estate no longer exists. *See SAS Overseas Consultants v. Benoit*, 2000 WL 140611 (E.D. La Feb. 7, 2000) ("A bankruptcy court has broader authority under §105 to grant a stay than it does under the automatic stay provisions of section 362, and may use its equitable powers to ensure the orderly resolution of reorganization proceedings."). The *Benoit* court also noted that "[t]he Fifth Circuit has held that a court may temporarily enjoin actions against a nondebtor under 'unusual circumstances.'" (*citing In re Zale Corp.*, 62 F.3d 746, 761 (5th Cir. 1995). Stays under §105(a) are also subject to the usual rules for the issuance of an injunction under Fed. Rule of Civ.P. 65. Accordingly, the court must examine whether both "unusual circumstances" and the prerequisites to issuance of an injunction exist so as to stay litigation temporarily.

- Under *Zale,* "unusual circumstances" exist if (1) the debtor and nondebtor enjoy an identity of interests that the suit against the nondebtor is essentially a suit against the debtor, and (2) when the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization. Test is disjunctive and an injunction may be warranted under either set of circumstances. *Zale* court also distinguished cases in which permanent injunctions were issued. The *Zale* court reasoned that the courts upheld permanent injunctions of third-party claims because while the injunction permanently enjoined lawsuits, it also channeled those claims to allow recovery from separate assets and thereby avoiding discharging the nondebtor (citing *SEC v. Drexel Burnham Lambert Group Inc. (In re Drexel Burnham Lambert Group Inc.*), 960 F.2d 285, 293 (2d Cir. 1992); *In re MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988) (holding injunction didn't discharge creditor because third-party interest could be asserted against settlement fund)).

- *Zale* appears to leave open the possibility of the issuance of a permanent injunction under §105 if a settlement trust is created from which claims could be paid in full.

7. **The Ninth and Tenth Circuits have also not allowed permanent third-party releases under a plan pursuant to §105(a) (with the exception of a lower court in the Ninth Circuit in an asbestos-related case).**

   - Ninth Circuit. Relies on §524(e) as the reason to disallow injunctive relief under §105(a). *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995). The *Lowenschuss* court held that §524 does not provide for the release of third parties from liability; §524(e) specifically states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Thus, §524(e) precludes bankruptcy courts from discharging the liabilities of nondebtors. *But see In re*

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Western Asbestos Co., Case Nos. 02-46284, Mem. Of Decision After Conf. Hrg., filed Feb. 3, 2004 (Bankr. N.D. Calif.). Court found it has jurisdiction over third-party claims under §1334(b) and concluded the injunctions should issue as to third-party nondebtors (including insurers) pursuant to §524(g). However, one of the debtors didn't qualify for §524(g) relief (no assets), so the court analyzed whether it and the others who were eligible for §524(g) relief, including nondebtors, would also be eligible under §105. The court said that it had the power to grant the relief if it determined it was "necessary or appropriate to do so." The court determined that even to the extent duplicative, it was "appropriate" since §524(g) is relatively new and untested. The court held that based on substantial contributions, risks regarding settling insurers terminating their settlements, the fact that holders of claims who would be affected have voted in favor of plan by substantial majority, §105(a) permitted the court to issue such orders as are either necessary or appropriate to render its more explicitly prescribed powers effective and the issuance of an injunction under 11 U.S.C. §105(a) protecting the debtors, the settling insurers, and related parties from the future prosecution of asbestos related claims is either 'necessary' or 'appropriate.'" It further held that the scope of the §105(a) injunctions would be no broader than the scope of the §524(g) injunctions. The district court affirmed the bankruptcy court on April 16, 2004, finding specifically that "each of the criteria under the Bankruptcy Code for confirmation of the plan and for issuance and entry of the injunctions set forth in the confirmation order have been satisfied." *In re Western Asbestos Co.,* No. 3:03-CV-00989, 2004 WL 1944792 (N.D. Calif. Apr. 16, 2004).

- Tenth Circuit. Allows temporary injunctive relief, but not permanent. *In re Western Real Estate Fund Inc.*, 922 F.3d 592 (10th Cir. 1990). The *Western* court held that a temporary restraining order against debtor's former attorney's pursuit of settlement funds subject to indemnification by debtor might be warranted during pendency of case, but injunctive relief should not extend to litigation over sums for which settling party might look for reimbursement to nondebtor mortgagee of debtor's damaged property that had shared in settlement. Permanent injunction precluding debtor's former attorney's attempt to recover unpaid portion of his fee from settling party would be improper. While temporary stay prohibiting creditor's suit against nondebtor during bankruptcy proceeding may be permissible to facilitate reorganization process in accord with broad approach to nondebtor stays, stay may not be extended postconfirmation in form of permanent injunction effectively relieving nondebtor from its own liability to creditor.

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8. Of the courts that are pro-release, all agree that §105(a) can only be exercised within the confines of the Bankruptcy Code. It does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute "a roving commission to do equity." *In re Dairy Mart Convenience Stores Inc.*, 351 F.3d 86, 92 (2d. Cir. 2003) (*quoting United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986)).

9. Furthermore, in the asbestos context, no courts dispute the relief available for third parties under §524(g) of the Bankruptcy Code, however, the courts have held that §105(a) cannot be invoked to afford relief that goes beyond the scope of §524(g).

   - *See In re Western Asbestos Co.,* Case Nos. 02-46284, Mem. Of Decision After Conf. Hrg., filed Feb. 3, 2004 (Bankr. N.D. Calif.) (discussed above).

   - *See also In re Combustion Engineering Inc.*, 391 F.3d 190 (3d Cir. 2005). In *Combustion,* as discussed above, the court held that the lower courts did not make the requisite findings respecting shared insurance in order for the Third Circuit to determine whether related-to jurisdiction existed in order to grant §105(a) injunctive relief over nondebtor, nonderivative claims. However, the Third Circuit did not remand on this issue because it determined that §105(a) does not permit the extension of a channeling injunction to nonderivative claims of nondebtors in any event. The court observed that §524(g) would not cover these nonderivative nondebtors by nature of the express Bankruptcy Code language -- *i.e.*, such claims would violate the requirements of §524(g)(4)(A). The court held that §105 can only go as far as §524(g) and no further: "[a]lthough the bankruptcy court has broad equitable authority to craft remedies necessary to facilitate the reorganization of a debtor, this power is cabined by the Code." The court also noted: "[w]hatever may be the limits of §105(a) in other contexts, we hold only that §105(a) cannot be used to achieve a result not contemplated by the more specific provisions of §524(g), which is the means Congress prescribed for channeling the asbestos liability of a nondebtor."

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Creative Exit Strategy: Limiting Damages When Co-Defendant Files for Bankruptcy

By Sharon Caffrey
June 27, 2007
The Legal Intelligencer

A creative exit strategy is sometimes the best defense for a manufacturer against potentially costly exposure to mass tort damages. While not every type of mass tort lends itself to a quick exit strategy, on occasion the litigation can be brought to a prompt and satisfactory resolution. However, it takes creative lawyering to appreciate and seize on these opportunities when they happen to arise.

For manufacturers involved in mass product liability actions, managing the sheer number of parties and their individual legal and factual issues can be daunting. Plaintiffs often pursue such claims individually, or on behalf of a class of similarly situated parties, in both federal and state courts, primarily against product manufacturers, designers and distributors. Various insurance companies and retailers also commonly face related liability or financial exposure.

The potential costs to a manufacturer can be huge, including defense expenses, indemnity payments and even punitive damage awards. In some instances, the best defense is a strong, front-loaded effort to defeat the opposition with the best trial attorneys and experts prepared to show the plaintiffs that the litigation is not as lucrative as they may initially have believed. An aggressive approach can work well if a defendant manufacturer has a small number of cases in a new mass tort area.

Sometimes the best course of action in mass product liability cases is to reach a global resolution satisfying the needs of all plaintiffs and defendants. This result can be effected only with the cooperation of both sides, and through some creative strategies allowing everyone to gain something -- the proverbial win-win outcome.

But, what if a related product designer or marketer declares bankruptcy or develops an alternative strategy for resolving the litigation, such as a class-action settlement, leaving the manufacturer alone to bear the brunt of the litigation risks and expenses? In these cases, a creative exit strategy from the litigation may be key not only to the manufacturer's financial well being, but also to its ultimate survival.

With the right strategy, the manufacturer may be able to take advantage of the bankruptcy of the product's designer and/or distributor without being forced to seek bankruptcy protection itself.

Frequently, in situations where a company designs, markets and distributes a product but outsources the actual manufacturing, the companies involved share liability as co-defendants. If the product designer and/or marketer cannot handle the cost of litigation and seeks bankruptcy protection, then the manufacturer is left "holding the bag" under the theory of joint and several liability, as the sole entity remaining that put the product into the stream of commerce. This may occur even though the manufacturer had no control over such aspects as product labeling, including warnings placed on the product prior to its distribution, a concern for manufacturers of dietary supplements and other health-related products, among others.

Often such cases are consolidated into a multidistrict litigation (MDL), in which all federal actions are combined in order to limit lawsuits and duplicative discovery. An MDL provides a platform for global settlement negotiations, with commonality requirements for a class-action settlement satisfied, and agreement on a scoring system and matrix that takes into account each individual plaintiff's circumstances and available defenses.

The MDL matrix must weigh liability and damage issues based on such factors as the nature, timing and severity of claimed injuries; use of other potentially harmful products; medical diagnosis; the ability to perform daily activities after an injury; and the merits of a claim. Applicable defenses would include statutes of limitations; the timing of the product use and injury; and the association, or lack of it, between the plaintiff's injury and the product.

If a distribution company is involved and attempts a class-action settlement, the manufacturer can potentially end its liability by entering into an agreement with the distribution company to provide a portion of the funds to satisfy the settlement in exchange for obtaining a release from all plaintiffs' claims. The MDL court must approve the scoring matrix and the negotiated class settlement between the new distribution company and class representatives. If the number of opt-outs is limited, it would be to the manufacturer's and new distributor's advantage to quickly resolve those claims.

This agreement, however, still leaves the manufacturer exposed to unresolved claims against the original bankrupt distributor when the product designer or the distributor files for Chapter 11 relief.

In some federal circuits, however, the manufacturer may have a remedy for avoiding potential new liability: a special channeling injunction.

A special channeling injunction may be used in some circumstances to protect a nondebtor manufacturer. The bankruptcy court retains jurisdiction over the manufacturer because of its cross-claims against the bankrupt designer and/or distributor.

The manufacturer and designer and/or distributor may be able to obtain special injunctive relief via the bankruptcy laws because the manufacturer's claims are a necessary and critical part of the debtor's estate, particularly when the debtor does not have sufficient capital to fund the bankruptcy trust itself. The manufacturer would enjoy the benefits of the bankruptcy's automatic stay pertaining to the litigation.

Through a channeling injunction, all defendants would receive relief from potential future claimants and current pending state litigation claims. The bankruptcy court may enter a channeling injunction on all claims against the designer and non-bankrupt-related defendants by confirming a Chapter 11 reorganization plan requiring all entities to fund a new trust with new money in addition to that used to satisfy the class settlement trust. To be truly effective, the channeling injunction must bind all parties, including those that have opted out of the class action, state court plaintiffs, and those that did not vote to accept the reorganization plan to seek relief from the class settlement and Chapter 11 trust.

Seeking out a special channeling injunction may not be an effective strategy in all situations in which a related company seeks bankruptcy protection. It would be virtually impossible to certify a class when the number of future plaintiffs is unknown. Also, unlike asbestos litigation, where the latency of the disease means that future injuries cannot be discovered until years later, potential injuries from a diet supplement or other health-related product may occur much sooner. If the product is no longer on the market, however, further potential liability would be limited, and class certification would be more possible, using a scoring matrix that takes into account the individuality of each plaintiff's claim.

Similarly, the special channeling injunction must take into account the individuality of each plaintiff's claim, and the trust must be sufficient to resolve all claims. In order for a nondebtor manufacturer to benefit from a bankruptcy stay, the manufacturer's contribution to the trust must be important and necessary. Thus, it cannot be a trivial contribution.

A special channeling injunction may not be an effective strategy in all courts. For instance, while the Southern District of New York appears amenable to special channeling injunctions, other courts, such as those in the 3rd U.S. Circuit Court of Appeals, are more conservative in their use of channeling injunctions.

The willingness of plaintiffs' counsel to resolve the great majority of claims is essential to a successful resolution via a special channeling injunction. In determining the class settlement's reasonableness and fairness, the bankruptcy court will weigh heavily a high level of support and participation of plaintiffs in reaching a global settlement. The plaintiffs must receive a fair and reasonable settlement that generates as few opt-outs as possible. Also, defendants must receive the benefits of a settlement class action and/or the protections afforded by the Bankruptcy Code, even though only one defendant sought Chapter 11 relief.

Such a result through a special channeling injunction gives all parties certainty and caps the long-term risk for a manufacturer when faced with the uncertainties of mass tort litigation without the primary co-defendants to share the burden of defending so many cases.

Sharon Caffrey is a senior litigator and a member of the Trial and Products Liability practice groups at Duane Morris.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: TRIBUNE COMPANY, et al.,[1] Debtors.	Chapter 11 Case No. 08-13141 (KJC) Jointly Administered **Related to Docket Nos. 4513, 4702, 5277, 5862, 6204, 6450, 7403, 7643, and 7682** **Hearing Date: August 25, 2011 at 1:00 p.m. ET** **Objection Deadline: August 18, 2011 at 4:00 p.m. ET**

MOTION OF THE DEBTORS FOR AN ORDER PURSUANT TO SECTIONS 105 AND 363 OF THE BANKRUPTCY CODE, BANKRUPTCY RULES 9019 AND 7023 AND RULE 23 TO (I) APPROVE SETTLEMENT AGREEMENT, (II) GRANT CLASS CERTIFICATION, APPOINT CLASS REPRESENTATIVES AND CLASS COUNSEL, AND APPROVE NOTICING PROCEDURES, (III) SCHEDULE FINAL FAIRNESS HEARING, (IV) FINALLY APPROVE SETTLEMENT AGREEMENT AFTER FINAL FAIRNESS HEARING, AND (V) GRANT OTHER RELATED RELIEF

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Tribune Company (0355); 435 Production Company (8865); 5800 Sunset Productions Inc. (5510); Baltimore Newspaper Networks, Inc. (8258); California Community News Corporation (5306); Candle Holdings Corporation (5626); Channel 20, Inc. (7399); Channel 39, Inc. (5256); Channel 40, Inc. (3844); Chicago Avenue Construction Company (8634); Chicago River Production Company (5434); Chicago Tribune Company (3437); Chicago Tribune Newspapers, Inc. (0439); Chicago Tribune Press Service, Inc. (3167); ChicagoLand Microwave Licensee, Inc. (1579); Chicagoland Publishing Company (3237); Chicagoland Television News, Inc. (1352); Courant Specialty Products, Inc. (9221); Direct Mail Associates, Inc. (6121); Distribution Systems of America, Inc. (3811); Eagle New Media Investments, LLC (6661); Eagle Publishing Investments, LLC (6327); forsalebyowner.com corp. (0219); ForSaleByOwner.com Referral Services, LLC (9205); Fortify Holdings Corporation (5628); Forum Publishing Group, Inc. (2940); Gold Coast Publications, Inc. (5505); GreenCo, Inc. (7416); Heart & Crown Advertising, Inc. (9808); Homeowners Realty, Inc. (1507); Homestead Publishing Co. (4903); Hoy, LLC (8033); Hoy Publications, LLC (2352); InsertCo, Inc. (2663); Internet Foreclosure Service, Inc. (6550); JuliusAir Company, LLC (9479); JuliusAir Company II, LLC; KIAH Inc. (4014); KPLR, Inc. (7943); KSWB Inc. (7035); KTLA Inc. (3404); KWGN Inc. (5347); Los Angeles Times Communications LLC (1324); Los Angeles Times International, Ltd. (6079); Los Angeles Times Newspapers, Inc. (0416); Magic T Music Publishing Company (6522); NBBF, LLC (0893); Neocomm, Inc. (7208); New Mass. Media, Inc. (9553); Newscom Services, Inc. (4817); Newspaper Readers Agency, Inc. (7335); North Michigan Production Company (5466); North Orange Avenue Properties, Inc. (4056); Oak Brook Productions, Inc. (2598); Orlando Sentinel Communications Company (3775); Patuxent Publishing Company (4223); Publishers Forest Products Co. of Washington (4750); Sentinel Communications News Ventures, Inc. (2027); Shepard's Inc. (7931); Signs of Distinction, Inc. (3603); Southern Connecticut Newspapers, Inc. (1455); Star Community Publishing Group, LLC (5612); Stemweb, Inc. (4276); Sun-Sentinel Company (2684); The Baltimore Sun Company (6880); The Daily Press, Inc. (9368); The Hartford Courant Company (3490); The Morning Call, Inc. (7560); The Other Company LLC (5337); Times Mirror Land and Timber Company (7088); Times Mirror Payroll Processing Company, Inc. (4227); Times Mirror Services Company, Inc. (1326); TMLH 2, Inc. (0720); TMLS I, Inc. (0719); TMS Entertainment Guides, Inc. (6325); Tower Distribution Company (9066); Towering T Music Publishing Company (2470); Tribune Broadcast Holdings, Inc. (4438); Tribune Broadcasting Company (2569); Tribune Broadcasting Holdco, LLC (2534); Tribune Broadcasting News Network, Inc., n/k/a Tribune Washington Bureau Inc. (1088); Tribune California Properties, Inc. (1629); Tribune CNLBC, LLC, f/k/a Chicago National League Ball Club, LLC (0347); Tribune Direct Marketing, Inc. (1479); Tribune Entertainment Company (6232); Tribune Entertainment Production Company (5393); Tribune Finance, LLC (2537); Tribune Finance Service Center, Inc. (7844); Tribune License, Inc. (1035); Tribune Los Angeles, Inc. (4522); Tribune Manhattan Newspaper Holdings, Inc. (7279); Tribune Media Net, Inc. (7847); Tribune Media Services, Inc. (1080); Tribune Network Holdings Company (9936); Tribune New York Newspaper Holdings, LLC (7278); Tribune NM, Inc. (9939); Tribune Publishing Company (9720); Tribune Television Company (1634); Tribune Television Holdings, Inc. (1630); Tribune Television New Orleans, Inc. (4055); Tribune Television Northwest, Inc. (2975); ValuMail, Inc. (9512); Virginia Community Shoppers, LLC (4025); Virginia Gazette Companies, LLC (9587); WATL, LLC (7384); WCCT, Inc., f/k/a WTXX Inc. (1268); WCWN LLC (5982); WDCW Broadcasting, Inc. (8300); WGN Continental Broadcasting Company (9530); WLVI Inc. (8074); and WPIX, Inc. (0191). The Debtors' corporate headquarters and the mailing address for each Debtor is 435 North Michigan Avenue, Chicago, Illinois 60611.

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Tribune Company ("Tribune") and Tribune New York Newspaper Holdings, LLC ("Tribune NY" each a "Debtor" and collectively, the "Debtors" or the "Tribune Defendants") hereby move this Court (the "Motion") for entry of an order substantially conforming with the form of order attached as Exhibit A (the "Preliminary Approval Order") pursuant to section 363 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 7023, 9014 and 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") (i) preliminarily approving the settlement agreement; (ii) granting class certification, appointing class representatives and class counsel, and approving noticing procedures; (iii) scheduling the final fairness hearing and establishing a process for finally approving the settlement agreement; and (iv) granting other related relief. In further support of this Motion, the Debtors respectfully state as follows:

SUMMARY OF RELIEF REQUESTED

1. The Settlement Agreement and Release (the "Settlement Agreement"),[2] attached hereto as Exhibit B, fully and finally settles and releases all claims under a minimum wage class action brought by the Plaintiffs (as defined below) on behalf of individuals that promoted and/or distributed the *amNew York* newspaper from 2004 to 2007 for a total gross settlement amount of $325,000, of which $275,000 will be contributed by the Debtors and $50,000 will be contributed by the Debtors' co-defendants. The Debtors' potential liability could be substantial if the Plaintiffs prevailed, as indicated by the $1.5 million class proof of claim together with the individual proofs of claim filed by eighteen (18) Plaintiffs for $10,000 each. If individual claims were asserted by every member of the Settlement Class (as defined below), the Debtors could face even greater claims against their estates.[3] Although the Plaintiffs' claims are meaningful to the individuals involved, and the aggregate value of their claims

[2] Any capitalized terms not defined herein are defined in the Settlement Agreement.

[3] For example, based upon further discovery, the settlement class size has been adjusted from an estimated 1,000 members to 2,950 members.

potentially exceeds $1.5 million, the Plaintiffs' class claim is modest relative to other claims in the Debtors' bankruptcy cases, a fact the Court recognized when it ordered the parties to mediate the dispute prior to incurring the substantial costs of a trial on class certification and potentially the merits.

2. The Settlement Agreement avoids significant litigation time and expenses in the event the class action litigation continued either in this Court or through prosecution of a relief from stay request by the Plaintiffs to return the dispute to the New York state court. This agreement was reached through use of a third-party mediator pursuant to the Court's mediation order, and through intensive, good faith, arms'-length negotiation among the parties during and after the mediation. Although the Debtors and their co-defendants strongly contend that they have meritorious defenses, have done nothing wrong, and owe no liability to the Plaintiffs in the class litigation, they have agreed to settle all claims in the best interests of their stakeholders. The Settlement Agreement—including the claims-made process and notice procedures to the Settlement Class members—clearly benefits the Settlement Class members, of which the vast majority earned annual income equivalent to the prevailing minimum wage, may never have otherwise become aware of their claims, and would likely be barred from asserting late-filed claims against the Debtors.

3. The parties acknowledge the uncertainties of class action litigation alleging violations of minimum wage laws, and although each side believes its position is meritorious and would prevail after a full trial on the merits, the outcome of any trial is unpredictable. This uncertainty was furthered by the Court's opinion that there were good reasons to grant or deny the class certification. For the Debtors, the settlement limits liability exposure and litigation expenses—potentially in the millions of dollars—to a fixed settlement amount. The Debtors further benefit from the release of the Plaintiffs' and class members'

disputes and claims as against the co-defendants based upon a contractual indemnification provision asserted by the co-defendants against the Debtors. For the Plaintiffs, the settlement provides certainty and an entitlement to a share of the cash settlement amount that is meaningful to each qualified class member without further litigation.

4. Following preliminary approval, notice will be provided to the Settlement Class members in accordance with the Settlement Agreement by the claims administrator, and the Settlement Class members shall have a 60-day notice period to file a claim, object to, or opt out of the settlement, after which time, the Debtors will request final approval of the Settlement Agreement, provided that certain conditions are met. This two-step approval process is consistent with class action procedures under the Bankruptcy Rule 7023 and Rule 23.

5. Certification of the Settlement Class for settlement purposes only is required at the same time as approval of the Settlement Agreement. The Debtors have stipulated to class certification for settlement purposes only under Rules 23(a) and (b) and request the Court to certify the Settlement Class to effectuate the Settlement Agreement. Further, the Debtors request the Court to appoint Class Counsel to represent the Settlement Class based on experience and adequate representation, and to appoint the Plaintiffs as "class representatives" for the Settlement Class.

6. The Debtors contend that the Settlement Agreement is fair, reasonable and adequate, and within the range of reasonableness, under Rule 23(e) and Bankruptcy Rules 7023 and 9019 as to the Settlement Class members, the Debtors, their estates, creditors and parties in interest, and that procedural fairness and due process are fully addressed by the noticing procedures set forth in the Settlement Agreement. The Settlement Agreement is a fixed cash settlement in exchange for the full release and discharge of any and all disputes and claims between the Settlement Class and the Defendants that relate to the alleged nonpayment or

inaccurate payment of wages for time that the members of the Settlement Class provided services in connection with the promotion and/or distribution of the *amNew York* newspaper and is not contingent on plan confirmation. Payment of the Settlement Amount and disbursements will be made following the Plan Effective Date.

7. For these reasons, the Debtors request the Court grant preliminary approval of the Settlement Agreement.

STATUS OF THE CASE AND JURISDICTION

8. On December 8, 2008, the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, except Tribune CNLBC, LLC, f/k/a Chicago National League Ball Club, LLC, which filed on October 12, 2009 (each date, as applicable, the "Petition Date"). The Debtors' chapter 11 cases are jointly administered for procedural purposes only.

9. The Debtors have continued in possession of their respective properties and have continued to operate and maintain their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

10. On December 18, 2008, the United States Trustee appointed the official committee of unsecured creditors (the "Committee").

11. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief sought herein are section 363 of the Bankruptcy Code, Bankruptcy Rules 7023, 9014, and 9019 and Rule 23.

BACKGROUND TO THE MOTION

A. State Court Wage Litigation

12. On May 31, 2007, plaintiff James Allen filed a Complaint in the United States District Court for the Southern District of New York against the Tribune Defendants, alleging minimum wage claims under the Fair Labor Standards Act and the New York Labor Law (collectively, the "NYLL") on behalf of himself and others similarly-situated.[4]

13. On July 9, 2007, Mr. Allen filed an Amended Complaint in the Southern District of New York, adding as named plaintiffs, Charles Evans, Pearl Evans, Gary Grant, Loretta Grant, Bill McNair, and Sean Serrao (the "Named Plaintiffs"), adding as named defendants Mitchell's Subscription Service LLC d/b/a LBN Consulting, LLC and Morning Newspaper Delivery, Inc. (collectively, the "Delivery Defendants" and together with the Tribune Defendants, the "Defendants"),[5] and alleging the same wage claims. Thereafter, the Named Plaintiffs, through their attorneys, voluntarily withdrew this lawsuit.

14. Following the voluntary withdrawal of the federal lawsuit, on August 20, 2007, the Named Plaintiffs filed the Class Action Complaint with the Supreme Court of New York, County of New York (the "State Court"), against the Debtors and the Delivery Defendants, alleging minimum wage claims under the NYLL, captioned *James Allen, et al. v. Tribune New York Newspaper Holdings, LLC, et al.*, Index No. 602801/2007 (the "State Court Case" and together with the class litigation in this chapter 11 proceeding, the "Lawsuit"). In the State Court Case, the Named Plaintiffs alleged that they and other similarly situated individuals were entitled to minimum wage payments as "employees" for their services as "hawkers" of *amNew York*, a free daily morning newspaper published by Debtor Tribune NY, on the streets in

[4] A description of the parties' prepetition litigation activities is set forth in the Declaration of Michael D. Palmer ("Palmer Decl."), attached hereto as Exhibit D.

[5] The Debtors entered into a contract with the Delivery Defendants under which the Delivery Defendants distributed *amNew York* using "hawkers" that brought the State Court Case (as defined below) and comprise the proposed Settlement Class. The Delivery Defendants are third party non-debtors, unrelated to the Debtors, and are not otherwise involved in the Debtors' chapter 11 cases.

the greater New York City area. The Plaintiffs sought underpayments for all hours worked as the difference between the prevailing New York minimum wage and the amount paid to each member of the class.

15. On September 24, 2007, the Debtors served their Answer and Affirmative Defenses to the Class Action Complaint in the State Court Case, and on October 25, 2007, the Delivery Defendants served an Answer upon the Plaintiffs in the State Court Case. The Defendants assert that the "hawkers" were at all times independent contractors and not "employees."

16. Written discovery was initiated in the underlying State Court Case to permit class certification.

17. The Debtors' chapter 11 petitions stayed the State Court Case. At that time, the Plaintiffs had yet to move to certify the class pursuant to N.Y. C.P.L.R. § 901. In June 2009, the Plaintiffs moved to sever their claims against the Debtors from their claims against the Delivery Defendants in the State Court Case. The State Court denied the motion to sever on March 3, 2010.

B. Proofs of Claim and Motion for Class Certification and Class Treatment

18. On March 25, 2009, the Court entered the Order pursuant to Sections 501, 502, and 1111(a) of the Bankruptcy Code, Bankruptcy Rules 2002 and 3003(c)(3), and Local Rule 2002-1(e) Establishing Bar Dates for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof (the "Bar Date Order") [Docket No. 813]. The Bar Date Order set a general bar date of June 12, 2009 at 4:00 p.m. prevailing Eastern Time (the "Bar Date") by which any person asserting a claim against the Debtors must properly and timely file a proof of claim.

19. On the Bar Date, the Plaintiffs, through their counsel, Joseph, Herzfeld, Hester & Kirschenbaum LLP ("Class Counsel"), timely filed two class proofs of claim [Claim Nos. 4938, 4939] (the "Class Claims") in the amount of $1.5 million each against Tribune and Tribune NY, and individual proofs of claim in the amount of $10,000 each for the seven (7) Named Plaintiffs and eleven (11) additional claimants (the "Opt-In Claimants," and together with the Named Plaintiffs, the "Plaintiffs" or "Class Representatives") against Tribune and Tribune NY (the "Individual Claims").[6] The Class Claims were filed on behalf of each Named Plaintiff in the State Court Case on behalf of themselves and all others similarly-situated, which they claimed were "current and former employees of the Debtor, each of whom was an employee of the Debtor and promoted and distributed *amNew York*."

20. On May 20, 2010, the Plaintiffs through Class Counsel filed their Movants' Motion for Class Certification and Class Treatment of Movants' Class Proofs of Claim (the "Class Certification Motion") [Docket No. 4513]. The Class Certification Motion requested this Court certify a New York minimum wage class composed of individuals "who worked for Debtors in a position in which they promoted newspapers by handing them out to people, at anytime between August 20, 2001 and December 8, 2008" pursuant to Bankruptcy Rules 7023 and 9014 and Rule 23.

21. The Debtors filed their Objection to the Class Certification Motion on November 1, 2010 on the basis that the Class Certification Motion was untimely and prejudicial and that the Plaintiffs failed to meet the requirements of Rule 23, among other arguments, including prejudice caused by allowing late filed claims via the Class Claims well after the Bar

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[6] The Individual Claims filed by Class Counsel on behalf of the Named Plaintiffs are: James Allen (Claim Nos. 4910, 4911), Charles Evans (Claim Nos. 4906, 4907), Pearl Evans (Claim Nos. 4904, 4905), Gary Grant (Claim Nos. 4912, 4913), Loretta Grant (Claim Nos. 4936, 4937), Bill McNair (Claim Nos. 4926, 4927), and Sean Serrao (Claim Nos. 4922, 4923). The Individual Claims filed by Class Counsel on behalf of the Opt-In Claimants are: Patrick Anderson (Claim Nos. 4908, 4909), Velma Barnhardt (Claim Nos. 4916, 4917), Victor Cruz (Claim Nos. 4914, 4915), Larry Fernandez (Claim Nos. 4902, 4903), John Haywood (Claim Nos. 4934, 4935), Mark Jackson (Claim Nos. 4932, 4933), Phil Johnson (Claim Nos. 4930, 4931), Victoria McLaughlin (Claim Nos. 4928, 4929), Damion Reid (Claim Nos. 4924, 4925), Jennifer Strange (Claim Nos. 4920, 4921), and Tenisha Walcott (Claim Nos. 4918, 4919).

Date [Docket No. 6204]. The Plaintiffs filed their Reply Memorandum in Support of Movants' Motion for Class Certification and Class Treatment of Movants' Class Proofs of Claim on January 6, 2011 [Docket No. 7403].

22. At the January 13, 2011 omnibus hearing, the Court directed the parties to mediation to attempt to reach a settlement prior to further litigation of the Class Claims. The Court entered an Order requiring mediation and setting forth the timetable for the mediation on January 31, 2011 (the "Mediation Order") [Docket No. 7682]. Pursuant to the Mediation Order, on March 14, 2011, the Defendants and Class Counsel, on behalf of the Plaintiffs and all similarly-situated persons, conducted an intensive, arms'-length negotiation and mediation session with Ruth D. Raisfeld, Esq., an independent mediator, and reached a settlement agreement in principle. The Debtors apprised the Court of the status of the settlement at the March 22, 2011 status conference.

RELIEF REQUESTED

23. By this Motion, the Debtors respectfully request that this Court enter the Preliminary Approval Order attached as Exhibit A preliminarily approving the Settlement Agreement and (i) certifying the class for settlement purposes only; (ii) appointing class representatives and Class Counsel; (iii) approving the form, manner, and content of notice for the Settlement Class and related claims administration procedures; and (iv) scheduling the final fairness hearing (the "Fairness and Settlement Hearing") no earlier than 150 days after the date of entry of the Preliminary Approval Order as the hearing date to (a) finally consider the fairness, adequacy and reasonableness of the Settlement Agreement and (b) enter the proposed order granting final approval of the Settlement Agreement substantially in the form attached as Exhibit C.

A. The Settlement Agreement Terms Are Fair, Reasonable and Adequate

24. The Settlement Agreement is the result of an intensive, full-day mediation session among the Defendants and Class Counsel, and subsequent arms'-length negotiations, conducted in accordance with the Mediation Order. The Settlement Agreement resolves any and all claims asserted by Class Counsel, on behalf of Plaintiffs and other similarly-situated class members, and provides for a fair, reasonable and adequate outcome consistent with the requirements of settlements in the class action and bankruptcy contexts.[7]

25. The most salient terms of the Settlement Agreement, in addition to the notice-related provisions, are summarized below:[8]

> a) Class Definition. The Settlement Class shall be certified for settlement purposes only to include "all persons who promoted and/or distributed the *amNew York* newspaper who received an IRS Form 1099 from the Delivery Defendants for such work performed, during the period from January 1, 2004 through the Petition Date" (the "Settlement Class").[9]
>
> b) Claim Disallowance. Upon entry of an order granting final approval of the Settlement Agreement, the Class and Individual Claims filed against Tribune and Tribune NY shall be automatically disallowed and expunged in their entirety. A summary of the disposition of each of the Class and Individual Claims is provided in Exhibit A to the Settlement Agreement. Plaintiffs further agree not to file any other proofs of claim or to modify or amend the Class or Individual Claims without the Debtors' consent.
>
> c) Total Gross Amount. This settlement shall be on a claims-made basis. The Defendants shall pay a total gross amount of $325,000 to fund the settlement of the Lawsuit, subject to the terms of the Settlement Agreement and final Court approval (the "Total Gross Amount"). The Tribune Defendants will contribute $275,000 and the Delivery Defendants will contribute $50,000 to the Total Gross Amount following the later of (i) entry of a final nonappealable order granting final approval of the settlement or (ii) the Plan Effective Date.

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[7] In the event the Settlement Agreement is not approved by the Court or the Settlement Agreement does not become binding and enforceable for any reason, the parties reserve all of their rights.

[8] The Settlement Agreement terms summarized in this Motion do not in any way supersede or alter the terms of the Settlement Agreement, and in the event of any conflicts, the Settlement Agreement controls.

[9] The period of time specified in the Settlement Class definition reflects information provided by the Delivery Defendants and is revised from Class Counsel's initial request for class certification. Following discussions with the Delivery Defendants, the Parties agree that the services provided by the Delivery Defendants began on January 1, 2004.

d) Enhanced Service Awards.[10] A total gross amount of $18,000 shall be paid to certain of the Plaintiffs[11] as enhancement awards in consideration for their time and effort actively pursuing the Lawsuit and assisting in its resolution on behalf of the Settlement Class (the "Enhanced Service Awards"). Distributions of the Enhanced Service Awards were determined by Class Counsel based on the level of involvement each recipient had in assisting Class Counsel in the Lawsuit. (*See* Palmer Decl. ¶¶ 29 – 32).

e) Attorneys' Fees and Costs. Defendants agree that Class Counsel should be awarded a sum equal to 33% of the Total Gross Amount after the deduction of litigation costs (the "Attorneys' Fees") and reimbursement for litigation costs in the amount of $18,364 incurred by Class Counsel in connection with the Lawsuit (the "Costs").

f) Common Fund. The remainder of the Total Gross Amount, after the deductions for the Enhanced Service Awards, Attorneys' Fees and Costs, shall be placed in a common fund (the "Common Fund").

g) Common Fund Distributions. Distributions from the Common Fund shall be made on a claims-made basis through the Claims Administrator. Defendants agree to pay each member of the Settlement Class who returns a valid and timely Claim Form (a "Qualified Claimant") an amount no less than $15 and no greater than $1,500 per Qualified Claimant according to the formula set forth in the Settlement Agreement. This formula accounts for both annual adjustments in the New York State minimum wage and fluctuations in the pay scale used by the Defendants to ensure each Qualified Claimant receives a fair and reasonable distribution based on the time period during which services were provided by the Qualified Claimant. (Palmer Decl. ¶¶ 23, 25).

h) Return. All unclaimed funds remaining in the Common Fund after conclusion of the claims-made process and reimbursement of the Debtors' payments of the Claims Administrator's reasonable fees and expenses shall revert to the Defendants (the "Return").

i) Claims Administrator. The claims-made process as to the Common Fund shall be administered by Gilardi & Co., LLC (the "Claims Administrator" or "Gilardi"), an experienced claims administrator of class action settlements. (Declaration of Daniel Burke ("Burke Decl.") ¶ 1,

[10] "Factors that courts consider in determining whether incentive awards are appropriate include: the risk to the plaintiff in commencing litigation, both financially and otherwise; the notoriety and/or personal difficulties encountered by the representative plaintiff; the extent of the plaintiff's personal involvement in the lawsuit in terms of discovery responsibilities and/or testimony at depositions or trial; the duration of the litigation; and the plaintiff's personal benefit (or lack thereof) purely in his capacity as a member of the class." *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, No. 06-3202, 2009 U.S. Dist. LEXIS 60790, at *35 (E.D. Pa. July 16, 2009) (awarding $60,000 in enhancement awards for three class representatives).

[11] The Enhanced Service Awards are sought on behalf of certain Named Plaintiffs as well as certain Opt-In Claimants who have been active in the Debtors' Bankruptcy Cases, of which several claimants attended the Court-ordered mediation with Class Counsel: Velma Barnhardt, John Haywood, Phil Johnson, Victoria McLaughlin, and Tenisha Walcott. (Palmer Decl. ¶ 19). The Opt-In Claimants and Named Plaintiffs are together seeking to be the settlement class representatives.

attached hereto as Exhibit E). The reasonable cost for the Claims Administrator is capped $22,500. (Burke Decl. ¶ 23). Any claims administration expense not covered by the Return shall be paid in equal thirds by the Plaintiffs and/or Class Counsel, the Tribune Defendants and the Delivery Defendants. The Claims Administrator shall mail Notice Packets, arrange for Publication Notice, perform address validation, calculate claim payments and all payments and distributions under the settlement, and perform other tasks reasonably necessary to administer the settlement. Gilardi is well-qualified to perform these functions. (Burke Decl. ¶¶ 5 – 22).

j) Release. Payment of the Total Gross Amount by Defendants pursuant to the Settlement Agreement shall constitute a full and complete settlement and general release of disputes and claims between the Settlement Class and the Defendants which relate to the alleged wage and hour claims and related claims for time that the members of the Settlement Class provided services in connection with the promotion and/or distribution of the *amNew York* newspaper while receiving an IRS Form 1099 from the Delivery Defendants for such services prior to and through the Petition Date, which release shall include in its effect the Defendants, and each and all of their present and former related and affiliated entities, parent companies, subsidiaries, members, owners, shareholders, officers, partners, directors, servants, employees, agents, attorneys, representatives, accountants, insurers, predecessors, successors and assigns, past, present, and future, and all persons acting under, by, through, or in concert with any of them, throughout the Universe (collectively, the "Releasees") from the beginning of time through the Petition Date.

k) Disclaimer of Liability. Nothing contained in this Motion or the Settlement Agreement is to be construed or deemed an admission of liability, culpability, negligence, or wrongdoing on the part of the Defendants.

l) Stipulation of Discontinuance. Within five (5) business days after the final approval of the Settlement Agreement, the parties shall execute a Stipulation of Discontinuance with Prejudice and file such stipulation with the State Court, with each party to bear its own costs and fees.

m) Settlement Funding Date. The Tribune Defendants shall be authorized to fund their portion of the Total Gross Amount, as provided in the Settlement Agreement, no later than ten (10) business days after the Settlement Effective Date.

n) Settlement Effective Date.[12] The effective date of the Settlement Agreement (the "Settlement Effective Date") is ten (10) business days

[12] The Defendants shall retain the right, in the exercise of their sole discretion, to nullify the settlement within thirty (30) days of expiration of the Settlement Bar Date, if five percent (5%) or more members of the Settlement Class opt out of the settlement.

after the Plan Effective Date or forty (40) days after the entry of a final, non-appealable order by the Court, whichever is later.

B. The Notice Procedures Are Fair, Adequate and Sufficient

26. The notice procedures set forth in the Settlement Agreement constitute fair, adequate and sufficient notice for purposes of informing all Settlement Class members of the class certification and settlement, and permitting such members to participate in the claims-made process, opt-out of the settlement, or object to the settlement in compliance with Rule 23 and due process considerations (*See generally* Burke Decl.). The notice procedures are summarized below.

a) Class Data List. Within ten (10) business days after entry of the Preliminary Approval Order, the Defendants shall provide to the Claims Administrator the name and last known residential address for each member of the Settlement Class (the "Class Data List"). The Claims Administrator shall perform address updates and verifications as reasonably necessary prior to the first mailing, including one change of address search for updating addresses.

b) Notice of Fairness and Settlement Hearing and Opt-Out Rights. Within twenty (20) business days of entry of the Preliminary Approval Order, the Claims Administrator shall send to each Settlement Class member, by first-class U.S. mail, postage prepaid to their last known address, the Notice of Pendency of Class Action Settlement (the "Notice"), substantially in the form attached as Exhibit C to the Settlement Agreement. The Notice will be accompanied by a "Claim Form" substantially in the form attached as Exhibit B to the Settlement Agreement (collectively, the "Notice Packet").

c) Publication Notice. Within twenty (20) business days of entry of the Preliminary Approval Order, the Claims Administrator shall publish a written notice in the Classified Section of the *New York Post* newspaper of one-eighth (1/8) to run for one (1) business day substantially in the form attached as Exhibit D to the Settlement Agreement (the "Publication Notice").

d) Notice Period. The Settlement Class members will have a sixty (60) day period (the "Notice Period") from the date of mailing the Notice Packets to postmark their Claim Forms, objections, or a statement requesting to be excluded from the class ("Exclusion Statement"). The last day of the Notice Period shall be the final day upon which a Claim

Form, objection, or Exclusion Statement shall be deemed timely submitted (the "Settlement Bar Date").

e) Undeliverable Notices. Within five (5) business days of receiving notice that a Notice Packet was undeliverable, the Claims Administrator will perform one skip-trace on such returned mail and re-mail a Notice Packet to an updated address (if any). The parties intend that the Claims Administrator use reasonable means to locate a member of the Settlement Class.

f) Deficiency Notices. The Claims Administrator shall send a deficiency notice to any Settlement Class members that submit an improperly completed Claim Form within five (5) business days of receipt. Settlement Class members shall have no more than fifteen (15) calendar days from the mailing of the deficiency notice to postmark a written response to cure all deficiencies. Failure to timely submit a Claim Form, or a response to a deficiency notice, shall invalidate a claim and will not be considered deficiencies subject to cure, unless the parties stipulate to allow cure.

g) Claim Form Processing. All original Claim Forms shall be sent directly to the Claims Administrator at the address indicated on the Claim Form. The Claims Administrator will certify that claims were timely filed, calculate the payments to be made to each Qualified Claimant, issue payments, and communicate as necessary with each parties' counsel and the Court.

BASIS FOR RELIEF REQUESTED

A. Class Certification Should Be Granted under Rule 23[13]

27. The Defendants have stipulated to class certification for settlement purposes only and submit that the Court should grant class certification and treatment for the Class Claim for that limited purpose only. *See In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig. ("In re GM Truck")*, 55 F.3d 768, 786 (3d Cir. 1995) ("By specifying certification for settlement purposes only . . . the court preserves the defendant's ability to contest certification should the settlement fall apart."). To certify a class for settlement purposes, the Court must find that the proposed class meets the requirements of Rules 23(a) and 23(b). *In*

[13] The positions stated in this section of the Motion are intended to support approval of the Settlement Agreement and class certification solely for settlement purposes. If the Settlement Agreement is not approved or does not become binding and effective for any reason, the positions of the parties would be restored to the same position they were in prior to the Settlement Agreement and the filing of this Motion, including the Defendants' objection to class certification and opposition to all claims asserted by the Plaintiffs and Class Counsel on their behalf. Likewise, Class Counsel would retain their right to prosecute the class and individual claims and the Lawsuit.

re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions (In re Prudential), 148 F.3d 283, 308 (3d Cir. 1998); *In re GM Truck*, 55 F.3d at 778; *In re Worldcom, Inc.*, 347 B.R. 123, 141 (Bankr. S.D.N.Y. 2006). The Court has the authority to certify the settlement class in the context of bankruptcy. *See, e.g., In re Kaiser Group Int'l, Inc.*, 278 B.R. 58, 62 (Bankr. D. Del. 2002); *Zenith Labs., Inc. v. Sinay (In re Zenith Labs., Inc.)*, 104 B.R. 659, 662-63 (Bankr. D.N.J. 1989). Delaware bankruptcy courts have recently approved similar class action settlements. *See, e.g., In re Aegis Mortgage Corp.*, Case No. 07-11119 (BLS) (Bankr. D. Del. June 25, 2010) (approving class action settlement pursuant to Bankruptcy Rule 9019 and Rule 23); *Pontius v. Delta Fin'l Corp. (In re Delta Fin'l Corp.)*, Adv. Proc. No. 08-50606 (CSS) (Bankr. D. Del. April 9, 2010) (approving class action settlement to settle claims under the Fair Labor Standards Act ("FLSA") and NYLL); *Caccamo v. Mortgage Lenders Network USA, Inc. (In re Mortgage Lenders Network USA, Inc.)*, Adv. Pro. No. 07-51415 (PJW) (Bankr. D. Del. Aug. 5, 2009) (approving fixed cash class action settlement to settle WARN Act class claims).

28. Rule 23(a) requires a showing of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[14] Fed. R. Civ. P. 23(a). The Class Certification Motion provides the grounds for class certification, which are summarized below to support the Court's findings of fact to support class certification for settlement purposes only.

> a) Numerosity. The potential number of class members is approximately 2,950 hawkers based upon the Delivery Defendants' books and records. The proposed settlement class is sufficiently large to make joinder of all individual class members impracticable. Class actions involving fewer class members have been approved in the Third Circuit. *See, e.g.*,

[14] The four elements of Rule 23(a) are:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Hacienda Heating & Cooling, Inc. v. United Artists Theatre Co. (In re United Artists Theatre Co.), 410 B.R. 385, 392 (Bankr. D. Del. 2009) (observing that numerosity is generally met when the class size exceeds 40); *In re Kaiser Group Int'l, Inc.*, 278 B.R. at 64 (certifying a class size of 47).

b) Commonality. Common questions of law or fact are shared between the Plaintiffs and the Settlement Class relating to their common contract and services provided as hawkers of *amNew York* and prevailing New York minimum wage law during the class period. *See In re United Artists Theatre Co.*, 410 B.R. at 392.

c) Typicality. The Plaintiffs possess claims that are typical of the class, which includes hawkers of *amNew York* during the class period. *See In re United Artists Theatre Co.*, 410 B.R. at 393. The Plaintiffs suffered the same alleged injury and possess the same interests as the prospective settlement class. *See In re Kaiser Group Int'l, Inc.*, 278 B.R. at 66.

d) Adequacy of Representation. Plaintiffs may adequately serve as Class Representatives because they share common interests in maximizing recovery and have claims arising from the same facts and circumstances as the Settlement Class, and Class Counsel is experienced with class action litigation and capable of competently and vigorously prosecuting the action. The Debtors did not object to the adequacy of Class Counsel to represent the Settlement Class.

29. Once the class action satisfies the four elements under Rule 23(a), the class action must also meet one of the three elements of Rule 23(b). In this case, the Class Certification Motion requested class certification under Rule 23(b)(3):

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The final factor under 23(b)(3) does not apply to settlement classes as there is no trial. *In re AremisSoft Corp. Secs. Litig.*, 210 F.R.D. 109, 122 (D.N.J. 2002); *In re Worldcom, Inc.*, 347 B.R. at 141, 143.

30. Predominance. Common issues predominate over individual variances in unpaid wages based on the shared questions of the Plaintiffs' and Settlement Class members' status while promoting and/or distributing the *amNew York* newspaper as alleged in the Class Certification Motion and supported by the finding of commonality among class members.

31. Superiority. Class certification and treatment of the Class Claim for purposes of settlement is in the interests of fairness and judicial economy and the settlement efficiently and fairly resolves the Class Claims, the Individual Claims, and all claims of Settlement Class members through the Settlement Agreement, thereby avoiding costly or prohibitive attempts by class members to litigate their claims individually against the Defendants, especially in light of the small dollar value of many of the claims.

B. Settlement Agreement Meets Legal Standards for Approval

32. Settlement of a class action in the context of bankruptcy should meet both the standards for settlement under Rule 23(e) for federal class actions and under Bankruptcy Rule 9019(a). *In re Am. Family Enters.*, 256 B.R. 377, 429 (D.N.J. 2000) (approving class action settlement pursuant to Rule 23 and Bankruptcy Rule 9019); *In re Worldcom, Inc.*, 347 B.R. at 139-40 (applying both Rule 23 and Bankruptcy Rule 9019 to approve a class action settlement). In addition to meeting the requirements for class certification under Rules 23(a) and (b), a separate inquiry under Rule 23(e) is required to establish that the settlement is fair, reasonable and adequate. *In re Prudential*, 148 F.3d at 316. A strong presumption in favor of settlements exists in litigation, especially in the class action context. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("This presumption is especially strong in 'class

actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation'" (quoting *In re GM Truck*, 55 F.3d at 784)). Settlements that are achieved through a procedurally fair arms'-length process—such as use of a third-party mediator in this case—among other factors, are entitled to an initial presumption of fairness. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004); *In re Worldcom, Inc.*, 347 B.R. at 143-44. The benefits of settlement include judicial economy and the avoidance of costs and risks in complex litigation such as this class action dispute. *Ehrheart*, 609 F.3d at 595.

(1) Settlement Should Be Approved Under Rule 23

33. Class action settlements are usually approved in a two step process: preliminary approval prior to notice to the class and final approval following a period during which class members may object to the settlement. *In re GM Truck*, 55 F.3d at 785. Settlements that are "fair, reasonable, and adequate" should be approved by the bankruptcy court pursuant to Rule 23(e). Fed. R. Civ. P. 23(e)(2); *In re Prudential*, 148 F.3d at 316; *In re GM Truck*, 55 F.3d at 785. Rule 23(e) is made applicable to a class action settlement in bankruptcy by Bankruptcy Rule 7023. In determining the fairness of a class action settlement under Rule 23(e), the bankruptcy court may consider a variety of factors, including:

> (i) the complexity, expense and likely duration of the litigation; (ii) the reaction of the class to the settlement; (iii) the stage of the proceedings and the amount of discovery completed; (iv) the risks of establishing liability; (v) the risks of establishing damages; (vi) the risks of maintaining the class action through the trial; (vii) the ability of the defendants to withstand a greater judgment; (viii) the range of reasonableness of the settlement fund in light of the best possible recovery; and (ix) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

See In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 258 (3d Cir. 2009) (quoting *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)); *In re Prudential*, 148 F.3d at 317 (same); *In re GM Truck*, 55 F.3d at 785 (same).

34. The proposed settlement satisfies the *Girsh* factors among other factors for approval of a class action settlement in light of the presumption of fairness inherent in an arms'-length negotiated settlement. The Court recognized the complexity and costs of continued litigation when it directed the parties to mediation to negotiate a settlement prior to further litigation. The notice procedures require individual notice in addition to publication notice and give Settlement Class members an adequate opportunity to participate in the class, to opt-out, or to raise any objections whatsoever to the settlement and the claims-made process, in satisfaction of all due process concerns. The Settlement Agreement resolves class litigation commencing in 2007 in State Court and continuing in the context of the Debtors' bankruptcy cases, during which Class Counsel pursued the action, identified additional class members, and filed proofs of claim on behalf of the Plaintiffs and the putative class. The significant costs and litigation risks entailed in establishing liability and damages, and maintaining the Lawsuit strongly support settlement of the Lawsuit. The settlement is within the range of reasonableness affording the best possible recovery to the Settlement Class of a sum certain share of the settlement amount, especially for those Settlement Class members otherwise barred from filing claims against the Debtors due to expiration of the Debtors' Bar Date.

(2) Settlement Should Be Approved Pursuant to Rule 9019

35. As a general policy, settlements and compromises are encouraged and favored by courts to efficiently resolve disputes in the bankruptcy context. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *In re TSIC, Inc.*, 393 B.R. 71, 78 (Bankr. D. Del. 2008). The bankruptcy court may approve a class action settlement pursuant to section 363 of the Bankruptcy Code. *See In re Martin*, 91 F.3d at 395 n.2. The procedure for approving a settlement in bankruptcy is similar to that under Rule 23(e) as set forth by Bankruptcy Rule 9019, which provides, in relevant part:

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> On motion of the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a). Approval of a settlement under Bankruptcy Rule 9019 is committed to the sound discretion of the bankruptcy court. *In re TSIC, Inc.*, 393 B.R. at 78; *Key3Media Group, Inc. v. Pulver.com, Inc. (In re Key3Media Group, Inc.)*, 336 B.R. 87, 92 (Bankr. D. Del. 2005). The Court, however, should defer to the debtor's business judgment when approving consensual settlements. *See In re Coram Healthcare Corp.*, 315 B.R. 321, 330 (Bankr. D. Del. 2004). *See also In re Nashaminy Office Bldg. Assocs.*, 62 B.R. 798, 803 (E.D. Pa. 1986) (providing that when approving a proposed settlement, the court "does not substitute its judgment for that of the trustee").

36. Bankruptcy courts generally approve settlements that are "fair, reasonable, and in the best interests of the estate." *In re TSIC, Inc.*, 393 B.R. at 78 (quoting *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). In determining whether to approve a settlement pursuant to section 363 of the Bankruptcy Code and Bankruptcy Rule 9019, a bankruptcy court is required to "assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." *In re Martin*, 91 F.3d at 393. Bankruptcy courts consider four factors when deciding whether to approve a proposed settlement: "(1) the probability of success in the litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." *Id.* (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968); *In re Neshaminy Office Bldg. Assocs.*, 62 B.R. at 803). *See also Will v. Northwestern Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006) (confirming the *Martin* factors as a longstanding test for approval of settlements); *In re Marvel Entm't Group,*

Inc., 222 B.R. 243, 249 (D. Del. 1998) (relying on these four factors to determine fairness, reasonableness, and adequacy of a settlement). "The court must also consider 'all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.'" *In re Marvel Entm't Group, Inc.*, 222 B.R. at 249 (quoting *TMT Trailer Ferry, Inc.*, 390 U.S. at 424). The court may approve the settlement so long as it is "above the lowest point in the range of reasonableness." *In re TSIC, Inc.*, 393 B.R. at 79 (quoting *Official Unsecured Creditors' Comm. v. Pa. Truck Lines, Inc. (In re Pa. Truck Lines, Inc.)*, 150 B.R. 595, 598 (E.D. Pa. 1992)). In alignment with the standard for approval under Rule 23(e), the ultimate inquiry is whether, in the court's discretion, the compromise embodied in the settlement "is fair, reasonable, and in the best interests of the estate." *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997).

37. Probability of Success in Litigation. In evaluating the first *Martin* factor, "the Court's task . . . is to canvass the issues to see whether the settlement fall[s] below the lowest point in the range of reasonableness." *In re Exide Techs.*, 303 B.R. 48, 68 (Bankr. D. Del. 2003) (quoting *In re Neshaminy Office Bldg. Assocs.*, 62 B.R. at 803). The Court need not be convinced that the settlement is the best possible compromise, just that the settlement is within the range of litigation possibilities. *In re World Health Alternatives, Inc.*, 344 B.R. 291, 296 (Bankr D. Del. 2006); *In re Coram Healthcare Corp.*, 315 B.R. at 330. The cost of litigating class actions is significant and the outcome is highly uncertain. Although the Debtors argue that meritorious defenses exist to deny Plaintiffs' class certification in the State Court Case and in the bankruptcy proceeding, and that the Debtors have no liability to the Plaintiffs under New York minimum wage law or any other applicable wage/hour laws, the Debtors seek to minimize legal expenses and costs and achieve a fair settlement for the benefit of their estates. Class Counsel is equally cognizant of the costs and risks of litigation and likewise has concluded that the Settlement Agreement is fair and reasonable. Given the substantial risks present in any litigated

action, and the risk that equitable considerations may balance in favor of class certification and treatment, the Debtors contend that the Settlement Agreement is fair and reasonable under this factor.

38. Likely Difficulties in Collection. This factor is less important in this case where the Debtors are defendants and potentially liable for the claims of the class members.

39. Complexity of the Litigation Involved. Class actions are notorious as complex litigated matters, often because they involve difficult legal and factual issues and require numerous inquiries to (i) evaluate and certify the class under Rule 23(a) and (b), (ii) determine the adequacy of Class Counsel under rule 23(g), and (iii) develop detailed notice and claims administration procedures for class members, each of which may be litigated to some extent by the parties in addition to the merits of the lawsuit. This Court directed the parties to mediation in an attempt to reach a settlement prior to any further litigation of the Class Certification Motion, with consideration of the costs and time of litigation balanced with the reasonably modest value of the disputed Class Claims in this case. The Settlement Agreement is an outcome of the Court mandated mediation and avoids complex and time-consuming litigation involving a New York state minimum wage class action that was not certified prepetition and for which limited discovery was completed prior to the Petition Date. Pursuit of this litigation in the bankruptcy context would only escalate the time, costs, and complexity of the Lawsuit without benefit to the parties and the Settlement Class.

40. Paramount Interest of the Creditors. The Settlement Agreement resolves asserted Class Claims in the amount of $1.5 million and Individual Claims in the aggregate amount of $180,000 against two Debtors in exchange for the all-in Settlement Amount of $325,000, of which $275,000 will be paid by the Debtors. The Debtors further benefit from the release of the Plaintiffs' and class members' disputes and claims as against the co-defendants

based upon a contractual indemnification provision asserted by the co-defendants against the Debtors. Resolution and liquidation of these disputed litigation claims serves creditors' interests in preparing the Debtors for emergence and is well within the appropriate range of reasonableness and fairness under Bankruptcy Rule 9019. The Class Claims relate to an underlying State Court Case that will be dismissed with prejudice through a Stipulation of Discontinuance with Prejudice within five (5) business days after final approval of the Settlement Agreement. Further, the Settlement Agreement embodies full and final releases of all claims relating to or arising under the Lawsuit, in exchange for the consideration and obligations set forth in the Settlement Agreement.

41. For these reasons, the Settlement Agreement is fair, reasonable and adequate, and well within the range of reasonableness, and is in the best interests of the Debtors' estates, their creditors and all parties in interest and the Settlement Class members.

C. Class Counsel Should Be Appointed and the Attorneys' Fees Approved

42. Class Counsel should be appointed to represent the class in this case and to effectuate the settlement and resolution of the Class Claims and Individual Claims. Class Counsel first brought the State Court Case in 2007 and has continued to actively work to represent the interests of class members in the Debtors' bankruptcy cases. (Palmer Decl. ¶¶ 3 – 20). The Debtors did not dispute the adequacy of Class Counsel in their Objection, and contend that Class Counsel has adequately identified and investigated potential claims, as evidenced by the additional eleven (11) Individual Claims filed against the Debtors in addition to the Named Plaintiffs, is experienced in handling minimum wage class actions, is knowledgeable of applicable law, and has the resources necessary to represent the class. (Palmer Decl. ¶¶ 33 – 40). For these reasons, Class Counsel will fairly and adequately represent the class and should be appointed by the Court as Class Counsel pursuant to Rule 23(g).

43. Attorneys' Fees equal to 33% of the Total Gross Amount after deductions for Costs is fair and reasonable—well-within the norm for similar wage and hour class actions and third circuit precedent—and should be awarded to Class Counsel pursuant to Rule 23(h) and New York law and practice. *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 496 (E.D.N.Y. 2006) (As part of class-action settlement, noting that contingency fees of 33 1/3% are "almost a national norm," yet permitting fee award up to 37.5% based upon special circumstances and results achieved); *King v. Fox*, No. 97-CV-4134 (RWS), 2004 WL 68397, at *7 (S.D.N.Y. Jan. 14, 2004) (Observing that "[a] one-third contingency fee is standard throughout the state and country.... For instance a one-third contingency fee is specifically provided for by New York Court Rules in personal injury and property damage cases." *Id.* at *5 (citing 22 N.Y.C.R.R. § 603.7)). A one-third contingency fee is presumptively valid in New York. *Id.* (citing *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 389 (S.D.N.Y. 2000)). The award of Attorneys' Fees is also consistent with third circuit guidance. *See, e.g., In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 736 (3d Cir. 2001) (noting that fee awards vary by case, fee awards typically range "from nineteen percent to forty-five percent of the settlement fund"); *In re AremisSoft Corp. Secs. Litig.*, 210 F.R.D. at 134 (observing that "[s]cores of cases exist where fees were awarded in the [range of] one-third to one-half of the settlement fund." (citations omitted)).

44. The Debtors have stipulated and agreed to the Attorneys' Fees and request the Court to approve the fee award and costs as part of the final approval of the Settlement Agreement. The Attorneys' Fees meets the standards for approval in common fund cases in third circuit courts, which have repeatedly approved percentage-of-recovery fee awards in common fund cases. *See, e.g., In re Delta Fin'l Corp.*, Adv. Proc. No. 08-50606 (CSS) (April 9, 2010) (approving attorneys' fees of 33% the maximum gross settlement amount); *See In re*

Cendant Corp. PRIDES Litig., 243 F.3d at 734 (approving percentage-of-recovery fee award in similar case with a reverter and where claimants were unaffected by fee award); *In re AremisSoft Corp. Secs. Litig.*, 210 F.R.D. at 133-34 (approving percentage-of-recovery fee award including 33-1/3% of the common stock to be distributed to the class). A percentage-of-recovery fee award is preferred in common fund cases in the Third Circuit and is appropriate in class actions where Class Counsel has worked on a contingency fee basis. *See In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) (reiterating that the percentage of common fund approach is the proper method of awarding attorneys' fees, but acknowledging lodestar as a cross-check); *In re AremisSoft Corp. Secs. Litig.*, 210 F.R.D. at 128 (citing *In re GM Truck*, 55 F.3d at 821-22). *See also Neuberger v. Shapiro*, 110 F. Supp. 2d 373, 386 (E.D. Pa. 2000) ("There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund." (internal quotations omitted)).

45. Third circuit courts evaluate attorneys' fee awards in common fund settlement cases based on a non-exhaustive list of factors:

> (1) the size of the fund created and number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

In re AT&T Corp. Secs. Litig., 455 F.3d 160, 165 (3d Cir. 2006) (quoting *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d at 301); *In re Cendant Corp. PRIDES Litig.*, 243 F. 3d at 733 (quoting *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)).

46. The Attorneys' Fees should be approved under *Gunter* and its progeny. The common fund is sizeable and is intended to serve approximately 2,950 potential Settlement Class members. The Plaintiffs have already agreed to the settlement and other class members

shall receive notice of the fee award and have an opportunity to object to the fee award at the Fairness and Settlement Hearing. Class Counsel has devoted time since 2007 to bring the underlying State Court Case, to appear and file claims, pursue class certification in the Debtors' bankruptcy cases, and participate in mediation and negotiation of the Settlement Agreement, in addition to responsibilities concerning the implementation of the settlement, on a contingency fee basis that is well within the norms of New York state litigation and the Third Circuit. (Palmer Decl. ¶ 43). Further, it is evident from a lodestar cross-check that the percentage-of-recovery compensation requested by Class Counsel is reasonable. *In re AT&T Corp. Secs. Litig.*, 455 F.3d at 164; *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d at 305-07; *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 742; *In re GM Truck*, 55 F.3d at 821 & n.40. At their reasonable hourly billing rates, Class Counsel has expended over $218,000 in time on the Lawsuit; accordingly, the lodestar cross-check results in a fractional lodestar multiplier of 0.463. (Palmer Decl. ¶ 45). *See In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, 2009 U.S. Dist. LEXIS 60790, at *49 (finding that where the requested fee by the percentage method was a fraction of the lodestar, it "clearly confirm[ed] the reasonableness of the fee award"). For these reasons, the Attorneys' Fees should be approved by the Court.

D. Approval Is in the Best Interests of the Debtors' Estates

47. The Settlement Agreement fully resolves a complex class action lawsuit presenting significant questions of law and fact, and requiring the involvement of a critical non-debtor co-defendant, and avoids potentially costly class action litigation. The Settlement Class benefits from the settlement as individual lawsuits would be cost prohibitive and impractical for each class member, including the time bar against untimely filed claims in the Debtors' bankruptcy cases, and the cash settlement provides a sum certain distribution on qualified claims. The Settlement Agreement was achieved through a good faith, arms'-length negotiation and

meets all the requirements for approval of a fair, reasonable and adequate class action settlement pursuant to Rule 23 and Bankruptcy Rule 9019. The Total Gross Amount of the Settlement Agreement and all payments and distributions derived therefrom, are fair and reasonable given the nature of the disputed claims and the anticipated pool of claimants, and provide a reasonable outcome for all parties involved in the settlement.

48. The Debtors submit for all these reasons that ample justification exists for the relief requested in this Motion.

NO PRIOR REQUEST

49. No prior request for the relief sought by this Motion has been made to this or to any other Court.

NOTICE

50. Notice of this Motion has been provided to: (i) the Office of the United States Trustee; (ii) counsel for the Committee; (iii) counsel to the administrative agents for Tribune's prepetition loan facilities; (iv) counsel to the administrative agent for the Debtors' post-petition loan facility; (v) the indenture trustees for Tribune Company's prepetition notes; (vi) Class Counsel; (vii) counsel to the Delivery Defendants; and (viii) all parties having requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

[Remainder of page intentionally left blank.]

WHEREFORE, the Debtors respectfully request this Court enter an Order, in substantially the form attached hereto as Exhibit A, (i) preliminarily approving the settlement agreement; (ii) granting class certification, appointing class representatives and class counsel, and approving noticing procedures; (iii) scheduling the final fairness hearing and establishing a process for finally approving the settlement agreement; and (iv) granting other related relief this Court may deem just and proper.

Dated: Wilmington, Delaware
August 4, 2011

Respectfully submitted,

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ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION

AMERICAN BAR ASSOCIATION Section of Litigation

Settlement of Class Action Claims is Enforceable Against Debtor in Bankruptcy

By Emily M. Yinger and Michael M. Smith

The global financial crisis led to sharp increases in bankruptcy filings and class action lawsuits. With businesses and individuals turning to bankruptcy to protect their remaining assets, and filing class actions to recover their losses, more plaintiff-class members are likely to be debtors in bankruptcy as well.

In the past, it was simply assumed that debtors were no different than any other class members—their claims could be released by a settlement as long as they were given notice and an opportunity to opt out. But that assumption was virtually untested. Given that bankruptcy law prohibits any act to exercise control over a debtor's property—including any legal claims—can a court approve the release of the debtor's claims as part of a class settlement? Or does the settlement process itself, with its affirmative opt-out requirement, constitute an impermissible exercise of control over the debtor's property?

Eleventh Circuit First to Speak

The Eleventh Circuit recently became the first federal appellate court (and only the second federal court at any level) to address this question in *Thomas v. Blue Cross and Blue Shield Ass'n.* In *Thomas,* a nationwide class of physicians claimed that they had been systematically underpaid by the defendant health insurance companies for over nine years. The appeal arose from the class-wide settlement agreement involving more than 20 of the defendant health insurance companies.

Jemsek was a physician class member who operated a clinic in North Carolina specializing in the treatment of Lyme disease. His unorthodox treatments triggered an investigation by the state medical board that resulted in the restriction of his medical license. The sequence of events that followed is key to the issues addressed by the Eleventh Circuit.

While settlement negotiations were ongoing in the class action, one of the class action defendants, Blue Cross Blue Shield of North Carolina, sued Jemsek in state court seeking to recover payments it had made for Jemsek's questionable Lyme disease treatments. Jemsek then filed for Chapter 11 bankruptcy protection.

Settlement of "Underlying" Class Action

When BCBSNC's state-court case against Jemsek was removed to bankruptcy court, Jemsek asserted various counterclaims against BCBSNC similar to the claims asserted by the plaintiffs

"Settlement of Class Action Claims is Enforceable Against Debtor in Bankruptcy" by Emily M. Yinger and Michael M. Smith. posted to the American Bar Association Section of Litigation's Class Actions & Derivative Suits committee webpage located at http://www.abanet.org/litigation/committees/classactions/bankruptcy-eleventh-circuit-thomas.html. © 2009 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

in *Thomas*. Several months after Jemsek sought bankruptcy court protection, the *Thomas* court preliminarily approved a class-wide settlement agreement. As part of the settlement, the physician class members agreed to release their claims against the health insurance companies, including BCBSNC.

Debtor Does Not Opt Out

Notices were mailed to all physician class members, including Jemsek, asking them whether they wanted to opt out of the class wide settlement agreement. Jemsek did not respond. A year later, the *Thomas* court gave its final approval to the settlement agreement. BCBSNC then moved to enjoin the claims asserted by Jemsek in the bankruptcy case on grounds that they were released by the *Thomas* settlement agreement.

Although Jemsek conceded that he did not opt out of the settlement agreement, he contended that the settlement agreement's release could not be enforced against his claims because he had filed for bankruptcy protection, and brought his claims in the bankruptcy action, before the *Thomas* settlement was approved.

Debtor's Section 362 Argument

Jemsek's poistion was grounded in Section 362 of the bankruptcy code. Section 362 stays any "action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case . . . [or] any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

Jemsek made two arguments based on this statute. First, he argued that his claims against Blue Cross were "cemented" within the bankruptcy court's jurisdiction before the *Thomas* settlement was approved, and thus the *Thomas* court had no jurisdiction to approve their release. The Eleventh Circuit dismissed that argument because Section 362 stays claims *against* the debtor, not claims *by* the debtor. Thus, under its plain terms, Section 362 had no effect on the claims asserted by Jemsek against Blue Cross.

Jemsek's second argument was more interesting. He asserted that the *Thomas* court ran afoul of Section 362 when it required him to make an election about whether to participate in the settlement or opt out, and thus his election to participate was invalid. Jemsek reasoned that his cause of action against Blue Cross became property of his estate when he filed for bankruptcy protection, and any attempt to "exercise control" over that cause of action would violate Section 362. Accordingly, Jemsek argued, when the *Thomas* court required him to either opt out of the settlement agreement or participate and release his claims against the defendants (including Blue Cross), the court improperly exercised control over his claims against Blue Cross.

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Class Settlement Upheld

The Eleventh Circuit rejected Jemsek's argument. It held that merely asking a debtor to make a decision about releasing his claims does not constitute an exercise of control of the property of the bankrupt estate. The court noted that, although Jemsek's claims were indeed property of the bankruptcy estate, the bankruptcy filing did not stay those claims. Because the claims were not stayed, Blue Cross was free to defend itself against them, and free to cause the claims to be settled. "It would not make sense under a plain reading of the [bankruptcy] statute," said the court, "to treat raising a defense against a non-stayed counterclaim as an 'exercise of control over property.'" Thus, a court administering a class action suit does not violate the automatic stay, or exercise any control over the debtor's claim, by requiring the debtor to make an election whether to opt out or participate in a class settlement. The court concluded "[d]ebtors holding claims as plaintiffs . . . must play by the same rules of procedure as any other plaintiff."

The Eleventh Circuit's interpretation of Section 362 forecloses an avenue of attack that could have affected the enforceability of existing class action settlements against some class members and made future settlements more difficult to achieve. The ruling confirms that a class member who petitions for bankruptcy protection before a class action is settled can be bound by a post-petition settlement agreement.

Editor's Note: Bankruptcy, class settlements, and related topics will be explored at the upcoming 13th Annual National Institute on Class Actions in San Francisco (October 30) and Washington, D.C. (November 20).

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AMERICAN BANKRUPTCY INSTITUTE

JOURNAL

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Claims Chat

Allowance of Class Claims in Bankruptcy Starts with Discretion

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Bankruptcy courts long have been a forum to resolve *pending* class action litigation on topics including asbestos liability, plastic surgery injury and other consumer protection and mass tort law. It was not until the Seventh Circuit Court of Appeals' decision in *In re American Reserve Corp.* that class action adversary proceedings and class proofs-of-claim could be filed on behalf of *potential* claimants.[1]

Michael J. Frishberg

Today, if not certified prepetition, a putative class may ask a bankruptcy court to file a class proof-of-claim and grant class certification. Only a few circuits expressly allow class claims,[2] but bankruptcy courts continually face how and when claims within a bankruptcy proceeding may be granted class action status. In 2009, for example, bankruptcy courts considered certifying classes relating to employment law[3] and fax machine spam.[4] These recent case examples illustrate how courts approach the question of class claim treatment and explain various procedures when addressing class claims.

Courts Have Strict Procedures, Broad Discretion over Whether to Apply Fed. R. Civ. P. 23

Class actions concentrate litigation in a single forum, and their procedures are designed to avoid "multiplicity of activity."[5] Similar benefits can be found in bankruptcy law, where "many of the perceived advantages of class treatment drop away."[6] Some question whether class actions have a place in bankruptcy cases because resolution of the class claim may complicate and delay the bankruptcy case. As one court explained:

> Bankruptcy provides the same procedural advantages as a class action. In fact, it provides more advantages. Creditors, even corporate creditors, don't have to hire a lawyer, and can participate in the distribution for the price of a stamp. They need only fill out and return a proof of claim sent with the Bar Date Notice. Furthermore, claims are "deemed allowed" under [11 U.S.C.] §502(a) in the absence of an objection, in which case discovery and fact-finding are avoided altogether.[7]

Gil Hopenstand

Bankruptcy law still has its own procedures, and a proof of claim executed and filed in accordance with the bankruptcy rules constitutes *prima facie* evidence of the validity and amount of the claim.[8] A filed proof of claim is "deemed allowed" until objected to,[9] and many courts extend that presumption to class claims.[10] Maybe the debtor will accept the class claim, decide not to litigate it or seek to compromise the class claim without an objection.[11] If a party objects to the class claim, that objection elevates the claim dispute to a "contested matter."

Absent a claim objection, a claimant must affirmatively move to invoke contested matter procedures and, by extension, Fed. R. Civ. P. 23. "[T]he proponent is the one who wants the court to enter an order. Without that

1 *In re American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988).

2 Sixth, Seventh, Ninth and Eleventh Circuits. Respectively, *see Reid v. White Motor Corp.*, 886 F.2d 1462 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *In re American Reserve Corp., supra*; *Birting Fisheries v. Lane (In re Birting Fisheries Inc.)*, 92 F.3d 939 (9th Cir. 1996); *In re Charter Co.*, 876 F.2d 866 (11th Cir. 1989), *cert. dismissed*, 496 U.S. 944 (1990).

3 *In re Bally Total Fitness of Greater New York Inc., et al.*, 402 B.R. 616 (Bankr. S.D.N.Y. 2009), *aff'd*, 411 B.R. 142 (S.D.N.Y. 2009) (claims include failure to provide meal and rest periods); *Kettell v. Bill Heard Enterprises Inc. (In re Bill Heard Enterprises Inc.)*, 400 B.R. 795 (Bankr. N.D. Ala. 2009) (alleged WARN Act violations).

4 *Hacienda Heating & Cooling Inc. v. United Artists Theatre Circuit Inc. (In re United Artists Theatre Company, et al.)*, 410 B.R. 385 (Bankr. D. Del. 2009).

5 *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

6 *Bally Total Fitness of Greater New York Inc.*, 411 B.R. at 145.

7 *In re Musicland Holding Corp.*, 362 B.R. 644, 651 (Bankr. S.D.N.Y. 2007) (citations omitted).

8 Fed. R. Bankr. P. 3001(f).

9 11 U.S.C. §502(a).

10 *But see Musicland Holding Corp.*, 362 B.R. at 652 ("Until certification, the [class] claim is in limbo... The proof of claim, improperly filed or improperly signed, is not *prima facie* evidence of the debt, and until class certification, may not even be a 'filed' claim within the meaning of 11 U.S.C. §502(a). In that case, no objection would be necessary, and it would be incumbent on the putative class representative to raise the issue [to extend the application of Rule 23].").

11 *Charter Co.*, 876 F.2d at 875; *cf, In re W.R. Grace & Co.*, 389 B.R. 373, 377, n.10 (Bankr. D. Del. 2008).

order, [Rule 23] is not applicable to the proof of claim and a class proof of claim is improper."[12] Class certification should be sought early in the bankruptcy process before the class action hampers the administration of the case.

In courts that follow *American Reserve*, consideration of a class action motion in bankruptcy or an objection to a class-action claim will trigger a two-step process. First, the court must exercise its discretion as to whether to apply Fed. R. Civ. P. 23 to the contested proceeding. Courts' decisions vary because, while Fed. R. Civ. P. 23 automatically applies to bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7023, its applicability to contested matters is left broadly to a court's discretion by Federal Rule of Bankruptcy Procedure 9014. If a court decides to apply Fed. R. Civ. P. 23, the second step is for a court to determine whether the proposed class action/proceeding and class representative satisfy the class certification requirements of Fed. R. Civ. P. 23(a) and (b) for numerosity,[13] commonality,[14] typicality[15] and adequate representation,[16] and subsequently maintainability.[17]

First, in deciding whether to apply Fed. R. Civ. P. 23, a court will consider a variety of factors relating to the bankruptcy case. Such factors include (1) whether the class was certified prepetition, (2) whether the members of the putative class received notice of the bankruptcy case bar date and (3) whether class certification will adversely affect the administration of the case.[18] Other courts additionally consider prejudice to the debtor or its creditors, prejudice to the putative class members, whether the class representative satisfied its burden to move for class certification and the status of proceedings in other courts.[19] Allowing a class claim effectively extends the bar date for class members, but not for others, so "putative members of an uncertified class who received actual notice of the bar date but did not file timely claims are the least favored candidates for class action treatment."[20]

Also relevant to whether class certification will affect the bankruptcy case are the timing of the certification motion and whether a plan has been negotiated, submitted, voted on or confirmed.[21] For example, when allowance of class claims did not arise until after a disclosure statement was approved and ballots were sent to creditors to vote on a plan, expunging the class claims "at this late juncture" was affirmed because the class claims otherwise "would wholly disrupt and undercut the expeditious execution of the Plan of Reorganization."[22]

If a bankruptcy court applies Fed. R. Civ. P. 23 to the contested matter, it next considers whether the class claim meets the Fed. R. Civ. P. 23(a) requirements of numerosity, commonality, typicality and adequate representation, and one of the three maintainability elements of Fed. R. Civ. P. 23(b). The case law here is well-developed, and bankruptcy courts are guided by their respective circuit's binding authorities.

Recent Examples

The factors in applying Fed. R. Civ. P. 23 are discretionary, and courts do not always exercise their discretion. When Bally Total Fitness filed a voluntary bankruptcy petition in the Southern District of New York in 2008, two different class action suits had been pending in California—one for nearly three years and the other for two months—alleging various employment law violations. One case involved between 3,180 and 5,000 present and former employees in California. The other case was brought only on behalf of personal trainers and group fitness instructors. Prior to Bally's bankruptcy petition, neither putative classes had sought class certification.

A bar date was set in Bally's bankruptcy case, and notice of the bar date was sent to all current employees and former employees whose employment had terminated after Jan. 1, 2004. Notice of the bar date was also published in newspapers nationwide. When the putative class members sought class certification in bankruptcy court or permission to file a class claim, the requests were denied, and the denials were affirmed on appeal due to the following factors:

- Classes were not certified prepetition;
- Putative class members received actual or constructive notice of the bar date, and notably only few such claims were filed;
- Expanding the bar date to include class members who did not file timely claims would prejudice claimants who met the claim deadline;
- "[C]lass certification would adversely affect the administration of these cases, adding layers of procedural and factual complexity that accompany class-based claims, siphoning the Debtors' resources and interfering with the orderly progression of the reorganization;"[23]
- Class status is unnecessary to protect the rights of putative class members, for their rights are protected by the bankruptcy claim process; and
- Resolving each class member's factual and legal issues in "mini-trials" would "mak[e] class treatment untenable and implausible."[24]

The district court concluded that, in this context, "bankruptcy provides the most expeditious and efficient path for the resolution of all creditors' claims."[25]

Analyses by other bankruptcy courts yielded different results. In *In re Bill Heard Enterprises*, about 2,300 terminated employees in seven states each filed an adversary proceeding in the Northern District of Alabama against the debtor—their former employer—alleging violations of the Worker Adjustment and Retraining Notification Act (WARN Act). Plaintiffs also filed

12 *In re Computer Learning Centers Inc.*, 344 B.R. 79, 87 (Bankr. E.D. Va. 2006).

13 The class must be "so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). What constitutes a sufficient number is a question of fact to be determined on a case-by-case basis, and numbers have varied. However, "impracticality" does not mean "impossibility," and a court has denied certification for 33 potential class members, but has certified a potential class of 390 members. For example, the Third Circuit has indicated that this numerosity requirement generally is met "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40." *United Artists Theatre Company*, 410 B.R. at 392, citing *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001).

14 There must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). It is not necessary to demonstrate that there is an absolute identity of facts among the class members. Common issues need not "predominate," but there need be only a single issue common to the class members. *In re Coggin*, 155 B.R. 934 (Bankr. E.D.N.C. 1993); *In re First Alliance*, 269 B.R. 428, 447 (C.D. Cal. 2001).

15 "[T]he claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). While courts often overlap this analysis with the question of commonality, typicality focuses on the relation between the representative parties and the class as a whole.

16 Courts analyze adequate representation and whether "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Specifically, "courts consider the adequacy of both the named representative and class counsel. Thus, adequate representation requires two elements: (1) the class representative must not have interests antagonistic to those of the class, and (2) class counsel must be qualified, experienced and generally able to conduct the proposed litigation." 5 *Moore's Federal Practice* §23.25[3][a].

17 The claimant must show that (1) prosecution of separate actions by or against individual class members would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the opposing party or that would be dispositive of the interests of nonparties or would impair or impede the nonparties' ability to protect their interests, (2) the party opposing the class has acted or refused to act in a way "generally applicable to the class" so that final relief with respect to the class as a whole is appropriate, or (3) the court finds that questions of law predominate over questions affecting only individual members, and that a class action is a superior method for the "fair and efficient adjudication of the controversy." *W.R. Grace & Co.*, 389 B.R. at 378.

18 *Musicland Holding Corp.*, 362 B.R. at 654-55 (internal citations omitted); *Bally Total Fitness of Greater New York Inc.*, 411 B.R. at 145.

19 *In re Craft*, 321 B.R. 189, 199 (Bankr. N.D. Tex. 2005).

20 *Musicland Holding Corp.*, 362 B.R. at 654-55. *See also Scoggin v. Adam Aircraft Industries Inc. (In re Adam Aircraft Industries Inc.)*, 2009 Bankr. Lexis 1747 at *9-10 (in such instances, "[a] class proof of claim or a class action certification may actually impede the normal bankruptcy process...").

21 *Id.*

22 *In re Ephedra Prods. Liab. Lit.*, 329 B.R. 1, 4 (S.D.N.Y. 2005).

23 *Bally Total Fitness of Greater New York Inc.*, 402 B.R. 616, 621 (Bankr. S.D.N.Y. 2009).

24 *Id.* at 622.

25 *Bally Total Fitness of Greater New York Inc.*, 411 B.R. at 148.

a class claim, and the debtor sought to have the adversary proceedings dismissed and handled by each plaintiff filing a proof of claim. Given the class size and that the debtor would vigorously oppose the WARN Act allegations however presented, the court held that resolution of the employment issues as a class claim would be more efficient than piecemealed into the claim-objection process, particularly given "the geographical hardship it would create on [putative class members] to defend their claims" in Alabama.[26]

The court held that class treatment was appropriate because joining 2,300 adversary proceedings was impractical, there would be several common questions to be addressed for each plaintiff, the proposed class representative suffered the same types of injuries as the class employees, no substantial or fundamental conflicts of interest existed between the proposed class representatives and the class as a whole, and the class was maintainable.[27]

In *In re Protected Vehicles Inc.*, the debtor terminated more than 300 employees, nearly 180 of whom filed proofs of claim alleging, *inter alia*, WARN Act violations.[28] Two former employees also filed similar adversary proceedings, and the court held that the issues could best be resolved as a class adversary proceeding. The court found relevant that the debtor would incur greater litigation costs in responding to each proof of claim individually rather than in one class adjudication, and the former employees' "disadvantage of individually litigating complicated legal issues for relatively small recoveries."[29] The class adversary proceeding met all of the requirements of Fed. R. Civ. P. 23(a) and (b)(3), however, the class would only be comprised of terminated employees who filed *timely* proofs of claim because opening the class to *all* employees "would render proof of claim deadlines in bankruptcy cases meaningless."[30]

Conclusion

Courts following *American Reserve* have broad discretion to allow class claims, when done correctly. Fed. R. Civ. P. 23 must be made applicable to the class claim by an objection, through an adversary proceeding or by class claim proponents affirmatively seeking such an order. Recent cases suggest that class claim consideration must come early enough in the bankruptcy proceeding so as not to hinder the case. Further, if a bankruptcy court decides that these initial hurdles are overcome, the class claim must meet the established requirements of Fed. R. Civ. P. 23(a) and (b). In the end, each bankruptcy court's determination will depend on the specific facts and on whether these procedures were met. ■

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26 *Bill Heard Enterprises Inc.*, 400 B.R. at 801.
27 *Id.* at 802-3.
28 *Burgio v. Protected Vehicles Inc. (In re Protected Vehicles Inc.)*, 397 B.R. 339 (Bankr. D. S.C. 2008).
29 *Id.* at 345-46.
30 *Id.* at 347.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

FOR PUBLICATION

In re:

Chapter 11

BALLY TOTAL FITNESS OF
GREATER NEW YORK, INC., et al.,

Case No. 08-14818 (BRL)
Jointly Administered

Debtors.

APPEARANCES:

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Before: Honorable Burton R. Lifland
United States Bankruptcy Judge

MEMORANDUM DECISION AND ORDER DENYING: 1) MOTION FOR ORDER TO ALLOW CLASS PROOF OF CLAIM BY THE CARRERA CLASS CLAIMANTS; 2) MOTION BY THE CARRERA CLASS CLAIMANTS FOR ORDER LIFTING THE AUTOMATIC STAY, OR IN THE ALTERNATIVE, FOR CLASS CERTIFICATION; AND 3) CREDITOR FRANCISCO FLORES' MOTION FOR CLASS CERTIFICATION

There are three interrelated motions before this Court. First, Cesar Carrera, Kevin Lai and Danna Brown, individuals on behalf of themselves, all others similarly situated and the general public, plaintiffs and putative class members in the action entitled *Carrera, et. al. v. Bally Total Fitness Corporation, et. al.*, Los Angeles County Superior Court Case No. BC345316 (collectively, the "Carrera Plaintiffs" and the "Carrera Action") move for an order to allow a class proof of claim (the "Carrera Motion") pursuant to Rules 9014 and 7023 of the Federal Rules of Bankruptcy Procedure. Second, the Carrera Plaintiffs move for either: a) an order pursuant to 11 U.S.C. section 362(d) annulling, terminating, modifying, or otherwise lifting the automatic stay to allow the Carrera Plaintiffs to liquidate their claims in the Carrera Action; or in the alternative, b) an order for class certification under Federal Rules of Civil Procedure ("FRCP"), Rule 23 (the "Lift Stay Motion"). Third, creditor Francisco Flores ("Flores," and together with the Carrera Plaintiffs, "Plaintiffs"), on behalf of himself and all others similarly situated in an action entitled *Francisco Flores v. Bally Total Fitness Corporation, et. al.*, Superior Court for the State of California, Alameda County, Case No. RG-08414512 (the "Flores Action" and together with the Carrera Action, the "Actions") moves for an order for class certification pursuant to FRCP 23(b)(1) and (b)(3) (the "Flores Motion," and together with the Carrera Motion, the "Motions").

BACKGROUND

On December 3, 2008 (the "Petition Date"), Bally Total Fitness Holding Corporation and its direct and indirect subsidiaries (collectively, the "Debtors", and together with Bally's non-debtor subsidiaries, the "Company") commenced cases under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Company is one of the largest full-service commercial operators of fitness centers in North America in terms of members, revenues and square footage of their facilities. On January 23, 2009, this Court entered an order (the "Bar Date Order") establishing March 9, 2009 as the deadline for filing proofs of claim against the Debtors (the "Bar Date"). On or before February 12, 2009, the Debtors' claims and notice agent mailed notice of the Bar Date by first class mail as required in the Bar Date Order. The Debtors also published notice of the Bar Date in the national editions of the Chicago Tribune and USA Today.

The Carrera Action

On December 30, 2005, prior to the Petition Date, the Carrera Plaintiffs commenced the Carrera Action in the Superior Court of California, County of Los Angeles ("California State Court") against Bally Total Fitness Corporation and Bally Total Fitness of California, Inc. (collectively "Bally"). The Carrera Action was brought as a class action on behalf of thousands of employees, in approximately 65 fitness clubs operated by Bally in California, including personal trainers, program directors, and sales managers, alleging claims for off-the-clock work, alleged forfeiture of sales commissions, failure to provide meal and rest periods mandated by California law, failure to provide timely itemized wage statements, failure to provide timely and accurate final paychecks, and failure to reimburse business expenses.

Each of the Carrera Plaintiffs entered into a written agreement, the "Bally Total Fitness Corporation Employment Dispute Resolution Procedure" (the "EDRP"), that requires the submission of employment-related claims to arbitration. In addition, it states that unless otherwise agreed by the parties, disputes relating to a particular employee are not to be submitted in the same proceeding with disputes relating to any other employees. On January 18, 2007, based on the EDRP, Bally filed a petition to compel arbitration and motion to strike the class action allegation. On April 29, 2008, the California State Court denied that motion (the "EDRP Decision") and on June 17, 2008, Bally appealed. The case was stayed pending resolution of the Bally appeal.

The Flores Action

On October 10, 2008, prior to the Petition Date, Flores filed an action in the Alameda County Superior Court. Like the Carrera Action, the Flores Action was brought as a class action on behalf of Bally employees,[1] alleging claims for unpaid wages, failure to provide meal and rest periods mandated by California law and failure to reimburse business expenses. On November 13, 2008, Bally filed a notice of removal of the civil action to federal court pursuant to the provisions of the Class Action Fairness Act of 2005. *See*, U.S. District Court, California Northern District Civil Dckt for Case No. 3:08-cv-051580VRW, *Dckt. No. 1*. Thereafter, based on the EDRP, Bally filed a motion to compel arbitration of Flores' claims on an individual basis. The motion to compel arbitration remains pending while the Flores Action is stayed pursuant to Bankruptcy Code section 362(a). On January 26, 2009, Flores filed three proofs of claim: one "on behalf of all other similarly situated group fitness instructors" in the amount of $83,553,912, of which $10,444,239 was designated as a priority claim; one "on behalf of all similarly situated

[1] The Flores Action was brought only on behalf of personal trainers and group fitness instructors.

personal trainers" in the amount of $43,459,400, of which $5,432,425 was designated as a priority claim; and one on his own behalf in the amount of $126,764.40, of which $15,771.80 was designated as a priority claim.

DISCUSSION

CLASS PROOF OF CLAIM

There is no absolute right to file a class proof of claim under the Bankruptcy Code. *In re Musicland Holding Corp*. 362 B.R. 644, 650 (Bankr. S.D.N.Y. 2007) ("while class proofs of claim in bankruptcy are not prohibited, the right to file one is not absolute."); *In re Sacred Heart Hosp. of Norristown,* 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995) (noting that the class action device may be utilized in appropriate contexts, but should be used sparingly). Rather, courts may exercise their discretion to extend FRCP 23 to allow the filing of a class proof of claim. In determining whether to exercise this discretionary power, courts primarily look at: a) whether the class claimant moved to extend the application of Rule 23 to its proof of claim; (b) whether "the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy"; and c) whether the claims which the proponent seeks to certify fulfill the requirements of Rule 23. *Musicland*, 362 B.R. at 651. Although Plaintiffs have moved for class treatment of their proof of claim,[2] they have failed to demonstrate that the requested relief would both be consistent with the goals of bankruptcy and satisfy the Rule 23 requirements. As such, the Motions are denied.[3]

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[2] Flores moved for class treatment of his proof of claim in his motion for class certification. Flores Motion at p. 8 ("by way of the instant motion, the proponent has satisfied the procedural requirement seeking application of Rule 23 to this matter.").

[3] Flores claims that the Flores Motion should be treated differently than the Carrera Motion because "there is not complete identity between either the legal or factual issues raised by the respective claims." First, Carrera seeks acceptance of a single proof of claim for a class of several different job positions, whereas Flores seeks acceptance of the filing on two separate class proofs of claim for distinct limited job positions (namely, the personal trainers and

<u>Authorizing the Filing of a Class Proof of Claim in *these* Chapter 11 Cases Would be Inconsistent with the Goals of Bankruptcy.</u>

The filing of a class proof of claim is consistent with the Bankruptcy Code generally in two principal situations: (i) where a class has been certified pre-petition by a non-bankruptcy court; and (ii) where there has been no actual or constructive notice to the class members of the bankruptcy case and Bar Date. *See Bailey v. Jamesway Corp. (In re Jamesway Corp.)*, No. 95 B 44821 (JLG), 1997 WL 327105, at *5 (Bankr. S.D.N.Y. June 12, 1997); *Sacred Heart,* 177 B.R. at 22 (classes certified pre-petition are the "best candidates" for a class proof of claim). Plaintiffs fail to meet both of these requirements. No class certification decision has been made in either the Carrera Action or the Flores Action and there are no material notice issues in this case. Both Actions purport to assert claims on behalf of present employees as well as any former employees. Actual or constructive notice has been given to these putative class members. The Debtors sent formal Bar Date notices to all present employees as well as all former employees whose employment terminated between January 1, 2004 and the Petition Date. The Debtors also published notice of the Bar Date in the national editions of the Chicago Tribune and USA Today. The direct notice, in combination with the published notice, was "reasonably calculated, under all the circumstances, to apprise interested parties" of the bankruptcy case and was of "such nature as to convey the required information." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Moreover, bankruptcy significantly changes the balance of factors to be considered in determining whether to allow a class action and thus class certification is often less desirable in

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the group fitness instructors). <u>Second</u>, the Carrera claims are allegedly broad, whereas Flores challenges only two limited Bally employment policies. <u>Third</u>, Carrera is stayed pending an appeal, whereas no such stay or appeal exists in Flores. Creditor Francisco Flores' Response to Debtor's Objection to Motion to Allow Class Proof of Claim; Request for Adjournment at p. 2. Assuming these factors are correct, they would not change this Court's analysis of whether the application of Rule 23 is appropriate and the Motions would still be denied.

bankruptcy than in ordinary civil litigation. *In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 5 (S.D.N.Y. 2005).

As explained by the *Musicland* Court,

> Bankruptcy provides the same procedural advantages as a class action. In fact, it provides more advantages. Creditors, even corporate creditors, don't have to hire a lawyer, and can participate in the distribution for the price of a stamp. They need only fill out and return the proof of claim sent with the Bar Date Notice. Furthermore, claims are 'deemed allowed' under § 502(a) in the absence of an objection, in which case discovery and fact-finding are avoided altogether.

Musicland, 362 B.R. at 651 (citations omitted). Further, class certification would adversely affect the administration of these cases adding layers of procedural and factual complexity that accompany class-based claims, siphoning the Debtors' resources[4] and interfering with the orderly progression of the reorganization. *See Ephedra*, 329 B.R. at 5. "[A] bankruptcy case can proceed no faster than its slowest matter . . . and a class action may 'gum up the works' because until complete, the bankruptcy court cannot determine the entitlement of other creditors." *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 376 (Bankr. S.D.N.Y. 1997).[5] Lastly, class status is unnecessary to protect the rights of the various members of the putative class; their rights are amply protected by the chapter 11 claims process itself.

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[4] Bally would be forced to incur substantial legal fees defending a class action – fees that would not be incurred if class members were required to file individual proofs of claim. *See Ephredra*, 329 B.R. at 10 (holding that "[t]he Court has discretion under Rule 9014 to find that the likely total benefit to the class members would not justify the cost to the estate of defending a class action under Rule 23."). Were Plaintiffs to prevail, their attorneys could seek payment of their fees from the Debtors' estates, necessarily diminishing the already limited distributions available to other creditors.

[5] According to the Debtors, although substantial discovery has been completed, the parties have yet to undertake the significant amount of discovery that will be required to litigate a class certification motion. After the completion of class certification discovery and the inevitable briefing, the Court will conduct a hearing on class certification. If the Court ultimately certifies a class, class members will need to be noticed and given an opportunity to "opt out" under Rule 23. The parties will then engage in merits discovery, which, in turn, will be followed by a complex and lengthy trial.

CLASS CERTIFICATION

Plaintiffs Fail to Satisfy the Requirements of FRCP Rule 23.

Even if the filing of a class proof of claim were authorized under the circumstances of these cases, which it is not, Plaintiffs' Motions shall be denied because they cannot fulfill the requirements of Rule 23. To certify a case under Rule 23, the court must be satisfied that all of the essential elements have been met. Under Rule 23(a), the plaintiff must establish the elements of numerosity, commonality, typicality and adequacy of class representative and counsel. Plaintiff must then satisfy one of the elements of Rule 23(b). The Supreme Court has directed district courts to conduct a "rigorous analysis" to determine whether the Rule 23 requirements have been satisfied prior to certifying a class.

Plaintiffs Cannot Satisfy the Superiority Standard Under FRCP Rule 23.

Plaintiffs are unable to show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). Though class treatment may be beneficial with other civil actions in consolidating the adjudication of common issues, this advantage disappears in the context of a bankruptcy.

As the *Ephedra* Court held:

> [S]uperiority of the class action vanishes when the 'other available method' is bankruptcy, which consolidates all claims in one forum and allows claimants to file proofs of claim without counsel and at virtually no cost. In efficiency, bankruptcy is superior to a class action because in practice small claims are often 'deemed allowed' under § 502(a) for want of objection, in which case discovery and fact-finding are avoided altogether. As for fairness, although the notice requirements of Rule 23 are superior for class members to the usual bankruptcy notice by publication, this shortcoming is easily remedied by a bankruptcy notice directed specifically at class members, either at the time of the original notice or thereafter by order extending the bar date for class members.

In re Ephedra Prods. Liab. Litig., 329 B.R. 1, 9 (S.D.N.Y. 2005). In other words, "superiority" has no place in bankruptcy. Aside from the loss of superiority in bankruptcy, the *de facto* expansion of the Bar Date for notified class members who failed to file individual claims in a timely manner will violate due process and prejudice the rights of timely filers.

Plaintiffs Cannot Satisfy the Predominance Standard Under FRCP Rule 23.

One of the key issues in determining whether class treatment is appropriate is whether "the questions of law or fact common to class members predominate over any questions affecting only individual members." FRCP 23(b)(3); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("[t]he first requirement of Rule 23(b)(3) is predominance of common questions over individual ones."). Here, Plaintiffs cannot satisfy their burden of establishing commonality because each putative class member's right to recovery is dependant on facts specific to that individual. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) (the predominance requirement of Rule 23(b)(3) is not met where there are "questions peculiar to" the individual class members). In both Actions, an individual analysis would be required to determine, *inter alia*, whether: 1) the putative class performed "hours worked" as defined in Wage Order No. 2-2001, applicable to the Debtors' business in California; 2) Bally "suffered" off-the-clock work (*see* 8 Cal. Code Regs. §§ 11010-030, 11060-140); 3) unpaid time would be considered *de minimis*; 4) Bally failed to provide compensation for the work allegedly performed by each class member; 5) Bally failed to reimburse class members' business expenses; and 6) class members' meal and rest period claims are justified. As such, the Court would have to engage in a series of highly disputed mini-trials for each class member to resolve the issues above, making class treatment untenable and implausible.

AUTOMATIC STAY

The Carrera Plaintiffs[6] seek relief from the automatic stay in order to pursue the Carrera Action pending against Bally in California State Court and in the alternative, to certify a proposed class. As stated above, the request for class certification shall be denied. For the reasons set forth below, the request for relief from the automatic stay shall also be denied.

Section 362(a) of the Bankruptcy Code establishes the automatic stay, which promotes the reorganization process by providing the debtor with "a breathing spell from [its] creditors." *Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 64 (2d Cir. 1986). Section 362(d)(1) of the Bankruptcy Code permits a court to grant relief from the automatic stay "for cause." When deciding whether sufficient cause exists to lift the automatic stay, the court is guided by the factors outlined in *Sonnax Indus., Inc. v. Tri Component Prods. Corp.*, 907 F.2d 1280, 1286 (2d Cir. 1990).[7] Applying these factors to the Carrera Action, it is clear that the Carrera Plaintiffs have failed to meet their burden of demonstrating cause.

The first Sonnax factor considers whether lifting the stay will result in partial or complete resolution of the issues. Allowing the Carrera Action to proceed would not result in a complete resolution of the issues because Bally's appeal of the EDRP Decision would still need to be resolved. If decided in favor of the Carrera Plaintiffs, there would be extensive discovery,

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[6] Flores does not seek relief from the automatic stay.

[7] The twelve factors are: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

briefing and then a hearing on the issue of class certification. If ultimately permitted, class members would need to be noticed and then given an opportunity to "opt out" under Rule 23, followed by merits discovery on both sides and ending with a lengthy trial. Therefore, this Sonnax factor weighs heavily against lifting the automatic stay.

The second and seventh Sonnax factors consider 1) the lack of any connection with or interference with the bankruptcy case; and 2) whether litigation in another forum would prejudice the interests of other creditors. First, allowing the actions to proceed would distract the Debtors' management from the bankruptcy proceeding by forcing them to litigate the Carrera Action and hinder its ability to perform its fiduciary duty of maximizing the value of the Debtors' estates, thereby affecting the interests of other creditors. Second, it will interfere with the uniform application of bankruptcy bar dates by preserving the claims of class members who failed to timely file their claims. This impact effectively dilutes the value of claims asserted by timely filers and implicates due process concerns, which also prejudices the interests of other creditors. *See Bailey v. Jamesway Corp. (In re Jamesway Corp.),* No. 95 B 44821 (JLG), 1997 WL 327105, at *5 (Bankr. S.D.N.Y. June 12, 1997) ("an action which expands the bar date for notified creditors may itself violate due process."). Finally, granting relief could open the floodgates to a multitude of similar motions causing further interference with the bankruptcy case, as evidenced by Flores' motion for class certification. *See In re Northwest Airlines Corp.*, No. 05-17930 (ALG), 2006 WL 2583647, at *2 (Bankr. S.D.N.Y. Aug. 28, 2006). Therefore, these Sonnax factors weigh heavily against lifting the automatic stay.

The fourth, fifth and sixth Sonnax factors consider: 1) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; 2) whether the debtor's insurer has assumed full responsibility for defending the action; and 3) whether the action primarily involves third parties. First, although the Carrera Action was moved, on Bally's motion, to the California State Court's Complex Litigation Panel, this Court has significant experience in applying state law and is well equipped to handle the Carrera Action. Second, the Debtors do not have insurance coverage with respect to the claims asserted in the Carrera Action. Third, the Carrera Action does not involve any third parties; Bally is the only party adverse to the Carrera Plaintiffs. These Sonnax factors, taken together weigh heavily in favor of denying relief.

The tenth and eleventh Sonnax factors consider: 1) whether the case is ready for trial; and 2) the interests of judicial economy and the expeditious and economical resolution of the litigation. First, the parties have not even started conducting the extensive discovery necessary to make a determination on the class certification issue and are therefore not ready for trial. Second, lifting the automatic stay and forcing Debtors to litigate this or any other class action suit during the pendency of these chapter 11 cases would hinder Debtors' efforts for a speedy and effective reorganization process. In addition, very few judicial resources have been expended by the California State Court, as the case has been stayed pending Bally's appeal of the EDRP Decision. As such, the automatic stay will not lead to judicial waste of resources and will not undermine an economical resolution of the litigation. Therefore, these Sonnax factors weigh against lifting the automatic stay.

Finally, the twelfth Sonnax factor considers the impact of the stay on the parties and the balance of harms. During the pendency of these chapter 11 cases, the Debtors' estates' limited resources are better spent stabilizing their operations and cash flows, rather than litigating a class action suit. Forcing the Debtors to litigate at this point would distract and hinder the Debtors from their reorganization efforts and would take away the "breathing space" necessary to allow them to restructure and preserve the value of their assets for the benefit of their creditors. Also damaging is the threat of other lift stay motions that will be filed by other putative class action litigants if the Lift Stay Motion is granted, leading to an unnecessary drain on the Debtors' resources and an untimely distraction from the reorganization process. In addition, the Carrera Plaintiffs have not demonstrated that they will suffer any great hardship if the Lift Stay Motion is denied. Whether awarded such claims sooner rather than later, they are no more prejudiced than any other potential creditor by what the Debtors anticipate will only be a short-term delay until a plan of reorganization is confirmed. This Sonnax factor therefore weighs heavily in favor of denying the lift stay.

Accordingly, pursuant to the Sonnax factors, the Lift Stay Motion shall be denied.

CONCLUSION

For the reasons set forth above and at oral argument, the Motion for Order to Allow Class Proof of Claim by the Carrera Class Claimants, the Motion by Carrera Class Claimants for Order Lifting the Automatic Stay, or in the Alternative, for Class Certification, and Creditor Francisco Flores' Motion for Class Certification are hereby denied.

IT IS SO ORDERED.

Dated: April 7, 2009
New York, New York

/s/Burton R. Lifland
Honorable Burton R. Lifland
United States Bankruptcy Judge

SETTLEMENT OF CLASS ACTIONS
IN CHAPTER 11 CASES

Kenneth S. Marks
Susman Godfrey L.L.P.

I. THE RULES APPLICABLE TO CLASS ACTION SETTLEMENTS IN CHAPTER 11 CASES

A. Class Action Settlements Must Satisfy Rule Fed. R. Civ. P. 23(e).

1. Bankruptcy Rule 7023 makes Fed. R. Civ. P. 23 applicable in adversary proceedings. *See* 6 Alba Conte & Herbert Newberg, Newberg on Class Actions § 20:6 (4th ed. 2002) ("Compliance with class notice and court approval requirements, pursuant to Rule 23 or analogous state class action rules, is necessary whether the settlement is within the jurisdiction of the bankruptcy court or the district or state court.").

2. Bankruptcy Rule 9014 allows Rule 7023 to apply in contested matters.

   - Although Rule 9014(c) specifies that certain rules apply in contested matters, and the specified rules do not include Rule 7023, it provides that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." To apply Rule 7023 in a contested matter, the bankruptcy court "shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order." Bankr. Rule 9014(c).

3. Fed. R. Civ. P. 23(e) provides that a class action may be settled or voluntarily dismissed "only with the court's approval" and directs that the following procedures apply to a proposed settlement or dismissal:

   a. Notice must be given "in a reasonable manner" to class members.

   b. A hearing must be held and the settlement approved only if the court determines it is "fair, reasonable and adequate."

   c. "[A]ny agreement made in connection with" the settlement must be identified to the court.

   d. If the class was previously certified under Rule 23(b)(3), the court may offer class members another opportunity to opt out.

e. Class members may object to the proposed settlement.

B. Settlements in Bankruptcy Court Must Satisfy Bankruptcy Rule 9019.

1. Under Rule 9019(a), "[o]n motion . . . and after notice and a hearing, the court may approve a compromise or settlement."

2. Although not prescribed in Rule 9019, the standard for approval of settlements in bankruptcy court is whether the settlement is "fair and equitable and in the best interest of the estate." Connecticut Gen'l Life Ins. Co. v. United Companies Fin. Corp., 68 F.3d 914, 917 (5th Cir. 1995); see Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 88 S.Ct. 1157, 1163 (1968) (recognizing "the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable.").

C. The Court has Different Perspectives in Reviewing Settlements Under Fed. R. Civ. P. 23(e) and Bankruptcy Rule 9019.

1. Under Rule 23(e), the court's focus is on fairness of the settlement from the standpoint of the members of the class. *Amchem Products, Inc. v. Windsor,* 117 S.Ct. 2231, 2249 (1997) ("The inquiry appropriate under Rule 23(e) . . . protects unnamed class members."); *Piambino v. Bailey,* 610 F.2d 1306, 1327 (5th Cir.), *cert. denied,* 101 S.Ct. 568 (1980) ("Rule 23(e) requires the trial judge to review any proposed settlement of a class action. The purpose of this salutary requirement is to protect the nonparty members of the class from unjust or unfair settlements affecting their rights."); *see In re General Motors Corp. Pick-up Truck Fuel Tank Products Liab. Lit.,* 55 F.3d 768, 785 (3d Cir.), *cert. denied,* 116 S.Ct. 88 (1995) ("Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.").

   Possible conflicts the court must guard against in reviewing a settlement are those between plaintiffs' counsel and the class, between the class representatives and the absent class members, and, in cases involving subclasses, between members of different subclasses. E.g., Piambino v. Bailey, 610 F.2d 1306, 1327-28 (5th Cir.), cert. denied, 101 S.Ct. 568 (1980).

2. The bankruptcy court's focus under Bankruptcy Rule 9019 is on fairness of the settlement from the standpoint of the debtor's estate. In re Refco Inc., 505 F.3d 109, 119 (2d Cir. 2007) ("[A] bankruptcy court's obligation

is to determine whether a settlement is in the best interests of the estate.") (emphasis in original); CFB-5, Inc. v. Cunningham, 371 B.R. 175, 181 (N.D. Tex. 2007) ("In ruling on a motion to approve a compromise, the role of the Bankruptcy Court is to determine whether the compromise reached is in the best interest of the creditors of the estate.").

3. In *In re Worldcom, Inc.,* 347 B.R. 123, 139-40 (Bankr. S.D.N.Y. 2006), the bankruptcy court rejected the argument that the objectives of Rule 23(e) and Bankruptcy Rule 9019 could not be reconciled by one judge. In that case, objectors to a class action settlement under consideration by the bankruptcy court argued that the competing obligations under Rule 23(e) and Bankruptcy Rule 9019 required the court to "wear two hats and apply competing standards." *Id.* The court "recognized that it faces an unusual situation here in which it must analyze the fairness of the Settlement relative to two opposing parties and from the perspective of each," but concluded that "it is possible that the Settlement will fall within the appropriate range of reasonableness or fairness as is required for each party and therefore warrant approval under both Rule 23 and Rule 9019." *Id.*

II. THE TESTS FOR DETERMINING WHETHER TO APPROVE A CLASS ACTION SETTLEMENT

A. The Test Under Rule 23(e) is Whether the Settlement is Fair, Reasonable and Adequate.

1. Courts analyze a number of factors in determining whether to approve a class action settlement. Virtually all courts assess the terms of a proposed settlement against:

a. the likelihood of success on the merits and the range of probable recoveries;

b. the stage of the proceeding at which settlement was achieved, including the amount and type of discovery concluded;

c. the expense, duration and likely complexity of continued litigation;

d. whether there are indicia of fraud or collusion in reaching the settlement; and

e. the number and nature of objections to the settlement by members of the class.

E.g., Churchill Village, L.L.C. v. General Electric, 361 F.3d 566, 575 (9th Cir.), *cert. denied,* 125 S.Ct. 56 (2004); *Ayers v. Thompson,* 358 F.3d 356, 369 (5th Cir.), *cert. denied,* 125 S.Ct. 372 (2004); *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liab. Lit.,* 55 F.3d 768, 785 (3d Cir.), *cert. denied,* 116 S.Ct. 88 (1995) (employing the nine-factors set out in *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975)).

2. In addition to these factors, some courts also consider:

   a. the opinion of class counsel about the settlement, even though it was class counsel who negotiated the settlement, *e.g., Strube v. American Equity Investment Life Ins. Co.,* 226 F.R.D. 688, 697 (M.D. Fla. 2005); *In re Lorazepam & Clorazepate Antitrust Lit.,* 205 F.R.D. 369, 375, 380 (D. D.C. 2002);

   b. the interest of the public in the settlement, *e.g., UAW v. General Motors Corp.,* 497 F.3d 615, 631 (6th Cir. 2007); and/or

   c. the presence and view of a governmental authority, *e.g., In re Immune Response Sec. Lit.,* 497 F.Supp.2d 1166, 1170 (S.D. Cal. 2007); *In re Lorazepam & Clorazepate Antitrust Lit.,* 205 F.R.D. at 380 (noting that the "Court may place greater weight on the opinion" of the Federal Trade Commission, a party to the case and the settlement, as an agency "committed to protecting the public interest.")

3. A potentially important factor in assessing a class action settlement in many cases is the ability of the defendant to pay. *E.g., Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1295 (9th Cir.), *cert. denied,* 113 S.Ct. 408 (1992); *In re Lupron Marketing and Sales Practices Lit.,* 228 F.R.D. 75, 93-94 (D. Mass. 2005) (considering "ability of defendant to withstand a greater judgment"); *In re Washington Public Power Supply System Sec. Lit.,* 720 F.Supp. 1379, 1387 (D. Ariz. 1989) (considering "defendant's ability to pay a judgment larger than the amount provided by the proposed settlement"); *see In re Worldcom, Inc.,* 347 B.R. 123, 147 (Bankr. S.D.N.Y. 2006) (noting that the defendant's ability to pay "is of uncertain utility in the context of an ongoing bankruptcy proceeding.").

B. The Test Under Bankruptcy Rule 9019 is Whether the Settlement is Fair and Equitable and in the Best Interest of the Estate.

   1. Bankruptcy courts consider factors similar to those under Fed. R. Civ. P. 23(e) in evaluating settlements under Rule 9019, although generally there is less emphasis on the process leading up to the settlement. *See In re Worldcom, Inc.,* 347 B.R. 123, 137 (Bankr. S.D.N.Y. 2006) (noting that

settlements under Rule 23(e), unlike under Rule 9019, have "both a procedural and a substantive component). Bankruptcy courts typically consider the factors set forth in *Myers v. Martin,* 91 F.3d 389, 393 (3d Cir. 1996), which are:

a. the probability of success in litigation;

b. the likely difficulties in collection;

c. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and

d. the paramount interest of the creditors.

E.g., In re Nutraquest, Inc., 434 F.3d 639, 644 (3d Cir. 2006); In re Winn-Dixie Stores, Inc., 356 B.R. 239, 249 (Bankr. M.D. Fla. 2006); In re Etoys, Inc., 331 B.R. 176, 198 (Bankr. D. Del. 2005); In re Lahijani, 325 B.R. 282, 290 (B.A.P. 9th Cir. 2005).

2. In addition, courts in the Second Circuit also consider (a) whether other parties in interest support the settlement; (b) the competency and experience of counsel supporting the settlement; and (c) the extent to which the settlement is the product of arm's length bargaining. In re Iridium Operating LLC, 478 F.3d 452, 462 (2d Cir. 2007); In re Worldcom, Inc., 347 B.R. 123, 137 (Bankr. S.D.N.Y. 2006); In re Joseph, 340 B.R. 694, 697 (Bankr. D. Conn. 2006).

C. Under Both Fed. R. Civ. P. 23(e) and Bankruptcy Rule 9019 the court's assessment of a proposed class action settlement is a fact intensive undertaking, which is subject to review for abuse of discretion. *E.g., In re Iridium Operating LLC,* 478 F.3d 452, 461 n. 13 (2d Cir. 2007) (bankruptcy court's approval of settlements under Rule 9019 is reviewed for abuse of discretion, although its articulation of the legal standard is reviewed de novo); *In re Warfarin Sodium Antitrust Lit.,* 391 F.3d 516, 535 (3d Cir. 2004) ("The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court, and we accord great deference to the district court's factual findings."); *In re Lahijani,* 325 B.R. 282, 290 (B.A.P. 9th Cir. 2005) (recognizing that analysis of settlements under Rule 9019 is "inherently fact-intensive, relative and contextual"); *Blackman v. Dist. of Columbia,* 454 F.Supp.2d 1, 8 (D. D.C. 2006) (in reviewing settlements under Rule 23(e) court must "consider the facts and circumstances of the case.").

D. Ultimately, the issue under both Rule 23(e) and Rule 9019 is whether the proposed settlement, in light of the relevant factors considered by the court, falls within the range of reasonableness. *E.g., In re Warfarin Sodium Antitrust Lit.,* 391 F.3d 516, 538-39 (3d Cir. 2004) (analyzing settlement of antitrust class action both as against potential range of recoverable damages and against settlements in other drug industry antitrust cases); *In re Cendant Corp. Lit.*, 264 F.3d 201, 241-42 (3d Cir. 2001), *cert. denied,* 122 S.Ct. 1300 (2002) (analyzing settlement of securities class action in same way and noting one study showing the range of recoveries in securities class actions is from 1.6% to 14% of claimed damages); *In re Worldcom, Inc.*, 347 B.R. 123, 137 (Bankr. S.D.N.Y. 2006) (Under Rule 9019, the court "need only 'canvass the issues' to determine if the 'settlement falls below the lowest point in the range of reasonableness.'" (quoting *In re Teltronics Services, Inc.*, 762 F.2d 185, 189 (2d Cir. 1985)); *In re Drexel, Burnham Lambert Group, Inc.*, 130 B.R. 910, 924 (S.D.N.Y. 1991), *aff'd,* 960 F.2d 285 (2d Cir. 1992) ("Courts should approve a class settlement if it falls within a range of reasonableness which recognizes the uncertainty of law and fact in any particular case and the concomitant risks and costs necessarily inherent in carrying any litigation to completion.").

III. NOTICE AND OTHER REQUIREMENTS FOR CLASS ACTION SETTLEMENTS IN CHAPTER 11 CASES

A. Notice of a Proposed Class Action Settlement Under Fed. R. Civ. P. 23

1. Rule 23(e)(1) requires that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal."

   a. The means and content of the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 70 S.Ct. 652, 657 (1950). To the extent that the notice includes notice of a settlement class under Rule 23(b)(3), the notice must include those items required under Rule 23(c)(2)(B).

   b. The general rule is that individual notice should be given to all class members who can be identified with reasonable effort. *Pigford v. Veneman,* 355 F.Supp.2d 148, 162 (D. D.C. 2005) ("If all (or most) class members can be individually identified and located, courts will require that individual notice be sent via mail or other direct means."); *see Eisen v. Carlisle & Jacquelin,* 94 S.Ct. 2140, 2151 (1974); *DeJulius v. New England Health Care Employees Pension Fund,* 429 F.3d 935, 943 (10th Cir. 2005) (noting that individual notice in cases under Rule 23(b)(3) may be required by Rule 23(c)(2)(B)). "When all class members cannot be identified, however, practical issues of effectuating notice arise and other methods, such as publication in newspapers or periodicals, are deemed sufficient." *Pigford,* 355 F.Supp.2d at 162; *see Dehoyos v. Allstate Corp.,* 240 F.R.D. 269, 296 (W.D. Tex. 2007) (individual notice not required to class of African-American and Hispanic policyholders of Allstate because Allstate cannot identify them from its records); *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 438 (2d Cir. 2007) (approving settlement notice in antitrust class action sent by debtor through class action claims administrator).

2. Notice must be sent sufficiently in advance of the settlement approval hearing to afford class members an opportunity to be heard. *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1374 (9th Cir. 1993), *cert. denied,* 114 S.Ct. 2707 (1994); *In re Agent Orange Prod. Liab. Lit.,* 597 F.Supp. 740, 759 (E.D.N.Y. 1984).

   a. Courts have approved a range of notice periods, depending upon the circumstances, although thirty days would seem to be the minimum in most cases. *E.g., Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1374-75 (9th Cir. 1993), *cert. denied,* 114 S.Ct. 2707 (1994) (approving notice in ERISA class action mailed 31 days before deadline for submitting objections and 45 days before settlement approval hearing); *In re BankAmerica Corp. Sec. Lit.,* 210 F.R.D. 694, 708 (E.D. Mo. 2002) (approving notice in securities class action mailed four weeks before deadline for submitting objections and seven weeks before settlement approval hearing); *Pigford v. Glickman,* 185 F.R.D. 82, 102 (D. D.C. 1999), *aff'd,* 206 F.3d 1212 (D.C. Cir. 2000) (approving notice in class action under Equal Credit Opportunity Act mailed one month before deadline for objections and six weeks before settlement approval hearing).

   b. Under the Class Action Fairness Act ("CAFA"), in class actions filed in federal court under Rule 23 or filed in state court under state class action rules and removed to federal court, defendants must serve copies of the proposed settlement and other information upon designated state or federal officials. 28 U.S.C. § 1715(b). "An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)." 28 U.S.C. § 1715(d). Thus, in most class actions, the order giving final approval to a settlement cannot be entered until at least 90 days after the notice required by CAFA is given. The hearing to consider approval of the proposed settlement, however, may proceed at an earlier date.

B. Notice of a Proposed Settlement Under Rule 9019

·Bankruptcy Rule 2002(a)(3) provides for "at least 20 days' notice" to creditors of the hearing on approval of a compromise or settlement. The bankruptcy court may "for cause shown" direct that notice not be sent.

C. Settlement Classes Under Fed. R. Civ. P. 23

1. Settlement classes must meet the requirements for certification under Rule 23. Many class actions are settled before a class has been certified by the court. In these cases, the court must, as part of the settlement approval process, determine that the class action satisfies the requirements of Rule 23. Denney v. Deutsche Bank AG, 443 F.3d 253, 270 (2d Cir. 2006) ("Before certification is proper for any purpose – settlement, litigation, or otherwise – a court must ensure that the requirements of Rule 23(a) and (b) have been met."); Mehling v. New York Life Ins. Co., 246 F.R.D. 467, 474 (E.D. Pa. 2007) ("Settlement classes must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirements.").

2. The requirements for certification of a class under Rule 23 are:

a. All of the standards of Rule 23(a) are met, that is,

(1) "the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class."

Fed. R. Civ. P. 23(a).

b. And one of the standards of Rule 23(b) is met, that is,

(1) prosecuting separate actions would create a risk of (A) inconsistent or varying adjudications that would create incompatible standards for the party opposing the class, or (B) adjudications for individuals that, as a practical matter, would be dispositive of the interests of others not party to the proceeding or that would substantially impair the ability of the nonparties to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief is appropriate for the class as a whole; or

(3) questions of law or fact common to class members predominate over questions affecting individual class members, and a class action is superior to other methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b).

IV. EXAMPLES OF CLASS ACTION SETTLEMENTS IN CHAPTER 11 CASES

A. Class Action Settlement in the Course of a Chapter 11 Case

In re Worldcom, Inc., 347 B.R. 123 (Bankr. S.D.N.Y. 2006)

1. In the course of the massive bankruptcy of Worldcom, the bankruptcy court had to consider whether to approve the settlement of a pre-petition class action filed in state court in Louisiana against the debtor. The class action alleged that telecommunications companies, including a predecessor of Worldcom, had wrongfully installed fiber optic cable in railroad rights-of-way crossing class members' properties. A settlement was reached between the parties but before it could be finally approved by the state court Worldcom filed bankruptcy. After Worldcom's bankruptcy, the class filed a class proof of claim and thereafter entered into additional settlement negotiations with the debtor. A settlement was reached, and a motion was filed seeking approval of the class action settlement.

2. The bankruptcy court reviewed the settlement under both Bankruptcy Rule 9019 and Fed. R. Civ. P. 23(e). 347 B.R. at 136-38. The court rejected arguments made by two objectors to the settlement that it could not "reconcile . . . competing obligations under Rule 23 and Rule 9019." *Id.* at 139-40. The court found the settlement to be within the range of reasonableness after considering the nine factors identified by courts in the Second Circuit under Rule 23. *Id.* at 144-49. It also reviewed the criteria for approval of the settlement under Rule 9019. *Id.* at 149. Next, the bankruptcy court examined the criteria under Rule 23(a) and 23(b)(3) for certification of a settlement class. *Id.* at 141-43. Finding these criteria satisfied, the court certified the class for settlement purposes. *Id.* at 143. The motion to approve the settlement was granted. *Id.* at 156.

B. Class Action Settlement Integral to a Plan of Reorganization

In re Drexel, Burnham Lambert Group, Inc., 130 B.R. 910 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992)

1. When Drexel filed for bankruptcy in 1990, it was facing numerous suits for securities fraud. Including proofs of claim filed in its bankruptcy, Drexel ultimately was named in 850 securities claims with aggregate claimed damages in excess of $20 billion. 130 B.R. at 914. At the time, Drexel had assets of approximately $2.5 billion and a like amount of non-securities liabilities. *Id.* at 913. While certain parties argued for the court to conduct estimation proceedings for each of the securities claims, the court issued a notice that the case would be converted to a Chapter 7 case unless the parties were able to agree on a means of resolving the claims. *Id.* at 915. The district court withdrew the reference of the securities claims to the bankruptcy court. *Id.*

2. Through a Securities Litigation Claimants Group (which included the SEC and the FDIC), the securities claimants negotiated with the debtor and representatives of Drexel's non-securities creditors. A settlement was reached, after months of negotiations, and a motion to approve the settlement was presented jointly to the bankruptcy court and the district court. The settlement required the 850 securities claims to be certified as a mandatory, non-opt out class action against Drexel. 960 F.2d at 288. Included among this class of claims were many claims that in themselves were class actions. 130 B.R. at 918. The mandatory settlement class was divided into two subclasses of claims. *Id.* The settlement allocated among the subclasses an SEC fund created through settlement with Drexel, allocated to the subclasses a percentage of Drexel's assets, and provided for the subclasses to pool their recoveries from lawsuits brought against the former officers and directors of Drexel. 960 F.2d at 288-89.

3. The settlement was conditioned upon approval of a separate plan of reorganization of Drexel. 130 B.R. at 926 ("Both the Settlement and Plan exist, and each must receive separate judicial approval."). The settlement, however, was essential to a reorganization of Drexel. *Id.* at 926-27 ("In the absence of the Settlement, there could be no Plan and indeed, no successful and prompt resolution of these Chapter 11 cases."); 960 F.2d at 293 ("The Settlement Agreement is unquestionably an essential element of Drexel's ultimate reorganization.").

4. Certification of the settlement class was reviewed under Rule 23(a) and (b)(1). A mandatory, non-opt out class under 23(b)(1) was appropriate because Drexel's assets "constitute a limited fund which is dwindling and which is insufficient to satisfy all claims of the class members." 130 B.R. at 920; *see* 960 F.2d at 292. The Second Circuit recognized that this was not a typical "limited fund" case because Drexel's bankruptcy prevented its assets from being

distributed "on the first come, first served basis that usually warrants class treatment under Rule 23(b)(1)(B)." *Id.* Nonetheless, the court of appeals agreed with certification of a mandatory, non-opt class because "some members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members." *Id.* A mandatory, non-opt out class was appropriate to "prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members." *Id.*

5. Approval of the settlement was analyzed under the standards of both Fed. R. Civ. P. 23 and Bankruptcy Rule 9019. 130 B.R. at 924-27.

6. The settlement included an injunction barring members of one subclass from bring suit against the officers and directors of Drexel. 960 F.2d at 293. The Second Circuit upheld the injunction against suits against non-debtors because "[i]n bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." *Id.* at 293. The injunction in this case was important because by limiting the number of suits against Drexel's officers and directors it "enable[d] the directors and officers to settle" the existing suits against them "without fear that future suits will be filed." *Id.* These settlements, in turn, would increase the amount available to all creditors of Drexel. 130 B.R. at 928.[1]

[1] *See also In re A.H. Robins Co.,* 880 F.2d 694, 701 (4th Cir.), *cert. denied,* 110 S.Ct. 376 (1989) (upholding injunction barring suits against debtor's directors and outside counsel and debtor's insurer and its outside counsel because such suits "would affect the bankruptcy reorganization in one way or another such as by way of indemnity or contribution."). In a recent opinion, the Second Circuit held that the jurisdiction of the bankruptcy courts to issue injunctions against non-debtors is limited to "claims that directly affect the *res* of the bankruptcy estate." *In re Johns-Manville Corp.,* 517 F.3d 52, 62 (2d Cir. 2008). In that case, the court held that an injunction barring asbestos claimants from suing an insurer of Johns-Manville for claims based on the insurer's breach of its own duty to the claimants exceeded the bankruptcy court's jurisdiction: "We conclude that the bankruptcy court erred insofar as it enjoined suits that, as a matter of state law, are predicated upon an independent duty owed by Travelers to the Appellants, that do not claim against the *res* of the Manville estate, and that seek damages in excess of and unrelated to Manville's insurance policy proceeds." *Id.* at 55.

--- B.R. ----, 2012 WL 310815 (D.Del.)
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United States District Court,
D. Delaware.
In re W.R. GRACE & CO., et. al., Debtors.

Civil Action Nos. 11–199, 11–200, 11–201, 11–202, 11–203, 11–207, 11–208, 09–644, 09–807.
Jan. 30, 2012.

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MEMORANDUM OPINION
RONALD L. BUCKWALTER, Senior District Judge.[FN1]

FN1. Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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***1** This Memorandum Opinion now addresses the appeals of final judgments of the United States Bankruptcy Court for the District of Delaware ("the Bankruptcy Court") related to the United States Bankruptcy Code Chapter 11 reorganization of Appellee W.R. Grace & Co., *et. al.* ("Grace").[FN2] By Orders dated May 19, 2009,[FN3] January 22, 2011,[FN4] and January 31, 2011,[FN5] the Honorable Judith K. Fitzgerald, the United States Bankruptcy Judge presiding over Appellee's reorganization case for approximately ten years, entered and/or approved the Settlement Agreement between Grace and Continental Casualty Company and Continental Insurance Company ("CNA Companies" or "CNA"),[FN6] and the Joint Plan of Reorganization ("the Joint Plan" or "the Plan") of Debtor Grace under Chapter 11. In support of these Orders, Judge Fitzgerald provided over 100 pages of careful analysis of the Settlement Agreement and the Joint Plan (itself consisting of 152 pages) in her Memorandum Opinions and adjoining Findings of Fact and Conclusions of Law.

FN2. Appellee Grace consists of sixty-two separate corporate entities. For clarity and ease of reference, the debtors are collectively referred to hereinafter as "Grace."

FN3. (*See* Bankr.No. 01–1139, Doc. No. 21747, 05/19/09, Memorandum Opinion and Order Sustaining Debtors' Objection to Unsecured Claims insofar as Claims Include Postpetition Interest at the Contract Default Rate.)

FN4. (*See* Bankr.No. 01–1139, Doc. No. 26106, 01/22/11, Order Pursuant to Section 105, 363, 1107, and 1108 of the Bankruptcy Code and Rules 2002, 6004, 9014, and 9019 of the Federal Rules of Bankruptcy Procedure Approving the Settlement Agreement Between W.R. Grace & Co. and the CNA Companies.)

FN5. (*See* Bankr.No. 01–1139, Doc. No. 26154, 26155, 01/31/11, Memorandum Opinion Regarding Objections to Confirmation of First Amended Joint Plan of Reorganization and Recommended Supplemental Findings of Fact and Conclusions of Law.)

FN6. The CNA Companies consist of several insurance companies joined together over the course of this litigation as a result of mergers and successions, including: Continental Casualty Company, Continental Insurance Company, Pacific Insurance Company, Boston Old Colony Insurance Company, Harbor Insurance Company, Buffalo Insurance Company, Buffalo Reinsurance Company, and London Guarantee & Accident Company of New York. For clarity and ease of reference, these insurance entities are collectively referred to hereinafter as the "CNA Companies."

Presently before the Court are two separate but related matters: (1) approval of the aforementioned Settlement Agreement; and (2) confirmation of the Joint Plan. The Court has carefully and fully considered the parties' objections and has completed an extensive review of nine separate court dockets, approximately 2,000 pages of party briefing, 460 pages of oral argument testimony before this Court, and several thousand pages of the supporting record. The Court now finds that the parties' Objections are denied, and (1) the Settlement Agreement between Grace and the CNA Companies is approved; and (2) the Joint Plan is confirmed in its entirety.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Appellee Grace is an expansive corporation engaged in the manufacture of chemicals and construction materials. Grace operates in both the domestic and global markets, and has diversified and extensive business activities. One component of its business involves the physical extraction of natural resources from the earth. Grace also refines these natural resources, and converts them through a process known as "expansion" into manufactured materials utilized for building construction and insulation. Despite its vast size and multifarious business activities, Grace has experienced serious financial difficulty as a result of its involvement in multiple tracks of extensive and expensive protracted litigation over the years, which cumulatively lead to Grace filing for Chapter 11 bankruptcy in 2001.

A. The Personal Injury Asbestos Litigation

From 1963 until 1990, Grace owned and operated a mine in Montana. The mine was located seven miles northeast of Libby, a small town situated in a narrow valley enclosed by tall mountains. Miners at the Libby mine extracted vermiculite, a natural mineral composed of shiny flakes that has since been linked to an especially carcinogenic form of asbestos. Following extraction, the vermiculite was processed using a procedure that generated a substantial degree of airborne dust. It was subsequently determined that the milling process used at the Libby mine emitted up to 5,000 pounds of asbestos per day into the atmosphere. The Libby residents were significantly exposed to asbestos due to the town's close proximity to the mine and its geographic location in a valley, which had the effect of concentrating vermiculite particles in the atmosphere. As a result, a significant number of both Libby residents and former Grace miners developed a plethora of pleural abnormalities.[FN7] The town was subsequently declared a Public Health Emergency Area by the Environmental Protection Agency ("EPA"), and continues to have the highest death rate of pleural disease related to asbestos of all counties in the United States.

FN7. Pleural disease encompasses many different medical conditions caused by an inflammation of the tissue surrounding the lungs and lining the chest cavity.

*2 Beginning in the 1970s, persons alleging injuries from exposure to asbestos in Libby (hereinafter collectively referred to as the "Libby Claimants") filed suit against Grace. The volume and amount demanded on such claims drastically surged between 1999 and 2000, due to a series of events in the tort system that highlighted Grace as a litigation defendant.[FN8] By 2001, Grace was involved in over 65,000 asbestos-related personal injury lawsuits involving over 129,000 claims. The asbestos litigation had a drastic effect on Grace's financial stability and corporate profitability. As time went on and more claims were filed, Grace faced the likelihood of not being able to satisfy any claims filed against it both presently and in the future.

FN8. Specifically, several other major corporations (many of which were Grace competitors) filed for Chapter 11 bankruptcy as a result of their own asbestos liability, which caused an increased focus on Grace as a mass tort litigation defendant. This time period of asbestos litigation bankruptcy filings is summarized in the chart below, as originally seen in *In re Asbestos Litigation*, No. 0001, 2002 WL 1305991, at *2 (Pa. D. & C.4th June 11, 2002), *rev'd on other grounds*

Ieropoli v. AC & S Corp., 842 A.2d 919 (Pa.2004).

Company	Bankruptcy Petition Date
Babcock & Wilcox	February 2000
Pittsburgh Corning	April 2000
Owens Corning	October 2000
Armstrong World Industries	December 2000
G–I Holdings	January 2001
W.R. Grace	**April 2001**
U.S. Gypsum	June 2001
United States Mineral Products	July 2001

B. The State of Montana Duty to Warn Litigation

The State of Montana ("Montana") conducted various state inspections over the course of the mine's operation to monitor the site's safety and health conditions. The Libby mine failed every state inspection between 1956 and 1974, and state inspectors found that the mine exhibited unsafe and unsanitary conditions. During these failed inspections, Montana allegedly informed Grace of the dangers of asbestos and its connection to pleural disease. A majority of Libby residents and Grace employees, however, remained unaware of the potential danger. As a result, Montana has been named as a defendant in over 180 cases filed in various Montana state courts, alleging that the State undertook affirmative duties when it performed the inspections and failed to warn former Grace employees and Libby residents of the asbestos risks associated with the nearby mine. More than fifty of these lawsuits allege that Montana "aided and abetted" Grace in its operation of the mine.

On or about March 25, 2003, Montana began to file Proofs of Claims against Grace's bankruptcy estate before the Bankruptcy Court for contribution and indemnification related to the pending state court actions. On December 14, 2004, the Montana Supreme Court held that under state law, Montana had a duty to provide Libby residents with public health-related information, and remanded the case to the state trial court to determine whether Montana had in fact breached that duty. *See* Orr v. State, 324 Mont. 391, 401; 106. P.3d 100, 107 (Mont.2004). Not wanting to be the sole bearer of asbestos liability, on June 9, 2005, Montana requested the Bankruptcy Court to exempt it from the automatic stay of litigation against Grace so that it could implead Grace as a third-party defendant in the Montana state court actions.[FN9] In response, Grace filed a motion requesting the Bankruptcy Court to expand the injunction so as to encompass actions brought against Montana because the two parties shared an identity of interests. The Bankruptcy Court denied Grace's motion on the grounds that it lacked "related-to" subject matter jurisdiction to enjoin the state-court proceedings since Grace's bankruptcy estate would not be directly affected by the outcome of the Montana proceedings. *See* In re W.R. Grace & Co., 366 B.R. 295, 301 (Bankr.D.Del.2007). Specifically, the Bankruptcy Court found that "Montana must first be found liable in state court and then pursue its claim for indemnification in bankruptcy court." [FN10] *Id.* In August of 2008, this Court affirmed. *See* In re W.R. Grace & Co., No. Civ. A. 08–246, 2008 WL 3522453, at *6 (D.Del. Aug. 12, 2008). The United States Court of Appeals for the Third Circuit upheld this Court's holding in 2009. *See* In re W.R. Grace & Co., 591 F.3d 164, 172–73 (3d Cir.2009). Montana maintains, however, that its claims are derivative of Grace's liability and that Grace therefore presently owes it indemnity and contribution.

FN9. When Grace filed its bankruptcy petition in 2001, it was granted an automatic stay against all ongoing and future legal proceedings. This injunctive relief, available under § 362 of the Bankruptcy Code, is awarded to all Chapter 11 petitioners. *See* 11 U.S.C. § 362(a) (stating that the filing of a bankruptcy petition results in the automatic stay of all "judicial, administrative, or other action or proceeding against the debtor[.]"). Grace's bankruptcy petition is more fully discussed, *infra.*

FN10. The Bankruptcy Court reasoned that if the state court did not find that Montana breached its duty, then indemnification and/or contribution would not be permissible. It went on to note that even if a breach of duty were found, Montana would still have to bring entirely separate proceedings to receive any indemnification or contribution from Grace. *See id.*

C. BNSF Railway Company Litigation

*3 Burlington Northern Santa Fe Railway ("BNSF") is a railroad company that entered into leases and agreements with Grace over the years related to operation of the Libby mine and shipment of Grace's asbestos-contaminated products. Specifically, BNSF leased property to Grace that was adjacent to the railroad. On this BNSF property, Grace built a suspension bridge and loading dock, which it used to transport vermiculite from the mine to railroad cars. Once the vermiculite was loaded onto the cars, it was shipped throughout the country on tracks owned by BNSF. Moreover, under the terms of several of the aforementioned leases and agreements, Grace agreed to indemnify BNSF for any asbestos-related personal injury claims that could be asserted against BNSF.

After the harmful effects of the vermiculite were discovered in Libby, personal injury claims were filed against BNSF, claiming that it should be held strictly liable for Grace's handling of asbestos-contaminated materials on BNSF property, or, in the alternative, that BNSF negligently allowed Grace to handle hazardous materials on its property. BNSF now contends that it has the right to be fully indemnified for the claims and defense costs stemming from this litigation.

D. The Property Damage Litigation

Grace has also been involved in numerous property damage class action disputes related to asbestos. This litigation is of two different types: (1) "traditional" property damage claims; and (2) Zonolite Attic Insulation ("ZAI") property damage claims.

Traditional property damage claimants allege that building and insulation materials manufactured by Grace contained asbestos and were used in the foundational structure of many public and private buildings. Over 4,000 such traditional property damage claims were filed against Grace alleging damages for costs incurred in the removal and replacement of asbestos products from buildings. Over a period of many years, Grace attempted to settle the traditional property damage claims. Approximately 1,136 of the initially filed 4,000 claims were withdrawn or dismissed as improperly filed. Litigation ultimately reduced the remaining amount of claims, and Grace was able to negotiate and settle approximately 407 claims for a total of $147 million. [FN11] To date, these settlements remain outstanding because they are contingent upon approval of the Joint Plan at issue. Appellant Anderson Memorial Hospital ("AMH"), a class of property owners of a hospital complex based in Anderson, South Carolina that utilized Grace products in its building construction, remains the only traditional property damage claimant that has not yet reached an agreement with Grace.

FN11. Specifically, Grace entered into the following settlements: (1) California State University and University of California for $1.4 million; (2) Pacific Freeholds Ltd., Inc. for $9,043,375; (3) various hospitals and healthcare facilities for $576,250; (4) several private commercial building owners in the United States for $16 million; and (5) building owners in Canada for $2.5 million.

The second type of asbestos property damage litigation is ZAI property damage claims. The basis of these claims is that Grace manufactured a loose-fill insulation product containing traces of asbestos, ZAI, that was subsequently used in the attics of many private homes. The affected class of plaintiffs claim damages for allegedly reduced property values and costs associated with the removal of ZAI from their homes. The ZAI property damage litigation has proven to be extremely time-consuming and expensive, including a separate "science trial" to determine certain highly-technical scientific claims.

E. The Canadian Class Action Litigation

*4 Grace's ZAI insulation products were also used in buildings in Canada. There are currently ten class action suits pending in Canada that relate to: (1) the cost of removal of asbestos from homes and buildings, diminutions of property values, and economic loss caused by ZAI products; and (2) personal injuries allegedly caused by exposure to ZAI. Additionally, the Canadian Province of Manitoba has brought suit for healthcare costs incurred or to be incurred in relation to the treatment of class members that were exposed to ZAI products. Both Grace and Her Majesty the Queen in the Right of Canada (hereinafter "the Crown" or "Canada") have been named as defendants in these class actions. The proposed representative class action plaintiffs allege, *inter alia,* that the Crown breached its duty to warn them of the dangers associated with ZAI products and asbestos.

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Recognizing their similar interests in the case at hand, Montana and the Crown have jointly presented a majority of their arguments to this Court. Several sections of both parties' appellate briefs mirror each other, and the two appellants chose to argue together at Oral Argument before this Court on June 28–29, 2011. As such, the Court will address their claims together below.

F. Estate Asset and Fraudulent Conveyance Litigation with Grace Subsidiaries

In the 1990s, Grace spun off various of its business activities to two of its subsidiary corporations, Sealed Air Corporation and Cryovac, Inc. ("Sealed Air") and Fresenius Medical Care Holdings, Inc. ("Fresenius"). Both companies were involved in litigation alongside Grace alleging successor liability and fraudulent transfer of estate assets from Grace to its subsidiaries. Specifically, it was alleged that Grace had fraudulently transferred its assets to Sealed Air and Fresenius to the detriment of creditors holding asbestos claims against Grace. The amount of disputed assets totaled billions of dollars. Additionally, both Sealed Air and Fresenius were also named as co-defendants alongside Grace in thousands of ongoing asbestos personal injury cases nationwide, and both subsidiaries sought indemnification from Grace pursuant to their parent-subsidiary contracts.

Grace and its subsidiaries entered into settlements shortly after Grace filed its bankruptcy petition in 2001. Under the terms of the settlements, Sealed Air and Fresenius agreed to contribute over $1.1 billion to Grace's bankruptcy estate in exchange for their release from any future liability related to Grace's asbestos litigation.

G. Garlock Sealing Technologies Litigation

Garlock Sealing Technologies LLC ("Garlock") is a manufacturer of engineered industrial products. Some products that Garlock previously manufactured contained asbestos. These products were utilized by several large corporations, including Grace.

When the harmful effects of asbestos were discovered, Garlock was named as a defendant alongside Grace in thousands of personal injury lawsuits claiming liability for asbestos-related injuries. Garlock has expended millions of dollars in defense costs and settlement agreements, paid approximately $1.37 billion in indemnity payments, and exhausted over $1 billion in insurance coverage. To date, approximately 100,000 asbestos personal injury claims remain pending against Garlock.

*5 Garlock is seeking indemnity and contribution from Grace for many of these claims in which both corporations serve as co-defendants. When Grace filed for bankruptcy in 2001, Garlock's attempts to recover these funds were stayed pending Grace's corporate reorganization. Unable to satisfy its massive liabilities, Garlock filed its own Chapter 11 bankruptcy petition in 2010.

H. Insurance Coverage Litigation

Grace has also experienced a multitude of other ongoing business and financial litigation, including disputes with its insurers: the CNA Companies, Government Employees Insurance Company ("GEICO"), Republic Insurance Company n/k/a Starr Indemnity & Liability Company ("Republic"), AXA Belgium, as Successor to Royale Belge SA ("AXA Belgium"), Maryland Casualty Company ("MCC"), Arrowood Indemnity Company ("Arrowood"), and Travelers Casualty and Surety Company ("Travelers"). Grace previously claimed that these insurers owed it coverage for its asbestos-related liability under its various insurance policies. This resulted in extensive litigation during which the extent and timing of the insurers' obligations under the policies were vehemently contested. Finally, after years of intensive negotiations and litigation, Grace and its insurers entered into various settlement agreements after Grace filed for bankruptcy. Under these settlements, Grace relinquished its claims for coverage in return for its insurers furnishing substantial consideration, including the contribution of millions of dollars to Grace's bankruptcy estate to be used to settle claims with asbestos personal injury claimants. Moreover, the settlements provided that the insurers would be categorized as "Settled Asbestos Insurance Companies" under the Joint Plan, meaning that they would receive injunctive protection.

1. The Grace—CNA Settlement Agreement

Particularly relevant to the present litigation is the Settlement Agreement entered into between Grace and the CNA Companies in 2010. Over the years, the CNA Companies were among the many insurance entities that issued primary and excess liability insurance coverage to Grace. CNA issued primary liability insurance policies to Grace granting coverage for asbestos claims between June 30, 1973 to at least June 30, 1985. These primary policies provided coverage for both "products-completed operations claims" ("products claims"), and "premises operation claims" ("non-products claims"). Products claims were subject to both per-occurrence and aggregate limits, while non-products claims were only subject to a per-occurrence limit. CNA also issued sixteen excess liability

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insurance policies at various attachment levels to Grace during this timeframe. These excess policies provided coverage for when the specified limits of the underlying policies were exhausted.FN12

FN12. All sixteen of CNA's excess policies to Grace attach at or above $75 million in excess of primary coverage, and a majority of these sixteen policies attach at or above $150 million in excess of the primary coverage.

For nearly three decades, both before and after Grace's bankruptcy petition, Grace and the CNA Companies have been engaged in various disputes regarding CNA's coverage under its insurance policies related to asbestos liability. Over the course of the years, the two companies entered into several agreements to settle these disputes. Prior to Grace's 2001 bankruptcy petition, Grace and CNA settled their disputes related to coverage for products claims under the primary policies. The parties had not, however, resolved their differences regarding coverage for non-products claims prior to Grace filing for bankruptcy. As a result of Grace's bankruptcy declaration, all litigation regarding non-products coverage was stayed pursuant to 11 U.S.C. § 362. During its corporate reorganization, Grace FN13 and the CNA Companies engaged in extensive negotiations to settle their remaining disputes. A Settlement Agreement was finally reached in November of 2010. The Settlement Agreement purports to resolve all remaining disputes between the parties related to insurance coverage and party obligations, as well as outstanding liabilities related to asbestos claims. The Settlement confers numerous monetary and transactional benefits upon Grace's bankruptcy estate. In exchange, Grace has agreed to release CNA from its previous obligations under the terms of the Settlement.

FN13. Also engaged in the negotiations were the Asbestos Personal Injury Committee and the Asbestos Personal Injury Future Claims Representative ("PI FCR").

***6** Grace moved for approval of the Settlement Agreement pursuant to Federal Rule of Bankruptcy 9019 in November 2010. The Libby Claimants and BNSF objected to entry of the Settlement Agreement. The disputes were fully briefed and litigated before the Bankruptcy Court in January 2011. On January 22, 2011, the Bankruptcy Court issued an Approval Order in conjunction with findings of fact and conclusions of law approving the Settlement Agreement. Nevertheless, the Libby Claimants and BNSF retain objections to entry of the Settlement Agreement.

2. AXA Belgium, GEICO, and Republic Excess General Liability Insurance Policies with Grace

Over the course of several years prior to Grace's bankruptcy petition, insurance companies AXA Belgium, GEICO, and Republic FN14 all issued high level excess general liability insurance coverage to Grace.FN15 Each policy contained an anti-assignment provision stating that the insurers would not be bound by any assignments unless they have consented to do so. AXA Belgium further claims that its policies contained provisions that required Grace to cooperate with it and prohibited settlements without its consent. When Grace filed for bankruptcy in 2001, it sought to assign its rights and interests under these policies to fund its bankruptcy estate. Whether or not it is actually legally permitted to do so has been the subject of much litigation, and is now before this Court for resolution.

FN14. GEICO and Republic have consolidated their arguments together for presentation to this Court. Given the parties' decision to jointly present their arguments, the Court will address their claims together below.

FN15. High level excess general liability insurance is a specific type of insurance coverage that provides additional coverage beyond that of the underlying insurance policy. This type of insurance coverage has commonly been referred to as an "umbrella policy." For example, if an insured is sued for $1 million and its primary insurance policy only covers $500,000 of the claim, the excess policy would cover the remaining $500,000 of the claim. *See generally* Michael Knoerzer, *Introduction to Excess Insurance and Reinsurance*, 652 PLI/LIT 115, 119 (Apr.2001).

I. Bank Lender Pre–Petition Litigation

In 1998 and 1999, Grace entered into two Credit Agreements with a consortium of bank credit facilities (collectively referred to hereinafter as the "Bank Lenders"). Under these Credit Agreements, Grace owed the Bank Lenders an aggregate principal of $500 million, plus interest accruing thereon.FN16 The 1998 Agreement had a set maturity date of May 16, 2003, and the 1999 Agreement was set to mature on May 2, 2001. The non-default interest rate under these Agreements was LIBOR (plus the Applicable Margin).FN17 The default rate, which is appli-

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cable under certain defined events of default, was LIBOR (plus the Applicable Margin) plus 2%. Additionally, both Credit Agreements called for Grace's payment of facility and attorney's fees.

FN16. Grace entered into the first Credit Agreement on May 14, 1998, under which it borrowed $250 million. On May 5, 1999, Grace also borrowed $250 million under the second Credit Agreement.

FN17. LIBOR is a commonly-used acronym in financial affairs that stands for "London Interbank Offered Rate." The LIBOR is the average interest rate that leading banks in London charge when lending to other banks. The LIBOR serves as a benchmark for financial institutions worldwide, which adjust their own interest rates based upon the LIBOR figure. For more information on this subject, *see generally* Ernest T. Patrikis, *Federal Reserve Capital Adequacy Guidelines as Applied to SWAPS*, 689 PLI/CORP 627, 694–98 (May 1990).

J. Grace's Bankruptcy Petition and The Joint Plan of Reorganization

As a result of all these legal disputes and its massive liabilities, Grace's financial stability as a corporation was seriously impaired. No longer able to satisfy the claims asserted against it, Grace ultimately filed a Chapter 11 bankruptcy petition on April 2, 2001. In filing the bankruptcy petition, Grace sought to reorganize its basic corporate structure so that it could better handle its outstanding liabilities, as well as its ongoing and future litigation, while moving forward as a "going concern."

Shortly after Grace filed its bankruptcy petition, it began to negotiate the basic structure of its reorganization plan. Grace therefore requested that the Bankruptcy Court grant it injunctive relief from its ongoing and future asbestos litigation liabilities while it underwent corporate reorganization. On May 3, 2001, the Bankruptcy Court entered a preliminary injunction barring the commencement of new actions related to Grace's asbestos liability. In January of 2002, the Bankruptcy Court modified the injunction to include additional parties and claims, and appointed a legal representative for all future asbestos-related personal injury claims to protect the interests of persons who may later assert claims against Grace. The Official Committee of Equity Security Holders ("Equity Committee") and the Official Committee of Asbestos Personal Injury Claimants ("Asbestos PI Committee") were also formed at approximately the same time.

*7 The Joint Plan went through several preliminary versions and revisions over the years. Notably, proposed Plans were initially filed in 2004 and 2005, but neither proposed Plan was confirmed. After several years of extensive discovery, complex litigation, and negotiations, the parties filed the present Joint Plan of Reorganization on September 19, 2008. The Plan was thereafter again modified, and its finalized version was filed on February 27, 2009. The final version of the Joint Plan, which is now on appeal before this Court, was confirmed by the Bankruptcy Court on January 31, 2011.

The Joint Plan sets forth detailed procedures for how and when claims are to be submitted, valued, and paid, and includes mechanisms that allow for future claimant recovery. The central tenants of the Joint Plan are two trusts, the Asbestos Personal Injury Trust (hereinafter "PI Trust" or "personal injury trust") and the Asbestos Property Damage Trust (hereinafter "PD Trust" or "property damage trust"), and corresponding channeling injunctions that enjoin all present and future asbestos-related claims against Grace and its protected third parties. It has been agreed that injunctive relief should extend to all parties that made contributions to the trust.

Under the Joint Plan, claimants are divided into nine classes (one of which, Class 7, is comprised of two subclasses). Each of these nine classes is further delineated as either an "impaired" or "unimpaired" class.[FN18] Six of the nine classes and subclass 7A are labeled as unimpaired.[FN19] The unimpaired classes voted almost unanimously in favor of the Joint Plan. [FN20] The remaining classes and subclass 7B are labeled as impaired, and also voted in support of the Joint Plan.[FN21]

FN18. In its most simple interpretation, members of the "impaired" classes under the Joint Plan are those persons and entities that will not necessarily have their claims paid in full according to the Plan's terms. Conversely, members of the "unimpaired" classes are those persons and entities whose claims are definitively set to be paid in full under the Joint Plan. Delineation as an impaired or unimpaired class also affects creditor voting rights. This subject is discussed extensively, *infra*.

FN19. Unimpaired classes under the Joint Plan include: Class 1 (Priority Claims), Class 2 (Secured Claims), Class 3 (Employee Benefit Claims), Class 4 (Workers' Compensation Claims), Class 5 (Intercompany Claims), Class 7A (Asbestos Property Damage Claims (excluding U.S. ZAI Property Damage Claims)), Class 9 (General Unsecured Claims), Class 11 (Equity Interests in Debtors Other than the Parent).

FN20. Class 9, an unimpaired class comprised of all holders of non-asbestos-related general unsecured claims, voted 92.54% in favor of the Joint Plan. However, the Bank Lenders, a small subset of Class 9, are not in favor of the Joint Plan. Their arguments are considered further, *infra.*

FN21. Impaired classes under the Joint Plan include: Class 6 (Asbestos Personal Injury Claims), Class 7B (American ZAI Property Damage Claims), Class 8 (Canadian ZAI Claims), and Class 10 (Equity Interests in the Parent). All impaired classes voted overwhelmingly in favor of the Joint Plan. The only opponents of the Joint Plan in Class 6 are the Libby Claimants. Their argument is further discussed, *infra.*

K. Bank Lender Post–Petition Litigation

At the time of Grace's bankruptcy petition, Grace still owed the Bank Lenders the $500 million principal of its loans, as well as several million dollars in accrued pre-petition interest, an amount which remains in dispute between the parties.[FN22] Grace could not pay either the outstanding principal or interest amounts when they became due in 2001 and 2003, and allegedly failed to perform several of its other obligations under the Credit Agreements.[FN23] The Bank Lenders submitted Proofs of Claims against Grace's bankruptcy estate on March 27, 2003, requesting the amounts owed to them under the Credit Agreements.

FN22. The parties assert different amounts as to the pre-petition interest that is owed. Grace claims that it owed approximately $2.5 million in accrued pre-petition interest at this time. (Grace Br. at 5.) The Bank Lenders, on the other hand, contend that approximately $3.1 million in accrued pre-petition was still outstanding at this point in time. (Bank Lender Br. at 9.) The Court need not determine which monetary figure is correct, however, because it is undisputed that Grace was current with its interest payments as of the Petition Date and that there thus was no pre-petition default. Only post-petition interest is relevant to the instant litigation.

FN23. In addition to not paying the principal and accrued interest, the Bank Lenders also claim that Grace failed to furnish certificates and other information and notices, as required by the Credit Agreements. As a result, the Bank Lenders contend that these failures to adhere to the terms of the Credit Agreements constituted an "event of default," entitling them to accelerate the entire outstanding amount of loans and notes due to the time period immediately following Grace's bankruptcy petition. Grace does not dispute that it did not furnish the certificates and other information and notices, but contends that noncompliance with these terms does not constitute an event of default.

The Bank Lenders are general unsecured creditors of Grace. Under the Joint Plan, the Bank Lenders are classified in Class 9—the General Unsecured Creditors class—along with all other generally unsecured creditors of Grace. As part of Grace's reorganization, the United States Trustee created and appointed The Official Committee of Unsecured Creditors ("the Committee") to represent the interests and negotiate on behalf of Grace's general unsecured creditors. Mr. Thomas Maher was appointed as Chairperson of the Committee. Mr. Maher also served as the Bank Lenders' Administrative Agent.

*8 In 2004, Grace began to focus its reorganization efforts on garnering the full support of its general unsecured creditors and equity holders for the Joint Plan. In January of 2005, Grace began to negotiate with the Committee in an attempt to reach an agreement on the rate and computation of interest that Grace would pay its general unsecured creditors under the Plan. After several years of negotiations, an agreement was ultimately reached in 2005, and was memorialized in a Letter Agreement ("the 2005 Letter Agreement"). Under the 2005 Letter Agreement, Grace agreed to pay post-petition interest to the Bank Lenders at a rate of 6.09%, compounded quarterly, and at a rate of 4.19%, or their contracted-for non-default rate, to all other general unsecured creditors. The 6.09% Bank Lender rate was higher than the non-default rate set under the Credit Agreements and the federal judgment rate [FN24] but lower than the set default rate under the Credit Agreements. Grace immediately amended its Joint Plan

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to reflect the terms of the 2005 Letter Agreement. Under the 2005 version of the Plan, all general secured creditors in Class 9 would have received 85% of their payment in cash and 15% in Grace's Common Stock.

> FN24. The federal judgment rate is governed by 28 U.S.C. § 1961, which provides in relevant part that:
>
> > (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1–year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> > 28 U.S.C. § 1961. The rate of interest used in calculating the amount of post-judgment interest is the weekly average 1–year constant maturity (nominal) Treasury yield. This rate is published every Monday by the Federal Reserve System. *See* http://www.uscourts.gov/FormsAndFees/Fees/PostJudgementInterestRates .aspx. In a bankruptcy case, the applicable rate is the federal judgment rate reflected on the day that the debtor filed its bankruptcy petition. *See In re Wash. Mut., Inc.*, Bankr.No. 08–12229, 2011 WL 4090757, at *35 (Bankr.D.Del. Sept. 13, 2011); *In re Chiapetta*, 159 B.R. 152, 161 (Bankr.E.D.Pa.1993). At the time of Grace's bankruptcy petition, the federal judgment rate was 4 .19%.

In late 2005, Mr. Maher contacted Grace requesting an amendment to the Letter Agreement based on a national upward trend in short-term interest rates. Following a new round of negotiations, a modified agreement was reached in 2006, and was also memorialized in a Letter Agreement ("the 2006 Letter Agreement"). Under the 2006 Letter Agreement, Grace modified the post-petition interest rate for the Bank Lenders so that the 6.09% rate would convert to a floating Prime Rate of interest on January 1, 2006. The previously-negotiated interest rates for the other general unsecured creditors were unaffected by the 2006 Letter Agreement. It remains in dispute whether the terms of the 2005 and 2006 Letter Agreements were meant to bind the Bank Lenders. The Bank Lenders contend that they do not. Grace, on the other hand, claims that the Bank Lenders were bound by the Agreements, and that it therefore repeatedly and publicly relied upon the Letter Agreements, including adjusting its internal books and records, SEC filings, monthly operating reports submitted to the Bankruptcy Court, and settlements, to reflect the terms of the Letter Agreements.

Throughout 2007 and 2008, Grace focused its reorganization efforts on resolving its asbestos liabilities. This required negotiations with major constituencies [FN25] and several estimation trials, during which Grace sought to determine its outstanding asbestos liabilities and how much money would be needed to fund an asbestos trust that would pay all these liabilities in full. Grace's liability and solvency were also vehemently contested during the estimation trials. During this time, the Bank Lenders never contested either the 2005 or 2006 Letter Agreements. At the beginning of April of 2008, Grace and the constituencies entered into a settlement, entitled the Term Sheet For Resolution of Asbestos Personal Injury Claims ("the Term Sheet"), which served as an underlying rubric for the current version of the Joint Plan. Under the Term Sheet, the Bank Lenders would be paid their principal in full, and would receive the post-petition interest rates reflected in the 2006 Letter Agreement. Shortly thereafter, the Bank Lenders objected to the rate of post-petition interest in the Term Sheet and demanded to be paid the higher default interest rate.

> FN25. The involved constituencies were the Official Committee of Asbestos Personal Injury ("PI") Claimants appointed by the U.S. Trustee, the Asbestos PI Future Claimants' Representative appointed to protect interests of future personal injury claimants, and the Official Committee of Equity Security Holders appointed by the U.S. Trustee.

***9** Entitlement to the default interest rate was litigated before the Bankruptcy Court in September of 2008. On May 19, 2009, the Bankruptcy Court issued its decision on the issue, finding that the Bank Lenders had no legal right to the post-petition default rate under the Credit Agreements. *See In re W.R. Grace & Co.*, Bankr.No. 01–1139, 2009 WL 1469831, at *1 (Bankr.D.Del. May 19, 2009). In addition to the Bank Lenders' plan confirmation objections, the findings of fact and conclusions of law reached in the May 2009 decision are also presently on appeal before this Court.

L. The Bankruptcy Court Proceedings

After five hearings and the resolution of numerous objections, the Bankruptcy Court initially approved the Joint Plan on March 9, 2009. The Bankruptcy Court then held a Confirmation Hearing so that all parties could have the opportunity to be heard and raise any additional objections. Forty-three objections were filed by thirty-nine parties at this time. After a sixteen-day hearing and the review of over 1,100 pages of objections, the Bankruptcy Court entered an order confirming the Joint Plan on January 31, 2011. In issuing its confirmation order and accompanying memorandum, the Bankruptcy Court resolved a substantial majority of the original forty-three objections to the Joint Plan. Presently before the Court are the remaining unresolved objections to the Joint Plan.

II. STANDARD OF REVIEW

A. Standard of Review Regarding Approval of the Settlement Agreement[FN26]

> FN26. District courts have jurisdiction to hear appeals of "final judgments, orders, and decrees" of the bankruptcy courts. *See* 28 U.S.C. § 158(a); *see also* Fed. R. Bankr.P. 8001(a). A bankruptcy court's approval of a settlement agreement is considered a final order. *See In re Nutraquest, Inc.*, 434 F.3d 639, 643 (3d Cir.2006). Thus, this Court has jurisdiction pursuant to 28 U.S.C. §§ 158(a) and 1334(b).

Bankruptcy Rule 8013 provides that a district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." Fed. R. Bankr.P. 8013. "An abuse of discretion standard applies where the Bankruptcy Court has exercised discretion in making its determination, such as in approving a proposed settlement." *In re Hudson's Coffee, Inc.*, No. Civ. A. 08–cv–5133, 2009 WL 1795833, at *2 (D.N.J. June 22, 2009) (internal citations omitted); *see also Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir.1996); *Hopkins v. McDonnell*, No. Civ. A. 06–683, 2006 WL 2241646, at *2 (D.N.J. Aug. 4, 2006). Under this standard, the bankruptcy court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed de novo. *See In re Sharon Steel Corp.*, 871 F.2d 1217, 1222–23 (3d Cir.1989) (internal citations omitted); *In re Morrissey*, 717 F.2d 100, 104 (3d Cir.1983) (internal citations omitted); *Hudson's Coffee*, 2009 WL 1795833, at *2 (internal citations omitted). In bankruptcy appellate litigation, the abuse of discretion standard is highly deferential to the judgment of the bankruptcy court, and the reviewing court should not disturb the findings of the bankruptcy court absent a "definite and firm conviction" that the bankruptcy court committed a clear error. *Hudson's Coffee*, 2009 WL 1795833, at *2 (quoting *In re Nutraquest, Inc.*, 434 F.3d 639, 645 (3d Cir .2006)) (internal quotations omitted).

***10** The Bankruptcy Court's order approving the Settlement Agreement between Grace and the CNA Companies constitutes a final order, and thus will be reviewed under the abuse of discretion standard. All parties to the Settlement Agreement and those objecting to its entry agree that this is the applicable standard of review here. Accordingly, this Court will review the Bankruptcy Court's findings and determine whether it abused its discretion based on "a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Id.* The Court will examine the Bankruptcy Court's findings of fact for clear error, and its conclusions of law de novo.

B. Standard of Review Regarding Confirmation of the Joint Plan[FN27]

> FN27. The Bankruptcy Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 157(a) and 1334(b), and this Court has appellate jurisdiction over the Bankruptcy Court decision under 28 U.S.C. §§ 158(a) and 1334(b).

The parties dispute the proper standard of review to be applied by this Court in reviewing the Bankruptcy Court's confirmation of the Joint Plan. Grace contends that this Court should apply the clear error test to the Bankruptcy Court's findings of fact, but should review its conclusions of law de novo. Four of the twelve Appellants disagree, claiming that the proper standard of review is de novo review of both the Bankruptcy Court's findings of fact and conclusions of law because entry of a channeling injunction is a non-core matter under 28 U.S.C. § 157.

Section 157 of the United States Code provides that "[b]ankruptcy judges may hear and determine ... all core proceedings arising under title 11 [.]" 28 U.S.C. § 157(b)(1). The Third Circuit has held that "[i]n core matters, the District Court reviews the Bankruptcy Court's findings of fact for clear error and its conclusions of law

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de novo." *In re Anes,* 195 F.3d 177, 180 (3d Cir.1999) (citing *Meridian Bank v. Alten,* 958 F.2d 1226, 1229 (3d Cir.1992)). A matter is considered "core" if it "involves a right created by the federal bankruptcy law" or involves a proceeding "that would only arise in bankruptcy[.]" *In re Guild & Gallery Plus, Inc.,* 72 F.3d 1171, 1178 (3d Cir.1996) (quoting *In re Wood,* 825 F.2d 90, 97 (5th Cir.1987)). The Third Circuit has found that "[c]onfirmation of a proposed bankruptcy plan is a core bankruptcy matter" under the United States Code. *Anes,* 195 F.3d at 180 (citing 28 U.S.C. § 157(b)(2)(L)).

In line with this Third Circuit precedent, the Court finds that appellate analysis of Grace's proposed Joint Plan is a core matter under Title 11. Review of the Joint Plan is the type of proceeding "that would only arise in bankruptcy." *Guild & Gallery,* 72 F.3d at 1178. As such, the Court will review the Bankruptcy Court's findings of fact for clear error and its conclusions of law de novo.

III. THE GRACE AND CNA COMPANIES' SETTLEMENT AGREEMENT

The Court first considers the objections filed in response to the Bankruptcy Court's approval of the Settlement Agreement reached between Grace and the CNA Companies. The Court considers this matter first because certain provisions of the Joint Plan rely on terms and conditions reached in the aforementioned Settlement Agreement. Thus, confirmation of the Joint Plan cannot be accomplished absent a full and accurate consideration of the Settlement Agreement.

***11** As previously mentioned, Grace and the CNA Companies entered into a Settlement Agreement in November 2010.[FN28] The Agreement purports to resolve all disputes related to the remaining coverage and outstanding obligations of both Grace and CNA.[FN29] Moreover, the Settlement resolves all remaining disputes between the parties regarding asbestos-related claims. Specifically, under the terms of the Settlement Agreement, CNA will make a payment of up to $84 million to the PI Trust over a period of six years for the benefit of asbestos personal injury claimants. Furthermore, CNA will release Grace from its prior obligations, under pre-petition settlement agreements or otherwise, for payment of retrospective premiums and indemnification for asbestos-related claims asserted against CNA. CNA also relinquishes its right to assert "indirect claims" against the PI Trust seeking indemnity and contribution from Grace, gives up numerous defenses to coverage under both the primary and excess policies, consents to the assignment of its insurance rights to the PI Trust, and agrees to withdraw, without prejudice, any Proofs of Claims it filed against the PI Trust, as well as its objections to the Joint Plan. In return, Grace will release CNA from claims under the policies for coverage of any asbestos-related claims. Moreover, the Settlement Agreement calls for CNA to be designated as a "Settled Asbestos Insurance Company" under Grace's Joint Plan.[FN30]

FN28. The Bankruptcy Court approved the Settlement Agreement on January 22, 2011. Nine days later on January 31, 2011, the Bankruptcy Court issued a Confirmation Order confirming the Joint Plan. Approval of a settlement agreement and confirmation of a reorganization plan are two entirely distinct matters, governed by different provisions of law and sections of the Bankruptcy Code.

Nonetheless, in filing their present objections, the Libby Claimants and BNSF conflate these distinct matters and argue, *inter alia,* that the Settlement Agreement cannot be approved because the Bankruptcy Court erred, for various reasons, in enjoining asbestos-related claims against CNA pursuant to 11 U.S.C. § 524(g). The Libby Claimants' and BNSF's objections to entry of the injunction are related to confirmation of the Joint Plan and are irrelevant to the present discussion regarding the Settlement Agreement. The Settlement Agreement does not alter the scope or clarity of the injunction in the Joint Plan, but rather merely provides that upon approval of the Settlement, CNA will be designated as a "Settled Asbestos Insurance Company" entitled to § 524(g) injunctive relief under the terms of the Joint Plan. Thus, to the extent that the Appellants make arguments based upon entry, extension, or clarity of the channeling injunction, those arguments are properly considered separately, *infra,* in this Court's analysis of confirmation of the Joint Plan.

FN29. The relevant insurance policies covered by the Agreement include all known and unknown, full or portions of, policies issued to Grace prior to June 30, 1985 by which CNA provided insurance coverage for asbestos-related claims.

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FN30. The benefit of being designated as a Settled Asbestos Insurance Company is that, under Grace's Joint Plan, the channeling injunction issued pursuant to 11 U.S.C. § 524(g) will extend to enjoin any asbestos-related personal injury claims brought against CNA, up to a limit of $1 million in litigation costs. If for some reason such claims are not enjoined under the terms of the Joint Plan, or have not already been addressed by the Settlement Agreement, then the PI Trust will indemnify CNA for any judgments rendered against it or any settlements it entered into with a third party, up to a maximum of $13 million.

The Settlement Agreement, however, only calls for CNA to be *designated* as such a party under the Joint Plan. The corresponding channeling injunction was not issued as part of the Bankruptcy Court's approval of the Settlement Agreement, but rather as part of the Bankruptcy Court's subsequent confirmation of the Joint Plan. Any challenges related to the substance of this designation or extension of injunctive relief to CNA, therefore, are relevant to the terms and conditions of the Joint Plan and are properly categorized as objections to the Confirmation Order, not the Settlement Agreement Approval Order. These objections are addressed by the Court in its discussion related to the confirmation of the Plan, *infra.*

After extensive briefing and oral argument, the Bankruptcy Court approved the Settlement Agreement on January 22, 2011. In entering its Approval Order and corresponding findings of fact and conclusions of law, the Bankruptcy Court found that the Settlement fully satisfied the requirements of both Third Circuit precedent and relevant provisions of the Bankruptcy Code. Nevertheless, Appellants BNSF and the Libby Claimants object to the Settlement Agreement. Specifically, both Appellants claim that they are entitled to the proceeds of Grace's insurance policies with CNA, and that they therefore have additional rights that are infringed upon by entry of the Settlement Agreement.

A. Application of the *Martin* Factors

Rule 9019 of the Federal Rules of Bankruptcy Procedure provides that, after appropriate notice and a hearing, the court may approve a compromise or settlement. *See* Fed. R. Bankr.P. 9019(a).[FN31] Compromises are favored in bankruptcy proceedings because they minimize litigation and expedite the administration of the bankruptcy estate. *Myers v. Martin (In re Martin),* 91 F.3d 389, 393 (3d Cir.1996) (quoting 9 *Collier on Bankruptcy* ¶ 9019 .03[1] (15th ed.1993)). Prior to approving a compromise or settlement, however, the court must "assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." *Martin,* 91 F.3d at 393. The standard for ascertaining these values is determined by a consideration of four factors, commonly known collectively as "the *Martin* factors":

FN31. Rule 9019 states in full that: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct." Fed. R. Bankr.P. 9019(a).

***12** (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors.

See id. (internal citations omitted).[FN32] In analyzing the compromise or settlement agreement under the *Martin* factors, courts should not "have a 'mini-trial' on the merits," *In re Jasmine, Ltd.,* 258 B.R. 119, 123 (Bankr.D.N.J.2000) (quoting *In re Neshaminy Office Bldg. Assocs.,* 62 B.R. 798, 803 (E.D.Pa.1986)); but rather should "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *Travelers Cas. & Sur. Co. v. Future Claimants Representative,* No. Civ. A. 07–2785, 2008 WL 821088, at *5 (D.N.J. Mar. 25, 2008) (citing *Jasmine,* 258 B.R. at 123); *see also In re Pa. Truck Lines, Inc.,* 150 BR. 595, 598 (E.D.Pa.1992), *aff'd,* 8 F.3d 812 (3d Cir.1993).

FN32. The question of whether the Bankruptcy Court applied the proper legal test is a conclusion of law, and is therefore reviewed de novo. *See In re Nutraquest, Inc.,* 434 F.3d 639, 644 (3d Cir.2006).

In applying the four *Martin* factors to the instant dispute, it is evident to the Court that the Bankruptcy Court properly applied and analyzed the Settlement Agreement

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under the applicable legal standard, and, more importantly, did not abuse its discretion because "on balance, the settlement benefits the estate." *In re Hudson's Coffee, Inc.,* No. Civ. A. 08–cv–5133, 2009 WL 1795833, at *3 (D.N.J. June 22, 2009) (internal citations and quotations omitted). Under the first factor, the Court is required to consider the likelihood of successful litigation if Grace and CNA continued to litigate their disputes outside the framework of the Settlement Agreement. For practical purposes, this factor is considered in conjunction with *Martin's* third factor—the complexity, expense, inconvenience, and delay of the litigation involved—because "[t]he balancing of the complexity and delay of litigation with the benefits of settlement is related to the likelihood of success in that litigation." *Nutraquest,* 434 F.3d at 646 (internal citation omitted). The evidence of record indicating the complexity of this case and the inevitable delay that would occur if the Settlement Agreement was thwarted and litigation were allowed to continue clearly weigh in favor of approving the Settlement. Further litigation of this dispute would be riddled with complexities, particularly given the number of parties involved and the interpretation of approximately nineteen different insurance policies with various coverage provisions. *See Hudson's Coffee,* 2009 WL 1795833, at *3 (noting that the number of parties involved, various theories of recovery, and the factual records required to support those theories should all be considered when analyzing the complexity of litigation under the third *Martin* factor). The Settlement Agreement obviates the need to further rehash these complex issues in costly and drawn-out litigation. Moreover, the continuation of litigation between Grace and CNA would inevitably create significant burdens and expenses, both monetary and non-monetary, for both parties, and "would only result in an unnecessary drain of estate resources." *Jasmine,* 258 B.R. at 127. Both Grace and CNA would need to expend significant costs and attorney's fees to conduct discovery, file and respond to motions, and further litigate their disputes regarding insurance coverage at trial. *See id.* Under these circumstances, it would not be long until "the attorneys' fees and costs [incurred and] paid ... would very soon reach the value of the proposed settlement itself." *Id.* Finally, continuing litigation would lead to an inevitable delay in distribution of Grace's bankruptcy estate, with an unlikely probability that litigation would even succeed. Grace and CNA have been involved in protracted litigation for over three decades. The Settlement Agreement would finally put an end to these disputes. It ensures that the PI Trust, and thereby Grace's bankruptcy estate, receive significant monetary and non-monetary contributions that will be distributed to Grace's creditors. It also eliminates the high degree of uncertainty that would accompany continued litigation. At the very least, the Settlement will allow Grace's creditors to recover funds much sooner than they otherwise could have done. Thus, the Court finds that the first and third *Martin* factors are satisfied in this case.

***13** The second *Martin* factor requires the Court to consider the likely difficulties surrounding the collection of any recovery. Grace is no longer a highly solvent company, but rather has only limited assets available to satisfy all of its outstanding liabilities. If the Settlement Agreement was not in place, the parties would continue to litigate and Grace would need to overcome significant roadblocks to recover any proceeds of the insurance policies. It is uncertain when, if ever, Grace would see the proceeds from this collection. The Settlement Agreement, however, provides for Grace's guaranteed collection of up to $84 million to fund its PI Trust. Thus, the Court further finds that the second *Martin* factor is satisfied.

Finally, under the fourth and final *Martin* factor, the Court must consider the effect that the Settlement would have on the creditors of Grace's bankruptcy estate. On this particular point, BNSF claims that the Settlement does not treat it fairly, and thus is not in its best interest, because the injunction that would be called for upon approval of the Settlement may enjoin claims against CNA that BNSF could assert. On this point, the Court first notes that the reach of the channeling injunction is an issue that relates to confirmation of the Joint Plan, not approval of the Settlement. Even with this fact aside, however, BNSF's argument still fails because "[w]hile the objectors' status as creditors is to be taken into consideration, it is not, by itself, determinative of the fairness of the proposed settlement." *Jasmine,* 258 B.R. at 128. Rather, this point should be balanced against the other three *Martin* factors, as well as the benefit being awarded to all creditors—not just the objecting parties—by the Settlement. *See Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco,* 688 F.2d 615, 628 (9th Cir.1982) (providing that in analyzing the fairness of a settlement, "[i]t is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness"). Under the terms of the Settlement Agreement, Grace stands to gain substantial monetary and non-monetary benefits. In particular, the PI Trust will be infused with millions of dollars, and CNA will relinquish its rights to pursue Proofs of Claims against Grace, confirmation objections, claims regarding retrospective premiums, asbestos-related claims for indemnity and contribution, and any pending legal actions regarding coverage

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disputes. A resolution of all these issues is highly valuable to Grace because it injects its bankruptcy estate with much-needed funding and "abstract" non-monetary value, which consequently help Grace to reorganize itself under Chapter 11. This infusion of tangible and abstract value into Grace's bankruptcy estate, in turn, is in the paramount interest of Grace's creditors because it enlarges the pool of funds available to *all* creditors and ensures greater guaranteed recovery. Thus, while BNSF may individually disagree, the Court sees no basis to find that the Settlement as a whole is not in the paramount interest of all of Grace's creditors.

***14** Based on the above reasoning, it is evident to the Court that the Bankruptcy Court exercised good judgment—far from an abuse of discretion—in its analysis of the *Martin* factors regarding approval of the Settlement Agreement, and was correct in determining that all four factors were satisfied.

B. Fairness of the Settlement Agreement Related to Appellants' Purported Rights to the Disputed Insurance Policies

Despite the fact that all four *Martin* factors are satisfied, the Libby Claimants and BNSF maintain that the Bankruptcy Court abused its discretion in approving the Settlement Agreement based on their purported rights as "additional insureds" under Grace's insurance policies.

1. BNSF's Objections

Over the years, BNSF and Grace entered into several contracts and leases by which Grace agreed to fully indemnify BNSF for any asbestos-related liability it may incur due to exposure to Grace Asbestos.[FN33] Grace also purchased separate insurance policies for BNSF that specifically named BNSF as an insured. During this same time period, Grace and CNA entered into various insurance agreements of their own that are currently at issue in this dispute. BNSF claims that several of Grace's insurance policies with CNA included generic endorsements providing insurance for losses relating to any contractual indemnification agreement entered into by Grace. Thus, BNSF asserts that it falls within the scope of the coverage provided to Grace by CNA's insurance, and that the Settlement Agreement thereby affects its rights as an "additional insured" under the policies.

FN33. These contracts and leases are more fully discussed, *infra,* in the Court's analysis regarding confirmation of the Joint Plan.

The Court, however, disagrees with BNSF's assertion that it is an "additional insured" under Grace's insurance policies with CNA. The Grace—CNA insurance agreements make no mention of BNSF as a named recipient of insurance proceeds under the policies. BNSF was not a subsidiary or employee of Grace. Nor did it ever own a financial interest in Grace or engage in any type of transaction in which Grace would have owed it some type of legal duty. While BNSF did have contractual indemnification agreements in place with Grace, these contracts make no mention of BNSF as an intended beneficiary of *Grace's* insurance coverage. Rather, it appears that Grace's insurance was merely intended to benefit Grace, not unnamed third parties, in the event it incurred any liabilities for which it would be responsible. Thus, the Court agrees with the Bankruptcy Court's assessment that BNSF is not an "additional insured" to any of the insurances policies between Grace and CNA.[FN34]

FN34. BNSF further asserts that, as an "additional insured" under the Grace—CNA insurance policies, Montana law dictates that Grace owes it a duty to defend it under a liability policy—a duty that is broader and independent from a duty to indemnify, and that cannot be waived by any entity other than BNSF. CNA argues that New York state law would apply on this point. Given the Court's finding that BNSF's is not an "additional insured" under the Grace—CNA policies, however, this argument is moot and the Court need not engage in a lengthy choice-of-law analysis to determine BNSF's alleged contractual rights under either state's law.

Moreover, the Court notes that Grace previously purchased entirely separate insurance policies awarding insurance to BNSF under which BNSF was explicitly named as a recipient of insurance proceeds. BNSF has provided no explanation to the Court as to why Grace would provide it with duplicative coverage in its own insurance policies with CNA, or why it would directly name BNSF as a named insured under one policy but not the other. The record is devoid of any evidence that Grace intended to do so.[FN35] In fact, the record indicates that Bankruptcy Court's Approval Order specifically accounts for BNSF's separate insurance policies, and provides that any rights BNSF may have under those policies will not be affected by the Settlement Agreement.[FN36] Therefore, given that BNSF is not an additional insured under Grace's insurance agreements with CNA, it has no right to complain that its rights are affected by the Settlement

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Agreement reached between Grace and CNA.

FN35. Although relevant to confirmation of substantive provisions of the Joint Plan, the Court notes that the Plan Proponents and Bankruptcy Court specifically modified the Joint Plan to ensure that the channeling injunction would not impact BNSF's rights to pursue claims against its own insurance coverage. Section 8.2.2 of the Joint Plan provides that:

> [T]he Asbestos PI Channeling Injunction ... shall not enjoin:
>
> (e) BNSF from asserting any claim ... for insurance coverage as an insured or an additional insured under an insurance policy (or part of a policy) that is not identified as being the subject of any Asbestos Insurance Settlement Agreement in Exhibit 5[.]
>
> Joint Plan § 8.2.2. This Section of the Joint Plan specifically precludes BNSF from asserting claims under any of the insurance policies listed in Exhibit 5. This list includes the Grace—CNA insurance policies. Thus, consideration of this provision in the Joint Plan further implies that Grace had no intention of including BNSF as an additional insured under its policies with CNA.

FN36. The Bankruptcy Court's Approval Order explicitly states:

> For the avoidance of doubt, the insurance policies identified in Exhibits A, B, and C to BNSF's Objections to Approval of the Settlement Agreement ... are not Subject Policies for purposes of the Settlement Agreement. All parties reserve their rights regarding such policies, including with respect to the existence and terms of such policies.
>
> (Bankr.No. 01–1139, Doc. No. 26106, 01/22/11, Order Pursuant to Sections 105, 363, 1107, and 1108 of the Bankruptcy Code and Rules 2002, 6004, 9014, and 9019 of the Federal Rules of Bankruptcy Procedure Approving the Settlement Agreement Between W.R. Grace & Co. and the CNA Companies ("Approval Order"), at 8–9, ¶ 5.)

2. The Libby Claimants' Objections

***15** The Libby Claimants allege that under Montana state law they have rights to Grace's insurance coverage that "vested" at the time of their injuries, and that such "vested rights" cannot be terminated by the Settlement reached between Grace and CNA. For the following reasons, the Court disagrees with this assertion.

"It has long been the rule in th[e] [Third] Circuit that insurance policies are considered part of the property of a bankruptcy estate." *ACandS, Inc. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 260 (3d Cir.2006) (citing *Estate of Lellock v. The Prudential Ins. Co. of Am.*, 811 F.2d 186, 189 (3d Cir.1987); *Tringali v. Hathaway Mach. Co.*, 796 F.2d 553, 560 (1st Cir.1986)). Therefore, when Grace filed for bankruptcy in 2001, its insurance policies with CNA became part of its bankruptcy estate, subject to distribution under a Chapter 11 plan of reorganization.

The Libby Claimants assert that, while the Grace—CNA insurance policies became part of Grace's estate upon filing for bankruptcy, the *proceeds* of these policies are not property of the estate, and the Libby Claimants are entitled to collect a portion of these insurance proceeds. This assertion, however, directly contradicts the general rule followed by most jurisdictions, including the Third Circuit, that the proceeds of a debtor's liability insurance policies are considered property of its bankruptcy estate. *See In re Nutraquest, Inc.*, 434 F.3d 639, 647 n. 4 (3d Cir.2006) (citing Am. *Bankers Ins. Co. of Fla. v. Maness*, 101 F.3d 358, 362 (4th Cir.1996); *St. Clare's Hosp. & Health Ctr. v. Ins. Co. of N. Am.*, 934 F.2d 15, 18–19 (2d Cir.1991); *Tringali*, 796 F.2d at 560)); *see also Maertin v. Armstrong World Ind., Inc.*, 241 F.Supp.2d 434, 447 (D.N.J.2002) ("[T]his Court must follow the general rule and find that the debtor's liability insurance policies and their proceeds are property of [the debtor's] estate."); *In re Salem Baptist Church of Jenkintown*, 455 B.R. 857, 867–68 (Bankr .E.D.Pa.2011); *In re World Health Alt., Inc.*, 369 B.R. 805, 810 (Bankr.D.Del.2007) ("When an insurance policy provides coverage only to the debtor, courts will generally rule that the proceeds are property of the estate.") (internal citations omitted). The Court finds no unique circumstances present in the instant case that indicate why the general rule should not apply.

Moreover, the Libby Claimants' reliance on the holdings of *Houston v. Edgeworth*, 993 F.2d 51 (5th Cir.1993) and *In re Louisiana World Exposition*, 832 F.2d 1391 (5th

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Cir.1987) to support their argument that proceeds of a liability policy are not property of the bankruptcy estate is misplaced. Contrary to Appellants' assertion, neither *Edgeworth* nor *Louisiana World* stands for this proposition. Rather, while the *Edgeworth* Court did find that the policy proceeds were not part of the bankruptcy estate under the circumstances present in that case,[FN37] it explicitly recognized that, in general, "[p]roceeds of ... insurance policies, if made payable to the debtor rather than a third party such as a creditor, are part of the estate[.]" *Id.* at 56. Moreover, in a footnote, the Fifth Circuit noted the common decision of courts in mass tort bankruptcies cases to include insurance proceeds as property of the estate to avoid a "free-for-all against the insurer[.]" *Id.* at 56, n. 21. Likewise, while the Fifth Circuit in *Louisiana World* also found that the insurance policy proceeds were not part of the debtor's estate in that case, this exclusion was predicated on the fact that the insurance policies in question only named the corporation's directors and officers as named insureds and did not extend such coverage to the debtor. *Louisiana World,* 832 F.2d at 1399–1400. Subsequent courts have upheld and positively cited to these general principles of law. *See Matter of Vitek, Inc.,* 51 F.3d 530, 534 n. 17 (5th Cir.1995) ("[T]he vast majority of courts do not bother to distinguish ownership of insurance policies from the ownership of the proceeds of those policies, but treat that the two go hand-in-hand.") (citing *Edgeworth*); *Salem Baptist Church,* 455 B.R. at 868–69 (engaging in a thorough analysis and positive affirmation of both *Edgeworth* and *Louisiana World); see also In re Adelphia Commc'n Corp.,* 302 B.R. 439, 448 n. 15 (Bankr.S.D.N .Y.2003) (detailing other cases on this point of law); *In re Downey Fin. Corp.,* 428 B.R. 595, 603–04 (Bankr.D.Del.2010).

FN37. Specifically, the Fifth Circuit stated that the debtor must first establish a "legally cognizable claim" to the insurance proceeds in order for them to be included in the bankruptcy estate. *Id.* at 56. Given that the debtor in *Edgeworth* was not named as an intended beneficiary under the policy, the court found that the insurance policy proceeds were not part of the debtor's estate. *Id.*

***16** In the present case, the proceeds of the Grace—CNA insurance policies are payable to Grace, *not* the Libby Claimants. The Libby Claimants are not listed as named insureds under any of these policies. Moreover, the Libby Claimants were in no way involved in the contract negotiations, purchasing of, or decisions to continue this insurance coverage. All such decisions were solely made between Grace and CNA. Thus, the Libby Claimants' citation to these cases actually undermines its argument, and its reliance on them to establish its rights to the insurance proceeds of the Settlement Agreement is summarily incorrect.

Alternatively, the Libby Claimants maintain that, regardless of whether the proceeds of the Grace—CNA insurance policies are included in the bankruptcy estate, they have a "vested right" under Montana state law to collect a portion of these proceeds,[FN38] and that entry of the Settlement Agreement will negatively impact their ability to do so. Given that the Libby Claimants are not named as insureds or intended beneficiaries under any of the Grace—CNA policies and there is no evidence on the record indicating that the policies were purchased for their benefit, the Libby Claimants hold no direct rights to the insurance proceeds. Thus, in order for the Libby Claimants to be able to obtain any portion of these proceeds, they need to establish that they have a legal right to this collection. Such a legal right could be established pursuant to, *inter alia:* (1) a state statute crafted by the legislature conferring a right upon the parties to pursue a direct action for the proceeds, (2) a judicial opinion of the state's judicial system, or (3) a public policy of particular importance to the state.

FN38. The Libby Claimants base their argument on Montana state law. In a footnote, the Plan Proponents make clear that they do not concede that Montana law applies, but rather claim that a choice-of-law analysis makes no difference to the outcome of the present dispute. Given that both parties fully briefed their arguments premised upon Montana state law, the Court will likewise apply that state's law to any choice-of-law inquiry in regards to the present matter.

The Libby Claimants primarily rely on the Montana Supreme Court's forty-four-year-old decision in *McLane v. Farmers,* 150 Mont. 116, 432 P.2d 98 (Mont.1967) to establish that they have state-law rights to the insurance proceeds that vested at the time of their injuries, *i.e.,* at the time when they were exposed to Grace Asbestos. *McLane* involved an automobile liability insurer's right to void an insurance policy that it had issued. *Id.* at 118. On May 22, 1964, Gerald Roberts purchased an automobile liability insurance policy from the defendant, Farmers Insurance Exchange. *Id.* at 117. Shortly thereafter, on June 7, 1964, Roberts was involved in an automobile collision with Dennis McLane. *Id.* By June 17 of that same

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year, Farmers had reason to believe that Roberts made certain misrepresentations on the insurance policy he purchased, but nonetheless continued to accept premium payments from him and paid certain claims arising from his accident with McLane. *Id.* Then, on July 10, 1964, Farmers rescinded its insurance policy and declared it void due to Robert's misrepresentations. *Id.* at 117–18.

Meanwhile, McLane had filed suit against Roberts on June 24, 1964 seeking compensation for liability related to the collision. *Id.* at 117. On July 22, McLane was granted a judgment against Roberts, and sought to recover the amount of the judgment from Farmers. *Id.* at 118. Farmers counterclaimed against Roberts, asserting that he was liable based on the misrepresentations. *Id.* Two years later, on February 4, 1966, Farmers received a default judgment against Roberts, which effectively terminated the policy between both parties. *Id.* On appeal, the issue before the Montana Supreme Court was whether Farmers' actions after it first had notice of Roberts' misrepresentations amounted to an implied waiver of its right to rescind the insurance policy. *Id.* The court found that Farmers' actions did constitute an implied waiver, and, as a result, McLane could recover the insurance proceeds from Farmers. *Id.* at 119–20. Specifically, the court held that McLane's right to these insurance proceeds vested prior to the attempted rescission. *Id.* at 119. However, the court refrained from finding when exactly McLane's rights vested, but rather stated that the vesting could have occurred "at either the time of the accident or at the time of the implied waiver of the right to rescind. Exactly which of the two possible times th[e] court need not decide." *Id.* at 119–20.

***17** The findings in *McLane,* however, substantially differ from the present scenario for three primary reasons. First, it is important to note that the Montana Supreme Court did not explicitly hold that a third party's rights to insurance proceeds vest at the time of injury, but rather merely stated that the rights vested before Farmers attempted to rescind the coverage. The court left open to inquiry whether this vesting occurred at the time of injury *or* at the time of Farmer's actions implying waiver. Thus, the Libby Claimants' firm reliance on *McLane* to establish that their state law rights to the insurance proceeds vested at the time of their injuries is based upon nothing more than indecisive dicta by the Montana Supreme Court.

Second, and more importantly, in *McLane,* the injured party claiming against the insurance company had obtained a judgment entitling him to the insurance proceeds. It is a well-recognized principle that "[i]n the liability insurance context ... a tort plaintiff must first establish the liability of the debtor before the insurer becomes [ ] obligated to make any payment." *Edgeworth,* 993 F.2d at 53–54; *see also* *Salem Baptist Church,* 455 B.R. at 868 (finding that a party's lack of a judgment to enforce its malpractice claims indicated that it had no right to the insurance proceeds).[FN39] The Libby Claimants have never secured a comparable judgment that would entitle them to the insurance proceeds. Nor have the Libby Claimants entered into a post-bankruptcy settlement agreement of their own upon which liability could be premised. As such, their reliance on the holding of *McLane* is again misplaced for this reason.

> FN39. The Libby Claimants attempt to refute this principle of law by asserting that "direct actions [against an insurer] and vesting of an injured party's rights have nothing to do with each other." (Libby Br. at 11.) The two legal principles are actually very much interrelated. Insurance companies do not merely dole out free proceeds to any party that files an insurance claim. Rather, to avoid fraud, conserve resources, and streamline policies, the claiming party must show that it has a right to the insurance proceeds because the insured is in some way liable to the claimant. This liability can be established in many ways: in accordance with proceeds owed to a party specifically identified as an intended beneficiary in an insurance contract, by provisions in a settlement, or, most relevant to the instant case, by obtaining a judgment against the tortfeasor. Absent liability, the claimant has no right to collect the proceeds. And since the claimant has no rights in the first place, there would be no rights that could vest. As such, the Libby Claimants' attempt to distinguish direct actions against an insurer from vesting principles is without merit. *See Dow Corning,* 198 B.R. at 240 ("[P]rior to obtaining and enforcing a judgment, an injured person merely has an expectation of recovery that is contingent upon the occurrence of future events, and such expectation does not rise to the level of a vested property right.").

The Court instead finds guidance on this point from the language of the court in *In re Dow Corning Corp.,* 198 B.R. 214 (Bankr.E.D .Mich.1996). *Dow Corning* also involved a mass tort bankruptcy related to allegedly de-

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fective breast implants. The court in that case considered whether an injured party's rights to insurance are independent from those of the insured, and, if so, whether those rights can interfere with the debtor's rights to finalize settlement agreements post-bankruptcy. *Id.* at 240. The court found that while an injured party's claim against an insured is a vested property interest entitled to constitutional protection, the injured party has no more than an expectation that he/she will be able to collect from the insured prior to obtaining a judgment. *Id.* In analyzing this issue in the context of mass tort bankruptcies, the court opined that:

> Even more troubling is the situation ... where at the time of the proposed settlement there are injured party claimants who are not yet known. If each unknown claimant could later sue the insurer and not be estopped by a fully litigated judgment against its insured or by a fair and equitable settlement, there would be no finality to litigation and no realistic likelihood of settlement.

***18** *Id.* at 242. The Court finds this language to be highly persuasive. Just like in *Dow Corning,* there are hundreds of claims that may be asserted against Grace in the future but that are not yet known or able to be ascertained. Meanwhile, there is only a limited amount of funds available to satisfy both present and future claims. Prior to the entry of this Settlement Agreement, Grace and CNA were involved in expensive and time-consuming litigation for over three decades. Rather than expending more funds on this litigation that could be included in the pool of recovery for personal injury claimants, the Settlement Agreement would put an end to these disputes and infuse the trust with over $84 million. Thus, not only can the Libby Claimants not cite to any judgment upon which entitlement to the insurance proceeds could be premised, but they also cannot argue that the Settlement Agreement would not be in their best interests as personal injury claimants.

A third critical difference between the holding of *McLane* and the circumstances present in this case is the fact that *McLane* was based upon a motor vehicle liability policy, while the Libby Claimants' argument is based upon general liability insurance policies. The two are not the same. Party liability under motor vehicle insurance policies in Montana is codified in a state statute, Montana State Code Annotated ("MCA") § 61–6–103, which provides that the liability of the insurer becomes absolute when the injury or damage covered by the *motor vehicle* liability policy takes place.[FN40] (emphasis added.) The Supreme Court of Montana has interpreted this statutory provision as "freez[ing] the liability of the insurance carrier at the point where injury or damage ... occurs." *Ulrigg v. Jones,* 274 Mont. 215, 225, 907 P.2d 937, 944 (Mont.1995). The Supreme Court has also, however, stated that "[t]here is nothing in the cited code section ... that obviates the tort claimant's obligation to first establish that the insured was liable for the injuries or damages for which coverage under the policy is claimed. Simply put, unless and until the tort claimant establishes the liability of the tortfeasor, then there are no injuries or damages 'covered by the policy.' " *Id.* Thus, while Montana's motor vehicle insurance liability statute provides that liability "freezes" at the time of injury or damage, it remains directly in line with the general principle of law that a third-party claimant cannot file an action against an insurance carrier until after the underlying claim has been settled or a judgment has been entered in favor of the claimant. *See id.; see also Harman v. MIA Serv. Contracts,* 260 Mont. 67, 73, 858 P.2d 19, 23 (Mont.1993); *Safeco Ins. Co. of Illinois v. Montana Eighth Judicial Dist. Court, Cascade Cnty.,* 300 Mont. 123, 129–30, 2 P.2d 834, 838–39 (Mont.2000). On the other hand, the Libby Claimants have not cited to, nor has the Court through its own independent search found, any comparable Montana state statute related to an insurer's liability under a general liability policy. Absent a comparable statute indicating to the contrary, the Court applies the general rule here that a third-party claimant must first establish the insured's liability prior to recovering anything from the insurer.

FN40. The statute states, in relevant part, that:

> (5)(a) The liability of the insurance carrier with respect to the insurance required by this part becomes absolute whenever injury or damage covered by the motor vehicle liability policy occurs. The policy may not be canceled or annulled as to the liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage.

* * *

> (6) A motor vehicle policy is not subject to cancellation, termination, nonrenewal, or premium increase due to injury or damage incurred by the insured or operator unless the insured or operator is found to have violated a traffic law or ordinance of the state or a city, is found negligent or contributorily negligent in a court of law or by [ ] arbitration proceedings[.]

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MONT.CODE ANN. § 61–6–103(5)(a); (6).

*19 Finally, given that the Libby Claimants' alleged rights to the insurance proceeds cannot be premised on a state statutory provision or a judicial opinion, the Court considers whether Montana has a public policy that would favor such a finding. Montana has no public policy in place that protects individuals claiming third-party rights to insurance proceeds under a general liability policy prior to obtaining a judgment or settlement upon which liability may be premised. Montana does, however, have a long-established public policy favoring settlements. *See Miller v. State Farm Mut. Ins. Co.,* 337 Mont. 67, 71–72, 155 P.2d 1278, 1281–82 (Mont.2007) ("The declared public policy of this State is to encourage settlement and avoid unnecessary litigation."); *see also Durden v. Hydro Flame Corp.,* 295 Mont. 318, 324, 983 P.2d 943, 946–47 (Mont.1999); *Augustine v. Simonson,* 283 Mont. 259, 266 (Mont.1997) (internal citations omitted); *Black v. Martin,* 88 Mont. 256, 269–70, 292 P.2d 577, 581 (Mont.1930). The benefits of settlement are numerous, including reducing litigation costs, stress, the risk of an extreme jury verdict, and conservation of judicial time and resources. See *Durden,* 295 Mont. at 324. As aptly noted by the court in *Dow Corning,* in the context of a mass tort bankruptcy:

> To grant an injured party more than an expectation before receipt of judgment would inhibit legitimate settlements. An insurer would never be able to settle a coverage suit with its insured without impleading the known injured party. It is axiomatic that the more parties involved, the more difficult it is to settle ... Therefore, it is not surprising that there appears to be no case where a fair and reasonable settlement entered into in good faith between an insurer and insured was subsequently undone by a court.

Id. at 242. Nothing in the record indicates that Grace's Settlement Agreement with CNA was entered into in bad faith or for deceptive purposes. In fact, as discussed extensively above, the record highlights the numerous benefits, both monetary and non-monetary, that the Settlement will confer upon not only Grace and CNA, but also third parties such as personal injury claimants.

The Court therefore finds that the Libby Claimants are not entitled to the proceeds of Grace's insurance policies with CNA. They are not named insureds or intended beneficiaries under the policies. There is no Montana statute conferring a third-party right to the insurance proceeds upon them. The Libby Claimants have not cited to any judicial opinion that establishes their "vested rights" to the insurance. Moreover, there is no public policy in place in Montana that favors their position. Therefore, given that the Libby Claimants have no rights to the insurance proceeds in the first place, it follows that the Grace—CNA Settlement Agreement in no way impairs their rights.

Based on all the above, the Court denies the appeals of BNSF and the Libby Claimants to the Grace—CNA Settlement Agreement, and finds that the Bankruptcy Court did not abuse its discretion in entering its Approval Order affirming the Settlement. The Settlement Agreement is therefore affirmed.

IV. CONFIRMATION OF THE JOINT PLAN

*20 Various Appellants raise numerous objections to the Joint Plan's confirmation. The Court considers each challenge separately below.

A. The Good Faith Requirement

Appellants AMH and Montana challenge the Joint Plan on the grounds that it was not proposed in good faith. Under § 1129(a)(3) of the Bankruptcy Code, a court may only confirm a reorganization plan if it finds that the plan was "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). While the Bankruptcy Code does not define "good faith," it has been established that a determination of good faith associated with a Chapter 11 reorganization plan requires a factual inquiry into a totality of the circumstances surrounding the plan's proposal. *Brite v. Sun Country Dev., Inc.,* 764 F.2d 406, 408 (5th Cir.1985). However, such inquiries must be done on a case-by-case basis because good faith determinations are factually specific. *In re Mount Carbon Metro. Dist.,* 242 B.R. 18, 39 (Bankr.D.Colo.1999); *see also* W. Homer Drake, Jr. & Christopher S. Strickland, *Commencing a Reorganization Case, available at* CH11 REORG. § 3:2. In assessing the totality of the circumstances, a court has "considerable discretion in finding good faith." *In re Coram Healthcare Corp.,* 271 B.R. 228, 234 (Bankr.D.Del.2001) (internal quotations omitted). Moreover, the bankruptcy courts are in the best position to ascertain the good faith of the parties' proposals. *Matter of Sound Radio, Inc.,* 93 B.R. 849, 853 (Bankr . D.N.J.1988), *aff'd in part, rev'd in part,* 103 B.R. 521 (D.N.J.1989), *aff'd,* 908 F.2d 964 (3d Cir. June 26, 1990). Thus, district and circuit courts should carefully consider any recommendations from the bankruptcy courts on appeal.

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The Third Circuit has stated that the "touchstone" of the good faith inquiry is "the plan itself and whether it will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Frascella Enter., Inc.*, 360 B.R. 435, 446 (E.D.Pa.2007) (quoting *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir.2000)). In its assessment, the Court should "keep[ ] in mind [that] the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start." *In re T-H New Orleans L.P.*, 116 F.3d 790, 802 (5th Cir.1997) (citing *Sun Country*). The factors which a court should consider in determining a debtor's good faith include if the plan:

> (1) fosters a result consistent with the [Bankruptcy] Code's objectives, (citations omitted); (2) has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected, (citations omitted); and (3) [exhibited] a fundamental fairness in dealing with the creditors (citations omitted).

Genesis Health Ventures, Inc., 266 B.R. 591, 609 (Bankr.D.Del.2001) (citations omitted). In applying these three factors to the present case, it is apparent to the Court that the Joint Plan was proposed in good faith.

***21** An analysis of the totality of the circumstances shows that the first factor—whether the reorganization plan is consistent with the general objectives of the Bankruptcy Code—has been satisfied. The Supreme Court of the United States has specifically identified two purposes of Chapter 11 as: (1) preserving going concerns; and (2) maximizing property available to satisfy creditors. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999); *see also In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119 (3d Cir.2004) (same). It cannot be disputed that Grace was placed in a financially precarious position as a result of its involvement in multiple tracks of extensive, protracted litigation over the years. As a result, Grace was left with the choice of either readjusting its debt structure, or inevitably being unable to meet both its current and future financial obligations. Grace chose the former position so that it could "make a fresh start" and continue to operate on the market as a "going concern" able to satisfy its outstanding liabilities. This type of reorganization is exactly what Chapter 11 was designed to accomplish.

The second factor requires that the plan have been proposed with honesty and good intentions, and that it have "a reasonable hope of success." *Sun Country*, 764 F.2d at 408. The Third Circuit provides the Court with guidance on this point, stating that, "[a]t its most fundamental level, the good faith requirement ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy[.]" *Integrated Telecom Express*, 384 F.3d at 119. In analyzing whether a plan has been proposed for honest and good reasons, courts routinely consider whether the debtor intended to abuse the judicial process, whether the plan was proposed for ulterior motives, or if no realistic probability for effective reorganization exists. *See Sound Radio*, 93 B.R. at 853 ("To find a lack of 'good faith' courts have examined whether the debtor intended to abuse the judicial process and the purposes of reorganization provisions."). AMH questions Grace's honesty and good intentions in its proposal of the Joint Plan. Specifically, AMH avers a lack of good faith because Grace chose not to present any evidence at the Confirmation Hearing regarding its good faith.[FN41] Moreover, AMH claims it was "repeatedly stymied" in its attempts to obtain discovery relevant to the issue of good faith. (AMH Br. 32.) On this point, the Court finds the case of *Frascella* to be particularly instructive. *In re Frascella Enter., Inc.*, 360 B.R. 435 (Bankr.E.D. Pa 2007). In *Frascella,* the bankruptcy court held that the debtor's plan was not proposed in good faith due to its repeated failure to make full and complete disclosures until forced to do so by the court. *Id.* at 446. Moreover, the *Frascella* debtor's business transactions suggested it had manipulated important financial information. *Id.* at 449. Additionally, the debtor had failed to disclose that it was merging with a company that had six months earlier encumbered all of its assets to secure its obligations. *Id.* at 448. As a result, the creditors that voted in favor of the *Frascella* reorganization plan were not informed of this crucial information until the first day of confirmation proceedings. *Id.* The court believed that the failure to disclose such important information to creditors was clearly indicative of a debtor's bad faith.

> FN41. If the good faith of a debtor's proposed Chapter 11 plan is contested, then the debtor bears the burden of proof on the issue, and the standard of proof is the preponderance of the evidence standard. *In re Barnes*, 309 B.R. 888, 891 (Bankr.N.D.Tex.2004). AMH has contested Grace's good faith both before the Bankruptcy Court and now before this Court. The burden of proof is therefore on Grace to show that it proposed the Joint Plan in good faith by a preponderance of the evidence. The Court finds that Grace satisfied its burden through the presenta-

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tion of evidence and expert witness testimony at the Confirmation Hearing.

***22** In stark contrast to the debtor's actions in *Frascella,* however, nothing in the present record indicates that Grace has engaged in any such comparable behavior. There is no evidence that Grace was dishonest or had ulterior motives when it proposed the Joint Plan. Nor is there any indication that Grace intended to abuse the judicial process. Rather, the record shows that the Joint Plan was the result of years of litigation and extensive arms-length negotiations. *See In re U.S. Mineral Prods. Co.,* Bankr.No. 01–2471, 2005 WL 5898300, at *6, 20 (Bankr.D.Del. Nov. 29, 2005) (noting that the parties' arm's-length negotiations were a significant factor in finding that a plan was proposed in good faith); *Mount Carbon Metro.,* 242 B.R. at 41 (same). Moreover, as noted in *Sound Radio,* the Bankruptcy Court was in the best position to assess Grace's good faith. 93 B.R. at 853. It oversaw the management of this case for over ten years, and completed an extensive and exhaustive review of the voluminous record before it. After careful consideration of all issues, the Bankruptcy Court found that Grace proposed the Joint Plan with honesty and good intentions. The Court sees no reason to dispute this finding.

The third and final factor courts should consider when considering a debtor's good faith is if the debtor exhibited a fundamental unfairness when dealing with its creditors. In order to satisfy this requirement, the plan must treat all parties fairly and ensure that its confirmation comports with due process. *See Mount Carbon Metro.,* 242 B.R. at 39.[FN42] Both AMH and Montana allege that the Joint Plan is fundamentally unfair. The Court considers each Appellant's argument in turn.

> FN42. The Court notes that *Mount Carbon Metro.* dealt with the confirmation of a Chapter 9 bankruptcy plan, which addresses a municipality's debt structure under the Bankruptcy Code. However, because Chapter 11's plan requirements have been expressly incorporated into Chapter 9 by 11 U.S.C. § 901(a), a court may only confirm a Chapter 9 plan if all provisions of § 1129(a) have been met. Thus, a Chapter 9 plan will only be confirmed if the court finds that the plan was proposed in good faith and not by any means forbidden by law. *Mount Carbon Metro.,* 242 B.R. at 39; *see generally* 8B C.J.S. *Bankruptcy* § 1121 (2011).

First, AMH asserts a lack of good faith and unfairness because it was allegedly singled out for disparate treatment by Grace in comparison to other property damage claimants. A lack of good faith is evident when "the debtor seeks to delay or frustrate the legitimate efforts of creditors to enforce their rights." *Sound Radio,* 93 B.R. at 853 (quoting *In re Pikes Peak Water Co.,* 779 F.2d 1456, 1460 (10th Cir.1985)). AMH has presented no evidence suggesting Grace intended to delay or frustrate its rights. In fact, it is apparent from the voluminous record that Grace proposed the Joint Plan with the legitimate purpose of restructuring itself so that it could emerge from bankruptcy able to operate as a going concern.

Moreover, courts have found that different treatment of a creditor, by itself, does not necessarily run afoul of the good faith standard. *See Mount Carbon Metro.,* 242 B.R. at 42 (noting that favorable treatment of one particular creditor does not automatically indicate bad faith). In order to constitute bad faith, the differing treatment of the creditors would need to have a serious disparate effect on the parties.[FN43] This is not the case here. To the contrary, the Joint Plan as proposed would pay AMH's claim in full and leave it unimpaired. Consequently, the Court finds that AMH's argument on this point fails.

> FN43. As noted above, *Mount Carbon Metro.* involved the confirmation of a Chapter 9 plan proposed by a municipality. *Id.* at 25–26. Under that plan's proposed structure, a particular creditor received favorable treatment. The court noted that while favorable treatment alone did not automatically constitute bad faith, in this particular case it had the greater effect of effectively stripping the municipality of its public function duties because it transferred almost all of its taxing and revenue-raising powers to a single creditor. *Id.* at 42. As such, the court found that the plan "ignor[ed] the District's current and future obligations as a governmental entity and in doing so both *unfairly* favor [ed] a single landowner [ ] and [fell] outside the policy and purposes of Chapter 9." *Id.* at 41 (emphasis added).

***23** The Court next addresses Appellant Montana's claim that Grace did not act in good faith because the asbestos personal injury claims were settled without Montana's participation in settlement negotiations.[FN44] However, as the Bankruptcy Court properly stated, the Bankruptcy Code does not require that all creditors participate in plan negotiations. *In re W.R. Grace & Co.,* 446 B .R. 96,

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104 n. 5 (Bankr.D.Del.2011) ("There is no requirement in the Bankruptcy Code that all creditors participate in plan negotiations."); *see also In re Wash. Mut., Inc.,* 442 B.R. 314, 364 (Bankr.D.Del.2011) (holding that the fact that the debtor's equity committee did not participate in plan negotiations was not enough to constitute a lack of good faith under § 1129(a)(3)). In fact, a debtor's plan may satisfy good faith even if it "may not be one which the creditors would themselves design and indeed may not be confirmable." *Frascella,* 360 B.R. 435 (Bankr.E.D. Pa 2007) (citing *Matter of Briscoe Enter., Ltd., II,* 994 F.2d 1160, 1167 (5th Cir.1993)). The Bankruptcy Court was significantly involved in the settlement process. It would not have approved these settlements or confirmed the Joint Plan if it had reason to believe that certain parties were not being treated fairly. *See In re W. Asbestos Co.,* 313 B.R. 832, 847 (Bankr.N.D.Cal.2003) ("The Court would not have approved the settlements if it had believed they were being proposed in bad faith."). The Court thus finds that Grace was not acting in bad faith simply due to Montana's absence in settlement negotiations.

> FN44. Montana also asserts the Joint Plan was not proposed in good faith because it disregarded the absolute priority rule, failed to comply with the Bankruptcy Code, and was unfairly discriminatory and infeasible. Essentially, Montana argues that because the Joint Plan may fail for these reasons, it should automatically fail on good faith grounds as well. These arguments, however, have no bearing on whether or not the Plan was proposed in good faith. Instead, "[t]he only test of 'good faith' is whether the reorganization plan can succeed." *Sound Radio,* 93 B.R. at 853 (citing *In re Texas Extrusion Corp.,* 68 B.R. 712, 723 (D.C.N.D.Tex.1986)). Thus, the Court gives no merit to this claim.

Therefore, after a consideration of all three "good faith factors," the Court concludes that the Joint Plan was proposed in good faith. The plan exhibits honesty, good intentions, and a reasonable expectation that reorganization can be achieved, and is fundamentally fair to all creditors. Most importantly, its structure and purpose is consistent with the Bankruptcy Code.

B. Asbestos Liability Trusts Under Section 524(g)

The second issue addressed by the Court regards objections raised by AMH as a challenge to the two trust structure of Grace's Joint Plan. For purposes of clarity and completeness, the Court first generally reviews the basic structure of the trusts under the Joint Plan, and then considers the merits of AMH's objections.

1. The Two Trust Structure of the Joint Plan

Section 524(g) [FN45] is a special provision of the Bankruptcy Code created by Congress to provide "supplemental injunctive relief for an insolvent debtor facing the unique problems and complexities associated with asbestos liability." *In re Combustion Eng'g., Inc.,* 391 F.3d 190, 234 (3d Cir.2004). Under this law, a debtor's reorganization centers around a statutorily-created trust. The purpose of the trust is to preserve and facilitate the resolution of current asbestos claims, while simultaneously relieving the insolvent debtor from the uncertainty associated with impending future asbestos litigation. It is funded by the reorganized debtor's assets, stock, and any funds from contributions and settlements with third parties. The trust assumes the debtor's liabilities, which in turn gives the debtor the opportunity to restructure itself as an economically-viable entity able to satisfy its present and future asbestos-related liabilities. *Combustion Eng'g,* 391 F.3d at 234; *In re G–I Holdings,* 328 B.R. 691, 694–95 (D.N.J.2005). In order to receive the benefits of the trust and channeling injunction, the debtor and any covered third parties must satisfy the explicit requirements of § 524(g).[FN46]

> FN45. Section 524(g) states, in relevant part:
>
> > (1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.
> >
> > (B) An injunction may be issued ... to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust ... except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.
> >
> > * * *
> >
> > (2)(B)(i) [T]he injunction is to be implemented in connection with a trust that, pursuant to the

> plan of reorganization ... (I) is to assume the liabilities of a debtor at which the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by ... asbestos or asbestos-containing products[.]
>
> 11 U.S.C. § 524(g)(1–2)(I).

FN46. Section 524(g) lists these requirements, including that: (1) the debtor likely faces substantial future demands for payment of asbestos-related actions; (2) the amount, number, and timing of those demands are indeterminate; (3) the pursuit of demands outside of the plan would likely threaten its purpose of dealing equitably with all claims and future demands; (4) the terms of the injunction, including any provisions barring action against third parties, are set out in the plan and any disclosure statements; (5) at least 75% of the classes of claimants whose claims are handled by the trust voted in favor of the plan; and (6) the trust includes mechanisms that provide the court with reasonable assurance that it will value and be in a financial position to pay present and future claims in substantially the same manner. 11 U.S.C. § 524(g)(2)(B)(ii)(I)-(IV).

***24** The central pillars of Grace's Joint Plan are two trusts—the Asbestos PI Trust (hereinafter "personal injury trust" or "PI Trust") and the Asbestos PD Trust (hereinafter "property damage trust" or "PD Trust"). The personal injury trust assumes all of Grace's liabilities related to personal injury claims. It is funded by Grace's own cash and stock, as well as third party cash settlements and reimbursement agreements.[FN47] The primary class affected by the PI Trust is the Class 6 personal injury class.

FN47. Specifically, the trust is funded by Grace's contributions of: $250 million in cash (plus interest); $400 million of its insurance settlement proceeds, insurance reimbursement agreements, and its rights to pursue unsettled insurance; $1.55 billion of deferred cash payments secured by a majority of Grace's common stock post-reorganization; and several million dollars in stock and cash to be paid by Grace's subsidiaries, Sealed Air and Fresenius.

The PI Trust operates according to criteria established in a claims matrix. The matrix attempts to organize the personal injury claims brought against Grace by creating separate, delineated categories of pleural diseases related to asbestos, and assigning a set amount of recovery—known as a "Scheduled Value"—to each level. In this sense, the matrix is similar to a chart in which each claimant will receive a predetermined set value for his claim if the severity of his disease matches defined medical criteria in a category under the matrix. In addition to the Scheduled Value, the matrix also provides a "Maximum Value" for each claim within a particular category. To obtain the Maximum Value of a claim under the PI Trust, claimants need to meet certain individualized criteria (such as having numerous dependants or being a higher-wage earner) that would entitle them to more recovery. The intent in creating the Scheduled Value and Maximum Value scheme is to ensure that all personal injury claimants will receive an award under the trust roughly equal to the amount they would have received outside of bankruptcy.

The property damage trust is vastly similar to the personal injury trust. This second trust assumes Grace's liabilities related to property damage claims. It is funded by the assets of Reorganized Grace, as well as the proceeds of the settlement agreements reached between Grace and its subsidiaries, Sealed Air and Fresenius.[FN48] The primary class affected by the PD Trust is Class 7.

FN48. When the Joint Plan is confirmed, Sealed Air and Fresenius will pay $30 million in cash to the Asbestos PD Trust. In addition, Cryovac, Inc. (a subsidiary of Sealed Air) and Fresenius will pay the interest on this amount to the PD Trust. At this time, Grace will also deliver to the PD Trust a Deferred Payment Agreement obligating it to pay all Class 7A Claims allowed in the future. Once Grace has successfully reorganized, it will pay an additional $30 million to the PD Trust on the third anniversary of the Effective Date of the Joint Plan.

Under the structure of the PD Trust, traditional property damage claims in Class 7A are distributed in accordance with the Case Management Order ("CMO") put forth by the Bankruptcy Court in 2009, as amended in 2010. (Case Management Order for Class 7A Asbestos PD Claims ("CMO"), Ex. 25, Joint Appendix ("JA") 000804 .) The CMO provides a centralized procedure for the resolution of all traditional property damage claims in Class

7A that were not previously resolved by settlements, as well as governing rules and timelines. American ZAI property damage claims in Class 7B follow a separate distribution procedure under the Plan. The Payment of American ZAI claims is governed by the Asbestos PD Trust Agreement and the ZAI TDP for Claims Agreement.

Through the procedures associated with these two trusts, the Joint Plan attempts to resolve Grace's current and future personal injury and property damage liabilities related to asbestos. With the two trusts assuming its liabilities, Grace is given some breathing room to reorganize itself and implement the terms of the Joint Plan so that it can emerge from bankruptcy as a going concern. The Bankruptcy Court oversaw the creation and implementation of both trusts under the Joint Plan. It approved the Joint Plan's structure, including both trusts, in its order confirming the Joint Plan on January 31, 2011, where it explicitly held that, "The Joint Plan [ ] complies, in all respects, with § 524(g)."

2. Requirements of a Proper Trust Under Section 524(g)

***25** AMH, however, objects to the structure of the Joint Plan on the grounds that the property damage trust is not a "genuine" trust. AMH claims that the PD Trust lacks specific procedures for determining and valuing claims, and instead merely "operates as nothing other than a check-writing facility for Class 7A Claimants." (AMH Br. 49.) The Court disagrees.

Section 524(g) provides, in relevant part, that a trust created pursuant to a plan of reorganization must:

> (I) assume the liabilities of a debtor ... [that] has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos-containing products; (II) be funded in whole or in part by the [debtor's] securities ...; (III) ... own, or ... be entitled to own if specified contingencies occur, a majority of the voting shares of: (aa) each such debtor; (bb) the parent corporation of each such debtor; or (cc) a subsidiary of each such debtor that is also a debtor; and (IV) is to use its assets or income to pay claims and demands[.]

11 U.S.C. § 524(g)(2)(B)(i). Only if a trust satisfies all four of these requirements will it be considered proper under the statute.

In the instant case, the Court finds that Grace's PD Trust satisfies all four requirements set forth under § 524(g). The first element is met because Grace is a corporate defendant involved in personal injury and property damage lawsuits related to asbestos exposure. Moreover, upon the Plan's execution, the trusts will assume Grace's liabilities for these legal actions. The second element is satisfied because the PD Trust is funded in part by its own securities. Specifically, the PD Trust is largely funded by the Class 7A Deferred Payment Agreement,[FN49] which constitutes a note for deferred payment. A note, in turn, meets the definitional requirements of a "security" under the Bankruptcy Code. *See* 11 U.S.C. 10 1(49)(A)(I) ("The term 'security' includes: [a] note[.]"); *see also In re Burns & Roe,* No. Civ. A. 08–4191, 2009 WL 438694, at *26, 31 (D.N.J. Feb. 23, 2009). Moreover, Grace satisfies the third element of § 524(g) because, upon the occurrence of certain specified contingencies,[FN50] both the PI and PD Trusts will own a majority share of Reorganized Grace. Finally, the fourth element is met because the assets in the PD Trust will be used to pay Grace's claims and demands related to its outstanding asbestos liabilities. As such, Grace's PD Trust constitutes a "genuine" trust that meets all the requirements set forth in § 524(g).

> FN49. The Class 7A Deferred Payment Agreement is a payment agreement entered into between Grace and the PD Trust, on behalf of property damage claimants. The Agreement outlines the terms and conditions for payment distributions from the PD Trust. (*See* Deferred Payment Agreement (Class 7A PD), Ex. 27, JA 000859.)

> FN50. These contingent events are provided and described in extensive detail in Grace's Share Issuance Agreement. (*See* Share Issuance Agreement, Ex. 20., JA 000626–42.)

C. The Section 524(g) Channeling Injunction

The next set of objections that the Court considers involves the injunction within Grace's Joint Plan that will channel all asbestos-related claims to the aforementioned trusts.

In conjunction with the creation of a trust under § 524(g), the bankruptcy court issues an injunction that acts as a nationwide stay against both current and future litigation in federal and state court related to the debtor's asbestos liability. During the period of corporate reorganization, creditors of the corporation can file proofs of claims in the bankruptcy court within the time frame specified by court order or the Federal Rules of Bankruptcy Procedure. *See* 11 U.S.C. § 501 (giving creditors authority to file proofs of claims); Fed. R. Bankr.P. 3003 (listing requirements for filing a proof of claim in a Chapter 11 reorganization case). Rather than asserting claims against the debtor corporation itself, however, the injunction "channels" all claimants to pursue any remedies that they may have against the trust, which will be resolved in accordance with the debtor's plan of reorganization. *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 234 (3d Cir.2005); *In re G–I Holdings, Inc.,* 328 B.R. 691, 694–95 (D.N.J.2005). Under certain limited circumstances, the channeling injunction can extend to enjoin claims against third parties that are directly or indirectly involved in the asbestos litigation. *See* 11 U.S.C. 524(g)(4)(A)(ii); *see also Combustion Eng'g,* 391 F.3d at 234–35 (stating that § 524(g) injunctions can bar actions directed at identifiable third parties that are directly or indirectly liable for the conduct, claims against, or demands of the debtor); *G–I Holdings,* 328 B.R. at 695 ("[T]he debtor, its predecessors and successors in interest, and any affiliates [can] receive broad protection from any asbestos-related claims through the bankruptcy court's issuance of a 'channeling injunction [.]' ") (internal citation omitted). When exercised concurrently with administration of the trust, "the rehabilitation process served by the channeling injunction supports the equitable resolution of asbestos-related claims" and "makes it possible for future asbestos claimants to obtain substantially similar recoveries as current claimants in a manner consistent with due process." *Combustion Eng'g,* 391 F.3d at 234.

***26** In the instant case, several Appellants raise objections to the channeling injunction within the Joint Plan, including: (1) the scope of the channeling injunction; (2) the fairness and equality of the channeling injunction; and (3) the effect of the channeling injunction on releases from liability under the Plan. The Court considers each objection in turn.

1. The Scope of the Channeling Injunction

a. Extension of the Channeling Injunction to Independent Insurer Wrongdoing Claims

The Libby Claimants allege that the scope of § 524(g) channeling injunction is improper because it is too ambiguous to be enforced. While they acknowledge that the injunction clearly enjoins them from pursuing Grace's insurers on claims related to insurer derivative liability, they contend that the injunction is vague as to whether they may assert claims against insurers for their alleged independent tortious "insurer wrongdoing." [FN51] (Libby Br. 38.) Thus, they argue that because the Bankruptcy Court did not expressly rule on whether individual insurer wrongdoing claims are permissible, the injunction as a whole is improper. Grace and its insurers [FN52] disagree, claiming that the injunction is explicitly clear that it only bars claims that are found to be derivative of Grace's liability. For the reasons that follow, the Court finds that the injunction in its present form is unambiguous in that it only enjoins the Libby Claimants from bringing claims against Grace's insurers for their derivative liability.

FN51. These independent claims of insurer wrongdoing are based on the notion that as Grace's insurers, these insurance companies owed the Libby Claimants a duty of care to warn them of the dangers associated with asbestos and the nearby mine.

FN52. Insurance agencies CNA Companies, MCC, Arrowood, and Travelers all filed responsive appellate briefs.

The Court first considers the alleged ambiguity of the injunction. According to the Libby Claimants, the channeling injunction runs afoul of Federal Rule of Civil Procedure 65(d). Rule 65(d) provides that "[e]very order granting an injunction ... must state the reasons why it is issued; state its terms specifically; and describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed.R.Civ.P. 65(d)(1). The basic purpose of Rule 65(d) is to ensure that enjoined individuals are on notice of what conduct is precisely outlawed or permitted by the injunction. *Schmidt v. Lessard,* 414 U.S. 473, 476 (1974); *see also Granny Goose Foods, Inc. v. Bhd. of Teamsters, Local No. 70,* 415 U.S. 423, 444 (1974) (stating that enjoined individuals are entitled to "fair and precisely-drawn notice" of what injunctions prohibit). The Third Circuit has recognized that injunctions designed to bar future violations may receive a somewhat relaxed interpretation, *Louis W. Epstein Family P'Ship v. Kmart Corp.,* 13 F.3d 762, 771 (3d Cir.1994) (quoting *Transgo, Inc. v. Ajac Transmission Parts Corp.,* 768 F.2d 1001, 1022 (9th Cir.1985)), because "[a]ll that is required under Rule 65(d) is for the language of the injunction to be as specific as possible under the totality of the circumstances, such that a reasonable person could understand what conduct is

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proscribed." *Prosser v. Springel,* Nos. Civ. A.2008–16, 2008–18, 2008 WL 2368898, at *7 (D.V.I. June 6, 2008) (quoting *Medtronic, Inc. v. Benda,* 689 F.2d 645, 649 (7th Cir.1982)). However,"[b]road, non-specific language that merely enjoins a party to obey the law or comply with an agreement" will not satisfy the requirements of Rule 65(d). *Epstein,* 13 F.3d at 771 (internal citation omitted); *Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n,* 389 U.S. 64, 76 (1967).

*27 The channeling injunction in the instant case meets the specification requirements of Rule 65(d). The terms of the Joint Plan specify that the injunction and its corresponding trust are issued pursuant to § 524(g) of the Bankruptcy Code. Section 524(g), in turn, provides that channeling injunctions can extend to "identifiable" third parties who are "directly or indirectly liable" for the debtor's conduct, including alleged liability "aris [ing] by reason of ... the third party's provision of insurance to the debtor [.]" 11 U.S.C. § 524(g)(4)(A)(ii)(III). As the record makes abundantly clear, Grace's channeling injunction incorporates the statutory requirements of § 524(g). The injunction precludes the assertion of "Asbestos PI Claims" against Grace and any "Asbestos Protected Party." Asbestos PI Claims are defined in Section 1.1(34) of the Joint Plan as any:

> Claim ... or Demand against, or any present or future, debt, liability, or obligation of, any of the Debtors or the Asbestos Protected Parties ... arising out of ... (a) death, wrongful death, personal or bodily injury ... sickness, disease, loss of consortium, survivorship, medical monitoring, or other [damages] ... caused, or allegedly caused [by] ... directly or indirectly, in whole or in part, acts or omissions of ... the Debtor; and (b) the presence of or exposure at any time to asbestos or any products or materials containing asbestos that were mined, processed, consumed, used, stored, manufactured, designed, sold, assembled, supplied, produced, specified, selected, distributed, disposed of, installed by, or in any way marketed by ... the Debtor[.]

(Joint Plan § 1.1(34).) Those parties covered by the injunction—"Asbestos Protected Parties"—are likewise clearly listed in Section 1.1(51) of the Joint Plan. (*Id.* at § 1.1(51).) Subsection (d) of this Section directly states that insurers with whom Grace has reached settlements and who have agreed to contribute funds to the asbestos trust—referred to as "Settled Asbestos Insurance Companies"—are encompassed within the Asbestos Protected Party definition. (*Id.* § 1.1(51)(d).) Thus, Grace's channeling injunction is not ambiguous.

Quite to the contrary and consistent with Rule 65(d), the channeling injunction provides enough specificity and reasonable detail, without any reference to a complaint or other documents, that is sufficient to put all involved parties on notice of what is prohibited—the pursuit of an Asbestos PI Claim against Grace or any Asbestos Protected Party *for its derivative liability,* including those insurers with whom Grace previously settled. By necessity, the injunction uses sufficiently broad language because it was crafted to encompass the hundreds of potential asbestos claims that may be filed in the future. Such a "sweeping injunction" is permissible if it is "clearly necessary to protect the assets of the bankrupt's estate." *Kremen v. Blank,* 55 B.R. 1018, 1022–23 (D.Md.1985); *see also United States v. An Article of Drug,* 661 F .2d 742, 747 (9th Cir.1981) ("[A]n injunction may be framed to bar future violations that are likely to occur.") (internal citation omitted). Given the complexity of the Joint Plan, the various provisions of the several settlements at play, the massive number of parties involved, and the still unknown number of potential future claimants, the Bankruptcy Court could not have realistically framed a more specific order. *Prosser,* 2008 WL 2368898, at *8. Therefore, in accordance with the circumstances at hand, the channeling injunction is sufficiently specific.[FN53]

FN53. The Libby Claimants rely on the recent Supreme Court decision of *Travelers Indem. Co.v. Bailey,* 129 S.Ct. 2195 (2009) to show the peril to which they are subjected as a result of the ambiguity of the injunction. The Libby Claimants correctly state that in *Travelers,* the Supreme Court held that an injunction issued pursuant to the 1986 John Manville bankruptcy reorganization barred actions against Manville's insurers for their own alleged tortious conduct. *Id.* at 2203. However, *Travelers* is distinguishable from the instant case because the Manville injunction was not entered pursuant to § 524(g). Unlike the injunction in Grace's Joint Plan, the Manville injunction was therefore not limited in scope or tied to any statutory authority. The Supreme Court noted this distinction in its Opinion, expressly stating that:

> Our holding is narrow. We do not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's

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> wrongdoing ... [I]n 1994 Congress explicitly authorized bankruptcy courts ... to enjoin actions against a nondebtor [under § 524(g)]. On direct review today, a channeling injunction of the sort issued by the Bankruptcy Court in 1986 would have to be measured against the requirements of § 524 ... we do not address the scope of an injunction authorized by that section.
>
> *Id.* at 2207. Thus, the holding of *Travelers* is inapplicable to the instant litigation on this point.

*28 Having decided that the injunction is not vague, the Court next addresses the Libby Claimants' assertion that the Bankruptcy Court should have expressly ruled on the permissibility of independently pursuing claims against insurers for their own alleged tortious conduct. Merely because the Bankruptcy Court did not specifically state whether or not independent insurer wrongdoing claims are permissible does not make the Joint Plan ambiguous and inoperable. FN54 The Libby Claimants have not provided, nor has the Court independently found, any provision of the Bankruptcy Code or federal caselaw indicating that a bankruptcy court judge must explicitly address all possible future legal issues and rule on whether or not they would be covered by the channeling injunction. Such a requirement would be unreasonable, impractical, and, for all intents and purposes, impossible given the massive scale of this case and the still unknown number of future claims.

> FN54. In fact, the Court notes that at the Confirmation Hearing, the Bankruptcy Court clearly told the parties that: "[t]here is no way that I'm going to be granting any injunction that covers independent liability not derivative of the debtor ... to the extent the liability is determined not to be derivative it won't be channeled." (Hearing Trans., 01/10/11, at 51, JA 055017.)

Finally, if the Bankruptcy Court had addressed these claims, it may have unintentionally crossed into the unconstitutional territory of advisory opinions. It is firmly established in our judicial system that federal courts cannot issue advisory opinions. *See Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792) (finding that the issuance of nonbinding opinions on the amount of benefits available to Revolutionary War veterans was "not of a judicial nature"); *Muskrat v. United States,* 219 U.S. 346, 363 (1911) (holding that a lawsuit between the government and Native Americans over an allotment of land was not justiciable); *Flast v. Cohen,* 392 U.S. 83, 96–97 (1968) ("[T]he implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions[.]") (internal citations omitted). In order for a case to be justiciable and not an advisory opinion, there must be an actual dispute between adverse litigants. *See Preiser v. Newkirk,* 422 U.S. 395, 401 (1975) (stating that a justiciable dispute involves "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (internal quotations and citations omitted); *Porta v. Klagholz,* 19 F.Supp.2d 290, 294 (D.N.J.1998) ("[F]or a case to be justiciable ... there must be an actual dispute between adverse litigants [.]") (internal quotations and citations omitted).

Herein lies the flaw in the Libby Claimants' argument—there is no actual dispute, nor are the claims presented with "clear concreteness ... precisely framed and necessary for decision[.]" *Flast,* 392 U.S. at 96–97 (internal citations omitted). There is no dispute between the parties that Grace's injunction bars claims against insurers for their derivative liability. Having established above that the channeling injunction is not ambiguous, there also is no dispute that the Libby Claimants can independently pursue claims against Grace's insurers for their own alleged wrongdoing. The Libby Claimants have not, however, articulated to the Court what specific conduct or actions these alleged insurer tort claims are based upon or when they have or will occur, but instead merely allude to hypothetical future claims that are too conjectural at this point in time. As such, there is no real and substantial controversy for the Court to decide. If and when the Appellants bring such a suit for independent insurer liability, then a court will consider the merits of these claims and decide whether or not they are derivative of Grace's liability, and therefore entitled to injunctive protection. This inquiry is simply too premature at this point in time. The Bankruptcy Court properly declined to rule on these purely hypothetical claims. This Court likewise declines the invitation to do so.FN55

> FN55. In a separate but related argument, Grace's insurer MCC asserts that the Bankruptcy Court erred in stating that Grace and MCC agreed that the indemnity provisions of their settlement agreement would not cover MCC's alleged independent tortious conduct. MCC claims

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that if it is sued for its own independent wrongdoing, then its settlement agreement with Grace should indemnify it against such claims. However, given that such independent wrongdoing claims are completely hypothetical at this point, the Court need not rule on this issue.

b. Extension of the Channeling Injunction to BNSF

***29** As set forth above, § 524(g) authorizes extension of the channeling injunction to certain third parties in limited situations. *See* 11 U.S.C. § 524(g)(4)(A)(ii)(I-IV). BNSF now asks this Court to extend to it the protections afforded by the § 524(g) injunction. In its briefing presented to the Court, however, its rationale for making this request is unclear. FN56 The Court is therefore placed in the difficult position of assessing the scope of BNSF's request.

FN56. The Court notes that BNSF did not attempt to clarify its request at Oral Argument before this Court on June 28, 2011, when it merely stated that: "The third issue on appeal is that BNSF should be entitled to the 524(g) injunction ... We'll rest on our briefs on that point." (No. Civ. A. 11–199, Doc. No. 160, Tr. 6/28/11 at 53.)

In its brief, BNSF asserts that "[c]laims by personal injury plaintiffs against non-debtors such as BNSF asserting derivative liability are 'indirect' claims against the Debtors that seek to recover damages caused by the presence of asbestos, and fall within the claims authorized to be channeled ... In essence, claims asserted against BNSF constitute indirect claims against the Debtor's Estate[.]" (BNSF Br. 32.) This statement mischaracterizes the definition of an "indirect claim" under Grace's Joint Plan. Under the Plan, an "Indirect PI Trust Claim" is a claim made against Grace by an indirect claimant for indemnification, contribution, or subrogation for damages it paid to a personal injury plaintiff exposed to asbestos for which Grace is liable. (Joint Plan § 1. 1(144).) In another Section, the Joint Plan provides that such claims shall be enjoined pursuant to the § 524(g) injunction. (*Id.* at § 8.2.1.) In this scenario, the indirect claim under the Plan that could be enjoined would be any claim for indemnity and/or contribution that BNSF could seek from Grace. It would not be, as BNSF categorizes it, a claim by a personal injury claimant asserted directly against BNSF. Only the indirect claim brought *by BNSF* against Grace could be enjoined and channeled to the trust under the Plan; not the direct claim by the personal injury plaintiff *against BNSF*. To allow the injunction to issue in the latter situation would have the effect of not only precluding actions against BNSF for its liability derivative of Grace's conduct, but also its own independent liability. This result is expressly prohibited by Third Circuit precedent. *See* Combustion Eng'g, 391 F.3d 190, 233 (3d Cir.2004) ("[Section] 524(g) d[oes] not authorize a channeling injunction over [ ] independent, non-derivative third-party actions against non-debtors[.]"). Therefore, to the extent that BNSF requests that the § 524(g) injunction be extended to enjoin claims against it for its own independent liability owed to personal injury claimants, this request will not be granted.

The Court now considers extension of the channeling injunction to enjoin claims against BNSF for actions brought against it that are allegedly derivative of Grace's conduct. On this point, the Court must consider the holding of *Combustion Engineering,* as it is directly relevant here. In that case, the Third Circuit clarified the scope of a § 524(g) channeling injunction, holding that:

> [Section] 524(g) limits the situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor ... [B]oth the plain language of the statute and its legislative history make clear [that] § 524(g) provides no specific authority to extend a channeling injunction to include third-party actions against non-debtors where the liability alleged is not derivative of the debtor.

***30** *Id.* at 234, 236. In so holding, the Third Circuit recognized the four instances under which third-party liability could arise under the Code in a Chapter 11 reorganization case: (1) a third party's ownership of a financial interest in the debtor; (2) a third party's involvement in management of the debtor; (3) a third party's provision of insurance to the debtor or a related party; or (4) a third party's involvement in a transaction changing the debtor's corporate structure, or in a loan or other financial transaction affecting the financial condition of the debtor. *Id.* at 235; *see also* 11 U.S.C. 524(g)(4)(A)(ii)(I-IV). If the third party does not fall into one of these four categories, then its claims will not be considered derivative of the debtor's liability, and thus are not eligible to be enjoined. *Combustion Eng'g,* 190 F.3d at 236–37 ("[Section] 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[.]"); *In re Federal–Mogul Global,*

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Inc., 411 B.R. 148, 165–66 (Bankr.D.Del.2008) (finding that a third party whose alleged liability arose from its contractual agreements with the debtor, but not as a result of any of the four conditions listed in § 524(g), could not have its claims enjoined); *In re Pittsburgh Corning, Corp.*, 453 B.R. 570, 590 n. 25 (Bankr.W.D.Pa.2011) (noting that it is "clear that the asbestos channeling injunction protection is available only to nondebtor affiliates that meet the § 524(g) requirements").

In the instant case, BNSF's alleged liability did not arise by any of the four circumstances provided by § 524(g): BNSF never owned a financial interest in Grace, provided insurance to it, engaged in its management, or entered into a transaction with it that altered Grace's corporate structure. Rather, BNSF's contractual indemnity agreements serve as the crux of its relationship with Grace. It has been explicitly recognized, however, that contractual indemnity agreements that do not otherwise meet the definitional requirements of § 524(g) cannot serve as the link in the chain connecting a third party's liability to the debtor for purposes of extending the channeling injunction to non-debtors. *See Federal–Mogul*, 411 B.R. at 166. Thus, because BNSF's claims against Grace do not meet the Code's definitional requirements of derivative liability, § 524(g) explicitly precludes the Court from extending injunctive relief to BNSF under these circumstances.

Moreover, § 524(g) injunctive relief is "closely tied to the value being contributed to the plan." *In re Congoleum Corp.*, 362 B.R. 167, 180 (Bankr.D.N.J.2007). Although BNSF asserts in a footnote that it "was always ready and willing" to make a contribution to the trust (BNSF Br. 33 n. 4), this does not change the fact that BNSF never in fact made such a contribution. Common sense and fairness dictate that BNSF should not be freely shielded from liability, while other parties are required to make substantial payments and sacrifices in order to receive injunctive protection. The Court therefore declines to extend injunctive relief to BNSF.

c. AMH's Objections to the Scope of the Channeling Injunction

*31 AMH alleges that the scope of the channeling injunction sweeps too broadly in violation of § 524(g) in regards to property damage claims. AMH claims that there is no need to channel property damage claims at all because such claims are unimpaired and fully paid under the TDP. (AMH Br. 50.) In making its argument, AMH asks this Court: "If P[roperty] D[amage] Claims are unimpaired and are to be paid 100% ... what is the purpose of channeling such claims to a trust?" (*Id.*)

The answer, of course, is that the purpose of channeling these claims is ensure the payment of both current and future property damage claims. Section 524(g) requires debtors seeking its protection to show that there is a substantial likelihood that they will be subject to future property damage or personal injury claims related to asbestos exposure before they can take advantage of the benefits provided by the statute's trust and channeling injunction. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(I). Despite the fact that many property damage claims have been resolved in the instant case, a cloud of uncertainty still hangs over the Debtor. Grace began shipping insulation products containing traces of asbestos across the country and internationally as early as the 1920s. It still remains unknown (and may never be ascertained) how many entities and individuals were affected by these products, the precise quantity of asbestos-laden products that were sold, which buildings the products were used in and how much was used per building, or the percentage of these entities that have successfully removed the asbestos products from their buildings. Thus, there remains a significant chance that future property damage claims will be asserted against Grace by property damage claimants. Numerous expert witnesses testified to this fact before the Bankruptcy Court.[FN57] Therefore, in order to meet the requirements of § 524(g), the Joint Plan must have established mechanisms that will handle payment of these future claims. Grace's Plan does so through the procedures associated with its PD Trust. As such, the extension of the channeling injunction to these property damage claims is proper.

FN57. The Court credits the testimony of former Judge Alexander Sanders, the legal representative for future asbestos-related property damage claimants ("PD FCR") in this case, and expert witness Dr. Denise Martin. Judge Sanders testified to the unquestionable benefits afforded to future property damage claimants under Grace's Joint Plan in comparison to pursuing their claims outside the context of the trust. (*See* Trans. of Plan Confirmation Hearing, ("Sanders Testimony"), 09/17/09 at 97–100, JA 004262.) Dr. Martin testified as to the substantial likelihood that future property damage claims will be made against the trust. *See In re W.R. Grace & Co.*, 446 B.R. 96, 144 (Bankr.D.Del.2011).

2. The Fairness and Equality of the Channeling In-

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junction

a. Application of the Channeling Injunction to MCC

Prior to filing for bankruptcy, Grace had reached a settlement agreement with one of its insurers, MCC. Pursuant to that agreement, MCC made substantial monetary contributions to Grace to assist in the coverage of its asbestos-related liability. In exchange, Grace terminated MCC's previous obligations and agreed to indemnify MCC against all future asbestos-related claims. After filing for bankruptcy, Grace entered into settlements with several other insurers. These settlements, as well as Grace's own contributions, will be used to fund the PI Trust. As a result, these other insurers and MCC were all designated as Settled Asbestos Insurance Companies under the terms of the Joint Plan, meaning that they were entitled to injunctive relief under § 524(g). The Libby Claimants now allege that extending this injunctive relief to MCC violates the "fair and equitable" requirement of § 524(g) because MCC did not make a direct financial contribution to the trust, but is nonetheless still protected from asbestos-related litigation. Grace and MCC claim that the statute has not been violated because MCC's financial contribution is indirectly included in the overall trust amount since Grace's own contributions to the trust are, in part, due to MCC's previous contribution.

***32** Section 524(g) provides, in relevant part, that a channeling injunction protecting debtors and identifiable third parties must be "fair and equitable" to those "persons that might subsequently assert [asbestos-related claims against the debtor], in light of the benefits provided ... to [the] trust on behalf of such ... debtors or such third part[ies]." 11 U.S.C. § 524(g)(4)(B)(ii). "A review of the case law suggests that finding that an injunction is fair and equitable is closely tied to the value being contributed to the plan." *In re Congoleum Corp.*, 362 B.R. 167, 180 (Bankr.D.N.J.2007). Federal courts within the Third Circuit have repeatedly recognized that such contributions to the trust can be made by the debtor or third parties themselves, or, alternatively, *on behalf of* the parties protected by the injunction. *See In re Kaiser Aluminum Corp.*, Bankr.No. 02-10429, 2006 WL 616243, at *17 (Bankr.D.Del. Feb. 6, 2006) (finding that settlements reached between Kaiser and its insurers at various points in time were fair and equitable because they constituted "substantial contributions" to the asbestos trust "on behalf of the Protected Parties"); *In re Burns & Roe Enter.'s, Inc.*, No. Civ. A. 08-4191, 2009 WL 438694, at *9, *35 (D.N.J. Feb. 23, 2009) (finding that the § 524(g) injunction at issue was fair and equitable to future claimants based on the benefits provided to the trust by or on behalf of the protected parties and settling insurers); *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 156 (D.Del.2006) (same); *In re Federal-MogulGlobal, Inc.*, Bankr.No. 01-10578, 2007 WL 4180545, at *33 (Bankr.D.Del. Nov. 16, 2007) (holding that substantial contributions made to the trust, either directly or by "the consensual resolution of claims against the Debtors," were fair and equitable). As such, as long as a party has contributed reasonable value to the reorganization plan, whether through its own direct contribution or by those made indirectly on its behalf by another party, then it is fair and equitable to future claimants for that party to receive the injunctive protection afforded by § 524(g).

As previously mentioned, the trust in this case is funded by both Grace's own contributions and the contributions of several third parties. MCC and Grace entered into their settlement agreement at a time when Grace was already experiencing financial difficulty as a result of the increased number of asbestos claims filed against it. The settlement payments made by MCC substantially increased Grace's available funds. After the bankruptcy filing, the remainder of these funds became part of Grace's bankruptcy estate. Subsequently, during its period of corporate restructuring, Grace formulated the Joint Plan under which it agreed to directly pay substantial value to the trust largely from the remainder of the assets and funds available in its bankruptcy estate. Thus, the contributions to the asbestos trust directly made by Grace include, to some degree, an amount originally contributed by MCC. Without MCC's previous payments, Grace would not be able to donate as much as it presently can to the trust. As such, Grace's direct contributions to the trust reflect, as provided for in § 524(g), an amount made "on behalf of" MCC. Therefore, extending injunctive protection to MCC is fair and equitable under these circumstances. In fact, not enjoining future claims against MCC could render a potentially unfair result since MCC could actually be responsible for double the amount of any other party given its previous significant monetary contribution to Grace.

***33** For these reasons, the requirements of § 524(g) are satisfied, and the findings of the Bankruptcy Court on this matter are therefore affirmed.

b. Application of the Channeling Injunction to CNA

In separate but related arguments, both BNSF and the Libby Claimants object to Grace's aforementioned Set-

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tlement Agreement with CNA, which categorizes CNA as a Settled Asbestos Insurance Company entitled to § 524(g) injunctive relief, because it allegedly violates the "fair and equitable" requirement of the statute.

i. BNSF's Objections

According to BNSF, the Bankruptcy Court erred because it did not make a specific finding as to whether the Libby Claimants' aforementioned post-bankruptcy, independent insurer wrongdoing tort claims against CNA would be covered by the channeling injunction, and that therefore entry of the injunction was not "fair and equitable" to those parties, *i.e.,* the Libby Claimants, whose future claims might be enjoined. BNSF further asserts that the Grace—CNA Settlement Agreement is unfair because the entire value of CNA's contribution under the Agreement would be included in the trust's overall pool—an amount set to be distributed among all asbestos personal injury claimants—without regard as to whether or not the claimant has a direct claim against CNA. Thus, BNSF claims that the current structure of the Joint Plan cannot be affirmed because it fails to account for the fact that the Libby Claimants are the only Class 6 claimants that could arguably bring direct claims against CNA for the insurer's alleged independent tort liability (assuming they could do so under applicable state law), and that allowing other Class 6 claimants who cannot assert such independent claims against CNA to recover the same amount is unfair and inequitable.

At the outset, BNSF lacks the standing to raise these claims.[FN58] The rule of the Third Circuit is clear that "[a]ppellate standing in the bankruptcy context is more restrictive than Article III standing," and is limited to "persons aggrieved by an order of the bankruptcy court." *In re Combustion Eng'g,* 391 F.3d 190, 214 (3d Cir.2005) (quoting *In re Dykes,* 10 F.3d 184, 187 (3d Cir.1993)). Aggrieved persons are those whose rights or interests are *directly* affected by an order of the bankruptcy court that "diminish their property, increase their burdens, or impair their rights." *Id.* (internal citations and quotations omitted) (emphasis added.). Appellate standing is not available to those parties that are only indirectly affected by the bankruptcy court's order by some indirect exposure to a potential harm. *Id.* at 215 (citing *Travelers Ins. Co. v. H.K. Porter Co.,* 45 F.3d 737, 741 (3d Cir.1995)).[FN59]

FN58. To the extent that the Libby Claimants, rather than BNSF, object to confirmation of the Plan, their claims are considered and discussed more fully, *infra.*

FN59. BNSF relies on the recent Third Circuit case of *In re Global Ind. Technologies, Inc.,* 645 F.3d 201 (3d Cir.2011) ("*GIT* ") to establish that it has standing. In *GIT,* the Third Circuit identified two types of standing in the context of bankruptcy litigation: (1) "bankruptcy standing," which addresses what is required of the parties to bring a claim before the bankruptcy court; and (2) "appellate standing," which addresses what is needed to bring a claim on appeal. *Id.* at 209. The Third Circuit only found that the objecting parties in that case had bankruptcy standing to object to confirmation of the reorganization plan when it was before the bankruptcy court, and did not address the objecting parties' appellate standing. *Id.* at 209–10. In the instant case, BNSF objects to substantive findings made by the Bankruptcy Court, and therefore BNSF must establish that it meets the requirements of appellate—not bankruptcy—standing to bring these claims. Therefore, BNSF's reliance on the holding of *GIT* to establish its standing on this issue is misplaced.

BNSF does not meet the requirements of appellate standing here because it has failed to show the Court how it would be directly adversely affected by the extension of the channeling injunction to CNA. Rather, BNSF appears to be raising concerns that properly belong to the Libby Claimants.[FN60] Such third-party standing, rooted in the uncertain possibility that the Libby Claimants may eventually bring independent tort claims at some point in the future, is impermissible. Therefore, due to the fact that BNSF was not personally aggrieved by the Bankruptcy Court's order extending injunctive protection to CNA,[FN61] the Court need not even address the merits of its claims.[FN62]

FN60. BNSF claims that it has standing because the channeling injunction enjoins BNSF from impleading and/or pursuing contribution claims against CNA, and will therefore inevitably increase the number of claims asserted against BNSF. BNSF cites *PWS Holding Corp.,* 228 F.3d 224 (3d Cir.2000), which it claims precisely supports its argument that "[d]irectly enjoining BNSF from pursuing such claims against the CNA Companies establishes standing." (BNSF Br. Objecting to Settlement Agreement, at 10 n. 3.) This misrepresents the holding of *PWS Hold-*

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ing. In that case, a creditor argued that the plan proponents failed to comply with disclosure requirements by not providing certain information to creditors. *PWS Holding,* 228 F.3d at 248. The Third Circuit found that the creditor lacked appellate standing to raise this claim because it could not show that it was "personally aggrieved" by the bankruptcy court's order, and that the possibility that other creditors would have acted differently was simply not enough to serve as the basis for third-party standing. *Id.* at 249. In so holding, the Third Circuit noted that third-party standing is of particular concern in bankruptcy proceedings that involve numerous parties, and that, while the Bankruptcy Code confers broad standing to parties at the trial level in this context, the same is not true on appeal. *Id.* at 248. The court stated that appellate standing is more restricted, and noted that "courts have been understandably skeptical of the litigant's motives and have often denied standing" in situations where a creditor seeks to assert the rights of another party on appeal in bankruptcy proceedings. *Id.* (quoting *Kane v. Johns–Manville Corp.,* 843 F.2d 636, 643 (2d Cir.1988) (internal citation omitted)).

The Court finds this language particularly instructive here. In its briefing, BNSF does not specifically identify any claims for which it presently seeks contribution or any impleader actions against CNA, let alone show the Court how the Joint Plan would inevitably increase the number of claims filed against BNSF should CNA receive injunctive protection. The Plan Proponents respond that BNSF has no such claims against CNA. (*See* Plan Proponents Br. Regarding Objection to Settlement Agreement, at 38 n. 92, "BNSF has no claims against CNA ...").) Therefore, as noted by the Third Circuit in *PWS Holding,* these amorphous claims are "simply too speculative to be a basis for ... standing here." *Id.* at 249.

Moreover, BNSF has not explained to the Court how it would even have a contribution claim against CNA. CNA and the Plan Proponents allege that BNSF would never be able to assert such claims based on how liability is apportioned according to Montana's multiple defendant liability statute. *See* MONT.CODE. ANN. § 27–1–703. Rather than engaging in a lengthy choice-of-law analysis and interpretation of state law, the Court notes that a "terse reference in a complex ... case is insufficient" to establish BNSF's standing here. *See Time Warner Entm't Co., L.P. v. F.C.C.,* 56 F.3d 151, 202 (D.C.Cir.1995) (finding that a party's reference to an argument in a footnote in its brief that was neither explained nor properly developed was insufficient grounds for standing); *see also S. W. Pa. Growth Alliance v. Browner,* 121 F.3d 106, 122 (3d Cir.1997) ("[A]ppellate courts should generally not address legal issues that the parties have not developed through proper briefing."). Finally, to the extent that BNSF asserts claims against CNA for the proceeds of its *own* insurance agreements with CNA, Section 8.2.2 of the Joint Plan makes explicitly clear that BNSF will not be hindered from asserting such claims and should have no difficulty in recovering these proceeds to which it is properly entitled.

FN61. Additionally, BNSF's argument would also fail on mootness grounds. BNSF argues that because it is a co-defendant with CNA, if the channeling injunction enjoined the Libby Claimants' future independent tort claims against CNA, then BNSF could potentially be exposed to greater liability since it is likely that more claims would be filed against it. Having already decided above, however, that that the Libby Claimants are not enjoined from bringing separate claims against insurers for their independent tort liability in this case, this argument is now moot.

FN62. Having found that BNSF lacks standing to raise these claims, the Court declines to discuss the merits of these claims in depth. Any objections related to approval of the Settlement Agreement have been addressed at length, *supra.* As to any remaining objections related to issuance of the injunction in the context of confirmation of the Joint Plan, the Court notes that the Bankruptcy Court fully addressed and considered the merits of these claims in its oversight of this case. (*See* Bankr.No. 01–1139, Doc. No. 26106, 01/22/11, Order Pursuant to Sections 105, 363, 1107, and 1108 of the Bankruptcy Code and Rules 2002, 6004, 9014, and 9019 of

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the Federal Rules of Bankruptcy Procedure Approving the Settlement Agreement Between W.R. Grace & Co. and the CNA Companies ("Approval Order").) Bankruptcy courts are entitled, in their discretion, to issue injunctions to the fullest extent permitted by § 524(g). *See* 11 U.S.C. § 524(g)(1)(A-B); *see also* Travelers Indem. Co. v. Bailey, 129 S.Ct. 2195, 2202 (2009). Therefore, the Court presently finds—for the sake of clarity and finality—that the Bankruptcy Court properly exercised its discretion without any clear error, and therefore all its findings related to BNSF's objections on these grounds are affirmed.

ii. The Libby Claimants' Objections

***34** The Libby Claimants also object to the channeling injunction on the grounds that it does not satisfy the fair and equitable requirement of § 524(g)(4)(B)(ii).[FN63] As a result of the Settlement Agreement reached between Grace and CNA, CNA agreed to contribute the proceeds of its insurance policies to Grace's bankruptcy estate for the benefit of asbestos personal injury claimants. In return, CNA was designated as a Settled Asbestos Insurance Company entitled to § 524(g) injunctive relief. As previously mentioned, CNA's insurance policies with Grace consist of coverage for both "products" and "non-products" claims. The Libby Claimants hold non-products claims because their injuries are primarily due to exposure as a result of airborne asbestos. According to the Libby Claimants, they hold "stronger insurance rights" because Grace's insurance covers 100% of the non-products claims asserted against it. (Libby Br. 27.) They claim that CNA's contribution that covers both products and non-products claims, without independently assigning a set value for each, violates the fair and equitable requirement because it will be distributed pro rata to all personal injury claimants without differentiating between product and non-product claimants.[FN64]

FN63. This section states, in relevant part, that:

(4)(B) ... [S]uch injunction shall be valid and enforceable ... if—

(ii) the court determines, before entering the order confirming such plan, that ... such injunction ... is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

11 U.S.C. § 524(g)(4)(B)(ii).

FN64. The Libby Claimants also assert that the fair and equitable requirement has been violated here because extending the channeling injunction to protect CNA could enjoin their potential independent insurer wrongdoing tort claims against CNA, and that the Bankruptcy Court's failure to value these independent tort claims was error. First, the channeling injunction is clear that it only enjoins third party claims that are derivative of Grace's liability, and the Libby Claimants are free to pursue their independent tort claims against CNA. This issue was discussed at length, *supra,* when the Court addressed the extension of the injunction to independent wrongdoing claims.

As to the Libby Claimants' other contention, the Court finds that there is nothing unfair or inequitable about the Bankruptcy Court's non-valuation of these claims that would run afoul of § 524(g)'s requirements. Section 524(g) provides that a channeling injunction must be fair and equitable to persons that might *subsequently assert* demands against the debtor or derivatively-liable third party in the future. *See* 11 U.S.C. § 524(g)(4)(B)(ii) (emphasis added). The statute goes on to define "demands" in this context as requests "for payment, present or future ... [that] pursuant to the plan [are] to be paid by the trust." 11 U.S.C. § 524(g)(5)(C). Thus, in accordance with the express language of the statute, the consideration being paid by CNA must be fair and equitable to claimants asserting claims against the PI Trust in the future in light of the benefits CNA has provided to such trust. The Libby Claimants have shown no reason and cited no evidence indicating that they would be unable to do so in the future. Nothing in the statutory language requires the Bankruptcy Court to independently value these alleged independent tort claims that may at some point be asserted against CNA. As such, the Libby Claimants' assertions on these grounds are based upon a flawed interpretation of the statute, and are therefore meritless.

Section 524(g) requires a court, prior to issuing injunctive relief, to first find that the reorganization plan is fair and equitable to persons who might later assert asbestos-related claims in light of the benefits the debtor or third parties provide to the trust. *See* 11 U.S.C. 524(g)(4)(B)(ii). In crafting this statutory provision, Congress did not explicitly define the meaning of "fair and equitable." As a result, most courts interpreting the section have "looked at all the elements of a plan and then made a generalized determination of what is fair and equitable." *In re Congoleum Corp.*, 362 B.R. 167, 179–180 (Bankr.D.N.J.2007); *see also In re Kaiser Aluminum Corp.*, Bankr.No. 02–10429, 2006 WL 616243, at * 17, 22 (Bankr.D.Del. Feb. 6, 2006); *In re J.T. Thorpe Co.*, 308 B.R. 782, 791 (Bankr.S.D.Tex.2003). This determination does not require mathematical certainty nor precision, but should identify a clear relationship between the benefits received and the contributions made by a third party that receives injunctive protection. *In re Quigley Co., Inc.*, 437 B.R. 102, 133, 134 n. 42 (Bankr.S.D.N.Y.2010).

An analysis of the record indicates that the fair and equitable requirement is clearly satisfied here. At trial, an expert witness estimated that claims against the PI Trust will have a total value ranging between $6.3 and $7.4 billion. As discussed at length above, Grace's Settlement Agreement with CNA injects significant monetary and non-monetary value into Grace's bankruptcy estate. Under that Agreement, CNA will contribute up to $84 million to the PI Trust for the sole benefit of personal injury claimants, a significant percentage of which are Libby Claimants. Additionally, the Settlement requires that both CNA and Grace give up prior obligations owed to and claims asserted against each other, and resolves all issues related to coverage, retrospective premiums, and indemnity rights. Given that Grace and CNA have been intensely litigating these various issues for over three decades, the value of putting an end to this litigation can hardly be overstated. Thus, in "examin[ing] the contributions ... in the context of the overall bankruptcy scheme," it is evident to the Court that the benefits provided to the trust by CNA and Grace are fair and equitable to any persons that might subsequently bring any asbestos-related claims. There is a clear relationship between the value provided by CNA's significant contributions and the benefit of injunctive relief it retains under the Settlement and Joint Plan. Section 524(g) does not require mathematical precision, and the case law does not indicate that an individualized valuation to differentiate between products and non-products claimants is necessary under these circumstances.[FN65] Therefore, the Court finds that the fair and equitable requirement of § 524(g) is satisfied here, and the Libby Claimants objections are overruled.

> FN65. The Libby Claimants rely on *Quigley*, 437 B.R. 102, 140 (Bankr.S.D.N.Y.2010) to support their argument that the Bankruptcy Court was required to assign a precise value to non-products claims. It is true that the *Quigley* Court held that a third party's contribution to the reorganization plan was substantially less than the benefit it would realize from the channeling injunction. *Id. Quigley,* however, is distinguishable from the instant case. The third party in *Quigley* was the debtor's parent corporation and sole shareholder. *Id.* at 111. Moreover, the parent itself had previously manufactured asbestos-containing products. *Id.* Upon acquiring the subsidiary, the parent took out many insurance liability policies that provided joint coverage to both corporations for their asbestos liability. *Id.* In light of this intertwined relationship, the *Quigley* Court engaged in a complicated and lengthy analysis of what the parent's estimated asbestos liability would be outside of its subsidiary's bankruptcy. *Id.* at 134–140. The instant scenario does not involve a parent and subsidiary with joint insurance policies. Rather, this dispute solely involves the debtor and one of its many insurers. Therefore, such a complex and lengthy analysis of the debtor's relationship with the third party is not warranted in this case, and the Court need only analyze the overall impact of CNA's contribution in the context of Grace's entire bankruptcy scheme. *See Congoleum*, 362 B.R. at 179–180.

3. The Effect of the Channeling Injunction on Releases from Liability Under the Joint Plan

***35** The Libby Claimants argue against confirmation of the Joint Plan on the grounds that it impermissibly releases Grace's subsidiaries, Sealed Air and Fresenius, from future claims related to Grace's asbestos liabilities by extending injunctive protection to them. They claim that third parties cannot be released from liability without the affirmative agreement of all creditors involved in the debtor's reorganization, and that because the Libby Claimants did not vote in favor of the Joint Plan, it was erroneous for the Bankruptcy Court to allow the release of Sealed Air and Fresenius from liability.

In order for a reorganization plan that includes an injunction barring third-party claims against non-debtors to

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be approved, the injunction must be "both necessary to the reorganization and fair" under 11 U.S.C. § 105(a). FN66 *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 206 (3d Cir.2011) (internal citations omitted) ("*GIT* "); *see also In re Cont'l Airlines, Inc.*, 203 F.3d 203, 214 (3d Cir.2000) ("The hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, and specific factual findings[.]"); *In re Prussia Assoc.*, 322 B.R. 572, 596 (Bankr.E.D.Pa.2005) (citing *Cont'l Airlines); In re Exide Tech.*, 303 B.R. 48, 72 (Bankr.D.Del.2003) (same).FN67 Grace's channeling injunction satisfies both of these requirements. First, extending the effects of the injunction to release the subsidiaries from future liability was necessary to both settlement agreements. The litigation regarding Sealed Air and Fresenius' liability to and indemnification from Grace demanded a significant amount of time and resources that was driving Grace further into debt. In order to effectively reorganize itself and emerge from bankruptcy as a going concern, it was evident early on in the reorganization period that Grace and its subsidiaries needed to settle their litigation disputes. A key part of both settlements was the release of both subsidiaries from future liability. Without these releases, it is unlikely that either Sealed Air or Fresenius would have agreed to settle. Moreover, Sealed Air and Fresenius' $1 .1 billion contribution was also very necessary to effectuate Grace's reorganization and make the Joint Plan work. This amount constitutes a significant portion of Grace's assets that will be used to pay both present and future personal injury and property damage claims, without which Grace would likely be unable to meet its outstanding liabilities and obligations under the Joint Plan. As such, the Court finds that both settlement agreements were necessary to effectuate Grace's successful reorganization.

FN66. Section 105(a) of the Bankruptcy Code states that: "[t]he court may 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).

FN67. In making their argument, the Libby Claimants rely on *In re Zenith Elecs Corp.*, 241 B.R. 92 (Bankr.D.Del.1999), which held that release of third party creditor claims could not be accomplished without the affirmative agreement of affected creditors. *Id.* at 111. However, *Zenith* was a lower court decision. As such, it is not binding on this Court. *Zenith* also predates the Third Circuit's findings in GIT and *Continental Airlines,* two decisions which *are* binding on this Court. Moreover, since *Zenith* was decided, other courts have noted its weaknesses. *See In re Exide Techs.*, 303 B.R. at 72 (stating that the holding of *Zenith* is "neither conclusive nor ... [is it] a list of conjunctive requirements," but rather is merely "helpful in weighing the equities of the particular case after a fact-specific review") (internal citations omitted).

Second, the injunction in this case is also fair to Grace's creditors. As detailed above in regards to the injunction's necessity, as well as continuously throughout this Opinion, there are only a narrow range of claims barred by the injunction for the distinct purpose of effectuating settlements to fund the Joint Plan and Grace's reorganization. All other creditor claims will be assumed and paid by Grace after it has completed reorganization. Moreover, both this Court and the Bankruptcy Court have previously considered the fairness of the Fresenius and Sealed Air Settlement Agreements. The District Court previously approved the settlements, finding that the releases were fair to Grace's bankruptcy estate and its creditors. The Bankruptcy Court expressly adopted these findings in its 2011 Confirmation Order. *See In re W.R. Grace & Co.*, 446 B.R. 96, 138–40 (Bankr.D.Del.2011) (summarizing District Court and Bankruptcy Court proceedings). Therefore, if the Libby Claimants were concerned with the fairness of the injunction, they could have raised this issue at a point in time prior to entry of the injunction in 2011. As such, the Court finds that the channeling injunction in Grace's Joint Plan is both necessary to Grace's reorganization and fair to its creditors, and the Libby Claimants' claims are therefore denied.

D. Classification of Creditor Claims

***36** Section 1129(a)(1) of the Code provides that a Chapter 11 reorganization plan may only be confirmed if "[t]he plan complies with the applicable provisions of [Title 11]." 11 U.S.C. § 1129(a)(1). Montana and the Crown FN68 now allege that the Joint Plan cannot be confirmed because it does not comply with §§ 1122(a) and 524(g) of the Bankruptcy Code. Specifically, they believe that their contribution and indemnification claims are not "substantially similar" to other claims within Class 6 because they are of a different nature and are based on different acts, and that therefore the Joint Plan's classification scheme violates § 1122(a). Montana and the Crown further assert that their claims should not be subject to the § 524(g) injunction because they are different than the remainder of claims within Class 6. Finally, both Appel-

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lants claim that even if their claims were the kind to which a § 524(g) injunction could apply, their claims do not meet the definitional requirements of "claims" and "demands" under the Bankruptcy Code, and thus cannot be enjoined by the channeling injunction. The Court considers each argument separately below.

FN68. The Crown relied on Montana's brief in making this argument. (*See* Crown Br. 20 ("The Crown incorporates by reference as if fully set forth herein those arguments set forth in Part I of the State of Montana's Opening Brief on Appeal[.]").) Therefore, the Court jointly considers the claims of Montana and the Crown.

1. The Section 1122(a) Classification Requirement

Section 3.1.6(a) of the Joint Plan classifies all personal injury claims resulting from exposure to Grace Asbestos in Class 6, Asbestos PI Claims. FN69 The personal injury claims in Class 6 are comprised of both (1) direct claims for personal injuries brought against Grace; and (2) indirect claims, entitled "Indirect PI Trust Claims," brought against Grace by third parties seeking contribution and indemnity as a result of being sued for asbestos liability related to Grace operations. Section 1.1(144) of the Plan defines Indirect PI Trust Claims as:

FN69. Section 1.1(34) of the Joint Plan broadly defines an "Asbestos PI Claim" as:

a Claim ... or Demand against ... any of the Debtors or Asbestos Protected Parties ... whether in the nature of or sounding in tort, or under contract, warranty, guarantee, contribution, joint and several liability, subrogation, reimbursement or indemnity, or any other theory of law, equity, or admiralty ... based on, arising out of, resulting from, or attributable to, directly or indirectly:

(a) death, wrongful death, personal or bodily injury ... caused, or allegedly caused, based on, arising or allegedly arising from or attributable to, directly or indirectly, in whole or in part, acts or omissions of one or more of the Debtors; [and]

(b) the presence of or exposure at any time to [Grace] asbestos.

(Joint Plan § 1.1(34)(i)(a-b).)

any Claim ... or Demand against the Debtors ... held by any Entity ... who has been, is, or may be a defendant in an action seeking damages for ... personal injuries ... to the extent caused or allegedly caused, directly or indirectly, by exposure to asbestos or asbestos-containing products for which the Debtors have liability ... [and] on account of alleged liability of the Debtors for payment, repayment, reimbursement, indemnification, subrogation, or contribution of any portion of any damages such Entity has paid or may pay to the plaintiff in such action[.]

(Joint Plan § 1.1(144).) Both the claims of Montana and the Crown fall within the definition of Indirect PI Trust Claims under the Plan because they seek indemnity and/or contribution from Grace.

Montana and the Crown, however, object to the classification of their claims in Class 6 on the basis that their claims are of a different nature. Specifically, they argue that claims for indemnity and contribution do not belong in Class 6 because they are not personal injury claims. Furthermore, they allege that their claims are rooted in a failure to warn theory, rather than liability based on asbestos production, and therefore are different than the remainder of the claims in Class 6. Thus, they believe that § 1122(a) is violated on these grounds.

***37** Section 1122(a) of the Code governs the classification of claims, providing that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). In analyzing whether claims within a given class are substantially similar, "the focus of the classification [should be on] the legal character of the claim as it relates to the *assets of the debtor.*" *In re AOV Indus., Inc.,* 792 F.2d 1140, 1150 (D.C.Cir.1986) (quoting *J.P. Morgan & Co. v. Mo. Pac. R.R.,* 85 F.2d 351, 352 (8th Cir.1936)) (emphasis in original). Therefore, in determining claim placement, plan proponents should attempt to group together those claims that exhibit a similar effect on the debtor's bankruptcy estate, rather than merely grouping together claims that are otherwise similar in character. *See id.* at 1150–51 (citing *In re Martin's Point Ltd. P'ship,* 12 B.R. 721, 727 (Bankr.N.D.Ga .1981)). Plan proponents and bankruptcy courts have considerably broad discretion in deciding how to classify claims. *See In re Jersey City Med. Ctr.,* 817 F.2d 1055, 1061 (3d Cir.1987) ("[I]t remains clear that Congress intended to afford bankruptcy judges broad dis-

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cretion to decide the propriety of plans in light of the facts of each case."); *see also* *In re U.S. Truck Co., Inc.,* 800 F.2d 581, 586 (6th Cir.1986) (same). However, plan proponents' classification schemes are not without limits. *See* *In re Dow Corning,* 244 B.R. 634, 644 (Bankr.E.D.Mich.1999) ("[T]here are limits on a plan proponent's classification freedom.") (internal citations omitted). It is a well-recognized principle that the classification of claims or interests must be "reasonable," and cannot be grouped together for arbitrary or fraudulent purposes. *See* *Jersey City Med. Ctr.,* 817 F.2d at 1061; *John Hancock Mut. Life. Ins. Co. v. Route 37 Bus. Park Assoc.,* 987 F.2d 154, 159 (3d Cir.1993); *In re Curtis Ctr. Ltd. P'ship,* 195 B.R. 631, 639 (Bankr.E.D.Pa.1996); *In re Fairfield Exec. Assoc.,* 161 B.R. 595, 600 (D.N.J.1993). "In short, ... substantially similar claims may not be classified separately when it is done for an illegitimate reason." *Dow Corning,* 244 B.R. at 644 (internal citations omitted).

It is clear to the Court that, in exercising their broad discretion under the Bankruptcy Code, the Bankruptcy Court and the Plan Proponents properly classified Montana and the Crown's indirect claims in Class 6. Both direct and indirect claims under the Plan exhibit a similar effect on Grace's bankruptcy estate—they seek recovery from the trust for actions related to Grace's asbestos liability. It makes no difference whether this recovery is sought directly by an individual plaintiff or indirectly through indemnity and/or contribution, or what the applicable legal theory is that underlies the claim, because, after all is said and done, all these claims "relate to the assets of the debtor" in substantially the same way. *AOV Indus.,* 792 F.2d at 1150. Furthermore, the Court notes that similar classification schemes involving direct and indirect claims related to a debtor's asbestos liability have been upheld on a regular basis by the federal courts. *See, e.g.,* *In re Combustion Eng'g, Inc.,* 295 B.R. 459, 495–96 (Bankr.D.Del.2003), *rev'd on other grounds;* 391 F. 190 (3d Cir.2004); *In re Pittsburgh Corning Corp.,* 453 B.R. 570, 581 n. 15 (Bankr.W.D.Pa.2011); *In re Burns and Roe Enters., Inc.,* No. Civ. A. 08–4191, 2009 WL 438694, at *24 (D.N.J. Feb. 23, 2009); *In re Dow Corning, Corp.,* 244 B.R. 634, 664–65 (Bankr.E.D.Mich.1999); *In re Asbestos Claims Mgmt. Corp.,* 294 B.R. 663, 673 (N.D.Tex.2003); *In re Porter Hayden Co.,* Bankr.No. 02–54152, 2006 WL 4667137, at *6 (Bankr.D. Md. June 30, 2006).

***38** It is also evident that the classification of Montana and the Crown's claims in Class 6 is reasonable. Both direct claims brought by injured plaintiffs and indirect claims brought by Montana arise out of exposure to Grace Asbestos in Libby, Montana. Similarly, both the direct claims of injured plaintiffs and indirect claims brought by the Crown arise out of exposure to Grace Asbestos from ZAI products sold in Canada. Nothing in the record indicates that Montana or the Crown's claims were placed in Class 6 for arbitrary or fraudulent purposes. As such, the Code—and common sense—indicate that the indirect claims of Montana and the Crown are "substantially similar to the other claims or interests" in Class 6, and that therefore § 1122(a) has not been violated.

2. Circumvention of the Section 524(g) Injunction

The § 524(g) channeling injunction in the instant litigation enjoins both the direct and indirect claims brought against Grace, and channels all such claims within Class 6 to the Grace trust. Montana and the Crown contend that their claims against Grace should not enjoined because their indemnity and contribution claims are based on a failure to warn theory that is different than all other claims in Class 6. Having already decided that Montana and the Crown's claims are not substantially different from other indirect claims within Class 6, the Court likewise declines to pull back the curtain of injunctive protection and expose Grace to liability for these claims.

Section 524(g) provides that an injunction may "enjoin entities from taking legal action for the purpose of directly or *indirectly* collecting ... [on] any claim or demand that ... is to be paid in whole or in part by [the] trust [.]" 11 U.S.C. § 524(g)(1)(B) (emphasis added). The primary purpose of § 524(g) is to "facilitat[e] the reorganization and rehabilitation of the debtor" while simultaneously promoting "the equitable resolution of asbestos-related claims." *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 234 (3d Cir.2005). In order to achieve this purpose, reorganization plans under Chapter 11 must resolve both direct and indirect claims brought against a debtor. If both types of claims arise out of the same nucleus of conduct, this purpose can only be achieved if both are enjoined.

Grace's Joint Plan, established pursuant to the requirements of § 524(g), properly categorizes the claims of Montana and the Crown as Indirect PI Trust Claims. As such, they are properly enjoined and channeled to the trust. To hold otherwise would be a fallacy. If the channeling injunction only plugged the hole in Grace's bankruptcy estate left open as a result of direct personal injury claims, then Grace would still sink from the flood of indirect claims that could permissibly be brought against it.

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This is not the result that was contemplated by Congress in its creation of this statutory section. *See* 140 CONG. REC. 6, 8,021 (1994) (statements of Senator Brown); 140 CONG. REC. S. 4523 (Apr. 20, 1994) (statements of Senator Heflin and Senator Graham); *Collier on Bankruptcy* § 111 (2011) (discussing statements of Senator Heflin). Rather, "[b]ecause Indirect PI Trust Claims ... relate to direct Asbestos Personal Injury Claims, they are appropriately channeled to the Asbestos PI Trust and have historically been channeled to trusts established in connection with asbestos related chapter 11 cases." *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 168–69 (D.Del.2006) (internal citations omitted). Thus, the Court finds that Montana and the Crown's claims are properly enjoined pursuant to the requirements of § 524(g).

3. Definitional Requirements of "Claims" and "Demands" Under the Bankruptcy Code

***39** Montana and the Crown further allege that their claims do not fall within the definitions of "claims" and "demands" under the Code, and that therefore they should not be subject to the § 524(g) channeling injunction.

a. Claims Under the Bankruptcy Code

Montana and the Crown allege that their requests for contribution and indemnity against Grace are not "claims" because they arose after Grace's 2001 bankruptcy petition, and that therefore they should not be channeled to the trust. In response, Grace contends that Montana and the Crown's claims fall precisely within the definition of a "claim" as recently interpreted by the Third Circuit, and that, as a result, Appellants' contribution and indemnity claims are properly channeled to Grace's trust to await payment.

The Court begins its analysis with the Bankruptcy Code's definition of a "claim":

> [a] right to payment, whether or not such right is reduced to judgment, liquidated, *unliquidated,* fixed, *contingent,* matured, *unmatured,* disputed, undisputed, legal, equitable, secured, or *unsecured[.]*

11 U.S.C. § 105(5)(A) (emphasis added). In adopting this definition, Congress intended the term to have an expansive and all-encompassing definition so as to "permit[ ] the broadest possible relief in the bankruptcy court." H.R.REP. NO. 95–595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266, at 21; *see also In re Jadczak,* Bankr.No. 10–11804, 2011 WL 13612, at *5 (Bankr.E.D.Pa. Jan. 4, 2011) (acknowledging the statute's broad scope). Partially due to the expansive scope of the statutory section, federal courts over the years have differed as to when exactly a claim arises under § 105(5)(A). The Third Circuit put an end to this debate in its recent precedential opinion of *Jeld–Wen, Inc. v. Van Brunt (In re Grossman's, Inc.),* 607 F.3d 114 (3d Cir.2010) ("*Grossman's* "). In that case, a plaintiff purchased asbestos-containing products for her home from Grossman's, a home improvement and lumber retailer, in 1977. *Id.* at 117. More than twenty years later, Grossman's filed for Chapter 11 bankruptcy, at which time it had actual knowledge that it had engaged in the sale of asbestos-laden products. *Id.* Grossman's Chapter 11 reorganization plan was confirmed in December of 1997. *Id.* Subsequently, in 2006, the plaintiff developed mesothelioma as a result of exposure to asbestos, and filed suit against Grossman's. *Id.* Applying prior caselaw, the bankruptcy court found, and the district court affirmed, that the plaintiff did not have a claim against Grossman's bankruptcy estate because her symptoms did not manifest until nearly ten years after Grossman's had filed its petition for bankruptcy. *Id.* at 118.

On appeal, the Third Circuit, sitting *en banc,*[FN70] overruled the lower courts (as well as prior contradictory caselaw), and clearly held that: "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code." *Id.* at 125. In regard to the plaintiff, this meant that her claims against Grossman's arose in 1977 when she was first exposed to the asbestos-laden product. *Id.*

> FN70. In its review of this case, the Third Circuit noted the importance of its precedential holding, stating that: "It is only on a rare occasion that we overrule a prior precedential opinion. We assemble en banc to consider whether this is such an occasion." *In re Grossman's,* 607 F.3d 114, 117 (3d Cir.2010) (Sloviter, J.).

Prior to its holding in this case, *Avellino & Bienes v. M. Frenville Co., (Matter of M. Frenville Co.),* 744 F.2d 332 (3d Cir.1984) ("*Frenville* ") provided the governing test in the Third Circuit for when a claim arose under the Bankruptcy Code. The *Frenville* test dictated that a claim arose when a right to payment accrued under state law. *Id.* at 337.

At the time that the Joint Plan was pending before the Bankruptcy Court, *Frenville* was still governing law. Therefore, Montana argued both before the Bankruptcy Court and now before this Court that Montana state law should apply to its claims. (*See* Montana Br. 21.) On July 2, 2010, the Third Circuit issued its opinion in *Grossman's,* whereby it expressly overruled the *Frenville* Test. Grossman's, 607 F.3d at 121 ("We are persuaded that the widespread criticism of *Frenville's* accrual test is justified, as it imposes too narrow an interpretation of a 'claim' under the Bankruptcy Code. Accordingly, the *Frenville* accrual test should be and now is overruled."). Thus, the holding of *Grossman's* remains the only applicable governing law for this Court to consider, and it therefore need not engage in an analysis of Montana state law on this point.

***40** The Court finds that, despite Appellants' statements to the contrary, *Grossman's* is directly applicable to this case and that Montana and the Crown's indirect claims for contribution and indemnity constitute "claims" under its holding. It is undisputed that the Libby Claimants and the Canadian plaintiffs in the ZAI class action suits were exposed to Grace Asbestos long before Grace's filing of its bankruptcy petition in 2001. Grace owned and operated the mine in Libby, Montana between 1963 and 1990.FN71 Grace's predecessor shipped Zonolite materials used in ZAI products as early as the 1920's. Moreover, the conduct giving rise to injury here—Grace's mining of asbestos, shipment of ZAI products to Canada, and Montana and the Crown's alleged failure to warn—all occurred prior to the 2001 bankruptcy petition. Montana would have this Court find that the holding of *Grossman's* only applies to direct tort claims under Grace's Joint Plan. However, at no point in its Opinion did the Third Circuit exempt indemnity and contribution claims in Chapter 11 reorganization plans from the holding of *Grossman's.* To do so, in fact, would have been contra to the broad definition that Congress intended for § 101(5)(A) to have under the Code. *See* Grossman's, 607 F.3d at 121 (recognizing that Congress intended the "broadest possible definition" of the term "claim" in its statutory creation). Moreover, subsequent cases applying *Grossman's* have held that its holding is not limited to direct tort claims. *See In re Rodriguez,* 629 F.3d 136, 142 (3d Cir.2010) (holding that a mortgagee's right to collect unpaid escrow amounts from mortgagors constituted a "claim" because it was rooted in the language of the loan documentation and mortgage itself that were available to both parties prior to bankruptcy filing); *In re Gainey Corp.,* 447 B.R. 807, 818 (W.D.Mich. May 6, 2011) (finding that a sales order that relieved a purchaser from the obligation to pay insurance deductibles for tort claims asserted against the company constituted "claims" because they were based on torts that predated the asset sale); *In re 266 Wash. Assoc.,* 141 B.R. 275, 282 (Bankr.E.D.N.Y.1992) ("Generally, unsecured creditors hold substantially similar claims; they are claimants of equal legal rank entitled to share pro rata in values remaining after payment of secured and priority claims. It has accordingly been observed that unsecured claims will, generally speaking, comprise one class, whether trade, tort, publicly held debt or a deficiency of a secured creditor.") (internal quotations and citations omitted).

FN71. Prior to 1963, Grace's predecessors, the Zonolite Company and Universal Zonolite Insulation Company ("Zonolite"), owned and operated the Libby mine. Zonolite assigned all of its rights, title, interest, and equity to Grace upon its purchase of the mine. *In re W.R. Grace & Co.,* 386 B.R. 17, 23–24 (Bankr.D.Del.2008).

Finally, the Court is unconvinced by Montana and the Crown's arguments that their requests for indemnity and contribution are still too contingent to be deemed "claims" because their rights to assert those claims have not yet accrued. This makes no difference under the Bankruptcy Code because § 101(5)(A) expressly encompasses requests that may still be "contingent," "unmatured," and "unliquidated." *See* 11 U.S.C. § 101(5)(A). In fact, the Third Circuit has previously found that "the contingent nature of the right to payment does not change the fact that the right to payment exists, even if it is remote, and thereby constitutes a 'claim' for purposes of § 101(5)." *Rodriguez,* 629 F.3d at 142. Thus, Appellants' argument is without merit.

b. Demands under the Bankruptcy Code

***41** In the alternative, Montana and the Crown also allege that their requests for indemnity and/or contribution do not constitute "demands" under the Bankruptcy Code because their requests for payment have not yet become due, and that therefore their claims should be exempt from the § 524(g) channeling injunction.

Section 524(g) defines the term "demand" in the context of Chapter 11 reorganization plans related to asbestos liability as a "demand for payment" that is either "present or future" and that "arises out of the same or similar conduct or events that give rise to the claims addressed by the injunction." 11 U.S.C. § 524(g)(5)(B). Thus, the straight-

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forward reading of the statute would appear to be that a demand is a claim that is either already present or may arise at some point in the future. Montana and the Crown's requests for indemnity and/or contribution fit neatly within the parameters of this definition—they are claims against Grace seeking reimbursement for personal injury lawsuits related to Grace Asbestos that Appellants defended or will defend in the future. Thus, the Court finds that Appellants' indemnity and/or contribution requests also satisfy the definitional requirements of "demands" under the Bankruptcy Code.

For all the aforementioned reasons, the claims made by Montana and the Crown fall within the definitions of "claims" and "demands" under the Code. Therefore, these claims and demands are properly subjected to the § 524(g) injunction and are properly channeled to the trust to await payment.

E. Feasibility of the Joint Plan

Section 1129(a)(11) of the Bankruptcy Code provides that:

> (a) The Court shall confirm a plan only if all of the following requirements are met:
>
> * * *
>
> (11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. 1129(a)(11). The debtor bears the burden of proof on this inquiry, and must show by a preponderance of the evidence that a reorganization plan is feasible. *Corestates Bank, N.A. v. United Chem. Techs. Inc.,* 202 B.R. 33, 45 (E.D.Pa.1996 (Padova, J.) (internal citations omitted); *In re S. Canaan Cellular Invs., Inc.,* 427 B.R. 44, 61 (Bankr.E.D.Pa.2010).

The purpose of the feasibility requirement is to prevent court confirmation of "visionary schemes." *In re Solange D. Chadda,* Bankr.No. 07–12665, 2007 WL 3407375, at * 4 (Bankr.E.D.Pa. Nov. 9, 2007) (internal citations omitted). In order to find a reorganization plan worthy of confirmation, the bankruptcy court must make a specific finding as to the plan's feasibility. *S. Canaan Cellular,* 427 B.R. at 61; *see also Chadda,* at *4. In making this finding, the bankruptcy court need not require a guarantee of success, but rather only must find that "the plan present[s] a workable scheme of organization and operation from which there may be reasonable expectation of success." *Corestates Bank,* 202 B.R. at 45 (citing 5 *Collier on Bankruptcy* ¶ 1129.02[11] (15th ed.1991)). However, the debtor's own unsupported sincerity and belief that its plan is feasible is insufficient to satisfy the inquiry. *S. Canaan Cellular,* 427 B.R. at 61. Rather, "[t]he test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." *Id.* (internal citations and quotations omitted).

***42** The bankruptcy court can consider a wide array of factors in determining a plan's feasibility, including assessment of the debtor's capital structure, the earning power of the business, economic conditions, and the ability of the corporation's management. *See In re Landmark at Plaza Park, Ltd.,* 7 B.R. 653, 659 (Bankr .D.N.J.1980). Most importantly, the debtor must provide the bankruptcy court with an estimate of its future earning capacity. *See In re Phila. & W. Ry. Co.,* 51 F.Supp. 129, 131 (E.D.Pa.1943).

In the instant case, the record clearly reflects that the Bankruptcy Court considered evidence concerning estimates of Grace's future earning capacity, capital structure, earning power, and current economic conditions. The Bankruptcy Court particularly credited the two-day expert testimony of Ms. Pamela Zilly, a vastly experienced investment banker and financial adviser that has previously been retained to work on other mass tort bankruptcy cases. The record also indicates that the Bankruptcy Court considered several financial reports and exhibits that were entered into evidence, as well as additional witness testimony. After careful consideration of all the evidence before it, the Bankruptcy Court found that "[i]n light of Grace's past performance, its ability to obtain exit financing, and its reasonable and conservative projections, we find that Reorganized Grace will be able to pay its debts as they come due." *In re W.R. Grace & Co.,* 446 B.R. 96, 142 (Bankr.D.Del.2011).

This Court finds ample evidence in the voluminous record before it to support the Bankruptcy Court's finding. Given her extensive prior experience and expertise in mass tort bankruptcies, Ms. Zilly was more than qualified to testify as to Grace's future earning capacity, capital structure, and earning power. Ms. Zilly testified that, in her expert opinion, Grace could emerge from bankruptcy as a financially strong corporation that would continue to

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steadily grow and garner significant profits that would enable it to satisfy its outstanding liabilities. Ms. Zilly's expert opinion was well supported and properly based on her analysis of Grace's corporate structure, internal records and historical precedent, financial reports of Grace's current business performance, financial projections of its future earning capacity, review of cost-cutting measures and productivity programs implemented since Grace entered bankruptcy, and analysis of a $37.3 million reserve established by Grace to cover its unsettled property damage claims and allocate payment for future claims. This evidence indicated that Grace's sales had doubled between 2000 and 2008, a time period that spanned several cycles of the chemical industry and troubling economic times. Ms. Zilly also analyzed and testified that Grace's Core EBITDA [FN72] showed a 64% increase between 2003 and 2008, and was therefore indicative of Grace's current profitability and future earning capacity as a corporation. Moreover, Grace also offered into evidence the written testimony of its General Counsel, Mr. Shelnitz, to explain how it arrived at the estimated value of future asbestos claims. The Bankruptcy Court properly credited this witness testimony, and this Court must "extend[ ] great deference to the Bankruptcy Court's assessment of the witnesses' testimony." Corestates Bank, 202 B.R. at 46 (citing *Fellheimer, Eichen, & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215, 1223 (3d Cir.1995)).

> FN72. EBITDA is a commonly-used financial acronym that stands for "Earnings Before Interest, Taxes, Depreciation, and Amortization." The EBITDA attempts to provide an accurate measure of a corporation's earnings that closely resembles its cash flow by removing large non-cash expenditures from the company's Statement of Operations. *See* Joseph J. Sciametta & Jack Kloster, *EBITDA v. Free Cash Flow—A Study in Viability and Value Indicators*, 22 AM. BANKR.INST. J. 16 (Mar.2003).

***43** Therefore, based on the extensive evidence before it, the Court believes that there is more than a "reasonable probability" that the Joint Plan would be successful. The evidence is credible, well supported, reasonable, and appropriately provides the Court with an accurate depiction of Grace's current and future financial status. Following confirmation, it is likely that "the things which are to be done ... can be done as a practical matter under the facts." *South Canaan Cellular*, 427 B.R. at 61 (internal citations and quotations omitted). Thus, the Court finds that Grace satisfied its burden of proving that the Joint Plan is feasible and that liquidation or further financial reorganization will not be likely.

Nevertheless, two Appellants, AMH and Montana, object on the grounds that the feasibility requirement is not satisfied under the present structure of the Plan. For the sake of clarity and finality, the Court considers each Appellant's arguments in turn.

1. AMH's Feasibility Claims

AMH contends that Grace failed to meet its burden of proving the Joint Plan's feasibility because it did not present sufficient evidence to establish how its anticipated liabilities would be dealt with under the Plan's provisions. To support its argument, AMH points to a number of alleged deficiencies on Grace's part, including the fact that a formal loan commitment document was not introduced as evidence of Grace's ability to obtain exit financing, Grace's alleged failure to introduce sufficient evidence that the trust could pay its outstanding property damage liabilities in the future, and the Plan's alleged failure to account for AMH's class claim.

The Court first considers AMH's allegation that Grace's introduction of evidence indicating that it could receive exit financing was deficient because it was based on "the confidence of its own investment advisor" and was not supported by any "concrete evidence" such as a formal loan commitment document. (AMH Br. 62.) Both parts of this argument lack merit. Ms. Zilly's testimony regarding Grace's ability to obtain exit financing is not unreliable merely because she was Grace's own financial advisor. In fact, her familiarity with Grace makes her even *more* qualified to accurately inform the Court about Grace's financial stability. Absent a lack of foundation to testify about the matter in question or a ground for impeachment, the Federal Rules of Evidence make clear that Ms. Zilly's testimony was proper.[FN73] Moreover, given that Grace bears the burden of proof here to show that its reorganization plan is feasible, it is only logical to expect that it would present its own financial advisor to attest to this fact. Numerous other courts have allowed such witness testimony, and the Court sees no reason to dispute this practice. *See, e.g.,* *Corestates Bank*, 202 B.R. at 46 (crediting the testimony of a financial analyst specifically hired by the debtor to assist in the preparation of financial statements for reorganization, as well as the testimony of the debtor's own Chief Financial Officer regarding the corporation's financial projections).

> FN73. Federal Rule of Evidence 702 provides

that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702. In conjunction with Rule 702, Rule 703 states, in relevant part:

> An expert may base an opinion on facts or data in the case that the expert *has been made aware of or personally observed.* If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Fed.R.Evid. 703 (emphasis added).

*44 Additionally, AMH's argument also fails because neither the Code nor federal caselaw require Grace to submit any specific documents proving the Plan's feasibility. All that is required is that the debtor satisfy its burden of proof by showing that "a reasonable assurance of commercial viability" is possible. *Chaddha,* 2007 WL 3407375, at *4 (internal citation omitted). Grace more than satisfied this requirement through the presentation of its expert witnesses and demonstrative exhibits. Ms. Zilly specifically testified that Grace could have obtained formal commitment letters from lenders, but chose not to in order to maintain flexibility in its capital structure. Similar approaches have been taken by other courts that have confirmed reorganization plans based upon a reasonable probability that a debtor would be able to obtain financing. *See In re Global Ocean Carriers, Ltd.,* 251 B.R. 31, 46 (Bankr.D.Del.2000); *In re 222 Liberty Assoc.,* 108 B.R. 971, 986 (Bankr.E.D.Pa.1990); *In re Reading Broad. Inc.,* 386 B.R. 562, 574 (Bankr.E.D.Pa.2008). As such, the Court finds that AMH's first argument is without merit.

The Court next considers AMH's allegation that Grace allegedly failed to substantiate its belief that it could satisfy its outstanding property damage liabilities. AMH claims that the only evidence offered on this point was Ms. Zilly's testimony that Reorganized Grace would be able to provide the PD Trust with approximately $1.6 billion over the course of twenty-five years. AMH asserts that the $1.6 billion figure has not been substantiated in any way, and that the Plan does not provide the means for Grace to stretch out its liabilities over a twenty-five year period.

The Court, however, finds ample evidence in the record before it to find that Grace would be able to satisfy its outstanding property damage liabilities over this twenty-five year period. In reaching her conclusion on this point, Ms. Zilly testified that, after an extensive analysis of Grace's financial records and corporate structure, she estimated Grace's unresolved and future property damage claims to be approximately $37 million. In account of this estimate, Grace established a $37.3 million reserve for the purpose of satisfying both its current unresolved and future property damage claims. Moreover, Ms. Zilly approximated that Grace would be able to obtain up to $1.6 billion over the next twenty-five years to pay these outstanding claims. She arrived at this conclusion after extensive review of Grace's financial history, current profitability, and estimated future earning capacity. Her reliance on this information properly supported her expert opinion and was entirely appropriate because experts in this field "would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Fed.R.Evid. 703. Most importantly, her testimony indicates a reasonable probability that Grace would be able to meet its debt obligations. Section 1129(a)(11) of the Code requires nothing more.

*45 Finally, AMH also argues that the Plan is not feasible, and thus cannot be confirmed, because it fails to take into account the possibility that AMH's putative class action claims may be allowed at some point in the future. This argument fails for several reasons. First, both this Court and the Bankruptcy Court have previously ruled that AMH's class action claim has little or no value. *See In re W.R. Grace & Co.,* No. Civ. A. 08–118, 2008 WL 4234339, at *2 (D.Del. Sept. 4, 2008); *In re W.R. Grace & Co.,* 389 B.R. 373, 380 (Bankr.D.Del.2008). These decisions suggest that it is unlikely that AMH's class claims will ever be allowed, and the foundational structure of AMH's argument is therefore significantly weakened.

Moreover, AMH premises its argument on *In re Harbin,* 486 F.3d 510 (9th Cir.2007), which held that "a bankruptcy court cannot adequately determine a plan's feasibility for purposes of section 1129(a)(11) without evaluating whether a potential future judgment may affect the debtor's ability to implement its plan." *Id.* at 518 (internal citations omitted). However, *Harbin* is distinguishable from the instant litigation. In that case, a creditor sued a debtor on a breach of contract claim. *Id.* at 514. The jury returned a verdict in the creditor's favor, but the court set aside the jury verdict and ruled in the debtor's favor. *Id.* The creditor appealed. *Id.* While the appeal was pending, the debtor sought to confirm its Chapter 11 plan. *Id.* The Ninth Circuit held that the plan could not be confirmed because the pending appeal "could significantly affect the plan's feasibility in the future." *Id.* at 518. Specifically, the potential claim at issue—reinstatement of a jury verdict—was certainly possible. This is not the case here. Given that both this Court and the Bankruptcy Court have previously found that AMH's class action claims lack value, there is no reasonably certain possibility that this claim "could significantly affect the plan's feasibility in the future." *Id.* As such, AMH's objection on this point is accordingly overruled.FN74

> FN74. AMH also claims that the Plan is not feasible because the procedures associated with the 2003 Bar Date Notice Order for PD Claims are flawed.
>
> In 2002, Grace attempted to organize all the property damage claims brought against it, and sought a centralized way to provide notice to all potential claimants. The result was the Summary Bar Date Notice Program ("Bar Notice"), which was published in thousands of newspapers and periodicals, and was estimated to reach 83% of adults nationwide. Over the years, AMH has repeatedly challenged the sufficiency of the Bar Notice, alleging that the notice procedures used did not reach a sufficient number of potential claimants and thereby violated due process. AMH repeats that argument here. The adequacy of the Bar Notice, however, has long been settled. In 2007, the Bankruptcy Court found that it comports with due process. *See In re W.R. Grace & Co.,* 366 B.R. 302, 304 (Bankr.D.Del.2007). This finding was affirmed by both this Court and the Third Circuit. *See Mission Towers v. W.R. Grace & Co.,* No. Civ. A. 07–287, 2007 WL 4333817, at *1 (D.Del. Dec. 6, 2007); *aff'd* 316 Fed. App'x. 134, 136 (3d Cir.2009).
>
> AMH claims that the Third Circuit's recent decision in *In re Grossman's, Inc.,* 607 F.3d 114 (3d Cir.2010), discussed more extensively, *supra,* has now re-opened the issue of the adequacy of the Bar Notice. Contrary to AMH's assertion, however, the holding of this case did not significantly alter the sufficiency of the Bar Notice. Rather, the Third Circuit in *Grossman's* merely clarified the scope of when a "claim" arises in the context of a Chapter 11 bankruptcy plan. *Id.* at 215. The Bar Notice does not address when a claim arises in this litigation, but is limited to the issue of providing adequate notice to potential claimants. Whether or not any given property damage claimant is now deemed to be a pre-petition or post-petition claimant under the new *Grossman's* test has no effect on if the claimant was given adequate notice. As such, AMH's objection on these grounds likewise fails.

In conclusion, the Court also notes that while AMH challenges the feasibility of the Joint Plan on numerous grounds before this Court, it failed to present any concrete evidence of its own on this point before the Bankruptcy Court. While Grace bears the burden of proving that its plan is feasible under § 1129(a)(11), an objecting party "bear[s] the burden of producing evidence to support their objection." *In re Armstrong World Indus., Inc.,* 348 B.R. 111, 122 (Bankr.D.Del.2006) (citing *In re Lernout & Hauspie Speech Prods., N.V.,* 301 B.R. 651, 656 (Bankr.D.Del.2003)); *see also In re Stratford Assocs. Ltd. P'ship,* 145 B.R. 689, 696 (Bankr.D.Kan.1992) (internal citations omitted). The record indicates that during the Confirmation Hearing proceedings, AMH offered no expert witness of its own to contradict the evidence entered by Grace regarding the Plan's feasibility, despite having ample opportunity to do so. AMH participated in all of the depositions of Grace witnesses, and therefore was provided with sufficient notice and information to form its own credible objection at the Hearing. The only testimony put forth by AMH related to this point was a report prepared by a former Grace analyst in 1995. However, the report was not formally admitted into evidence. Moreover, it was significantly outdated, and the Bankruptcy Court properly found that it did not therefore accurately depict the amount of Grace's current property damage claims, especially "when actual figures are available and