v. Crane Co*., 169 Cal. Rptr. 3d 373, 381 (Ct. App. 2014) (noting that California's civil procedure statute "provides for a setoff when a settlement is given 'before verdict or judgment.' It has no application to a post-judgment settlement. Similarly, a court has no equitable power to modify a judgment for a settlement which may or may not be sought, may or may not occur, and would be in an unknown amount.") (internal quotation omitted).

[19] *Cf. Atchison, Topeka and Santa Fe Ry. Co. v. Hercules, Inc.*, 146 F.3d 1071, 1073 (9th Cir. 1998) (holding that dismissal of an action as a sanction for the plaintiff having violated orders issued in a related action was not permitted by the federal rules; and would "eviscerate" Fed. R. Civ. P. 14, which made the claims by the plaintiff against a third-party defendant permissive, and thus allowed the plaintiff to assert those claims in a separate action).

State lawmakers have strong policy reasons for not requiring claimants to file all available Trust Claims before pursuing solvent defendants. Though it does not deal with asbestos cases, the decision of the North Carolina Supreme Court in *Lunsford v. Mills*, 766 S.E.2d 297 (N.C. 2014), is instructive. There, the court held that, where more than one at-fault driver was responsible for a policyholder's injuries, the policyholder could recover under her underinsured motorist ("UIM") coverage before exhausting the liability insurance policies of all the at-fault drivers. *Lunsford*, 766 S.E.2d at 303. Explaining the public policy rationale for not requiring policyholders to pursue all possible claims before seeking UIM benefits, the court noted that policyholders "commonly suffer serious injuries and need prompt payment of benefits to pay medical expenses and other costs" and that placing on them the burden of pursuing "all claims, including weak, tenuous ones, against all potentially liable parties, no matter how impractical, before being eligible to collect their contracted-for UIM benefits" could "substantially delay the recovery of UIM benefits and promote litigation expenses that reduce insureds' overall recovery." *Id.*

For similar reasons, state law generally does not require asbestos victims to file Trust Claims before pursuing solvent defendants. Mesothelioma is a terminal illness; victims usually die within two years of diagnosis. The claims of living victims are more valuable than those of decedents, so claimants' counsel reasonably seek to get their clients to trial before they succumb. And, as many courts expedite trials for living mesothelioma victims, counsel have good reason to focus on solvent defendants before diverting effort to Trust Claims.

Only a handful of states have enacted any legislation regarding Trust Claims,[20] and the CMO would impose greater burdens on claimants than any of those statutes. Even in Texas, where claimants are required to file all trust claims that they "believe" they may have within 150 days before their assigned trial date, claimants are not required to file claims for which the fees and expenses of filing the claim would outweigh the potential recovery.[21] By contrast, the CMO would require that the claimants file all "available" Trust Claims regardless of how much they could obtain as compensation. The claimant would be required to undertake that investigation, regardless of whether he thought the potential recovery from any particular trust is worth the investment. Thus, claimants could be forced to spend more on investigating claims than they could recover from the relevant trusts. No state law imposes such a burden on claimants, and the District Court has no authority to do so here.

2. The proposed CMO would affect substantive rights and is beyond the Court's authority under the Rules Enabling Act

The CMO would affect litigants' substantive rights, and could not be adopted under the guise of regulating practice under Fed. R. Civ. P. 83(b).[22] Under the Rules Enabling Act, any rules promulgated by the court "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2075 (Bankruptcy Rules Enabling Act). A majority of the Supreme Court recently instructed that, if a state law or rule is part of the state's definition of substantive rights and

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[20] *See* 2015 Ariz. Legis. Serv. Ch. 246 (H.B. 2603); Ohio Rev. Code Ann. §§ 2307.951-53 (2012); 76 Okla. Stat. Ann. §§ 81-89 (2013); 2015 Tex. Sess. Law Serv. Ch. 532 (H.B. 1492); Wis. Stat. Ann. § 802.025 (2014); 201 W. Va. Laws Ch. 36 (S.B. 411) (2015). In addition, a handful of state courts have adopted case management orders regarding Trust Claims.

[21] *See* 2015 Tex. Sess. Law Serv. Ch. 532 (H.B. 1492) Sec. 90.052(a)-(d), amending Chapter 90, Civil Practices and Remedies Code, by designating Sections 90.001 through 90.012 and adding subchapter heading A and B, namely, Asbestos or Silica Trust Claims.

[22] "A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§2072 and 2075, and the district's local rules." Fed. R. Civ. P. 83(b).

remedies, it must be applied by federal courts in diversity cases. *See Shady Grove*, 559 U.S. at 416-17 (Stevens, J., concurring). As Justice Stevens observed, "if the federal rules altered the burden of proof in a case, this could eviscerate a critical aspect—albeit one that deals with *how* a right is enforced—of a State's framework of rights and remedies," and thus could not be applied. *Id.* at 425 n.9 (Stevens, J., concurring). The concurring and dissenting Justices agreed in *Shady Grove* on that basic principle; Justice Ginsburg, speaking for herself and three other members of the Court, recognized that federal rules could not override substantive state law, and instead must be interpreted "with awareness of, and sensitivity to, important state regulatory policies," to avoid "trench[ing] on state prerogatives." *Id.* at 437-39 (Ginsburg, J., dissenting). The same principle applies with equal force in bankruptcy cases. *See Raleigh*, 530 U.S. at 20 ("The basic federal rule in bankruptcy is that state law governs the substance of claims." (internal quotation marks omitted)).

Individual judges' rules and local court rules may deal only with "matters of detail"[23] or "housekeeping" matters to promote efficiency in the court[24] and to fill interstices in the federal rules.[25] Even when "concededly procedural," they cannot be used to introduce changes that are of "great importance to litigants," *Miner v. Atlass*, 363 U.S. 641, 649-51 (1960), and that affect

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[23] *Baylson v. Disciplinary Bd. Of Sup. Ct. of Pa.*, 975 F.2d 102, 104 (3d. Cir. 1992) (striking down local rule as going beyond the "matters of detail" contemplated by Fed. R. Crim. P. 57 (the analog to Fed. R. Civ. P. 83), and thus transcending local rulemaking authority).

[24] *See, e.g.*, *Adams v. Adams*, 734 F.2d 1094, 1098-99 (5th Cir. 1984) (noting that district courts may adopt "housekeeping" rules for the bankruptcy courts, "primarily to promote the efficiency of the court.").

[25] *See Tiedel v. N.W. Mich. Coll.*, 865 F.2d 88, 91 (6th Cir. 1988) ("The draftsmen of Rule 83 expected local rule making 'would be used only on rare occasions when the Civil Rules deliberately had left gaps to be filled in light of recognized local needs[,] [such as the setting of motion days.]'") (citing 12 C. Wright & A. Miller, *Fed. Prac. & Proc.* § 3152 (1979 & Supp.)).

"those aspects of the litigatory process which bear upon the ultimate outcome of the litigation." *Colgrove v. Battin*, 413 U.S. 149, 163 n.23 (1973).

The issue of which side, plaintiff or defendant, will be required to investigate all potentially responsible parties is of "great importance to litigants." *Miner*, 363 U.S. at 650. Shifting that burden to the claimants conflicts directly with, and is a complete departure from, the general rule that the defendant bears the burden of production of evidence necessary to lay off liability onto other parties. This is too great an innovation for local rulemaking, and the burden it would place on the claimants is too large to be imposed by local rule. *See Stern v. U.S. Dist. Ct.*, 214 F.3d 4, 18 (1st Cir. 2000).[26] *A fortiori*, it goes much too far for an individual judge's rule or case management order such as the one incorporated in the Debtors' Plan. The obvious purpose of the Trust Claim filing and certification requirement of the CMO is to affect the outcome of the litigation. For that reason alone, the CMO is beyond the authority of the Court. *See Colgrove*, 413 U.S. at 163 n.23; *Stern*, 214 F.3d at 17 (noting that *Colgrove* requires a showing that the rule will not affect the outcome of the litigation).

Garlock's proposed CMO would require the claimant and his or her attorney to investigate all potential Trust Claims and file available ones before the claimant may proceed to

[26] In *Stern*, the court struck down a local rule requiring the prosecutor to demonstrate that information sought from the defendant was "essential, not privileged, and not otherwise feasibly available." 214 F.3d at 18. Although the local rule did not expressly conflict with a national rule, the court noted that it imposed a standard that was a "significant departure" from the standard applied by courts on motions to quash. *Id.* Citing *Miner*, the court noted that compelling production of evidence is of "great importance" to litigants, and held that the local rule "work[ed] changes too fundamental to be accomplished under the aegis of the district courts' rulemaking power." *Id.* The court also noted that, unlike in *Colgrove*, there had been no showing that the local rule would not affect the outcome of the proceedings. The rule would make it "measurably more difficult for prosecutors to secure convictions," and the court held that "the magnitude of this new burden is simply too large to be imposed by local rule." *Id.* at 19.

trial. But the Court cannot impose barriers on litigants beyond those imposed by the Federal Rules. As the Second Circuit has observed:

> Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation . . . or a failure to comply with sanctions imposed for such conduct . . . a court has no power to prevent a party from filing pleadings, motions or appeals authorized by the Federal Rules of Civil Procedure.

Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 652 (2d. Cir. 1987).[27]

The justification Garlock has offered for the Trust Claim filing and certification requirement is that, before the bankruptcy, plaintiffs and their attorneys in some cases supposedly "withheld" evidence of exposure to non-Garlock products by not filing Trust Claims until after litigating their claims against solvent defendants. *See* CMO ¶ 4. Thus, the claims filing and certification requirement is in the nature of a sanction—even though Judge Hodges in his estimation opinion was careful to note that he "ma[de] no determination of the propriety" of filing Trust Claims after trial, *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 87 (Bankr. W.D.N.C. 2014), and, as noted above, state law generally gives plaintiffs that discretion.

[27] *See also*, *e.g.*, *Stern*, 214 F.3d at 19 (local rule requiring the prosecutor to demonstrate that information sought was "essential, not privileged, and not otherwise feasibly available" found invalid); *Schoenberg v. Shapolsky Publishers, Inc*., 971 F.2d 926 (2d. Cir. 1992) (court could not order that discovery be completed before motion to dismiss could be filed), *abrogated on other grounds*, *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d. Cir. 2000); *Brown v. Crawford Cty.*, 960 F.2d 1002, 1009 (11th Cir. 1992) (individual judge's rule requiring judicial approval before a motion for summary judgment could be filed found invalid as it imposed a requirement not found in Fed. R. Civ. P. 56, and violated the litigant's substantive and procedural rights); *Wilkinson v. Burger King Corp.*, 923 F.2d 154 (10th Cir. 1991) (local district court rule eliminating motions for rehearing in bankruptcy proceedings unless the district court granted leave to file the motion held inconsistent with the bankruptcy rules and invalid); *Holloway v. Lockhart*, 813 F.2d 874, 880 (8th Cir. 1987) (local rules requiring leave of court before filing a request for production in habeas case was invalid as inconsistent with Rule 34(b), which permits such requests without leave of court).

Regardless, alleged misbehavior of different parties in litigation that took place years ago in other courts cannot justify altering the rights of claimants who choose to litigate in the future.[28]

A separate issue of fairness arises from paragraph 6 of the CMO. It provides that a Litigation Option claimant who filed a proof of claim before the Confirmation Date shall commence litigation by filing a Notice of Election on the docket. There is no time limitation set for when the Notice of Election must be filed, and the one-year "tolling" provision of paragraph 4.1 in the CRP is not expressly incorporated.[29] In the absence of a comparable tolling provision of the CRP or applicable law, claimants selecting the Litigation Option might be left without a reasonable period of time in which to proceed and, indeed, could be deprived of the opportunity entirely, in violation of due process rights. Moreover, all of the deadlines for Trust Claim filings, discovery, and motions imposed by the CMO run from the time the proof of claim was filed, rather than the Notice of Election. *See* CMO ¶¶ 6-8. Thus, those deadlines could have run even before the claimant has made an election to litigate.

C. The Plan Would Release and Extinguish All Avoidance and Derivative Claims Against the Debtors' Parents and Affiliates Under the Pretense of a "Settlement" That Originates in a Blatant Conflict of Interest and Is Not Fair or Equitable to Asbestos Creditors

Embedded in the Plan is an arrangement, referred to as the "Parent Settlement," that would release and enjoin all avoidance claims and derivative liability claims, including all such claims held by individual asbestos victims, against EnPro, Coltec, and their direct and indirect

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[28] *Cf. Kronberg v. LaRouche*, 461 Fed. App'x 222, 225 n.3 (4th Cir. 2012) (noting that court must consider whether the party or its attorney was to blame for misconduct in determining whether to impose dismissal sanction and that courts seldom impose a dismissal sanction against a blameless client).

[29] CRP ¶ 4.1(b) provides that claims must be submitted to the Settlement Facility within the later of (i) the limitations period in the jurisdiction where the claim was filed or could have been filed, or (ii) one year after the Settlement Facility first makes claim forms available and provides notice of such date on its website.

nondebtor subsidiaries. By that means, the parent companies and other nondebtor Affiliates seek absolution forever from any responsibility they may have for the asbestos torts of the Debtors on any legal theory whatsoever, and would insulate themselves from liabilities they might otherwise have if the capped funding of the Plan falls short of the asbestos claims that come forth over time. The basic concept of the Parent Settlement was not developed by any party that was intent on prosecuting those claims, but by the Debtors themselves. And the Debtors have acted all along in cooperation with Coltec and other Affiliates whose potential obligations are in question under the avoidance provisions of the Bankruptcy Code and doctrines of transferee liability and derivative liability under applicable nonbankruptcy law. For the reasons explained below, the so-called "Parent Settlement" is a contrived and collusive arrangement fashioned by the Debtors and their parents, Coltec and EnPro, to the detriment of the asbestos claimants. The defects of the Parent Settlement underscore the bad faith of the Plan and thus its unconfirmability under § 1129(a)(3).

1. Despite its label, the "Parent Settlement" is really no settlement at all; rather, it is a relinquishment of claims by the Debtors to protect their parent companies and Affiliates

A true settlement of claims presumes a plaintiff and defendant and genuine adversity. *See* Black's Law Dictionary 1582 (10th ed. 2014) (defining "settlement" as an "agreement ending a dispute or lawsuit"). Those predicates are not present here. Indeed, when the ACC sought authority to create an actual controversy, the Debtors and Coltec vigorously and successfully resisted. Three years ago, the ACC, joined by the FCR, moved for leave to file certain avoidance claims and derivative claims against EnPro, Coltec, and certain nondebtor Affiliates, and to prosecute those claims on behalf of GST's bankruptcy estate and for the benefit

of asbestos creditors.[30] The Motion for Leave did not purport to frame each and every cause of action that might arise against Affiliates in favor of the Debtors' estates and creditors. Rather, a proposed complaint attached to that motion set forth certain specified claims based on (1) a restructuring carried out in 2004 and 2005, (2) the transfer of three businesses from GST to Coltec and another affiliate as part of that restructuring, (3) the issuance of two subordinated and non-amortizing promissory notes representing 100% of the "purchase price" for the businesses, (4) the ultimate default in payment of those notes when they came due, and (5) the extension and revision of those notes on the brink of the Debtors' Chapter 11 filings.[31] The Motion for Leave asserted, among other things, that Coltec, EnPro, and certain Affiliates of the Debtors incurred liabilities worth more than $227 million as transferees, and unlimited liability for the Debtors' asbestos torts as alter egos and successors.

The Debtors and Coltec opposed the Motion for Leave, contending that it would disserve progress of the bankruptcy to open up avoidance and derivative claims for litigation at a time when the parties were preparing for the estimation of mesothelioma claims. And they insisted on the Debtors retaining the right and duty of debtors-in-possession to control claims of the estates and creditors—even though the proposed targets of these claims were the very companies alleged to have dominated and controlled the Debtors to the injury of those creditors.

Judge Hodges denied the Motion for Leave, but emphasized that his ruling was without prejudice and did not constitute an evaluation of the validity of the claims set forth in the

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[30] *See* Joint Motion of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants' Representative for Leave to Control and Prosecute Certain Claims as Estate Representatives, dated Apr. 30, 2012 [Dkt. No. 2150] ("**Motion for Leave**").

[31] *See* Proposed Complaint, dated Apr. 30, 2012 [Dkt. No. 2150, Ex. A] ("**Proposed Complaint**").

Proposed Complaint.[32] In lieu of allowing the ACC and FCR to prosecute the proposed claims, Judge Hodges authorized the Debtors to enter into tolling agreements with the putative defendants so as to prevent the running of the limitations periods.[33] These agreements have been periodically extended. Thus, the record relating to these claims remains undeveloped. Having successfully sidelined the prosecution of these claims, the Debtors now seek to extinguish them without a full airing of the merits. The Rule 9019 process they invoke is by no means the equivalent of a lawsuit or even a "mini-trial."

Coltec and EnPro, who control the Debtors, would be the principal targets of these unlitigated claims and, hence, the principal beneficiaries if the claims were released and extinguished. From the start of this reorganization, moreover, the Debtors have worked hand in glove with EnPro and Coltec. Two days after filing Chapter 11, the Debtors moved for a TRO and preliminary injunction barring asbestos claimants from pressing asbestos-related claims, direct or derivative, against EnPro, Coltec, and other nondebtor Affiliates.[34] It would defy reason to suppose that the Debtors could ever act as disinterested estate fiduciaries championing

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[32] *See* Order Denying, Without Prejudice, Motion for Leave, entered June 7, 2012 [Dkt. No. 2292]; Hr'g Tr. at 94:10-95:10, 118:20-120:6, June 1, 2012.

[33] *See* Order (A) Authorizing the Debtors to (I) Enter Into the Affiliate Tolling Agreement and (II) Enter Into the Proposed Managers Tolling Agreement Pursuant to 11 U.S.C. §§ 105(a) and 363 and Bankruptcy Rule 6004 and (B) Authorizing Debtors to Abandon Non-Affiliate Preference Claims Pursuant to 11 U.S.C. §§ 105(a) and 554(a) and Bankruptcy Rule 6007, entered June 4, 2012 [Dkt. No. 2281].

[34] *See* Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction Staying All Asbestos-Related Claims Against Affiliated Entities, *Garlock Sealing Techs., LLC v. Those Plaintiffs Listed on Exhibit B to the Complaint, and Unknown Asbestos Claimants*, No. 10-3145 (Bankr. W.D.N.C. June 7, 2010) [Dkt. No. 2]; Plaintiffs' Memorandum of Law in Support of Complaint for Declaratory and Injunctive Relief and Motion for Temporary Restraining Order and Preliminary Injunction Staying All Asbestos-Related Claims Against Affiliated Entities, *Garlock Sealing Techs., LLC v. Those Plaintiffs Listed on Exhibit B to the Complaint, and Unknown Asbestos Claimants*, No. 10-3145 (Bankr. W.D.N.C. June 7, 2010) [Dkt. No. 2-2].

the interests of asbestos creditors as to claims the Debtors have been intent on blocking from the start and would now extinguish through the Parent Settlement. Without a genuine dispute between genuinely adverse parties, there can be no genuine settlement. This Court need not entertain the Debtors' pretense to the contrary, especially considering that the Parent Settlement is a transparent attempt to circumvent § 524(g) and § 524(e), neither of which it could possibly satisfy.

Indeed, the Debtors are using the Parent Settlement as the putative justification for the "Parent Settlement Enforcement Injunction," which, as explained below, would confer the benefits of a channeling injunction issued under § 524(g) without complying with the prerequisites for obtaining such an injunction. *See infra* part V.A.2. In other words, the Parent Settlement is simply a ruse intended to skirt the requirements and protections of § 524(g), which is all the more reason why this Court should not deign to treat it as a genuine settlement.

In addition, the Debtors are using the Parent Settlement and Parent Settlement Enforcement Injunction to circumvent the limitation of § 524(e), which provides that the "discharge of a debt of the debtor *does not affect the liability of any other entity* on . . . such debt." 11 U.S.C. § 524(e) (emphasis added). "Section 524(e) was intended for the benefit of the debtor but was not meant to affect the liability of third parties or to prevent establishing such liability through whatever means required." *In re Christian*, 180 B.R. 548, 550 (Bankr. E.D. Mo. 1995) (citation and internal quotations omitted). Hence, § 524(e) preserves the rights of creditors to obtain compensation from nondebtor third parties—whether those rights are, for example, based on a written guaranty, state fraudulent transfer law, or theories of alter ego or successor liability—when those creditors are unable to obtain full payment of their discharged debt from debtors. *See, e.g.*, *Kathy B. Enters., Inc. v. United States*, 779 F.2d 1413, 1414-15 (9th Cir.

1986) (holding that creditor of the debtor may proceed after discharge against recipient of a fraudulent transfer from the debtor). But the Parent Settlement would close the path of recourse against nondebtors that § 524(e) is designed to keep open by releasing and enjoining all avoidance claims and derivative claims against the Debtors' parent companies and other Affiliates. This not only highlights the bad faith with which the Parent Settlement has been proposed, thereby rendering the Plan unconfirmable under § 1129(a)(3), but also renders the Plan unconfirmable under § 1129(a)(1).

The exceptions to § 524(e) are limited and unavailable under this Plan. Section 524(g) is an express statutory exception to § 524(e) and provides that a properly issued channeling injunction may shield certain third parties from the Debtors' asbestos torts. *See* 11 U.S.C. § 524(g)(4)(A)(ii). But, as shown below, the Plan does not comply with § 524(g), so the Parent Settlement and Parent Settlement Enforcement Injunction cannot be predicated on that statute. *See infra* part V.A.2. Additionally, the Fourth Circuit has held *in a non-asbestos case* that courts may confirm Chapter 11 plans containing nondebtor releases or injunctions only "cautiously and infrequently" and where, among other requirements, the proposed releases or injunctions are "essential to the reorganization." *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014) (quoting *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002)). Even if that Fourth Circuit decision could apply in an asbestos-related bankruptcy such as this case—which it cannot since § 524(g) controls (*see infra* part V.A)—the Debtors still could not prove that the Parent Settlement's releases and injunction are "essential to the reorganization."

The Debtors take the position that Garlock is solvent and that the Plan would pay asbestos victims the allowed amount of their claims in full. If that were a certainty, asbestos claimants would never have any reason or incentive to pursue derivative claims, and the Parent

Settlement would be superfluous to the Debtors' reorganization. But, of course, a large element of speculation is embedded in the Debtors' contention, given that their Plan itself anticipates asbestos claims against it over the next forty years. No doubt that uncertainty accounts for the Debtors' acknowledgement that full payment of allowed asbestos claims under their Plan is not guaranteed (leaving aside that their notion of the allowed amounts is highly artificial and the values built into their Plan are much lower than what claimants could achieve in the tort system). *See* Disclosure Statement § 8.2. Precisely because of the inherent uncertainties posed by a stream of claims running decades into the future, the Debtors are striving to put a hard cap on their tort liabilities through the Plan. That effort faces high obstacles, as this First Set of Objections demonstrates. But whatever may be said of debtors' rights in bankruptcy, the Code certainly contains no provision that allows *nondebtors* to anticipate and cut off claims that may arise against themselves in the future. The unique exception is § 524(g), which would grant relief only on conditions that Coltec and the other Affiliates are not willing to meet.

By capping the funding available to pay asbestos claimants under the Plan while extinguishing the rights and remedies of asbestos claimants to seek redress from Coltec, EnPro, and the Affiliates in the event that funding proved inadequate, the Plan would deprive the Debtors' asbestos victims of those rights and remedies at the very point they needed them most. In this respect, the Plan would shift the risk of inadequate funding to asbestos victims, rather than on the equity holder, where it belongs. Meanwhile, EnPro, the Debtors' ultimate parent, would retain an equity interest worth hundreds of millions of dollars. This palpable unfairness underscores the bad faith of this so-called "settlement" and Plan.

The putative consideration that would be given in exchange for granting the parent companies and Affiliates extraordinary releases and injunctive protection is largely illusory and

certainly unnecessary for a reorganization of the Debtors if the premises of the Plan itself are to be believed. Specifically, the consideration would consist of:

- a $30 million contribution to the Settlement Facility by Coltec;
- a $500,000 contribution by Coltec to pay the costs of dissolving Anchor;
- EnPro's guarantee of the Debtors' deferred and contingent payment obligations under the Plan; and
- the subordination of the Affiliates' rights to insurance shared with GST.

In the overall context of the Plan, Coltec's $30.5 million contribution under the Parent Settlement would be insubstantial, since GST could easily provide that funding from its own resources. As of June 30, 2015, Garlock had current assets of approximately $386 million.[35] Indeed, given Garlock's reported assets, once the $30.5 million contribution were made, Garlock could turn around and send the same amount of money back to Coltec or EnPro as a dividend. Nothing in the Plan would preclude that result. In essence, EnPro and Coltec could obtain the broad releases and injunctive protection of the Parent Settlement for literally nothing. In a similar vein, the Parent Settlement requires EnPro to guarantee the Debtors' contingent contributions to the Litigation Fund. Yet, the Debtors have stated that the contingent contributions from EnPro are "not expected to be necessary" and would probably never be made,[36] while EnPro has expressed the same expectation to investors.[37] Finally, the proposed subordination of Affiliates' insurance rights is not meaningful. From the beginning of their reorganization effort, the Debtors recognized that the depleted insurance available to the Coltec

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35 EnPro Indus., Inc., Quarterly Report at 19 (Form 10-Q) (June 30, 2015).

36 Disclosure Statement § 3.1.18.

37 *See* EnPro Industries News Release, EnPro Industries Announces Agreement with Future Claims Representative in ACRP, Initiates Quarterly Dividend, 1 (Jan. 13, 2015) ("[T]he guarantee . . . will prove to be largely unnecessary.").

group for asbestos claims would be consumed in GST's quest to resolve its own asbestos liabilities fully and finally.[38]

2. The Debtors are not entitled to "business judgment" deference

The Debtors suggest that the Court should rubberstamp the Parent Settlement by deferring to their "business judgment."[39] But their "business judgment" in this matter warrants no deference under the law. In any proposed settlement between debtors and insiders, courts "apply 'heightened scrutiny and some skepticism' in considering the settlement terms." *In re Chassix Holdings, Inc.*, 533 B.R. 64, 70 (Bankr. S.D.N.Y. 2015) (quoting *In re Charter Commc'ns*, 419 B.R. 221, 240 (Bankr. S.D.N.Y. 2009)). "The case law clearly holds that when a debtor in possession seeks to settle a dispute with its parent company or with another related party, the court should give greater scrutiny than in the usual case." *In re Dow Corning Corp.*, 192 B.R. 415, 428 (Bankr. E.D. Mich. 1996); *accord In re Foster Mortg. Corp.*, 68 F.3d 914, 918 (5th Cir. 1995); *In re Drexel Burnham Lambert Grp., Inc.*, 134 B.R. 493, 498 (S.D.N.Y. 1991). It is for this Court to scrutinize the Parent Settlement without giving any weight to the self-interested judgments of the conflicted Debtors. *See In re Chicago Invs., LLC*, 470 B.R. 32, 93 (Bankr. D. Mass. 2012) (concluding that deference to debtor's business judgment was unwarranted where it had not "negotiated [settlement] in an arm's length transaction").

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38 *See infra* part V.A.2.

39 *See* Debtors' Response to the Official Committee of Asbestos Personal Injury Claimants' Preliminary Confirmation Objections Regarding the Parent Settlement Proposed in the Debtors' Second Amended Plan or Reorganization ¶ 4, dated May 22, 2015 [Dkt. No. 4620] (hereinafter, "**Debtors' Preliminary Response**").

3. The Debtors cannot show that the Parent Settlement was negotiated at arm's length or was not the product of fraud or collusion

Courts evaluating insider "compromises" under Rule 9019 consider "the extent to which the settlement is truly the product of arms-length bargaining, and not fraud or collusion." *In re Foster Mortg. Corp.*, 68 F.3d at 918. If the Court concludes that Rule 9019 properly applies, the Debtors will have the burden of showing that the Parent Settlement was the product of arm's length negotiation, devoid of fraud and collusion. *See, e.g.*, *In re Fox*, 2011 WL 10468085, at *11 (Bankr. N.D. Ind. Mar. 16, 2011); *In re Matco Elecs. Grp., Inc.*, 287 B.R. 68, 76 (Bankr. N.D.N.Y. 2002). They will not be able to do so.

The Debtors suggest that the FCR's support of the Parent Settlement somehow "rebuts any allegation of self-dealing and alleged conflicts of interest in negotiation of the Parent Settlement."[40] But this is demonstrably wrong because Coltec and the Debtors shaped the essential elements of their arrangement before the FCR ever joined the discussion. The Debtors' First Amended Plan, filed on May 29, 2014, included the basic deal. Like the present Plan, the First Amended Plan called for Coltec to pay $30 million, plus another $500,000 to fund Anchor's dissolution and windup. And, while the settlement under the First Amended Plan would have granted Reorganized Garrison a first-priority lien on the shared insurance, the current Parent Settlement would provide the flipside of the same coin by subordinating any interests of EnPro, Coltec, and the nondebtor Affiliates in that insurance to the Reorganized Debtors' obligations to make payments to the Settlement Facility and Litigation Fund under the Plan. The only element of consideration added to the Parent Settlement during the negotiations with the FCR was EnPro's guarantee of the contingent contributions to the Litigation Fund. But

[40] Debtors' Preliminary Response, ¶ 4.

even this concession is more apparent than real. There was never any chance that EnPro could make a straight-faced bid for injunctive protection under a plan for the Debtors unless it could claim credit for some contribution. Since EnPro has told the world it does not expect its guarantee to be drawn on to any material extent, *see supra* note 37, its subsidiaries Coltec and Garlock cannot credibly argue that the guarantee adds much value to the preexisting proposal. Thus, the changes made to the Parent Settlement with the FCR's participation were by no means sufficient to cleanse the proposal of its essentially self-dealing character.

And, to top it off, between the First Amended Plan and the Plan now proposed, the Debtors and Coltec, with the FCR's acquiescence, *broadened* the scope of the release and injunction provisions in the Parent Settlement. In particular, the universe of claims to be released and enjoined was enlarged to include any claims alleging the derivative liability for "any GST Asbestos Claim," including those based on successor liability, piercing the corporate veil, or alter ego, that might have been maintainable not only by the Debtors or their estates, *but by creditors or claimants against the Debtors*.[41] In other words, claims and remedies belonging to creditors, and not to the Debtors' estates, would be released and extinguished under the Plan, as part of the Parent Settlement. These would include claims for successor liability or alter ego which, under certain state laws, belong to individual creditors and not to the bankruptcy estates. *See, e.g.*, *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1252 (9th Cir. 2010) (stating a judgment creditor's alter-ego claim against the debtor, which attempted to reach the debtor's shareholders, did not belong to the bankruptcy estate under California law); *In re Ozark Rest. Equip. Co.*, 816 F.2d 1222, 1225 (8th Cir. 1987) (holding that alter-ego claim belongs to creditor under Arkansas

41 *See* Plan § 1.1.109 (defining "Released Claims").

law and therefore bankruptcy trustee lacked standing).[42] These would also include claims to avoid and recover fraudulent transfers that belong to creditors under applicable nonbankruptcy law, and as to which creditors would obtain the right to press against the nondebtor transferees once the two-year limitations period under § 546(a) for bringing estate avoidance actions has run. *See, e.g., In re Tribune Co.*, 499 B.R. 310, 321-22 (S.D.N.Y. 2013) (stating that the trustee has only two years to commence avoidance actions after a debtor files bankruptcy, and if that prerogative expires, a "creditor regains standing to pursue a state law fraudulent conveyance action, in its own name and for its own benefit") (citation and internal quotation marks omitted); *Klingman v. Levinson,* 158 B.R. 109, 113 (N.D. Ill. 1993) (stating that bankruptcy trustee does not "retain this exclusive right in perpetuity" and that the "trustee's exclusive right to maintain a fraudulent conveyance action expires and creditors may step in (or resume actions) when the trustee no longer has a viable cause of action") (citation omitted).

It is one thing for a putative settlement to propose the release of claims "belonging . . . to the estate," as Code § 1123(b)(3)(A) expressly contemplates. But, by releasing and enjoining claims "maintainable . . . by creditors of or claimants against the Debtors,"[43] the Plan is proposing to release and enjoin any derivative liability claims *held by claimants* against nondebtors. A party can settle and release its own claims; it cannot settle and release the claims of other parties. *See, e.g., DSQ Prop. Co., Ltd. v. DeLorean,* 891 F.2d 128, 131 (6th Cir. 1989) (explaining that a trustee, who lacks standing to assert the claims of creditors, equally lacks

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[42] *See also In re RCS Engineered Prods. Co.,* 102 F.3d 223, 226 (6th Cir. 1996) (same under Michigan law); *In re Flintkote Co.*, 486 B.R. 99, 112 (Bankr. D. Del. 2012) (noting that, in connection with the *Flintkote* asbestos bankruptcy case, a California state court held that alter-ego claims belong to the claimant under California law and cannot be asserted by the bankruptcy estate) *aff'd*, 526 B.R. 515 (D. Del. 2014).

[43] Plan § 1.1.109.

standing to settle them); *accord, In re Derivium Capital, LLC*, 380 B.R. 392, 401-02 (Bankr. D.S.C. 2007).[44] But this is precisely what the proposed Parent Settlement would do over the objections of claimants who vote to reject the Plan and worse yet, in the case of future claimants, without their knowledge, all contrary to the dictates of due process that pervade the Bankruptcy Code.[45]

In sum, the Debtors cannot show that the Parent Settlement is the result of arm's-length negotiations without fraud or collusion. That is reason enough to reject the Parent Settlement.

4. Even on the limited record developed thus far, the Parent Settlement fails to pass muster under Bankruptcy Rule 9019

Even assuming, for argument's sake, that the Parent Settlement could be regarded as a *bona fide* settlement, its terms still could not be approved as fair and equitable. Courts evaluate plan settlements under the same standard that applies to stand-alone settlements under Bankruptcy Rule 9019. To be approved, such settlements must be "fair and equitable."

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[44] *See also Newby v. Enron Corp.*, 394 F.3d 296, 305 (5th Cir. 2004) (noting that a releasing party must have authority to make the release in question); *In re Yelverton*, 2013 WL 4051733, at *2 (Bankr. D.D.C. Aug. 8, 2013) (explaining that, had an agreement purportedly settled a claim belonging to a Chapter 7 debtor and not to the bankruptcy estate, such a settlement would not have been binding because "the trustee had no authority to settle on [the debtor's] behalf"); *In re Lehman Bros. Sec. & ERISA Litig.*, 2012 WL 2478483, at *5 (S.D.N.Y. June 29, 2012) ("[C]ase law makes clear that a court must not simply interpret the language of the release, but also should consider whether there was authority to enter into the release on behalf of the class for the particular claims at issue inasmuch as a settlement agreement cannot release claims that the parties were not authorized to release") (internal quotation marks omitted).

[45] The FCR's acquiescence underscores that he has not adequately protected the classwide interests of future claimants, still less their individual interests. *See infra* part VI. The Debtors and Coltec would be unable to bind future claimants to a judgment negating derivative claims by naming the FCR as a defendant and winning a declaratory judgment. *See In re G-I Holdings, Inc.*, 328 B.R. 691, 698 (D.N.J. 2005) ("[T]he Legal Representative is not a guardian ad litem with the power to bind future claimants. Thus, this Court sees no reason to draft the Legal Representative in this case in the futile hope of obtaining a binding determination of BMCA's successor liability."). By parity of reasoning, they cannot bind future claimants to that outcome by obtaining the FCR's agreement for a settlement of unlitigated claims.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968). As the proponents of the Parent Settlement, the Debtors and Coltec have the burden of proving that their settlement meets that test.[46] This is a burden they cannot satisfy.

To determine whether a proposed settlement is fair and equitable, the court must "assess and balance the value of the claim[s] that [are] being compromised against the value to the estate of the acceptance of the compromise proposal." *In re Martin*, 91 F.3d 389, 393 (3d. Cir. 1996). Courts thus consider:

- the probability of success in litigation of the claims to be settled;
- the difficulties, if any, to be encountered in the matter of collection following successful litigation of such claims;
- the complexity of the litigation involved in such claims (including the expense, inconvenience, and delay necessarily attending the litigation); and
- the paramount interest of the creditors and a proper deference to their reasonable views of the proposed settlement.[47]

Some of the claims to which the Parent Settlement would apply are known and have been partially developed through limited discovery under Bankruptcy Rule 2004. Those claims are set forth in the Proposed Complaint. The Plan, however, does not limit the Parent Settlement's reach to only those claims. Instead, the Plan would use the Parent Settlement to extinguish entire categories of claims, extinguishing even those as yet undiscovered, undeveloped, or unknown (or

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[46] *See In re Final Analysis, Inc.*, 417 B.R. 332, 341-42 (Bankr. D. Md. 2009); *accord In re TCI 2 Holdings, LLC*, 428 B.R. 117, 136 (Bankr. D.N.J. 2010); *In re Kay*, 223 B.R. 816, 819 (Bankr. M.D. Fla. 1998) (citing *In re A&C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986)).

[47] *See, e.g., United States ex rel. Rahman v. Oncology Assocs., P.C.*, 269 B.R. 139, 149 (D. Md. 2001), *aff'd sub nom. United States ex rel. Rahman v. Colkitt*, 61 F. App'x 860 (4th Cir. 2003); *In re Fairmont Gen. Hosp., Inc.*, 510 B.R. 783, 790 (Bankr. N.D. W.Va. 2014); *In re Barnwell Cnty. Hosp.*, 491 B.R. 408, 417 (Bankr. D.S.C. 2013); *In re Final Analysis, Inc.*, 417 B.R. at 341; *In re Lanier*, 383 B.R. 302, 307 (Bankr. E.D.N.C. 2008); *see also In re Maloy*, 2009 WL 4800070, at *3 (Bankr. W.D.N.C. Dec. 7, 2009) (Whitley, J.) (considering all four factors).

at least unknown to anyone other than the Debtors, EnPro, and Coltec). As they carry the burden of proving that the proposed Parent Settlement is fair and equitable, the Debtors and Coltec are required to make complete disclosures regarding potential claims to be extinguished under the Parent Settlement so that they may be properly evaluated in light of the consideration to be given. This they have not done.

(a) ***The claims that the Parent Settlement would extinguish have a higher likelihood of success than what its terms reflect***

The limited record developed thus far shows that the claims described in the Proposed Complaint are strong and likely to succeed if litigated.

(i) *The Avoidance Claims*

The avoidance claims set forth in the Proposed Complaint addressed transactions that can be summarized as follows. In 2004 and 2005, EnPro and Coltec orchestrated the transfer of three valuable businesses from GST to Coltec and Stemco LP, a Texas limited partnership and indirect subsidiary of Coltec ("Stemco TX"). Two of the businesses, GGB LLC and Coltec Industrial Products LLC, were transferred outright from GST to Coltec. The transfer of the Stemco business involved a more complex set of transactions whereby GST caused its subsidiaries to transfer all of the Stemco assets to Stemco TX, which had been created specifically to receive the assets in these transactions. In return for the three businesses, Coltec and Stemco TX gave GST two subordinated promissory notes with a combined face value of approximately $227 million. The subordinated promissory notes were so encumbered with oppressive terms and so lacking in customary noteholder protections that they could not be sold without the consent of the note obligors and not without a deep discount from their face amount. In addition, the notes were not amortizing; they called for interest payments until January 1, 2010, when the entire principal balance of the two notes fell due. That date came and went without payment. Months later,

shortly before GST's bankruptcy filing, the notes were amended to extend their maturity dates to January 1, 2017. The notes were further amended to add provisions that purportedly enable the note obligors, Coltec and Stemco TX, to offset against amounts payable to GST any amounts that the obligors pay to asbestos claimants under any theory of derivative liability.

The 2004-2005 transfers and the 2010 note revisions were fraudulent transfers. Both stripped GST of valuable assets in return for less than reasonably equivalent value. And, evidence uncovered in the ACC's Rule 2004 investigation (which consisted only of document discovery) shows that EnPro and Coltec designed and undertook these transfers specifically to separate the transferred GST assets from GST's asbestos liabilities so as to protect those assets from the reach of asbestos creditors.

The memorandum submitted by the ACC in support of the Motion for Leave lays out at length the reasons why the fraudulent transfer claims stated in the Proposed Complaint are likely to succeed.[48] The same memorandum also refutes the repeated assertions of the Debtors and Coltec that these avoidance claims, as well as the derivative claims, are time-barred.[49] In the interest of brevity, the ACC will not repeat all the points made in the memorandum and in the reply brief in support of the Motion for Leave,[50] but instead incorporates those submissions by reference as if they were fully stated herein.

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[48] Memorandum of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants Representative in Support of Their (I) Motion for Leave to Control and Prosecute Certain Claims as Estate Representatives, and (II) Motion to Lift Injunction to Permit Such Claims to Proceed at 16-44, dated Apr. 30, 2012 [Dkt. No. 2151].

[49] *Id*. at 45-61.

[50] Reply Memorandum of the Official Committee of Asbestos Personal Injury Claimants in Support of Motion for Leave to Control and Prosecute Certain Claims as Estate Representatives and the Motion to Lift Injunction, dated May 29, 2012 [Dkt. No. 2257].

The Debtors assert that the claims to be released under the Parent Settlement "are contingent on a showing that GST was or is insolvent" and that the mesothelioma estimate shows that the Debtors have "ample assets and liquidity to pay all present and future asbestos claims in full," which allegedly makes the Debtors solvent "at all relevant times."[51] But the Debtors exaggerate the import of the estimate and its bearing on their asserted solvency, particularly when Judge Hodges stated that "for purposes of this estimation proceeding, the court will not address the solvency issue."[52] It is therefore highly dubious, to say the least, to use a 2014 estimate of mesothelioma liability as proof of solvency in 2004. Indeed, for "the purpose of a solvency analysis . . . assets and liabilities must be valued based upon *information known or knowable as of the date of the challenged transfer*." *In re Commercial Fin. Servs., Inc.*, 350 B.R. 520, 541 (Bankr. N.D. Okla. 2005) (emphasis added); *see also In re Heritage Org., L.L.C.*, 375 B.R. 230, 284 (Bankr. N.D. Tex. 2007) ("[T]he court values contingent assets and liabilities based on information known or knowable as of the date of the challenged transfer, without the benefit of hindsight."). Thus, the 2014 estimate does not provide the Debtors with any basis for a retrospective view when it comes to their asserted solvency "at all relevant times."

Moreover, as shown above, the Plan anticipates that asbestos claims against the Debtors will come forward over the next forty years, but would nonetheless cap the funding available to pay those claims, while EnPro retains its indirect equity interest in GST. *See supra* part I.C.1. Yet, the Debtors themselves acknowledge that there is no guarantee that there will be adequate funding to pay all asbestos claims in full. *See supra* note 7. The Plan thus shifts the risk of inadequate funding to the asbestos claimants rather than leaving that risk with the equity interest

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51 Debtors' Preliminary Response ¶ 6.

52 Order for Estimation of Mesothelioma Claims ¶ 12, entered Apr. 13, 2012 [Dkt. No. 2102].

holder. Given that risk, the Debtors' assertions of solvency and payment "in full" should not be allowed to thwart potentially valuable avoidance claims and derivative claims. Indeed, under well-established caselaw, fraudulent transfers can be set aside even where no unpaid unsecured creditors remain, as such recoveries still provide benefit to the estate. *See, e.g.*, *In re Coleman*, 426 F.3d at 726-27 (finding bankruptcy court erred in limiting recovery on avoidance action to amount necessary to pay creditors in full); *In re Acequia, Inc.*, 34 F.3d 800, 807-08 (9th Cir. 1994) (stating that corporation paying "all unsecured creditors in its plan of reorganization" did not render avoidance action moot).[53] Those decisions have particular relevance here, given the Plan's proposal to leave the risk of funding failure squarely on the claimants' shoulders.

The 2004-2005 transfers and the 2010 note revisions are best understood as part and parcel of a single, continuing, wrongful scheme to thwart the rights of asbestos creditors. The Parent Settlement is the final step in that scheme.

(ii) *The Derivative Liability Claims*

In addition to the avoidance claims, the Parent Settlement would extinguish potential derivative liability claims arising from EnPro's and Coltec's domination and control of the Debtors, particularly GST. The Proposed Complaint sets forth facts showing that, in the 2004-2005 transfers and the 2010 note revisions, Garlock was subservient to the domination of EnPro and Coltec, and that these transactions were a direct expression of the parent companies' pervasive control over GST's approach to its asbestos liabilities.[54]

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[53] *Accord Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290, 293 (7th Cir. 2003); *In re Calpine Corp.*, 377 B.R. 808, 813 (Bankr. S.D.N.Y. 2007); *see also* 5 *Collier on Bankruptcy* ¶ 544.09[1] (Alan N. Resnick & Henry J. Sommer, eds. 15th ed. 2006) ("A debtor may use the section 544(b) powers after confirmation even though all of the unsecured creditors have been paid.").

[54] *See* Proposed Complaint ¶¶ 80-91, 218, 222, 224.

As alleged in the Proposed Complaint, EnPro planned the transfers in 2004, in the midst of a major EnPro strategic initiative concerning GST's asbestos liabilities.[55] It was EnPro, far more than GST's own officers or board of managers, that set policy and directed strategy for coping with GST's asbestos problems. EnPro had its own counsel, the Robinson Bradshaw firm, establish a consulting relationship with Bates White to focus on analyzing GST's asbestos liability.[56] Acting at EnPro's direction, Robinson Bradshaw spearheaded the implementation of the 2004-2005 transfers by, among other things, drafting essential documents, obtaining consent from Bank of America, and preparing the corporate resolutions ultimately approving the transfers.[57] The terms of the Coltec and Stemco TX notes tilt so far against GST's interest as to make the parent companies' domination of GST undeniable.[58]

Further evidence of EnPro and Coltec's domination and control of GST abounds. For example, EnPro and Coltec perform many of GST's basic business and corporate functions, such as payroll, pensions, employee benefits, auditing, in-house counsel, information technology, supply-chain management, and the procurement of insurance coverage. Notably, at all times since at least 2002, Coltec has had full control over GST's cash.[59] Officers and directors of EnPro routinely exercise decision-making authority over GST matters. And EnPro frequently

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55 *Id*. ¶¶ 33, 84, 218.

56 EnPro Industries, Inc., Annual Report, at 36 (Form 10-K) (2004).

57 Proposed Complaint ¶ 84(f).

58 *See id.* ¶¶ 51-54, 61-64.

59 Coltec operates a cash management system whereby all of GST's cash receipts are commingled with Coltec's, and then Coltec, in turn, at its discretion, makes funds available for Garlock's expenditures. *See* Debtors' Motion for Entry of an Order Under 11 U.S.C. §§ 363, 364, 1107, and 1108, ¶¶ 17-22, dated June 5, 2010 [Dkt. No. 21].

moves executives from jobs within entities in the EnPro group to jobs within GST, and vice-versa.

The foregoing is not intended to be a comprehensive survey of the evidence showing EnPro and Coltec's domination and control of GST that would give rise to their being held derivatively liable for GST's asbestos torts. Discovery continues, and as the record develops, the ACC will bring additional facts to light. Yet, even at this preliminary stage, the evidence strongly points to EnPro and Coltec's "complete domination with respect to the transactions at issue." *State ex rel. Cooper v. Ridgeway Brads Mfg. LLC*, 666 S.E.2d 107, 114 (N.C. 2008) (internal quotation marks omitted). Armed with these facts, a duly authorized estate representative pursuing actions against EnPro and Coltec would likely prevail on these claims.

(b) ***Once successful, GST's estate would have no difficulty collecting on the claims***

If the avoidance actions were successful, the three fraudulently transferred businesses, or the value of those businesses, would return to GST's hands. *See* 11 U.S.C. § 550(a) (providing that "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property"); *In re Centennial Textiles, Inc.*, 220 B.R. 165, 176 (Bankr. S.D.N.Y. 1998) ("[Avoidance] is intended to restore the [Debtor's bankruptcy] estate to the financial condition it would have enjoyed if the transfer had not occurred."). Because of the insider nature of the transfers, the Debtors cannot claim any serious obstacles to accomplishing such a recovery. Similarly, if EnPro and Coltec were found derivatively liable for GST's asbestos torts, under a theory of successor liability, veil-piercing, and the like, their entire net worth would be brought to bear to respond to recovery by the estate.

(c) *The potential recoveries justify the costs of litigation*

The Debtors have argued that the prosecution of the claims set forth in the Proposed Complaint would cost the estates "millions of dollars unnecessarily."[60] But their assertions on this point are speculative and pay little heed to the realistic and substantial recoveries that would be in the offing if the claims were litigated and not extinguished under the Parent Settlement. The potential recoveries on the fraudulent transfer claims and similar common-law restitution claims exceed $288 million plus interest, while the veil-piercing and successor liability claims could make the entire net worth of Coltec and EnPro available to respond to GST's asbestos liabilities. Such valuable prizes, which can only be realized by litigation, justify a substantial investment in the litigation process. The claims set forth in the Proposed Complaint are too valuable and important to leave them to Coltec's tender mercies in an intramural resolution where, given its control of GST, Coltec has in effect negotiated with itself.

(d) *Proper deference to creditors' views requires rejection of the Parent Settlement*

Settlements must serve the "best interests of the creditors." *In re Maloy*, 2009 WL 4800070 at *3. Thus, courts evaluating settlements give proper "deference to [creditors'] reasonable views of the proposed [s]ettlement." *Id*. Even when all other factors suggest a settlement should be approved, the opposition of creditors can supply enough reason to deny it. *See In re Qmect, Inc.*, 359 B.R. 270, 273 (Bankr. N.D. Cal. 2007) ("Of greater weight is the unanimous opposition to the settlement by creditors at various levels of priority.").

The Parent Settlement is an objectively bad deal. If approved, it would trade viable claims, some of which are not even held by the Debtors' estates, for inadequate consideration. It

[60] Debtors' Objection and Response to the Motion for Leave ¶ 49, dated May 18, 2012 [Dkt. No. 2219].

would extinguish claims before any claimant or duly authorized estate representative had any opportunity to develop their merits in full-bore litigation, which would be very different than a truncated Rule 9019 process. Moreover, the Parent Settlement would be the culmination of a scheme to prevent asbestos victims from obtaining fair compensation and recourse for GST's asbestos torts. Nothing about the Parent Settlement bears any hallmarks of being fair and equitable. Far from it, the arrangement originated in blatant self-dealing that has not been cured by the largely cosmetic changes made to it in the current Plan. The Parent Settlement should not be approved and, as a result, the Plan should not be confirmed.

II. The Debtors Have Not Disclosed the Insiders and Individuals Who Will Serve in Controlling Positions Post-Confirmation in Violation of § 1129(a)(5)

Section 1129(a)(5) of the Bankruptcy Code requires plan proponents, as a precondition to confirmation, to disclose "the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor . . . or a successor to the debtor under the plan." 11 U.S.C. § 1129(a)(5)(A)(i). Plan proponents must also disclose "the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." *Id.* § 1129(a)(5)(B). And, lastly, plan proponents are required under this section to show that "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy." *Id.* § 1129(a)(5)(A)(ii).

The Debtors purport to make these required disclosures in Exhibit D to their Disclosure Statement, which identifies their current board members and principal officers. But these disclosures are incomplete, rendering the Plan unconfirmable under § 1129(a)(5)(A)(ii). There is no mention of who would serve as the Trustee of the Settlement Facility, which would be a "successor to the debtor under the plan." *Id.* § 1129(a)(5)(A)(i) Moreover, the Debtors describe

the "nature" of their insiders' current compensation in terms so vague that they could apply to the copensation of almost anyone serving in a senior corporate position.[61] Even if the Debtors adequately disclose these insiders and other individuals serving in post-confirmation control positions, along with those insiders' compensation, it remains to be seen whether the appointment or continuation of individuals tapped for these positions would be consistent with the interests of asbestos claimants and with public policy. Given the Debtors' marked hostility to asbestos claimants, this is not a conclusion that can be taken for granted.

III. The Debtors Cannot Meet Their Burden of Demonstrating That the Plan Satisfies the "Best Interest of Creditors" Test Under § 1129(a)(7)

The "best interest of creditors" test under Bankruptcy Code § 1129(a)(7) requires that each creditor in an impaired class either accept the plan or "receive or retain under the plan on account of [its] claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive . . . if the debtor were liquidated under chapter 7 . . . on such date." 11 U.S.C. § 1129(a)(7)(A). If a plan fails the best-interest test, it cannot be confirmed. Because the Debtors cannot show that all non-accepting asbestos claimants would receive a distribution equal to, or greater than, the distribution received if GST were liquidated under Chapter 7, the Plan is not confirmable under § 1129(a)(7).

The Plan would fail the best-interest test even if the Debtors' liquidation analysis were accepted, *arguendo*, at face value, because of the way the Plan would treat untimely filed asbestos claims. To begin with, the Debtors' liquidation analysis assumes that, if GST were being liquidated under Chapter 7, its assets would be sold as a going concern. The analysis

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[61] *See* Disclosure Statement § 7.5.1 ("[T]he total compensation package that the Debtors' directors, officers, and key employees receive includes base salary, annual bonus opportunities, long-term Cash incentives and other benefits.")

further assumes that, in addition to liquidating GST, a Chapter 7 trustee would place GST in a North Carolina dissolution proceeding where the trustee could, according to Garlock, take advantage of a five-year limitations period to cut off future asbestos claims. According to the Debtors' calculations, these measures would make approximately $874 million available, after deducting the Chapter 7 trustee's fees and administrative expenses, to pay an estimated $300 million in claims, including $200 million in allowed asbestos claims. This would leave hundreds of millions of dollars remaining for Coltec's benefit. The Plan nevertheless would disallow, and thereby leave uncompensated, untimely filed asbestos claims, including Class 4 asbestos claims that are subject to the October 6, 2015 bar date. *See* Plan § 1.1.45(b). But true fidelity to the Bankruptcy Code, in a Chapter 7 case, would leave the tardily filed claims *subordinated* rather than disallowed and barred. *See* 11 U.S.C. § 726(a)(2)(C) & (a)(3).[62] And, even if the aggregate value of allowed asbestos claims reached $200 million, by the Debtors' own calculations there still would be hundreds of millions of dollars available to pay the untimely filed asbestos claims

[62] "It is in section 726 that we find the consequences for the late filing of a proof of claim, and those consequences are *not* disallowance of the claim but subordination of the payment of that claim to the payment of all other allowed and timely filed claims." *In re Babbin*, 164 B.R. 157, 161 (Bankr. D. Colo. 1994) (emphasis in original). And, because "section 1129(a)(7) of the Bankruptcy Code requires that a chapter 11 plan of reorganization provide non-consenting impaired creditors, as of the effective date of the such plan, with at least as much as they would receive in a hypothetical chapter 7 liquidation on such date, the requirements of section 726(a) are imported into a chapter 11 case." *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 256 (Bankr. S.D.N.Y. 2007). Thus, in a Chapter 11 reorganization, "[l]ate-filed claims are entitled to be paid (§ 726(a)(3)) after all timely claims have been paid in full (§ 726(a)(2)), but before interest is paid on any claims (§ 726(a)(5))." *In re Wa. Mut. Inc.*, 442 B.R. 314, 357 n.44 (Bankr. D. Del. 2011); *see also Kitrosser v. CIT Grp./Factoring, Inc.*, 177 B.R. 458, 469 (S.D.N.Y. 1995) ("Although the requirements of Chapter 7 are in general not applicable to Chapter 11 proceedings, *see* 11 U.S.C. § 103(b), Section 726 does apply through the requirements of Section 1129."). These principles apply here, particularly in light of the Debtors' position on Garlock's solvency.

before Coltec could receive any remainder. In this respect, the Plan fails the best-interest test and cannot be confirmed.

The Debtors' liquidation analysis also assumes that "the Chapter 7 trustee will resolve asbestos personal injury claims through a settlement process similar to the Claims Resolution Procedures under the Plan, and that allowance litigation for asbestos personal injury claims would be subject to a case management order similar to the Case Management Order proposed under the Plan."[63] These are unsubstantiated and self-serving assumptions that are not amenable to proof. In a Chapter 7 liquidation, asbestos claimants would not be confined to the CRP and the matrix values, and allowance litigation would proceed forward under the normal procedural and evidentiary rules, untouched by the CMO. In that setting, the Chapter 7 trustee, acting on behalf of the Debtors' estates, would have to contend with comparable litigation risks and pressures that Garlock faced in the tort system. And, current asbestos claimants would not be compelled to accept the artificially low settlement values contained in the CRP and would thus stand to recover more in settlement of their claims in a Chapter 7 allowance proceeding than they would if the CRP were imposed on them.

IV. The Debtors Cannot Meet Their Burden of Demonstrating Feasibility Under § 1129(a)(11)

The Debtors bear the burden of proving feasibility under 11 U.S.C. § 1129(a)(11). *See In re Danny Thomas Props. II Ltd. P'ship*, 241 F.3d 959, 963 (8th Cir. 2001). They cannot do so. The feasibility analysis contained in their Disclosure Statement emphasizes that they allegedly have "the financial wherewithal and business prospects to satisfy [their] obligations under the

63 Disclosure Statement, Ex. C at 4 n.3 (Chapter 7 liquidation scenario).

Plan."[64] Discovery, which is ongoing in this proceeding, will give the ACC the opportunity to test whether that statement can hold up to scrutiny. In any case, the Debtors' alleged "financial wherewithal and business prospects" supply only part of the analysis. The feasibility analysis also applies to "any successor to the debtor under the plan," which, in this instance, would include the Settlement Facility and the Litigation Fund. The Debtors' feasibility analysis leaves the Settlement Facility and Litigation Fund, in their capacities as successors, unmentioned, which shows that the Debtors have not even begun to meet their burden. But that is not the only problem here.

The Debtors' feasibility case implicitly rests on the following syllogism: (1) Judge Hodges' estimate of the liability for present and future mesothelioma claims is reasonable and reliable; (2) with respect to funding, the Plan provides a premium over Judge Hodges' estimate; and, therefore, (3) the Plan is feasible. But the syllogism is flawed because, for starters, Judge Hodges' estimate was just that—an estimate, which could prove wrong for any number of reasons. Moreover, the estimate embraced the Debtors' construct of "Legal Liability" in the aggregate, an abstraction that deliberately ignores the costs of resolving individual asbestos claims in the real world. The estimate is thus an inapposite metric for gauging the feasibility of the Plan, which would permit claimants to liquidate their claims individually through litigation as if they were in the tort system, albeit under special rules of Garlock's own devising. It does not provide assurance that there will be enough money in the Litigation Fund after Reorganized Garrison's defense costs and management fees are deducted to pay the allowed amounts of all Litigation Option claims in full. The Debtors themselves acknowledge that "[t]here can be no

64 Disclosure Statement § 7.3.

absolute guarantee . . . [that] the Settlement Facility and Litigation Fund will be able to pay in full Allowed GST Asbestos Claims for which they are responsible."[65]

Nor is adequacy of funding the only issue relevant to feasibility. The test for feasibility considers "whether the things which are to be done after confirmation can be done as a practical matter under the facts." *In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985) (internal quotations omitted); *accord In re Murray*, 2012 WL 1066730, at *2 (E.D.N.C. Mar. 28, 2012). The Plan would consolidate all Litigation Option claims in the U.S. District Court for the Western District of North Carolina for pretrial proceedings and, in doing so, would provide the real potential of foisting tens of thousands of asbestos personal-injury cases on the District Court. Such a caseload would swamp the Western District's six district judges and add to the already severe backlog of cases across the federal court system. *See* Joe Palazzolo, *Record Backlog Jams Courts*, Wall St. J., Apr. 7, 2015, at A1. The District Court disposed of just 895 civil cases in all of 2014.[66] By comparison, GST's claims database includes approximately 4,000 pending claims for mesothelioma (leaving aside tens of thousands of other claims). In addition, the parties' experts have each predicted that more than 6,000 new mesothelioma claims have arisen since the Debtors filed their petitions, and the Debtors' expert, Dr. Bates, forecasts between 231 and 1,387 mesothelioma claims against Garlock every year for the next 20 years. The filings will continue in large numbers for years to come. The Plan thus poses a grave risk of overtaxing the resources of the Bankruptcy Court and the District Court by the demands of pretrial proceedings alone,

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65 Disclosure Statement § 8.2.

66 *See Table C-5, U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending Dec. 31, 2014* at 1, Statistical Tables for the Fed. Judiciary (Dec. 31, 2014) http://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2014/12/31.

leaving aside trials. The Debtors' only answer to this is to attempt to coerce settlements through its CRP, but, as noted above, that is not a lawful answer.

The Plan fails to come to grips with the basic problems of doing justice in the context of mass tort. As a result, the Plan is not feasible. By the same token, the Plan also fails to provide adequate means of implementation, in violation of Code §§ 1123(a)(5) and 1129(a)(1).

V. The Plan Fails to Comply with the Applicable Provisions of the Bankruptcy Code, and Is Therefore Unconfirmable Under § 1129(a)(1)

Section 1129(a)(1) requires, as a prerequisite to confirmation, that the Plan comply with the applicable provisions of the Bankruptcy Code. For the reasons explained below, the Plan fails that prerequisite and thus cannot be confirmed.

A. The Plan Violates the Code Because It Would Invoke Protections Equivalent to, if Not Greater Than, Those Available Under § 524(g), Without Complying with That Statute's Safeguards and Prerequisites

The Debtors argue that § 524(g) is irrelevant because all that they are trying to do is obtain confirmation of "an ordinary plan" and entry of "an ordinary discharge injunction."[67] But that argument is disingenuous, as it fails to acknowledge that the Plan provides for the issuance of the Parent Settlement Enforcement Injunction and for declaratory relief in the form of Plan section 7.12, both of which would provide the Debtors, their parent companies, and Affiliates with all the protections and benefits of a § 524(g) channeling injunction without satisfying the prerequisites for such an injunction. There is nothing "ordinary" about the Debtors' Plan. Nor are the Debtors content to limit themselves to "an ordinary discharge injunction" that would protect only them from their current asbestos liabilities. The Parent Settlement Enforcement

[67] Debtors' Statement in Response to Asbestos Committee's Preliminary Confirmation Objections ¶ 24, dated May 22, 2015 [Dkt. No. 4616] ("**Debtors' Response to the Committee's Preliminary Plan Objections**").

Injunction and the declaratory relief in section 7.12 are crucial elements in the scheme of the Debtors and their parent companies to obtain all the benefits of § 524(g) while failing to comply with all of its prerequisites. Simply put, the Debtors' Plan amounts to an audacious attempt to circumvent § 524(g) and remake the legal regime that has governed asbestos reorganizations since that statute was enacted in 1994. Section 524(g) is the only remedy available for effectively dealing with mass-tort asbestos claims in a Chapter 11 setting. The failure of the Debtors' Plan to abide by all the requirements for obtaining § 524(g) relief renders the Plan unconfirmable.

1. Congress took special care in enacting a specific statute to address the complex problems posed by asbestos bankruptcies

Asbestos personal-injury claims present an extraordinary challenge because of the long latency period between asbestos exposure and the manifestation of disease, which can range from 15 years to 40 years or more. Given the long latency, epidemiologists anticipate that thousands more people each year for decades to come will fall ill as a result of their long-ago exposures to asbestos. Even if future claims are "contingent" claims within the meaning of § 101(5), a discharge would raise significant due process problems because future claimants—whose injuries have not yet manifested and who are not aware that a proposed Chapter 11 plan purports to affect their interests—cannot be identified or given adequate notice. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997); *In re Grossman's Inc.*, 607 F.3d 114, 122 (3d. Cir. 2010); *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d. Cir. 1995); *In re Waterman S.S. Corp.*, 141 B.R. 552, 559 (Bankr. S.D.N.Y. 1992), *vacated on other grounds*, 157 B.R. 220 (S.D.N.Y. 1993).

A Chapter 11 debtor can reorganize only if it establishes that its plan is feasible and that it will not be forced back into bankruptcy. *See* 11 U.S.C. § 1129(a)(11). In an asbestos-driven

bankruptcy, a plan that fails to resolve future claims is not likely to satisfy the feasibility requirement because of the magnitude of future liabilities. *See In re UNR Indus., Inc.*, 725 F.2d 1111, 1119-20 (7th Cir. 1984); *In re Johns-Manville Corp.*, 36 B.R. 743, 757 (Bankr. S.D.N.Y. 1984). To address issues surrounding future claims and plan feasibility, the debtor in *Johns-Manville* put forward a "largely consensual plan" that pioneered the use of a channeling injunction and a post-confirmation trust dedicated to the resolution of asbestos claims. *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986), *aff'd* 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d. Cir. 1988). The Manville trust assumed the debtor's present and future asbestos liabilities, and the debtor benefited from what was, from its standpoint, the functional equivalent of a discharge as to future claims, as future claimants were enjoined from seeking recovery from the reorganized company and required to seek recourse exclusively from the trust. The bankruptcy court in *Johns-Manville* determined that it had the authority to issue a channeling injunction based on its residual power under Bankruptcy Code § 105(a) to enjoin actions that may have an adverse impact on the debtor's estate or the bankruptcy proceeding. *See id.* at 624-25. The court also found support in its analogous powers to, for example, authorize the sale of estate assets free and clear of third-party interests and to channel those interests solely against the sale proceeds. *Id*. at 625-26.

The validity of the channeling injunction was never tested on appeal in *Johns-Manville* because the Second Circuit found that the appellant objecting to the plan could not assert the rights of future claimants or the rights of present claimants who allegedly did not receive adequate notice to attack the channeling injunction. *See Kane*, 843 F.2d at 645. This created "lingering uncertainty in the financial community as to whether the injunction can withstand all

challenges [which] has apparently made it more difficult for [reorganized Manville] to meet its needs for capital and has depressed the value of its stock," which was part of the corpus of the Manville trust. H.R. Rep. No. 103-835 at 40 (1994); *see also Kane*, 843 F.2d at 640 (noting that the trust was funded in part by the "stock of the reorganized Manville corporation"). To resolve the uncertainties regarding the *Johns-Manville* model and to foster the reorganization of asbestos defendants who sought to employ that model, Congress codified the *Johns-Manville* approach by enacting § 524(g) and (h) as part of the Bankruptcy Reform Act of 1994.

Congress enacted § 524(h) to dispel the legal uncertainties surrounding the asbestos-related channeling injunctions issued before the 1994 Bankruptcy Reform Act, most notably, in the *Johns-Manville* and *UNR Industries* bankruptcy cases. *See* H.R. Rep. No. 103-835 at 40. Section 524(h) provides that these previously issued channeling injunctions are deemed to have satisfied the statutory prerequisites for channeling injunctions issued under § 524(g) if the court determined that the Chapter 11 plan was fair and equitable in accordance with § 1129(b) and a legal representative for future asbestos claims was appointed and did not object to the plan or the channeling injunction. *See* 11 U.S.C. § 524(h)(1). It is notable that Congress went out of its way to enact a special statutory safeguard for the *Manville* and *UNR* channeling injunctions, which reflects an implicit determination by Congress that § 105(a) of the Bankruptcy Code did not supply sufficient statutory authority to ensure the continuing viability of these injunctions.

With respect to debtors who had not yet obtained asbestos-related channeling injunctions, Congress enacted § 524(g), which is designed to "facilitate[e] the reorganization and rehabilitation of the debtor as an economically viable entity," and to "make[] it possible for future claimants to obtain substantially similar recoveries as current claimants." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d. Cir. 2004). The statute provides for the creation

of a trust under a confirmed plan of reorganization and for a permanent, post-confirmation injunction channeling the debtor's present and future asbestos claims to the trust for resolution. *See* 11 U.S.C. § 524(g)(2)(B)(i). The channeling injunction is designed to "supplement the injunctive effect of a discharge" and may be issued only "in connection with" an "order confirming a plan of reorganization under Chapter 11." *Id*. § 524(g)(1)(A). Once the plan is confirmed and the channeling injunction approved, asbestos claimants are permanently enjoined from seeking to recover from the reorganized debtor and are required to pursue their claims exclusively against the § 524(g) trust. *See id*. § 524(g)(1)(B).

Additionally, "[t]o give bankruptcy courts power to channel all appropriate claims to the trust—and to provide an incentive for parent and affiliated companies of an entity undergoing asbestos-related bankruptcy to contribute to the trust—§ 524(g) contains a provision allowing the bankruptcy court to enter a [channeling injunction to bar] certain actions brought against nondebtor third parties." *In re Quigley Co., Inc.*, 676 F.3d 45, 59 (2d. Cir. 2012). Specifically, § 524(g) provides that a channeling injunction "may bar any action directed against" identifiable third parties who are "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability arises by reason of":

> (1) the third party's ownership of a financial interest in the debtor or an affiliate;
>
> (2) the third party's involvement in the management of the debtor or service as an officer, director, or employee of the debtor or a related party;
>
> (3) the third party's provision of insurance to the debtor or a related party; or
>
> (4) the third party's involvement in a transaction changing the corporate structure, or in a financial transaction affecting the financial condition, of the debtor or a related party.

11 U.S.C. § 524(g)(4)(A)(ii)(I)-(IV). By extending the protection of a channeling injunction to such third parties, § 524(g) grants them the equivalent of a discharge from the debtor's present and future asbestos liabilities, without requiring them to go through Chapter 11 themselves.

To obtain such extraordinary and complete injunctive relief, certain requirements spelled out in § 524(g) must be met. Among other things, bankruptcy courts considering proposed § 524(g) plans must make an independent determination that the proposed channeling injunction would be "fair and equitable" to future claimants in light of the benefits provided or to be provided to the trust under the plan. *Id.* § 524(g)(4)(B)(ii). Moreover, an asbestos trust to be created under § 524(g) must be "funded in whole or in part by the securities of 1 or more debtors" and "by the obligation of such debtor or debtors to make future payments, including dividends." *Id.* § 524(g)(1)(B)(i)(II). This ensures that the trust will have an "'evergreen' funding source for future asbestos claimants." *Combustion Eng'g, Inc.*, 391 F.3d at 248. In addition, the trust must "own," or be capable of owning, "if specified contingencies occur, a majority of the voting shares" of each debtor, parent corporation of each debtor, or a subsidiary of each debtor that is also a debtor. *Id.* § 524(g)(1)(B)(i)(III). Because of the long latency of asbestos-induced diseases, trusts established under § 524(g) are set up to remain in operation for decades, treating present and future asbestos claims "substantially in the same manner," *id.* § 524(g)(2)(B)(ii)(V), but never knowing with certainty the number of claimants who will file claims with them or what the severity of their asbestos-related injuries will be. The long duration of asbestos latency and the inability to forecast claims with precision thus presents risks—chiefly, the risk that there will not be enough "evergreen" funding to treat future claims "substantially in the same manner" as the claims previously resolved by the trust. Hence, by requiring that the trust "own" or be capable of owing a majority of the voting shares, § 524(g)

prevents debtors and their insiders from shifting the risk of plan failure or funding failure onto the trust and the asbestos claimants who are the trust's beneficiaries.

Section 524(g) also requires, as a precondition to relief, that a supermajority of at least 75% of current claimants vote in favor of the plan. *Id.* § 524(g)(2)(B)(ii)(IV)(bb); *see also In re Quigley Co.*, 346 B.R. 647, 653 (Bankr. S.D.N.Y. 2006). In addition to protecting the interests of current claimants, *see In re Fed.-Mogul Global, Inc.*, 684 F.3d 355, 361 (3d. Cir. 2012), the 75% voting requirement also protects the interests of future claimants, as broad acceptance by a supermajority of current claimants constitutes a reliable indicator that the plan would also enjoy widespread support from future claimants, had those claimants been known, been given notice, and sought counsel about the plan. *See Combustion Eng'g, Inc.*, 391 F.3d at 237 ("The several prerequisites set forth in § 524(g) are designed to protect the interests of future claimants whose claims are permanently enjoined. Among these, the plan must be approved by a supermajority of current claimants").

Moreover, § 524(g) speaks in terms of "claimants" actually "voting[ ] in favor of" the plan. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). If a plan is to be confirmed with a § 524(g) injunction, there is no room for debtors to assert that claimants are "deemed" or "conclusively presumed to have accepted" the plan on the alleged basis that the claims are unimpaired by the plan. Rather, a supermajority vote by current claimants in favor of the plan is an inflexible requirement for a § 524(g) channeling injunction. This is because extraordinary injunctive relief benefiting debtors and third parties facing potential derivative liability can be obtained only through negotiation and consensus, and not through litigation and cramdown. *See In re Thorpe Insulation Co.*, 671 F.3d 1011, 1027 (9th Cir. 2012) ("To confirm the § 524(g) plan, [the debtor] also needed the affirmative vote of 75 percent of asbestos claimants voting on the plan. . . . If

[the debtor] did not negotiate with asbestos claimants and their representatives to set a plan that they would support, a successful reorganization would not have been possible."); *In re Congoleum Corp.*, 426 F.3d 675, 679 (3d. Cir. 2005) ("Section 524(g) of the Bankruptcy Code requires that 75% of current asbestos claimants approve a plan of reorganization before a channeling order may be issued. As a result, garnering support from a large number of claimants is crucial to the success of a plan.").

2. The Plan would afford the Debtors and their nondebtor insiders and Affiliates all the benefits of a § 524(g) channeling injunction while evading that statute's essential requirements

The proposed Plan injunction that is termed the "Parent Settlement Enforcement Injunction" would provide the same—if not greater—protection to the Debtors, their parent companies, nondebtor Affiliates, and possibly others, as a channeling injunction granted under § 524(g). The Parent Settlement Enforcement Injunction would block, among other things, the prosecution of any suit "in any forum," the attachment or levying of property, and the exercise of any setoff "on account of *any Released Claim*." Plan § 8.2 (emphasis added). The parties protected by and benefiting from this injunction would be the "Released Parties," a term that includes EnPro, Coltec, their direct and indirect nondebtor subsidiaries, and the past, present, and future Representatives of these entities (*e.g.*, officers, directors, managers, and employees). *See id.* §§ 1.1.110, 1.1.115, & 8.2. In addition to enjoining claims and lawsuits "on account of any Released Claims," the injunction would also block claims "*affecting* any Released Party." *Id.* § 8.2 (emphasis added). This could be read to confer the protection of the injunction on unidentified persons, such as nonbankrupt asbestos defendants holding potential contribution or indemnity claims against the Debtors or other Released Parties, who are able to conjure some theory or relationship explaining why a lawsuit against them would "affect" one of the Released Parties.

The Plan's definition of "Released Claims" includes "any and all claims . . . by which any Released Party is asserted to be or have been derivatively liable for any claim, including, without limitation, any GST Asbestos Claim including, without limitation, any Claims arising under a theory that (i) any Released Party is a successor to any Debtor; (ii) any Debtor's separate corporate existence should be disregarded, or (iii) any Released Party is an alter ego of any Debtor . . . ." *Id.* § 1.1.109. The Plan's definition of "Released Claims" thus aims to encompass derivative asbestos liability in its broadest sense. What is more, the definition of "Released Claims" sweeps in not only claims held by the Debtors' estates but also derivative claims held by the asbestos claimants themselves under applicable nonbankruptcy law, which the Debtors have no authority to settle or release. *See supra* part I.C.1.

Additionally, section 7.12 of the Plan, which bears the heading "No Successor Liability," declares that "neither the Debtors . . . nor the Released Parties will . . . assume, agree to perform, pay, or indemnify creditors or otherwise have any responsibilities for any liabilities or obligations either (i) as such liabilities or obligations may relate to or arise of the operations of the assets of the Debtors . . . or (ii) as such liabilities or obligations may relate to or arise out from the *Released Claims*." *Id.* § 7.12 (emphasis added). Based on this wording, section 7.12 would shield the Debtors, their parents, and Affiliates not only from claims asserted against them based on theories of successor liability but also from claims asserting any other theory of derivative liability for the Debtors' asbestos torts. And, there is no language in section 7.12 indicating that it would be limited to only avoidance claims and derivative claims held by the Debtors' estates.

Furthermore, section 7.12 of the Plan would effectively extinguish "direct" or "independent" asbestos claims against the nondebtor Affiliates that arise from their own asbestos

torts. To explain how and why that would be so, some background is needed. Two days after the Debtors filed for bankruptcy in June 2010, they commenced an adversary proceeding in this Court, seeking declaratory and temporary injunctive relief to protect their parent companies and nondebtor Affiliates from asbestos lawsuits while the Debtors sought to reorganize in Chapter 11. To justify why such relief was necessary, the Debtors explained that "many" asbestos claimants "assert their Asbestos Claims against one or more of the Affiliates based on various theories of derivative liability," [68] which included "allegations that one or more of the Affiliates is a 'successor in interest' to, or 'alter ego' of, one or more of the Debtors, or that the corporate veils between such Affiliates and the Debtors should be pierced."[69] Moreover, the Debtors posited that "*several hundred*" asbestos claimants "*each year*" asserted "asbestos claims against one or more of the Affiliates based on allegations that such Affiliates *used Garlock's asbestos-containing products* or asbestos-containing products manufactured by other companies in engines, compressors, pumps, and other equipment that the Affiliates produced and sold."[70] The Debtors referred to this latter category of claims as "actions based on the Affiliates' alleged *direct liability*."[71] Because of the asserted threat both categories of claims would pose to estate property (namely, the Debtors' rights to the shared insurance) and to enable management to focus on the reorganization effort, Judge Hodges without objection issued a TRO and later a

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[68] *See* Complaint for Declaratory and Injunctive Relief ¶ 33, *Garlock Sealing Techs., LLC v. Those Plaintiffs Listed on Exhibit B to the Complaint, and Unknown Asbestos Claimants*, No. 10-3145 (Bankr. W.D.N.C. June 7, 2010) [Dkt. No. 1] (emphasis added).

[69] *See* Plaintiffs' Memorandum of Law in Support of Complaint for Declaratory and Injunctive Relief and Motion for Temporary Restraining Order and Preliminary Injunction Staying all Asbestos-Related Claims Against Affiliated Entities at 10, *Garlock Sealing Techs., LLC v. Those Plaintiffs Listed on Exhibit B to the Complaint, and Unknown Asbestos Claimants*, No. 10-3145 (Bankr. W.D.N.C. June 7, 2010) [Dkt. No. 2-2] (emphasis added).

[70] *Id.* (emphasis added).

[71] *Id*. at 15 (emphasis added).

preliminary injunction shielding the Debtors' parents and nondebtor Affiliates from asbestos-related lawsuits, pending the Debtors' reorganization in Chapter 11.

As explained above, the Plan would effectively extinguish the first category of claims—that is, claims "based on various theories of derivative liability." The Plan would also extinguish the second category of claims—*i.e.*, those "based on the Affiliates' alleged direct liability" for asbestos torts. In particular, section 7.12 would shield the Debtors and the "Released Parties" from, *inter alia*, "liabilities" that "may *relate to or arise out of* the operations of the assets of the Debtors . . . ." Plan § 7.12 (emphasis added). That language would sweep in direct claims against the Affiliates that arise from Garlock asbestos-containing materials being installed or used in the Affiliates' products. Indeed, by employing the words "relate to or arise out of," section 7.12 tracks injunction language that courts in other cases have found to be of such expansive scope as to shield nondebtors from claims arising from their *own* asbestos torts, not just derivative claims arising from the debtor's asbestos torts. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 148-49 (2009); *In re Johns-Manville Corp.*, 534 B.R. 553, 564 (Bankr. S.D.N.Y. 2015).[72] In this respect, the Plan is objectionable, for it would confer the functional equivalent of a bankruptcy discharge on nondebtor parent companies and Affiliates who have not undertaken bankruptcy themselves.[73]

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[72] *Cf. also Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (noting the exceptionally broad scope of the words "in relation to," for "as many a curbstone philosopher has observed, everything is related to everything else").

[73] Indeed, by shielding nondebtors from their own asbestos liability, the Plan would place this Court into a jurisdictional thicket, since it is at least arguable that such a remedy is beyond the Court's "related to" bankruptcy jurisdiction. *See In re Johns-Manville Corp.*, 600 F.3d 135, 152-53 (2d. Cir. 2010) (stating that bankruptcy jurisdiction is *in rem*, and court sitting in bankruptcy has no jurisdiction to enjoin *in personam* claims against an insurer that were predicated, as a matter of state law, on the insurer's own alleged misconduct).

The Debtors and Coltec have denied that the Plan would extinguish independent, non-derivative claims against the nondebtor Affiliates. The Debtors, in particular, point to language added to the definition of "Released Claims" and to Plan § 7.12, which reads:

> For the avoidance of doubt, the Debtors *do not intend* or purport to release or bar any claim against any Released Party that is (a) based upon such Released Party's independent liability to any person and (b) would not be a GST Asbestos Claim or an Anchor Claim in these Chapter 11 Cases if it were to be asserted directly against one or more Debtors.

But the words "do not intend" signal that this sentence is merely precatory and thus would not supply enforceable language carving out direct claims against the Affiliates if the Plan were confirmed. *See Dragon Head LLC v. Elkman*, 987 N.Y.S.2d 60, 61 (N.Y. App. Div. 2014) (determining that provision beginning with the phrase "it is the intention of [the parties]" was precatory language and therefore not legally binding). Furthermore, the wording of Debtors' proviso largely nullifies their stated intent. Given that Affiliates used GST's or Anchor's asbestos-containing products as component parts of their own products, exposures to asbestos from an Affiliate's products would likely give rise to a direct claim against the Affiliate for negligence or strict product liability while *also* predicating such a direct tort claim against GST or Anchor. In short, to borrow the language of Debtors' proviso, the claim against the Affiliate "*would* . . . be a GST Asbestos Claim or an Anchor Claim . . . if it were asserted directly against one or more Debtors." Plan § 7.12 (emphasis added). And so the Plan would extinguish the Affiliate's liability for its own breach of legal duties. *See id.*

By conferring the functional equivalent of a Chapter 11 discharge on EnPro, Coltec, and the other nondebtor Affiliates, the Plan violates §§ 524(a), 524(e), and 1141(d) of the Bankruptcy Code, and thus cannot be confirmed under § 1129(a)(1). Moreover, the combination of the Parent Settlement Enforcement Injunction and § 7.12 of the Plan would confer on the

Debtors and their Affiliates all the benefits of a § 524(g) channeling injunction and even greater protection than what § 524(g) allows. Yet the Plan does not fulfill all of § 524(g)'s prerequisites. Among other things, the Plan does not require a determination of this Court that the injunctive and declaratory relief to be provided under this Plan is fair and equitable to future claimants in light of the benefits provided or to be provided on behalf of the Debtors and the "Released Parties," such as Coltec and EnPro. *See* 11 U.S.C. § 524(g)(4)(B)(ii). (As noted in part I.C.1 above, that is not a determination that the facts would support.) In addition, the Plan does not require that any trust operating for the benefit of Garlock's asbestos creditors "own," or be capable of owning, a majority of the voting shares of Reorganized GST, Coltec, or EnPro. *See id*. § 524(g)(1)(B)(i)(III). The Plan instead would impose a maximum cap on the funding that the Debtors and Coltec would contribute to compensate asbestos victims. This is a far cry from the "evergreen" source of funding that § 524(g) contemplates. Furthermore, the Parent Settlement Enforcement Injunction and section 7.12 of the Plan are not made contingent on at least 75% of the Debtors' current asbestos claimants voting in favor of the Plan. In short, the Plan constitutes an attempted end-run around § 524(g), which is impermissible.

3. Section 524(g) preempts more general statutory remedies

Section 524(g) is the specifically drawn statutory provision that authorizes the channeling of present and future asbestos claims away from debtors to a trust and shielding of nondebtors from derivative liability for the debtors' asbestos torts. Section 524(g) controls in this case under the well-settled maxim that specific statutory provisions prevail over more general ones. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. __, 132 S. Ct. 2065, 2071 (2012) ("'[I]t is a commonplace of statutory construction that the specific governs the general.'" (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). Indeed, this canon of construction has special force where, as in § 524(g), "Congress has enacted a comprehensive

scheme and has deliberately targeted specific problems with specific solutions." *Id.* (internal quotation marks omitted). This canon also has "full application" where "a general authorization [such as Bankruptcy Code § 105] and a more limited, specific authorization [such as § 524(g)] exist side-by-side." *Id.* "There the canon avoids . . . the superfluity of a specific provision that is swallowed by the general one, 'violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" *Id*. (quoting *D. Ginsburg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). Time and again, the Supreme Court has invoked this canon of construction when interpreting bankruptcy law to determine that the specific statutory provision displaces the general one. *See Law v. Siegel*, 571 U.S. __, 134 S. Ct. 1188, 1194 (2014); *D. Ginsburg & Sons, Inc.*, 285 U.S. at 208; *see also Combustion Eng'g, Inc.*, 391 F.3d at 236-37 (stating that "the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g)").[74]

As shown above, § 524(g) is the provision of the Bankruptcy Code that addresses liabilities for asbestos claims in bankruptcy. Because § 524(g) is the statutory scheme that Congress created to specifically address present and future asbestos personal injury and wrongful death claims in bankruptcy, courts may not invoke more general provisions to grant equivalent or greater remedies.

[74] *Accord In re Lowenschuss*, 67 F.3d 1394, 1402 n.6 (9th Cir. 1995); *In re G-I Holdings, Inc.*, 328 B.R. 691, 696 (D.N.J. 2005). *Cf. Surrey Inv. Servs., Inc. v. Smith*, 418 B.R. 140, 148 (M.D.N.C. 2009) (concluding that the more general provisions of section 503(b)(1)(A), concerning administrative expenses, could not be used to "end-run the requirements of section 503(b)(2)" the more specific section addressing compensation).

4. The statutes cited by the Debtors do not specifically address asbestos liabilities in bankruptcy and thus cannot override the special statutory scheme of § 524(g)

The Plan provides that the Parent Settlement Enforcement Injunction would be issued "pursuant to the Court's powers under Bankruptcy Code §§ 105, 362, and 1141, Rule 9019 of the Bankruptcy Rules, and the Court's supplemental jurisdiction under 28 U.S.C. §§ 1367 and 1651." Plan § 8.2. Unlike § 524(g), these statutes are not specifically applicable to asbestos mass-tort bankruptcies. They do not address asbestos claims specifically and fail to mention the word "asbestos." Accordingly, they cannot override § 524(g).[75]

Section 105, in particular, is almost the quintessential general statute, authorizing the courts to "issue any order, process, or judgment that is necessary or appropriate *to carry out the provisions of this title*." 11 U.S.C. § 105(a) (emphasis added). Yet, § 105 "does not give the court the power to create substantive rights that would otherwise be unavailable under the Code." *Combustion Eng'g, Inc.*, 391 F.3d at 236. Nor does § 105 "allow the bankruptcy court to override the explicit mandates of other sections of the Bankruptcy Code." *Law*, 134 S. Ct. at 1194 (quoting 2 *Collier on Bankruptcy* ¶ 105.01[2], at 105-6 (16th ed. 2013)). In *Combustion*

[75] Nor can they supply a proper predicate for awarding permanent injunctive relief that would bind future asbestos claimants and shield nondebtors from derivative asbestos liabilities. For example, § 362 of the Bankruptcy Code imposes the automatic stay that lasts for the duration of the bankruptcy case; if the automatic stay has not been previously lifted or annulled by the court, the stay terminates upon the closing of the case, dismissal of the case, or the granting or denial of a discharge. 11 U.S.C. § 362(c)(2). In other words, § 362 does not authorize *permanent* injunctive relief upon confirmation of a Chapter 11 plan. Similarly, § 1141(d) grants a Chapter 11 discharge but only with respect to the pre-confirmation debts of a debtor, not nondebtor affiliates. *Id*. § 1141(d)(1)(A) (providing that confirmation of a plan "discharges *the debtor* from any debt that arose before the date of such confirmation") (emphasis added); *see also id*. § 524(e) (providing that "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt"). Bankruptcy Rule 9019, another provision cited by the Debtors, provides in part that "the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019. It says nothing about injunctive relief.

Engineering, the Third Circuit rejected the bankruptcy court's resort to its general equitable powers under § 105(a) to shield two nonbankrupt affiliates of the debtor from their own asbestos liability, because to do so would "trump [the] specific provisions of the Bankruptcy Code" contained in § 524(g). 391 F.3d at 236. The Third Circuit was particularly concerned that to proceed outside the parameters of § 524(g) "may jeopardize the rights of . . . claimants." *Id*. at 237. It concluded that "[b]ecause § 524(g) expressly contemplates the inclusion of *third parties' liability* within the scope of the channeling injunction—and sets out the specific requirements that must be met in order to permit inclusion—the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g)." *Id*. at 236-37 (emphasis added). The Third Circuit's reasoning in *Combustion Engineering* applies equally here to preclude the Debtors' attempt to use § 105(a) "to circumvent the more specific requirements of § 524(g)." *Id*. at 238; *see also In re Congoleum Corp.*, 362 B.R. 167, 202 (Bankr. D.N.J. 2007) ("[T]he explicit safeguards built into § 524(g) may not be sidestepped by resort to § 105.").[76]

The same reasoning also refutes the Debtors' reliance on "the Court's supplemental jurisdiction under 28 U.S.C. §§ 1367 and 1651." Plan § 8.2. Section 1651 of the Judicial Code, known as the "All Writs Act" or "All Writs Statute," provides in relevant part that "all courts

[76] The Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), is likewise instructive. In that case, Fibreboard attempted to certify a class under Rule 23 that would have had the effect of enabling Fibreboard to address asbestos liabilities without recourse to the Bankruptcy Code. The Court rejected the attempt because "the incentives such a resolution would provide to companies facing tort liability to engineer settlements similar to the one negotiated in this case would, in all likelihood, *significantly undermine the protections for creditors built into the Bankruptcy Code*." *Id*. at 860 n.34 (emphasis added). The Court also noted the subsequent enactment of § 524(g). *See id*. To allow the Debtors to avoid § 524(g) here would have the same prohibited effect of undermining protection that the Bankruptcy Code confers upon creditors.

established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651. Just as § 105(a) is a general source of equitable power for the bankruptcy courts, the All Writs Act is a general source of equitable power for other federal courts. Moreover, as the Supreme Court has explained, the All Writs Act "is a residual source of authority to issue writs *that are not otherwise covered by statute*." *Pa. Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985) (emphasis added). "Where a statute specifically addresses the particular issue at hand," such as § 524(g), "it is that authority, and not the All Writs Act, that is controlling." *Id.* The All Writs Act is thus unavailable as an "option" in lieu of § 524(g).

Nor can the Debtors avail themselves of "supplemental jurisdiction" under 28 U.S.C. § 1367 to circumvent the requirements of § 524(g). Section 1367 grants the district courts, in "any civil action" over which the district courts already have original jurisdiction, "supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Congress enacted § 1367 to codify the district courts' "pendent jurisdiction" and "ancillary jurisdiction" that enabled them to hear and determine closely related cross-claims and third-party claims asserted under Rules 13 and 14 of the Federal Rules of Civil Procedure. *See* H.R. Rep. No. 101-734, at 27-30 (1990). Section 1367 thus provides a grant of subject-matter jurisdiction to hear and resolve a narrow class of claims; it does not confer power on the courts to award permanent injunctive relief in asbestos-related bankruptcies. Indeed, the Debtors have not cited, nor has the ACC's research uncovered, any case in which § 1367 was invoked to permanently enjoin present and future asbestos claims in a Chapter 11 reorganization, in derogation of Bankruptcy Code § 524(g). Like the other statutes addressed above, § 1367 says

nothing about dealing with mass-tort asbestos claims in bankruptcy or anything in the way of injunctive relief. Thus, § 1367 cannot be used to accomplish an end-run around the specific statutory scheme of § 524(g).[77]

5. The § 111(b) saving clause must be construed narrowly and is void to the extent it is inconsistent with § 524(g)

The Debtors argue that § 524(g) is not "mandatory" because of an uncodified saving clause that was enacted along with § 524(g) in the Bankruptcy Reform Act of 1994. Debtors' Response to the Committee's Preliminary Plan Objections ¶ 24. The FCR makes a similar argument, suggesting (in error) that the saving clause transforms § 524(g) into a mere "safe harbor." Future Claimants' Representative's Response to the Preliminary Confirmation Objections of the Official Committee of Asbestos Personal Injury Claimants to the Debtors' Second Amended Plan of Reorganization at 6-7, dated May 22, 2015 [Dkt. No. 4618]. The saving clause provides as follows: "RULE OF CONSTRUCTION.—Nothing in [§ 524(g)] shall be construed to modify, impair or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Bankr. Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (Oct. 22, 1994). Contrary to the assertions of the Debtors and the FCR, the saving clause does not grant permission in asbestos bankruptcies to fashion injunctive remedies that fail to comport with § 524(g). Indeed, their arguments are undercut not only by the history and background of the saving clause but also by the well-established canon of construing saving clauses narrowly.

[77] The Debtors fail to provide any statutory basis for the "No Successor Liability" provision contained in section 7.12 of the Plan. That alone should convince this Court to reject it.

When § 524(g) was enacted, at least one commentator recognized that making § 524(g) applicable only to asbestos claims in bankruptcy would negatively imply that bankruptcy courts lack the power to approve comparable relief in non-asbestos cases: "Because the legislation [§ 524(g)] applies only to asbestos litigation, the negative implication of the statutory language is that the injunction-trust mechanism *can not be used for other types of mass torts*. This would be a most unsatisfactory result." Janet A. Flaccus, *A Potpourri of Bankr. Changes: 1994 Bankr. Amendments*, 47 Ark. L. Rev. 817, 846 (1994) (emphasis added). To address the "negative implication" issue, Congress included the saving clause in § 111(b) of the 1994 Reform Act. As noted by one court, the saving clause in § 111(b) "was intended by Congress to avoid any conjecture that, *absent cases involving asbestos*, bankruptcy courts lacked the power to issue permanent injunctions." *In re Richard Potasky Jeweler, Inc.*, 222 B.R. 816, 827 n.19 (S.D. Ohio 1998) (citing the 1994 Reform Act's legislative history) (emphasis added); *see also* G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge,"* 84 Iowa L. Rev. 753, 776 (1999) ("When viewed in the context of their legislative history, the *Manville* Amendments are a clear articulation of Congress's refusal to express itself on the question of third party nondebtor discharge in circumstances *other than those involving asbestos product liability*.") (emphasis added). The legislative history of the saving clause shows that it was intended to leave open the question whether courts may issue channeling injunctions and bind future claimants *in non-asbestos cases*.[78] But, with respect to asbestos cases, Congress laid out a specific and comprehensive

[78] *See* 140 Cong. Rec. H10764 (daily ed. Oct. 4, 1994) ("The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide *(Footnote continued on next page.)*

statutory scheme for obtaining such injunctive relief, which the saving clause in section 111(b) cannot be construed to frustrate.[79]

It is well established that courts are to construe saving clauses narrowly so as not to override a detailed statutory scheme. To the extent a saving clause is inconsistent with such a scheme, it is void. *See* 2A *Sutherland on Statutory Constr.* § 47:12 (7th ed. 2013) ("Although saving clauses are usually strictly construed, unlike the case of a proviso, repugnancy between the saving clause and the purview [that is, the body of the statute] does not make the enacting part void but operates to invalidate the saving clause."); *see also Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000) (citing *Looney v. Comm.*, 133 S.E. 753, 755 (Va. 1926) ("It is well settled that saving clauses which are inconsistent with the body of an act are rejected and disregarded as ineffective and void.")). The Supreme Court has long rejected interpretations of saving clauses that would undermine the established regulatory scheme or swallow up the main body of the statute. *See, e.g.*, *United States v. Locke*, 529 U.S. 89, 106-07 (2000); *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987); *Pa. R.R. Co. v. Puritan Mining Co.*, 237 U.S. 121, 129-30 (1915); *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907).

(Footnote continued from previous page.)
explicit authority *in the asbestos area* because of the singular cumulative magnitude of the claims involved.") (emphasis added).

[79] The possibility that § 524(g) could be construed, by negative implication, to foreclose third-party releases or injunctions in non-asbestos cases was neither theoretical nor academic. In *In re Lowenschuss*, the Ninth Circuit reasoned as follows: "That Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of third parties in an extremely limited class of cases [*i.e.*, asbestos-related bankruptcy cases] reinforces the conclusion that § 524(e) denies such authority in other, non-asbestos, cases." 67 F.3d at 1402 n.6. The Ninth Circuit so stated without discussing or citing the uncodified saving clause in section 111(b).

The saving clause in § 111(b) cannot be read as creating a facile loophole to § 524(g), thereby frustrating the latter's purpose and rendering it meaningless. Any such interpretation would violate the cardinal principle of statutory construction requiring that all words in a statute be given meaning. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see also Texas & Pac. Ry. Co.*, 204 U.S. at 246 ("This [saving] clause . . . cannot in reason be construed [in a manner that] would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."). Similarly, the saving clause cannot be construed in a way that would produce an absurd result. *See Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 243 (4th Cir. 2009). Were this Court to accept an argument that the saving clause effectively renders § 524(g) optional when it comes to seeking a channeling injunction or nonconsensual third-party release for asbestos claims, it would essentially be finding that, in spite of the detailed specifications outlined in § 524(g), Congress, through the saving clause, intended to allow debtors to achieve the *exact same result* contemplated by § 524(g) without complying with § 524(g) itself. Such an interpretation would be absurd. The only proper interpretation—that is, the one that gives effect to *both* § 524(g) and the saving clause—is to confine the saving clause's application to non-asbestos bankruptcy cases. The arguments of the Debtors and the FCR to the contrary should be rejected.

6. The words "may issue," as used in § 524(g), denote that the Court has discretion in deciding whether to issue a channeling injunction; those words do not signify that § 524(g) is "optional" for the Debtors

The Debtors assert that § 524(g) is "optional, not mandatory" because the statute provides that the court "may issue" a channeling injunction to "supplement" the discharge injunction. Debtors' Response to the Committee's Preliminary Plan Objections ¶ 21. They are wrong. The words "may issue" simply mean that courts have discretion in deciding whether to issue a

§ 524(g) channeling injunction, not that the Debtors have "options" when it comes to obtaining an asbestos-related channeling injunction that binds future claimants and protects their parent companies and Affiliates. *See In re ASARCO LLC*, 2009 WL 8176865, at *2 (Bankr. S.D. Tex. July 21, 2009) (explaining that, under § 524(g), a court "may issue" an asbestos-related channeling injunction and, therefore, "the Code *authorizes* the court" to issue such an injunction) (emphasis added); *cf. In re Reece*, 498 B.R. 72, 81 (Bankr. W.D. Va. 2013) (explaining that § 105(a) of the Code, which uses the words "may issue," "provides the Court with authority to exercise discretion."); *United States v. Bird*, 2009 WL 4801374, at *2 (W.D.N.C. Dec. 8, 2009) (explaining that "use of the word 'may'. . . shows that the decision to issue a stay is committed to the discretion" of the court). Other statutes and rules confer discretionary authority on the courts to enter injunctions through the words "may issue." *See, e.g.*, 11 U.S.C. § 105(a) (providing that the court "*may issue* any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title") (emphasis added); 28 U.S.C. § 1651 (providing that federal courts "*may issue* all writs necessary or appropriate in aid of their respective jurisdictions . . .") (emphasis added); Fed. R. Civ. P. 65(a)(1) (providing that a court "*may issue* a preliminary injunction only on notice to the adverse party") (emphasis added). It is appropriate then to interpret § 524(g) the same way and reject the Debtors' erroneous gloss.

7. The Debtors cannot render § 524(g) nugatory through their misguided attempt to make the terms "claim" and "demand" mutually exclusive

The Debtors argue that § 524(g)'s "principal purpose is to provide authority to enjoin the prosecution of 'demands' against the reorganized debtor . . . ." Debtors' Response to the Committee's Preliminary Plan Objections ¶ 22. Section 524(g) defines "demand for payment, present or future," as one that "*was not a claim* during the proceedings leading to the confirmation of a plan of reorganization." 11 U.S.C. § 524(g)(5) (emphasis added). "In many

circuits at the time section 524(g) was enacted," the Debtors assert, "it was unclear whether future claims were Code claims [that is, a "claim" as broadly defined under § 101(5)], and [§] 524(g) provided authority to enjoin them if they were not, by extending the Court's authority to include 'demands.'" Debtors' Response to the Committee's Preliminary Plan Objections ¶ 22. But, according to the Debtors, "Fourth Circuit precedent" now holds that "all current and future asbestos claims dealt with by the Plan are Code 'claims,' not demands." *Id*. ¶ 23. "The claims are therefore covered by the ordinary discharge injunction," the Debtors contend, "and Debtors do not need to 'supplement the injunctive effect of a discharge' by invoking section 524(g)." *Id*. The Debtors' argument fails for at least two reasons.

First, although the Debtors are not specific about which "Fourth Circuit precedent" they are referring to, they have previously relied on the *Grady* decision rendered in the *A.H. Robins* case to make similar assertions.[80] *See Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988). But asbestos claims were not at issue in *Grady*, and the Fourth Circuit rendered the 1988 *Grady* decision long before § 524(g) was enacted. In *Grady*, the Fourth Circuit held that any claim held by a person who had used the Dalkon Shield but had not developed an injury as a result was a contingent claim under § 101(5) and therefore was subject to the automatic stay. *Id.* at 203. The Fourth Circuit was careful to add, however, that it was not deciding whether the contingent claim held by the Dalkon Shield user could be discharged. *Id.* Thus, *Grady* says nothing about asbestos and § 524(g), and its holding was expressly limited to the narrow issue regarding the automatic stay. *Grady* is therefore inapposite and, contrary to the Debtors' position, does *not* mean that the terms "claim" and "demand" in § 524(g) are mutually exclusive.

[80] *See, e.g.*, Debtors' Motion for Entry of an Order Approving Solicitation and Confirmation Procedures and Schedule ¶ 32, dated June 24, 2014 [Dkt. No. 3802].

Second, courts actually confronting the issue have rejected the notion that the terms "claim" and "demand" are mutually exclusive, as well as the implication that § 524(g) is merely "optional" for the channeling of asbestos liabilities. *See In re W.R. Grace & Co.*, 729 F.3d 332, 339-42 (3d. Cir. 2013); *In re Flintkote Co.*, 526 B.R. 515, 522-23 (D. Del. 2014). In *W.R. Grace*, an asbestos property-damage claimant, AMH, argued that a § 524(g) plan could not be confirmed and could not channel asbestos property-damage claims to a trust. AMH maintained that there could be no such thing as a future property-damage "demand" since "any buildings that contain asbestos already contain the material." *W.R. Grace & Co.*, 729 F.3d at 339. There could only be asbestos property-damage claims under Code § 101(5), not demands—or so the argument went—so there was no basis for the requisite finding under § 524(g) that the debtor was "likely to be subject to substantial future demands for payment." *Id*. at 340 (quoting 11 U.S.C. § 524(g)(2)(B)(ii)(I)). The Third Circuit squarely rejected this argument. According to the court, "demand" as used in § 524(g) describes a "present or future" demand for payment, and as the term "claim" defined in § 101(5) is an expansive one, the court could not "fathom a situation where an individual could hold a 'present' demand for payment that is not technically a 'claim' under § 101(5)." *Id*. at 341 (quoting *In re Flintkote Co.*, 486 B.R. 99, 124 (Bankr. D. Del. 2012)). It reasoned that, if the terms "demand" and "claim" were treated as mutually exclusive, the category of present demands would be read "out of the statute," in violation of the canon that statutes are to be interpreted to avoid rendering any language superfluous. *Id*. at 341-42. The Third Circuit also observed that Congress enacted § 524(g) to enable debtors to "emerge free and clear of the entire universe of asbestos liabilities, as evidenced by the statute's reference to present and future demands . . . ." *Id*. at 341 (citations and internal quotation marks omitted). To accept AMH's (and Garlock's) "mutual exclusivity" theory would make § 524(g) trusts

"impossible" because, as noted above, bankruptcy courts must find that debtors are "likely to be subject to substantial future demands for payment" in order to channel claims to those trusts. *Id.* at 342; *see also* 11 U.S.C. § 524(g)(2)(B)(ii)(I). Such an outcome, the Third Circuit concluded, "cannot be consistent with congressional intent." *W.R. Grace & Co.*, 729 F.3d at 342.

The district court in *Flintkote* rejected a similar argument for treating "claims" and "demands" as mutually exclusive, but on slightly different grounds. There, the debtor's former parent company, Imperial Tobacco, objected to the § 524(g) plan, arguing that there could be no supportable finding of "substantial future demands" because "asbestos production in this country ended decades ago," leaving only "claim" holders (*i.e.*, persons exposed to asbestos before confirmation) and no "demand" holders (*i.e.*, persons who would be exposed post-confirmation). *Flintkote Co.*, 526 B.R. at 522. The district court overruled Imperial's objection by noting, first, that the term "demand" in § 524(g) referred to "a demand for payment, present or future, that . . . was not a claim *during the proceedings* leading to confirmation of a plan of reorganization." *Id.* (quoting 11 U.S.C. § 524(g)(5)) (court's emphasis). "The natural reading of this phrase," the court explained, "refers to claims that were actually raised or identified 'during the proceedings,' as opposed to claims that merely could have been raised if only the asbestos victims had known about them." *Id.* at 522-23 (citation and internal quotation omitted). Hence, under the court's interpretation, a contingent § 101(5) "claim" held by an asymptomatic person who was exposed to asbestos prepetition still qualifies as a "demand" under § 524(g). The terms are not mutually exclusive. In addition, the *Flintkote* court determined that accepting Imperial's reading would deprive exposed but asymptomatic individuals of a key statutory protection. Section 524(g) provides for the appointment of a legal representative to protect "the rights of persons that might subsequently assert demands." *Id.* (quoting 11 U.S.C. § 524(g)(4)(B)(ii)). Under Imperial's

reading, "the only asbestos victims who would be covered by this provision are those who are not yet exposed. Anyone who has been exposed would be left in the cold." *Id*. at 523 (citation and internal quotation omitted).

In sum, the *Flintkote* and *Grace* decisions show that the crabbed reading the Debtors give § 524(g) in the effort to get around it has no merit. Congress enacted § 524(g) as a comprehensive and detailed statutory scheme that applies specifically to mass-tort asbestos liability. The circumstances of this case make § 524(g) apposite and controlling here. Before bankruptcy, Garlock defended against asbestos claims in the tort system for decades. When it entered Chapter 11, some 100,000 asbestos claims were pending against it.[81] Garlock faces untold numbers of asbestos claims arising in the future. Garlock is trying to resolve its present and future asbestos liability once and for all by channeling that liability away from the Debtors, the parent companies, and the Affiliates. But Garlock is trying to do so without complying with the protections that § 524(g) affords to claimants and demand holders. Accordingly, the Plan violates § 524(g) and cannot be confirmed under § 1129(a)(1).

B. The Plan Violates the Code Because It Would Grant a Chapter 11 Discharge to Anchor, Even Though Anchor Is Dissolving, and Would Release Nondebtors from Claims Derivative of Anchor Liabilities, in Addition to Those Derivative of Garlock Liabilities

The Plan provides for the liquidation and dissolution of Anchor post-confirmation. Plan § 2.1. Yet, although Anchor will not be reorganizing or engaging in a business post-confirmation, the Plan would nevertheless confer a Chapter 11 discharge on Anchor, in violation of Bankruptcy Code § 1141(d).

[81] Information Brief of Garlock Sealing Technologies LLC at 2, 75, dated June 7, 2010 [Dkt. No. 24].

The Debtors have stated unequivocally to this Court that "[t]he Plan . . . does not provide Anchor a discharge." Debtors' Response to the Committee's Preliminary Plan Objections ¶ 26. But the Plan itself belies that assertion. Specifically, the Plan provides for a "discharge . . . of all Claims . . . against the *Debtors*." Plan § 8.1.1 (emphasis added). The term "Debtors" includes Anchor. *Id*. § 1.1.44. Thus, contrary to the Debtors' express representation, Anchor would receive a discharge even though it is ineligible for one. Section 1141(d) of the Bankruptcy Code provides that a debtor cannot receive a discharge when:

> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
>
> (B) the debtor does not engage in business after consummation of the plan; and
>
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

11 U.S.C. § 1141(d)(3). All of these elements are present. The Plan requires Anchor to be liquidated, dissolved, and wound up; Anchor thus will not engage in business after the Plan is consummated; and Anchor is not eligible for a Chapter 7 discharge because it is a corporation and not an individual. *See* 11 U.S.C. § 727(a)(1). In short, the Plan violates § 1141(d) because it would confer a discharge on the liquidating and dissolving Anchor. As a result, the Plan cannot be confirmed.

In addition to granting a discharge to Anchor, the Plan would also grant Anchor's nondebtor Affiliates the functional equivalent of a discharge. Through the Parent Settlement Enforcement Injunction and section 7.12, the Released Parties, which include EnPro and Coltec, would be shielded from derivative liability for Anchor's asbestos torts, even though Anchor would not reorganize and continue as a business post-confirmation. *See* Plan §§ 7.5, 7.12, & 8.2. This would violate § 524(g) insofar as an asbestos debtor must reorganize and obtain a Chapter

11 discharge in order for the debtor and its affiliates to have the "supplemental" benefit of a § 524(g) channeling injunction. *See* 11 U.S.C. §§ 524(g)(1)(A), 1141(d)(3)(B).

Even in non-asbestos cases, where § 524(g) does not apply, courts have refused to confirm plans containing nondebtor releases where the debtor was liquidating. *See, e.g.*, *In re New Towne Dev., LLC*, 410 B.R. 225, 231-32 (Bankr. M.D. La. 2009); *In re Berwick Black Cattle Co.*, 394 B.R. 448, 461 (Bankr. C.D. Ill. 2008). The Fourth Circuit recently applied the substantive factors enumerated in the Sixth Circuit's *Dow Corning* decision to evaluate whether a nondebtor release proposed in a plan could pass muster. *See Nat'l Heritage Found., Inc.*, 760 F.3d at 347 (citing *In re Dow Corning Corp.*, 280 F.3d at 658). The *Dow Corning* factors expressly require *reorganization* of the debtor in order to approve a nondebtor release or injunction. A reorganization plan can only protect a nondebtor by injunction if the "non-debtor has contributed substantial assets to the *reorganization*" and the "injunction is essential to *reorganization*." *Id*. (emphasis added).[82] So, even if the *Dow Corning* factors were to apply here—which they cannot since the comprehensive scheme of § 524(g) controls—the nondebtor Released Parties still could not be released or shielded from Anchor's liability because Anchor would be liquidated and dissolved under the Plan. Because the Plan would grant the Released Parties the equivalent of a discharge, when Anchor is ineligible for a discharge to begin with, the Plan violates the Bankruptcy Code and cannot be confirmed.

C. The Plan Violates § 1107(a) of the Code, Because It Would, Through the So-Called "Parent Settlement," Countenance a Breach of the Debtors' Fiduciary Duties to Asbestos Claimants, and § 1123(b)(3)(A) of the Code, Because It Would Release and Enjoin Claims Not Belonging to Them or Their Estates

[82] Otherwise, such a plan violates § 524(e) of the Code, which provides that discharging a debt of the debtor "does not affect the liability of any other entity on . . . such debt." 11 U.S.C. § 524(e).

It is indisputable that, as debtors-in-possession, the Debtors owe fiduciary duties to their creditors. *See* 11 U.S.C. § 1107(a) (providing that "a debtor in possession . . . shall perform all the functions and duties . . . of a trustee serving in a case under this chapter"); *see also CFTC v. Weintraub*, 471 U.S. 343, 355 (1985); *Wolf v. Weinstein*, 372 U.S. 633, 649 (1963); *Pepper v. Litton*, 308 U.S. 295, 307 (1939). As an estate fiduciary, a debtor-in-possession must not act in its own interest but rather in the interests of the creditors of the estate. *In re J.T.R. Corp.*, 958 F.2d 602, 605 (4th Cir. 1992). The fiduciary duties owed by the Debtors to the creditors include a duty of care to protect estate assets, a duty of loyalty, and a duty of impartiality. *See In re Bowman*, 181 B.R. 836, 843 (Bankr. D. Md. 1995). The duties to avoid self-dealing, conflicts of interest, and the appearance of impropriety are encompassed within the concept of the duty of loyalty. *See In re Combined Metals Reduction Co.*, 557 F.2d 179, 196-97 (9th Cir. 1977); *see also Bowman*, 181 B.R. at 844 ("An evaluation of a settlement offer in a bankruptcy context differs from an evaluation of a settlement offer in a non-bankruptcy context because additional factors must be taken into consideration, such as . . . the risk to all creditors, not just to the equity holders.").

In the Parent Settlement, the Debtors have served their own interests and those of their parent companies rather than the paramount interest of creditors. Rather than using their fiduciary powers to enforce the estate-held claims or to allow a party not laboring under similar conflicts to do so in their place, the Debtors have abused their powers in their effort to extinguish those claims. The Supreme Court has instructed that debtors and their insiders should not be permitted to "use the reorganization process to gain an unfair advantage" and that any plan that "simply turn[s] out to be too good a deal for the debtor's owners " must be rejected. *Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999) (discussing the

absolute priority rule) (internal citation omitted). The Debtors have also usurped claims held not by their estates, but by creditors. Because the Parent Settlement attempts to license the Debtors' breach of fiduciary duties and their usurpation of creditors' rights, the Plan violates § 1107(a) and is thus unconfirmable under § 1129(a)(1).

Section 1123(b)(3)(A) provides in relevant part that a plan may "provide for . . . the settlement or adjustment of any claim or interest *belonging to the debtor or to the estate*." 11 U.S.C. § 1123(b)(3)(A) (emphasis added). The Plan exceeds those parameters. As demonstrated above, the Parent Settlement provides for the putative settlement and release of claims that do not belong to the Debtors' estates, but to creditors.[83] In this respect, the Plan violates § 1123(b)(3)(A) and cannot be confirmed under § 1129(a)(1).

D. The Plan Violates §§ 1124(1) and 1126(a) of the Code by Purporting to Treat Class 4 Current Asbestos Claimants as Unimpaired and Thereby Ignoring the Votes Cast by the Holders of Those Claims

The Debtors contend that Class 4, which comprises holders of current unliquidated asbestos claims against Garlock, is "unimpaired and should be deemed to have voted to accept the Plan." Plan § 2.2.4(d). But the Plan alters the claimants' rights in undeniable ways, plainly entitling them to vote. Indeed, Garlock has implicitly conceded as much, and is soliciting the votes of Class 4 claimants "in the event the Court determines" that the claims are impaired. *Id*. Garlock's pretense that Class 4 claims will be paid in full, and are not impaired, is best seen as a ploy to mislead asbestos claimants into voting for the Plan or to dissuade them from voting at all.

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[83] *See supra* part I.C.3. That a debtor is vested as trustee with the legal capacity to enforce creditors' state-law fraudulent conveyance claims pursuant to 11 U.S.C. § 544(b) does not make it the "owner" of those claims. *See In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d. Cir. 2000). And a debtor lacks even that capacity when it comes to creditors' state-law claims that do not fall within the avoidance provisions of the Code.

Section 1124 of the Bankruptcy Code provides that a class of claims is impaired under a plan "unless, with respect to each claim . . . of such class, the plan . . . leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim . . . ." 11 U.S.C. § 1124(1). Thus, the legal, equitable, and contractual rights of *each member* of the class must be left unaltered for that class to be unimpaired. The Debtors, as plan proponents, bear the burden of demonstrating that the Plan does not alter *any* rights of *any* Class 4 claimant. *See In re PPI Enters. (U.S.), Inc.*, 324 F.3d at 203; *In re Reuter*, 427 B.R. 727, 773 (Bankr. W.D. Mo. 2010) *aff'd*, 443 B.R. 427 (B.A.P. 8th Cir. 2011) *aff'd*, 686 F.3d 511 (8th Cir. 2012). The Debtors cannot meet that burden.

Section 1124 is "the threshold to creditor protection." *In re Barrington Oaks Gen. P'ship*, 15 B.R. 952, 959 (Bankr. D. Utah 1981). It defines impairment "in very broad terms." *In re Schwarzmann*, 103 F.3d 120, at *3 (4th Cir. 1996) (citation omitted). "[A]ny alteration of the creditor's rights, no matter how minor," is an impairment. *In re Village at Camp Bowie I, L.P.*, 710 F.3d 239, 245 (5th Cir. 2013). The purpose of the Bankruptcy Code's broad concept of impairment is "[t]o maximize creditor participation in the confirmation process," *In re Wilhelm*, 101 B.R. 120, 122 (Bankr. W.D. Mo. 1989), and ensure that those "claimants who have something at risk" are able to send "a signal to the court that the creditors who have the most to lose" either "believe this plan represents the best possible recovery under the circumstances" or that it does not. *In re K Lunde, LLC,* 513 B.R. 587, 596 (Bankr. D Colo. 2014); *see also PPI Enterprises*, 324 F.3d at 203. Hence, "even the smallest impairment . . . entitles a creditor to participate in voting." *In re Am. Solar King Corp.*, 90 B.R. 808, 819 (Bankr. W.D. Tex. 1988). Although the Plan would significantly alter the legal rights of asbestos claimants who are most at risk thereunder, the Debtors seek to prevent them from having their opinion of the Plan heard, in

contravention of § 1124 and in blatant disregard of § 524(g), which conditions relief on a supermajority vote of current asbestos claimants.

1. Class 4 is impaired because the Plan would deprive asbestos creditors of recourse against Garlock and Garlock's assets

Outside of bankruptcy, claimants would have the right to litigate their claims against Garlock, and all of Garlock's assets would be available to satisfy their claims. Under the Plan, however, asbestos claimants would be enjoined from seeking recourse against Reorganized Garlock and its assets.[84] Instead, those claimants who choose the Litigation Option would be required to litigate their claims against Reorganized Garrison, which would prosecute objections to Litigation Option claims.[85] The allowed amounts of claims would be paid from the Litigation Fund or the Settlement Facility's fund, both of which would be capped. The Debtors would not have to make any additional contribution to those funds beyond what is provided for in the Plan.[86] Thus, Garlock would emerge from Chapter 11 with an equity value of several hundreds of millions of dollars that would be beyond the reach of Class 4 claimants.[87] In this regard, the Plan unmistakably alters the claimants' rights and thus renders Class 4 impaired.

"When the [creditor's] relationship to the debtor is changed, the creditor ought to have the right to express a formal opinion about the change." *In re Elijah*, 41 B.R. 348, 351 (Bankr. W.D. Mo. 1984). There can be no serious debate that a class of creditors is impaired when a reorganization plan extinguishes the debtor's obligations to creditors in that class and a third party assumes the Debtors' obligations to the creditors. In *Bustop Shelters of Louisville, Inc. v.*

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84 *See* Plan § 8.1.1.

85 *See id*. §§ 7.3.2(g), 7.3.4.

86 *See id*. §§ 7.3.1, 7.3.2.

87 *See supra* part III.

Classic Homes, Inc., for example, the Sixth Circuit noted that a lender "would be impaired as a matter of law if the [debtor's] obligation to pay the loan was extinguished and a different party substituted to assume the payments." 914 F.2d 810, 814 (6th Cir. 1990). Extinguishing the debtor's obligations in and of itself is an impairment, as it "alters" the creditors' rights, regardless of whether the creditors have suffered economic harm. *See In re Barrington Oaks Gen. P'ship,* 15 B.R. 952, 956 (Bankr. D. Utah 1981) (concluding that lender was impaired where the plan provided that a third party would be substituted for the debtor as obligor under a trust deed, where the loan was non-recourse, and where lender's only remedy was foreclosure); *see also In re Greenwood Point, LP,* 445 B.R. 885, 906 (Bankr. S.D. Ind. 2011) (stating that "any alteration of the rights constitutes impairment even if the value of the rights is enhanced") (internal quotation omitted).

Garlock, however, contends that Class 4 is unimpaired because claimants in that class will be paid "in full" under the Plan.[88] The ACC disputes that assertion, both as to the legal meaning of the Plan and as to its factual application. But even if the claimants were to be paid in full—and the Plan does not guarantee that result—they would nonetheless be impaired. Prior to the 1994 Bankruptcy Reform Act, the Bankruptcy Code provided that a class would not be impaired if the plan "provides that, on the effective date of the plan, the holder of such claim . . . receives, on account of such claim . . ., cash equal to . . . the allowed amount of such claim . . . ." 11 U.S.C. § 1124(3) (repealed 1994). But Congress deleted § 1124(3) from the Code in 1994.[89]

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88 *See* Disclosure Statement, ¶ 1.2.2.

89 *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (enacted Oct. 22, 1994) (deleting prior § 1124(3)). Congress deleted that provision to overrule the decision rendered in *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994), where the court held that unsecured creditors, who were being denied postpetition interest by a debtor that was liquidation and reorganization solvent, were nonetheless properly classified as unimpaired because the plan promised to pay the *(Footnote continued on next page.)*

As the House committee report explained: "As a result of [deleting § 1124(3)], if a plan proposed to pay a class of claims in cash in full the allowed amount of the claims, the class would be impaired entitling creditors to vote for or against the plan of reorganization." H.R. No. 103-835, at 48 (1994). Thus, "a class that is to be paid its allowed claim in full will be deemed an impaired class . . . . A class would only be unimpaired pursuant to section 1124(1) if the legal or equitable rights of a class are left unchanged." 7 *Collier on Bankruptcy* ¶ 1124.LH[2] (Alan N. Resnick & Henry J. Sommer, eds. 16th ed. 2015); *see also, e.g.*, *In re Atlanta-Stewart Partners*, 193 B.R. 79, 82 (Bankr. N.D. Ga. 1996) (holding that, by deleting § 1124(3), "Congress intended to do away with the concept that a creditor receiving payment in full is unimpaired"); *In re Crosscreek Apts. Ltd.*, 213 B.R. 521, 536 (Bankr. E.D. Tenn. 1997) (holding that, after deletion of § 1124(3), a plan proponent can no longer render a claim unimpaired by paying the claim in full at confirmation); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 240 (Bankr. D.N.J. 2000) (holding that the amendment to § 1124 meant that a class of creditors receiving full payment in cash was impaired and entitled to vote).

Since the 1994 amendment of § 1124, some courts have held that claims are not impaired if they are paid in full in cash, with post-petition interest. *See Texas Rangers Baseball Partners*, 434 B.R. 393, 406 (Bankr. N.D. Tex. 2010) (collecting cases). That conclusion is not consistent with the legislative history of § 1124, and is contrary to the plain language of § 1124(1). As the *Texas Rangers* court noted, to be unimpaired under § 1124(1), all of the creditors' "legal, equitable, and contractual rights" must be honored. *Id.* at 406-07. While for the "typical unsecured creditor, those rights equate to the payment of the debt owed with interest as allowed

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(Footnote continued from previous page.)
allowed amount of their claims in cash on the effective date. H.R. Rep. No. 103-835, at 47-48 (1994).

by law," if the creditor has other rights that are affected by the Plan, the creditor's claim will be impaired even if paid in full. *Id.* at 407. In *Texas Rangers*, for example, the court held that, although payment to the creditor would satisfy the debtor's monetary obligations under certain loan documents, the lenders had other non-monetary rights under those documents, and thus would be impaired unless they were allowed to exercise those rights after the plan's effective date. *Id.* at 407-08. Here, even if the Class 4 claimants were to be paid in full the allowed amounts of their claims, with interest—and the Plan does not guarantee that they would be—they would nonetheless be impaired under § 1124(1) because, as shown above, their legal and equitable rights would be altered by the Plan.

The Debtors' assertion that claims would be paid in full rests on the aggregate estimate of present and future mesothelioma claims.[90] But, as the Debtors have explicitly conceded, the estimate could prove wrong, and the capped funds could prove insufficient.[91] They admit "[t]here can be no absolute guarantee . . . [that] the Settlement Facility and Litigation Fund will be able to pay in full Allowed GST Asbestos Claims for which they are responsible."[92] Indeed, the Litigation Fund could be depleted if even a small percentage of Class 4 claimants chose the Litigation Option and won judgments while the Litigation Fund was simultaneously drained by Garrison's costs of defense and its own litigation management fees.[93] If and when the Litigation Fund ran dry, all remaining claimants would be deprived of any Litigation Option altogether, a clear deprivation of their jury trial rights enshrined in the Seventh Amendment to the United

90 *See* Disclosure Statement, § 1.2.12.

91 *Id.* § 8.2.

92 *Id.*

93 *See supra* part I.A.2.

States Constitution and protected from alteration in bankruptcy by 28 U.S.C. § 1411(a). *See In re Roman Catholic Archbishop of Portland,* 339 B.R. 215, 220 (Bankr. D. Or. 2006).

The Debtors suggest that the mesothelioma estimate[94] answers all confirmation issues, including impairment, because, they assert, the estimate is the "law of the case." Hr'g Tr. at 46:2-6 (Mar. 18, 2015). But they overstate and misapply that notion. The "law of the case" doctrine is "not a matter of rigid legal rule, but more a matter of proper judicial administration which can vary with the circumstances." *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 290 n.3 (4th Cir. 1982). Thus it may "sometimes be proper for a [trial] judge to treat earlier rulings as binding, sometimes not." *Id*. The mesothelioma estimate is interlocutory, not final, and federal appeals courts have held that the "law-of-the-case doctrine only applies to final orders, not interlocutory orders." *Murphy v. FedEx Nat'l LTL, Inc.*, 618 F.3d 893, 905 (8th Cir. 2010); *accord United States v. Young*, 267 F. App'x 876, 879 (11th Cir. 2008); *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997); *Pérez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994). Similarly, "[p]reliminary or tentative rulings do not establish law of the case." 18B Charles Alan Wright *et al.*, *Fed. Prac. & Proc. Juris.* § 4478.5, at 791 (2d ed. 2002) (footnote omitted). Judge Hodges himself described estimation as "not a dispositive proceeding" but "merely a preliminary step in the process of formulating a reorganization plan."[95]

Moreover, § 157(b)(2)(B) of the Judicial Code carves out from the scope of core proceedings the "estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11." 28 U.S.C. § 157(b)(2)(B). The Plan attempts to use the mesothelioma estimate as the basis for capping the

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94 *In re Garlock Sealing Techs. LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014)

95 Order Denying Motion of Legal Newsline to Open Proceedings to the Public ¶ 3, entered July 31, 2013 [Dkt. No. 3069].

amount of money that would be available to pay asbestos claimants. In other words, the Debtors are employing it as an estimation for distribution purposes, placing it outside the adjudicatory authority of the Bankruptcy Court. *See Roman Catholic Archbishop of Portland,* 339 B.R. at 220-21. Thus, if this Court were to accept the Plan on that basis, the estimate would be subject to *de novo* review by the District Court. *See* 28 U.S.C. § 157(c)(1); Fed. R. Bankr. P. 9033(d). An order reviewable *de novo* is not the "law of the case."

Additionally, of course, Judge Hodges' opinion did not discuss the Plan, which had not even been proposed at that point. The estimate does not speak to GST's aggregate liability for cancers other than mesothelioma or for nonmalignant diseases. Judge Hodges specifically refrained from determining the allowed amounts of any individual mesothelioma claim.[96] And the opinion did not discuss issues that arise when the mesothelioma estimate is brought to bear on particular confirmation requirements, such as the "best interest of creditors" test or the absolute priority rule.

As this Court itself has noted, "[t]his is a fairly novel plan . . . that presents a variety of unsettled issues of law and fact that are matters of fair debate and, to some extent[], ... calculated guesses . . . ." Hr'g. Tr. at 10:14-18, March 4, 2015. The mesothelioma estimate does not discuss, much less purport to apply, the tests the Debtors must meet to confirm their Plan. An expansive application of the "law of the case" doctrine to foreclose "fair debate" would be improvident, injudicious and conducive to error.

[96] Order for Estimation of Mesothelioma Claims ¶ 11, entered Apr. 13, 2012 [Dkt. No. 2102].

2. Class 4 is impaired because the CMO would impose requirements on claimants that they would not be subject to in the tort system

As discussed in part I.A.2 above, the Plan provides that Litigation Option claims would be consolidated for pretrial proceedings in the District Court for the Western District of North Carolina and would be governed by the proposed CMO. The CMO's requirement that claimants and their counsel investigate all possible alternative asbestos exposures and file all "available" Trust Claims before proceeding against Reorganized Garrison imposes obligations on claimants that are not imposed by the laws of any state, or by any federal law or rule. The CMO would shift the burden of proof and investigation of non-Garlock asbestos exposures from Reorganized Garrison to the claimants and would override the longstanding rule that a plaintiff has no obligation to sue every party responsible for his or her injury. *See supra* I.B.1. The CMO profoundly alters the legal rights of claimants and thus constitutes an impairment. *See, e.g., In re L & J Anaheim Assocs.*, 995 F.2d 940, 943 (9th Cir. 1993) (class was impaired where plan deprived creditor of opportunity to invoke procedural mechanisms available to it under state law); *cf. also Butner*, 440 U.S. at 56 (creditors should be afforded the same protections they would have under state law outside of bankruptcy); *Coudert Bros.*, 673 F.3d at 190-91 (creditor should not be deprived of state-law advantages).

3. Class 4 is impaired because the Plan eliminates the claimants' legal rights to pursue claims against the Debtors' parent companies and Affiliates

Asbestos claimants have the legal right to seek to hold Garlock's parent companies, nondebtor Affiliates, and certain other parties derivatively liable for Garlock's asbestos torts, based on theories such as successor liability, alter ego, and piercing the corporate veil. *See Auto. Indus. Pension Trust Fund v. Ali*, 2012 WL 2911432, *8 (N.D. Cal. July 16, 2012) (stating that successor liability is not an independent cause of action but simply a theory for imposing liability

based on a predecessor's ERISA violation); *Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc.*, 356 F.3d 731, 736 (7th Cir. 2004) (characterizing alter ego claims as "merely a procedural means of allowing liability on a substantive claim . . . ."). The Plan would release and enjoin such claims,[97] which would clearly result in impairment. *See, e.g., In re Eller Bros., Inc.*, 53 B.R. 10, 12 (Bankr. M.D. Tenn. 1985) (holding that creditor was impaired where plan released guarantors from potential liability).

The Debtors assert that claims alleging derivative liability of its parent companies and Affiliates belong to the estates.[98] But that overbroad assertion ignores the difference between claims arising in favor of a debtor itself and creditors' fraudulent transfer claims for which a debtor-in-possession is vested with standing and legal capacity to enforce as a trustee.[99] It also overlooks applicable state law governing whether alter ego or successor liability claims belong to the Class 4 claimants or to the Debtors' estates, and who can assert such claims.[100] Under certain state law, claims for alter ego or successor liability against the nondebtor entities would clearly belong to the creditors, and not the bankruptcy estates.[101] Moreover, certain direct and non-derivative asbestos claims against Affiliates would be extinguished under the Plan, and the

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97 This injunction is improper. *See supra* part V.A.2.

98 *See* Disclosure Statement § 2.3.5.

99 *Cybergenics Corp.*, 226 F.3d at 243 (holding that while § 544(b) authorizes a debtor in possession to "avoid a transfer using a creditor's fraudulent transfer action" that does not mean the action is "actually an asset of the debtor in possession" or property of the estate) *aff'd en banc sub nom. Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d. Cir. 2003).

100 *Bd. of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 n.5 (3d. Cir. 2002) (citing *Butner*, 440 U.S. at 54) (a "cause of action is considered property of the estate if the claim existed at the commencement of the filing and the debtor could have asserted the claim on his own behalf under state law"); *see also In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 607 (2d. Cir. 1994) ("Bankruptcy courts have long been charged with ascertaining, under state law, whether claims belong to the bankruptcy estate or to other claimants.").

101 *See supra* note 42 and accompanying text.

Debtors do not even argue that such claims are estate property nor could they. *See supra* part V.A.2.

Garlock's creditors also have legal rights under applicable nonbankruptcy law to press claims for, and recoup, any prepetition fraudulent transfers. Those creditors were not divested of their avoidance claims when the Debtors filed bankruptcy; rather, their right to press those claims was stayed pending the right of the Debtors or other estate representatives to pursue avoidance actions under Bankruptcy Code §§ 544(b) and 548 for the benefit of the estate and creditors as a whole.[102] Creditors obtain or regain the right to press their own fraudulent transfer claims if the automatic stay is lifted to permit them to do so or if the § 546(a) limitations period for filing avoidance actions under Bankruptcy Code runs.[103] Because the Plan would release and enjoin the avoidance claims of Class 4 asbestos claimants, their claims are impaired by the Plan, and the claimants ought to have their voices heard and their votes counted. And because the Plan chooses to disregard their votes and thereby disenfranchise voters, it cannot be confirmed.

VI. The FCR Is Not an Adequate Representative of the Individual Interests of Future Claimants; Moreover, in Supporting a Plan That Would Arbitrarily Rule Out Many Valid Future Claims, He Has Failed to Protect the Shared Interests of Future Claimants as a Group

One of the express conditions to confirmation and consummation of the Plan is a finding by this Court "that the FCR has adequately represented Future GST Asbestos Claimants."[104] Under the circumstances of this case, such a finding would be insupportable.[105]

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[102] *See supra* part I.C.3.
[103] *See supra* part I.C.3.
[104] Plan § 7.8.1(g).
[105] The FCR has cast a ballot purporting to accept the Plan on behalf of Class 5 claimants in their entirety. The ACC has already gone on record objecting to that ballot because the FCR has no legal capacity or authority to vote on the Plan. *See* Preliminary Confirmation Objections of the Official Committee of Asbestos Personal Injury Claimants to the Debtors' Second Amended *(Footnote continued on next page.)*

The FCR is a fiduciary appointed by the Court to protect the interests of future asbestos claimants as a group. The future claimants are victims whose asbestos injuries from the Debtors' products will not manifest until after a plan is confirmed. *See* Order Granting Debtors' Motion for Appointment of Joseph W. Grier, III as Future Claimants' Representative ¶ 2, entered Sept. 16, 2010 [Dkt. No. 512]. The FCR has "the powers and duties of a committee set forth in section 1103 of the Bankruptcy Code as are appropriate for a Future Asbestos Claimants' Representative." *Id.* ¶ 6. Like a committee, he is responsible for protecting the collective or classwide interests of his constituency. But, also like a committee, he has no authority to exercise or dispose of the individual rights of any constituent.[106] *See, e.g.*, *In re G-I Holdings, Inc.*, 328 B.R. 691 (D.N.J. 2005) (holding that the future claimants' representative could not be named as a defendant and forced to represent the future claimants in an adversary proceeding in which the debtors were seeking a declaration that affiliates did not have successor liability, and that the Debtors' attempt to bind the future claimants through the legal representative in that manner would offend due process); *In re Johns-Manville Corp.*, 52 B.R. 940, 943 (S.D.N.Y. 1985) (noting that the powers of the future claimants' representative are like those of a

(Footnote continued from previous page.)
Plan of Reorganization ¶¶ A.30 & B.2(l), dated Apr. 30, 2015 [Dkt. No. 4586]; *see also* Limited Reply of the Official Committee of Asbestos Personal Injury Claimants to the Future Claimants' Representative's and the Debtors' Statements in Response to the Asbestos Committee's Preliminary Confirmation Objections at 3-6, dated June 15, 2015 [Dkt. No. 4659]. The ballot dispute will become important if, as we anticipate, Class 4 rejects the Plan and the Debtors point to Class 5 as an impaired assenting class and go forward on that basis to attempt a cramdown. The ACC reserves the right to raise and brief any and all objections to the FCR's ballot at the appropriate time.

[106] In comparison to a committee of several members drawn from different segments of existing creditors, the FCR is a single individual and his constituents cannot be identified. He therefore cannot promote the forging of a consensus among creditors within the same class who have competing views or interests. This practical limitation stresses the need for a future claimants' representative to be especially careful in distinguishing matters of individual rights from the general classwide interests he is charged with protecting.

committee under § 1103, and that the appointment of the legal representative is not to enable the representative to bind the claimants, but simply to assure that future claimants have a meaningful opportunity to be heard and participate).[107]

The constituency of future claimants is large, diffuse, and diverse. It encompasses persons who differ substantially from one another as to the circumstances of their asbestos exposures, their eventual diagnoses, and their resulting damages, and also with respect to what jurisdiction's law governs their claims. As a result, the interests of future claimants are not uniform; conflicts of interest within the group are rife. When it comes, then, to matters of individual rights and interests, or to individual entitlements in a "zero sum game," no single fiduciary can possibly stand as an adequate representative of each individual member of the group.

The Supreme Court's decision in *Amchem*, underscores this fundamental structural concern. There, a group of persons who had been exposed to asbestos sought to represent all current and future asbestos claimants against the defendants for purposes of a settlement class action under Rule 23 of the Federal Rules of Civil Procedure. The Court held that the proposed class of asbestos claimants could not be certified under Rule 23, and the named class representatives could not bind absent class members to the settlement. The Court reasoned that the members of the class were so diverse that the class could not satisfy Rule 23(b)(3)'s

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[107] *Cf. In re Donlevy's Inc.*, 111 B.R. 1 (Bankr. D. Mass. 1990) (creditors' committee cannot bind creditors to accept a plan); *In re Refco Inc.*, 336 B.R. 187, 197 (Bankr. S.D.N.Y. 2006) (ordinarily, a creditors' committee may not bind its constituents or its members) (citing *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d. Cir. 2005)); *In re Daewoo Motor America, Inc.*, 488 B.R. 418, 429-30 (C.D. Cal. 2011) (citing 7 *Collier on Bankruptcy* ¶ 1103.05[1][d][i] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. rev. 2014) ("Although committees are charged with negotiating the plan on behalf of their constituencies, the committees are not authorized or empowered to bind their constituencies. They are vested with considerable power and authority under the Code, but they are not the agents of and cannot bind the groups they represent.")).

requirement that common questions of law or fact predominate over questions affecting individual members, and concluded also that the named parties could not "fairly and adequately protect the interests of the class." *Amchem*, 521 U.S. at 625 (citing Fed. R. Civ. P. 23(a)(4)). Although all members of the class had been exposed to the defendants' asbestos products, each individual case involved unique facts. The Supreme Court underscored "the disparate questions undermining class cohesion" that had been set out by the Third Circuit below:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . *The [exposure-only] plaintiffs especially share little in common, either with each other* or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

Id. at 624 (internal citation omitted; emphasis added). Moreover, the Court noted, "[d]ifferences in state law . . . compound these disparities." *Id.*

As the language italicized in the foregoing passage shows, the problem of adequacy of representation in *Amchem* was not merely the mixing of present and future claimants in a single class. The Supreme Court also made clear that it would be impermissible to treat future claimants themselves as a class with respect to an effort to channel their claims into a compensation system different than what the law would otherwise prescribe for them. As the Court put it, future asbestos claimants "share little in common . . . with each other." *Id.* at 624. That problem applies with full force when the FCR here postures himself as speaking for all future claimants as a class in endorsing the Debtors' Plan, a plan that would dictate which kinds

of viable future claims should be favored and which ones disfavored.[108] That is a posture that the powers of the FCR, which are equivalent to the powers of a committee, do not allow him to assume[109]—not, at least, with regard to a Plan that blatantly seeks to displace the tort system without broad support among identifiable creditors.

As tort victims, future asbestos claimants and present ones have certain broad interests in common when their tortfeasor seeks to reorganize. Both groups benefit when their representatives are able to extract enough money from the debtor to provide full and fair compensation for their injuries. But whereas victims with existing claims naturally look for prompt payment (having suffered substantial delays as a function of the automatic stay), future claimants seek protection from the risk that funds will be depleted before their claims become compensable. *See id.* at 626. It is therefore the special role of the FCR to advocate for measures providing for equality of distribution as between present claimants and future ones. That is also one of the central goals of § 524(g) of the Bankruptcy Code, which requires that a trust created pursuant to that statute "operate through mechanisms . . . that provide reasonable assurance that the 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)(ii)(V).

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[108] *Cf. Amchem*, 521 U.S. at 610 (noting that the proposed class action settlement in *Amchem*, would do "more than simply provide a general recovery fund. . . . Rather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others") (emphasis in original) (citation omitted).

[109] *See, e.g.*, *In re Rusty Jones, Inc.*, 128 B.R. 1001, 1012 (Bankr. N.D. Ill. 1991) (noting that a committee could not be the representative of a class whose members may have differing interests from other members of the committee's constituents); *In re Continental Airlines, Inc*., 57 B.R. 839, 841 (Bankr. S.D. Tex. 1985) (noting that neither § 1103 nor caselaw provides any authority "for treating a Committee, per its historical role, or its counsel as the 'representative' of a class in the sense of the traditional class action").

In the lengthy history of reorganizations carried out under § 524(g), asbestos creditors committees and future claimants' representatives have cooperated to secure overall trust funding commensurate with the debtor's and other protected parties' ability to pay, not allowing the tension between paying full compensation and preserving the fund to interfere with their joint pursuit of the fundamental interest shared by their respective constituencies. The situation now presented in the Debtors' bankruptcy cases is unprecedented and anomalous. Despite what is expected to be the resounding rejection of the Plan by present claimants, the FCR supports it, even though it would limit the compensation set aside for victims at much less than what the Debtors can afford and what they and the nondebtor protected parties would be required to pay in the absence of special bankruptcy protections. What is more, the FCR lends the Plan his support even though the CRP, as discussed above, would make many claimants ineligible for compensation as a result of the arbitrary and discriminatory criteria of the Settlement Option and the inadequacy of the Litigation Option. His conduct begs the key questions: How can a future claimants' representative purport to protect the shared interests of his constituency as a whole, when he endorses a plan that, if confirmed, would override rights that many future claimants would enjoy under applicable nonbankruptcy law, exclude many valid claims from payment, and pay allowed claims only at values far lower than what the tortfeasor could realistically achieve in the tort system? How can such a fiduciary suppose that a plan like that would command wide support among his constituents if they could speak for themselves?

VII. By Tamping Down Garlock's Asbestos Liabilities and Shifting the Risk of Plan Failure to Asbestos Claimants, While Preserving Existing Equity Interests for EnPro, the Plan Violates the Absolute Priority Rule, Which Would Preclude Cramdown if Class 4 Rejects the Plan

As shown above, the Plan is the culmination of Garlock's attempt to escape the tort system, impose its own one-sided rules for asbestos tort liability and compensation, and strip

claimants of many protections afforded to them by state law. As a result, the Plan would pay asbestos claimants far less than what they could realistically expect to receive outside of bankruptcy, but nonetheless provides for EnPro to retain its indirect equity interest in GST through a newly created subsidiary. The Plan therefore violates the absolute priority rule.

In addition, the Plan anticipates that asbestos claims will arise against the Debtors over the next forty years, but would cap the funding available to pay those claims. And, although the Debtors acknowledge that full payment of allowed asbestos claims under their Plan is not guaranteed, the Plan would nonetheless preserve EnPro's indirect equity interest in perpetuity. Thus, the Plan would shift the risk of inadequate funding to asbestos victims, rather than on the equity holder, where it belongs. For this reason, among others, the Plan is not fair and equitable to each class of impaired claims.

Accordingly, if Class 4 rejects the Plan, as anticipated, the Debtors will be unable to cram down the Plan in accordance with Bankruptcy Code § 1129(b), even if another class of claimants entitled to vote accepts the Plan. The ACC reserves the right to fully brief its cramdown-related objections if the Debtors seek a cramdown after the ballot agent reports the results of the voting.

[*Remainder of page intentionally left blank*]

CONCLUSION

For the reasons explained above, the ACC requests that the Court enter an order denying confirmation of the Plan and granting to the ACC such other and further relief as this Court deems just and appropriate.

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Respectfully submitted,

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