Docket #0018 Date Filed: 12/20/2021

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	:	Chapter 11
ALDRICH PUMP LLC, *et al.*,[1]	:	Case No. 20-30608
Debtors.	:	(Jointly Administrated)
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS,	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 21-03029
ALDRICH PUMP LLC, MURRAY BOILER LLC, TRANE TECHNOLOGIES COMPANY LLC, and TRANE U.S. INC.,	:	
Defendants.	:	

TRANE TECHNOLOGIES COMPANY LLC AND TRANE U.S. INC.'S
MOTION TO DISMISS AND BRIEF IN SUPPORT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), made applicable to this adversary proceeding through Federal Rule of Bankruptcy Procedure 7012(b), Defendants Trane Technologies Company LLC ("**New TTC**") and Trane U.S. Inc. ("**New Trane**," and together with New TTC, the "**Non-Debtor Affiliates**") respectfully move this Court to dismiss the *Complaint for Substantive Consolidation of Debtors' Estates with Certain Nondebtor Affiliates or, Alternatively, to Reallocate Debtors' Asbestos Liabilities to Those Affiliates* [Adv. Pro. Dkt. 1]

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Aldrich Pump LLC (2290) and Murray Boiler LLC (0679). The Debtors' address is 800-E Beaty Street, Davidson, North Carolina 28036.

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(the "**Complaint**" or "**Compl.**"), filed by Plaintiff the Official Committee of Asbestos Personal Injury Claimants (the "**Committee**").[2]

PRELIMINARY STATEMENT

1. The Committee recently advised this Court that it views this substantive consolidation action as a means to test the validity of the Corporate Restructuring and thereby force the dismissal of this bankruptcy proceeding.[3] The Committee also made plain its intent to inflict harm on the parties to the Corporate Restructuring.[4] Substantive consolidation, however, is not a means to compel the dismissal of a case or punish a party for engaging in a legal transaction

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[2] Capitalized terms not defined herein have the meanings ascribed to them in the Complaint. At the same time it filed the Complaint, the Committee also filed the *Motion of the Official Committee of Asbestos Personal Injury Claimants for Substantive Consolidation of Debtors' Estates with Certain Nondebtor Affiliates or, Alternatively, to Reallocate Debtors' Asbestos Liabilities to Those Affiliates* [Adv. Pro. Dkt. 2] (the "**Motion**"). The Non-Debtor Affiliates object to the relief requested in the Motion on the same grounds set forth herein.

[3] This Court already has rejected the Committee's argument--made in opposition to the Debtors' motion for a preliminary injunction--that Section 524(g) pre-empted Texas state law. *See Findings of Fact and Conclusions of Law Regarding Order: (I) Declaring that the Automatic Stay Applies to Certain Actions Against Non-Debtors, (II) Preliminarily Enjoining Such Actions, and (III) Granting in Part Denying in Part the Motion to Compel* [Adv. Pro. No. 20-03041, Dkt. No. 308] ("**PI Decision**"), ¶¶ 139-49 (rejecting the Committee's pre-emption argument). Here, the Committee argues that the federal common law of substantive consolidation effectively pre-empts Texas state law. Nowhere in the Complaint does the Committee allege that consummation of the Corporate Restructuring failed to comply with Texas state law. Rather, the Committee seeks to "unwind" a legally authorized and valid corporate transaction under Texas state law based upon the purported supremacy of federal common law. The Committee's attempt to use the federal common law of substantive consolidation to unwind the state law sanctioned Corporate Restructuring fares no better than its previously rejected pre-emption argument. Pre-emption generally operates only in the face of a federal statute or as implied by a scheme of federal regulation. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). The Supreme Court allows pre-emption based on federal common law only in those extremely few and limited areas "involving uniquely federal interests." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). The courts have found such uniquely federal interests solely in matters involving: (i) the obligations to and rights of the United States under its contracts, *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1321 (7th Cir. 1997); (ii) the civil liability of federal officials for actions taken in the course of their duties, *Howard v. Lyons*, 360 U.S. 593, 597 (1959); (iii) civil liabilities arising out of the performance of federal procurement contracts, *Boyle*, 487 U.S. at 505–06; and (iv) health benefits for federal employees, *Rievley ex rel. Rievley v. Blue Cross Blue Shield of Tenn.*, 69 F. Supp. 2d 1028, 1037 (E.D. Tenn. 1999). Transactions under the Texas merger statute implicate no uniquely federal interests. States, in fact, possess almost exclusive interest in the formation and governance of corporations. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations."). This Court, therefore, should reject the Committee's renewed effort to overturn a valid state law corporate transaction based upon the purported supremacy of federal law.

[4] *See* 12/3/2021 Hearing Tr., 284:17-20 ("[I]f they want to dismiss the cases, that might be okay. But if they don't, we're seeking something that we hope will be far worse for them.").

with which another party disagrees. The Non-Debtor Affiliates, moreover, do not know of a single case where a constituency comprised solely of disputed tort claimants successfully prosecuted a claim for substantive consolidation of a debtor and non-debtor. The Committee's effort to force a round peg through a square hole is nothing more than an ill-conceived, vindictive ploy to purportedly gain leverage in negotiations with the Debtors by subjecting the Non-Debtor Affiliates and their various stakeholders to the bankruptcy process. The Committee's misguided effort even causes them to ignore the harm its requested relief would impose on its own constituency, as the Debtors' assets, currently available for the exclusive purpose of satisfying asbestos claimants, would become available to satisfy the claims of the Non-Debtor Affiliates' creditors if this Court ordered substantive consolidation.

2. The Complaint pleads two causes of action citing Section 105(a) of the Bankruptcy Code as the sole predicate for relief. Count I alleges a cause of action to substantively consolidate New TTC with Aldrich and New Trane with Murray. Count II demands a declaratory judgment finding the Plans of Divisional Merger and certain ancillary documents unconscionable or, alternatively, reallocating the Debtors' asbestos liabilities to the Non-Debtor Affiliates. The Court should dismiss the Complaint, pursuant to Federal Rules 12(b)(1) and 12(b)(6), because both Counts contravene settled law and fail to allege facts supporting the Committee's claims for such extraordinary relief.

3. As a threshold matter, this Court lacks subject matter jurisdiction over the claims in the Complaint because the Committee fails to establish that (i) it possesses standing to assert such claims and (ii) such claims are ripe for judicial determination. In the absence of subject matter jurisdiction, the Court must dismiss the Complaint.

4. Even if the Court possesses subject matter jurisdiction over the Complaint, it should dismiss the claims alleged therein as a matter of law. With respect to Count I, no Bankruptcy Code provision empowers a court to substantively consolidate a non-debtor with a debtor so as to subject involuntarily the non-debtor to the bankruptcy court's jurisdiction. Section 303 of the Bankruptcy Code establishes the only statutory mechanism by which creditors may force a non-debtor into bankruptcy. Critically, the Section 303 remedy remains unavailable to tort claimants, like the Committee's constituency, whose claims remain subject to a bona fide dispute. The Committee, therefore, seeks a remedy prohibited by the express provisions of the Bankruptcy Code. Section 303's strict requirements and safeguards—designed to prevent abusive practices—are entirely absent from this adversary proceeding for substantive consolidation. Recognizing this incongruity, many courts correctly have held a party cannot circumvent the strict prescriptions of Section 303 by invoking Section 105(a) to force a non-debtor into bankruptcy through the guise of substantive consolidation. This Court similarly should reject the Committee's attempt to sidestep Section 303's express requirements for involuntary bankruptcies.

5. Even assuming the Committee can circumvent Section 303, the Complaint fails to allege facts sufficient to satisfy the widely adopted test for substantive consolidation enunciated in *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515 (2d Cir. 1988). The Complaint does not, because it cannot, allege that creditors dealt with New TTC/Aldrich or New Trane/Murray as a single economic unit following the Corporate Restructuring and that creditors did not rely on the parties' corporate separateness in extending credit. The Complaint also does not, because it cannot, contend that the affairs of New TTC/Aldrich or New Trane/Murray are so hopelessly scrambled that substantive consolidation would benefit all of these entities' creditors.

6. Count II's claim of unconscionability lacks any foundation whatsoever in law. The Court should dismiss Count II because a party cannot plead unconscionability as an affirmative cause of action.

7. For the foregoing reasons, as amplified below, the Court should dismiss the Complaint pursuant to Federal Rules 12(b)(1) and 12(b)(6).

ALLEGATIONS IN THE COMPLAINT

8. The facts alleged in the Complaint, couched in conjecture and hyperbole, amount to nothing more than a generic description of a corporate transaction under applicable state law. These facts fall far short of establishing legally sufficient claims. The Committee ***does not allege anywhere in the Complaint*** that (i) the Corporate Restructuring failed to comply with applicable state law, (ii) asbestos claimants have suffered an actual or imminent injury as a result of the Corporate Restructuring, (iii) creditors dealt with the Debtors and the Non-Debtor Affiliates as a single economic unit, (iv) creditors did not rely on the separate identity of the Debtors and the Non-Debtor Affiliates in extending credit, (v) the Debtors and the Non-Debtor Affiliates failed to maintain separate books and records, (vi) the Debtors and the Non-Debtor Affiliates commingled any assets, (vii) the Debtors are insolvent, (viii) the Debtors' current assets and financial resources are insufficient to pay their liabilities in full, (ix) the Non-Debtor Affiliates have breached or failed to perform any obligation under the Funding Agreements, or (x) any risk of diminution or insufficiency of any of the Non-Debtor Affiliates' or the Debtors' assets or financial resources. Similarly, the Complaint contains nothing more than speculative and conclusory allegations concerning the purported harm to asbestos claimants and the purported benefit of substantive consolidation.

STANDARD OF REVIEW

9. Federal Rule 12(b)(1) requires a court to dismiss a Complaint if it finds the claims set forth therein not justiciable. A claim is not justiciable if the plaintiff lacks standing to assert same. To establish standing, a plaintiff (1) must have suffered an injury in fact; *i.e.* an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical, (2) must establish a causal connection between the injury and the defendant's alleged conduct, and (3) must establish it is likely, as opposed to merely speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The complained of injury or threat of injury must prove "credible," not merely "imaginary or speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

10. Even if a plaintiff establishes standing, a justiciable claim does not exist unless and until the claim proves ripe for determination. Ripeness is a "subset[] of Article III's command that the courts resolve disputes, rather than emit random advice." *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991). A court functions "neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). The ripeness doctrine exists "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (citation and internal quotation marks omitted).

11. In considering the ripeness of a claim, a court must balance "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *accord Retail Indus.*

Leaders Ass'n v. Fielder, 475 F.3d 180, 188 (4th Cir. 2007). "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997). The courts, therefore, find a case ripe for decision only where "the action in controversy is final and not dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006); *see also S.C. Elec. & Gas Co. v. Randall*, 333 F. Supp. 3d 552, 566 n.17 (D.S.C. 2018) ("A case is ripe for judicial decision where the issues are purely legal in nature, relate to an action which is final, and is not dependent on future uncertainties or contingencies."). The party bringing suit bears the burden of proving ripeness. *Miller*, 462 F.3d at 319.

12. Federal Rule 12(b)(6) requires a court to dismiss a complaint that fails "to state a claim upon which relief can be granted." The complaint must contain "'sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d 230, 234 (4th Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Conclusory statements and facts merely consistent with a defendant's liability do not suffice to carry a complaint over the line between possibility and plausibility." *Fairfax v. CBS Corp.,* 2 F.4th 286, 292 (4th Cir. 2021) (citation and internal quotation marks omitted). A complaint satisfies the facial plausibility standard only where "allegations [] allow the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Founders Fed. Credit Union v. Mitchell*, No. 20-00487, 2021 WL 4486370, at *1 (W.D.N.C. Sept. 30, 2021). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE COMPLAINT'S CLAIMS

A. The Committee Lacks Standing to Assert The Complaint's Claims

13. A plaintiff can establish standing only by proving it suffered an injury which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560. A plaintiff also must establish a causal connection between the purported injury and the defendant's alleged conduct. *Id.* A plaintiff finally must establish it is likely, as opposed to merely speculative, that a favorable decision will redress the purported injury. *Id.*

14. The Committee fails to allege the requisite injury to establish standing. The Committee represents claimants holding disputed asbestos claims against the Debtors. Nowhere in the Complaint does the Committee allege any ***actual or imminent*** injury. To the contrary, any purported injury to an asbestos claimant remains highly speculative and hypothetical at this point in time. As a threshold matter, no asbestos claimant has established the Debtors' liability for any specific asbestos claim. Even if an asbestos claimant could establish such liability, the Complaint does not allege the Debtors' current assets and financial resources will prove insufficient to pay such liability. The Committee's claim of injury rests upon pure conjecture and the hypothetical assumptions that (1) the asbestos claimants have proven the Debtors' liability for the asbestos claims, (2) the Debtors' liability to the asbestos claimants exceeds the value of their assets and financial resources, and (3) the Non-Debtor Affiliates will refuse to provide the Debtors with any necessary additional funding to pay their liabilities.[5] Nowhere in the Complaint does the Committee allege that the Debtors' assets and financial resources are insufficient to pay legitimate

[5] The Non-Debtor Affiliates' agreement to pay $270 million into a qualified settlement fund renders the final point less conjecture and more fantasy.

asbestos claims in full.[6] As a result, the Committee cannot possibly establish the requisite "concrete and particularized" injury given the contingent and wholly speculative nature of its claim. *See Zepeda v. Boeme Indep. Sch. Dist.*, 294 F. App'x 834, 838 (5th Cir. 2008) ("If the purported injury is contingent [on] future events that may not occur as anticipated, or indeed may not occur at all, the claim is not ripe for adjudication." (alteration in original) (citation and internal quotation marks omitted)); *Mehler Texnologies, Inc. v. Monolithic Constructors, Inc.*, No. 09-0655, 2009 WL 3149383, *2 (N.D. Tex. 2009) (holding that court lacked subject matter jurisdiction to hear claims for contingent future damages); *accord Thomas*, 473 U.S. at 581.

15. The Complaint further fails to allege the requisite nexus between any purported injury and Defendants' alleged conduct. The Committee fails to allege how "[t]he Corporate Restructuring has disadvantaged, hindered and delayed the recourse and recoveries of asbestos claimants." Compl., ¶ 53. Any hindrance or delay in the prosecution of asbestos claims results from the Debtors' bankruptcy filing and the application of the automatic stay, not the Corporate Restructuring.[7] The Committee's allegation that "[t]he Corporate Restructuring and bankruptcy filings have resulted in inequitable treatment of, and therefore harm to, asbestos creditors by artificially and structurally subordinating them, not only to non-asbestos unsecured creditors but also to equity holders" ignores the contingent and disputed nature of the tort claimants' claims. *Id.* The Corporate Restructuring did not "subordinate" asbestos claimants. Unlike undisputed creditors and equity holders, a claimant holding a contingent, disputed claim is not entitled to

[6] The Committee conveniently ignores the very real likelihood that the Corporate Restructuring did not and will not harm asbestos claimants in any way. The Debtors indisputably possess sufficient assets and financial resources to pay legitimate asbestos claims if and when the Debtors' liability has been determined to exist, and the Complaint does not allege otherwise.

[7] In fact, shortly after the Corporate Restructuring, tort claimants simply added the Non-Debtor Affiliates as named defendants to their asbestos complaints. The Corporate Restructuring proved no different than any other corporate transaction that transferred historical asbestos liabilities to another corporate entity, and it certainly did not "hinder" or "delay" the tort claimants in the prosecution of their claims.

payment on its claim until liability becomes established. A debtor's payment to an undisputed creditor—while at the same time not paying a contingent, disputed creditor—does not constitute "inequitable" conduct. A company's distribution to an equity holder—while at the same time not paying a contingent, disputed creditor—also does not constitute "inequitable conduct" where, as here, no allegation is made that the company lacks sufficient assets and financial resources to pay the disputed creditor if and when any liability becomes established.[8] The Corporate Restructuring did nothing to change the nature of the asbestos claimants' claims; asbestos claimants held the same contingent, disputed claims both before and after the Corporate Restructuring.

16. The Committee, for similar reasons, cannot establish that a favorable decision here will redress any purported injury. Substantive consolidation does not provide asbestos claimants with relief from the automatic stay. Nor does substantive consolidation provide asbestos claimants with "direct recourse" against the Non-Debtor Affiliates' assets without first establishing that such liability exists.[9] Contrary to the Committee's assertions, substantive consolidation will not "ensur[e] that asbestos creditors will once again be *pari passu* with other unsecured creditors and have priority over equity holders . . . ." Compl., ¶ 4. Substantive consolidation does not provide the disputed asbestos claims with the same treatment as an undisputed trade claim or undisputed equity interest. The disputed asbestos claimants held no undisputed rights to payment prior to the Corporate Restructuring and "lost" no such rights as a result of the Corporate Restructuring.

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[8] North Carolina's Limited Liability Company Act (§ 57D-4-05) allows distributions to an equity holder unless, "after giving effect to the distribution, either of the following would occur: (1) The LLC would not be able to pay its debts as they become due in the ordinary course. (2) The LLC's total liabilities would exceed the value of the LLC's assets."

[9] Although state fraudulent transfer law may, under certain circumstances, provide a plaintiff with a provisional remedy (*e.g.*, prejudgment attachment or injunction) prior to the plaintiff establishing a defendant's liability on an underlying claim, a substantive consolidation claim is not a state law fraudulent transfer claim. The federal common law of substantive consolidation simply does not allow a plaintiff to obtain provisional relief against a defendant before the plaintiff has established the defendant's liability on an underlying claim.

Substantive consolidation does not magically turn disputed asbestos claims into valid, undisputed claims. Substantive consolidation, in short, ***will not*** put disputed asbestos claimants "once again on equal footing with non-asbestos unsecured creditors" and ***will not*** make them "senior to equity holders."

17. The Committee, for the foregoing reasons, lacks standing to assert the claims set forth in the Complaint.

B. The Court Lacks Subject Matter Jurisdiction Because The Complaint's Claims Are Far From Ripe

18. Even if the Committee can establish standing, the Complaint's claims are not ripe for adjudication. "'Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction.'" *Andrew v. Lohr*, 445 F. App'x 714, 714 (4th Cir. 2011) (citation and internal quotation marks omitted) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010)). "[T]he question of ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation and internal quotation marks omitted).

19. The Committee's substantive consolidation claim is not ripe for review because it raises a host of issues not fit for judicial determination at this time. The Complaint maintains that substantive consolidation would cure the alleged "inequitable treatment" of asbestos claimants. This allegation, however, depends entirely on the speculative and hypothetical assumptions that (1) the asbestos claimants have proven the Debtors' liability for the asbestos claims, (2) the

Debtors' liability to the tort claimants exceeds the value of the Debtors' assets and financial resources, and (3) the Non-Debtor Affiliates will breach their obligations under the Funding Agreements and refuse to provide any necessary additional funds to the Debtors to satisfy their liabilities. These hypothetical future events render the Complaint's substantive consolidation claim hopelessly unripe for adjudication and subject to dismissal. *See Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) ("A claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact remains wholly speculative." (citation and internal quotation marks omitted)); *accord Thrifty Rent-A-Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc.*, 849 F. Supp. 1083, 1086 (D.S.C. 1991).

20. The Committee also will not suffer any hardship if the Court withholds consideration of its unsubstantiated substantive consolidation claim. As acknowledged in the Complaint, the Debtors possess segregated assets designated specifically and exclusively for the payment of asbestos claims. The Debtors, moreover, possess additional financial resources to pay any liabilities as necessary, including the uncapped Funding Agreements. The Committee does not allege the Non-Debtor Affiliates have breached any obligation under the Funding Agreements and fails to allege any risk of diminution or insufficiency of the Non-Debtor Affiliates' or the Debtors' assets or financial resources. Nowhere does the Complaint assert that asbestos creditors will suffer any immediate harm from withholding a ruling on substantive consolidation until the above hypothetical contingencies materialize, if ever. The Committee, therefore, will suffer no immediate hardship, and this Court should withhold consideration of the Complaint's substantive consolidation claim unless and until it becomes ripe.

21. For the foregoing reasons, the Court should dismiss the Complaint's claim for substantive consolidation for lack of subject matter jurisdiction.

II. THE COURT SHOULD DISMISS COUNT I BECAUSE IT SEEKS TO OVERRIDE EXPRESS PROVISIONS OF THE BANKRUPTCY CODE

22. Even if the Court exercises subject matter jurisdiction over this action, it still should dismiss the Complaint's Count I because the requested relief is not available under Section 105 of the Bankruptcy Code. Allowing the Committee to obtain substantive consolidation through this adversary proceeding would sanction an involuntary bankruptcy without satisfying the stringent requirements and concomitant safeguards of Bankruptcy Code Section 303. Allowing this end-run around the Bankruptcy Code proves particularly inappropriate here where the party seeking substantive consolidation holds a claim subject to a bona fide dispute and is, therefore, prohibited from filing an involuntary petition under Section 303.

23. The Complaint relies entirely on Bankruptcy Code Section 105(a) as the sole predicate for substantive consolidation. Compl., ¶ 13. Although Section 105(a) confers equitable powers upon a bankruptcy court, those powers "are not a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules." *Off. Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987). Rather, as the Supreme Court has confirmed, Section 105(a) confers only "authority to 'carry out' the provisions of the Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014). It is well settled that Section 105 "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." *Id.*; *see also In re Southmark Corp.*, 49 F.3d 1111, 1116 (5th Cir. 1995) (explaining that Section 105(a) does not "empower bankruptcy courts to act as roving commission[s] to do equity" (alteration in original) (citation and internal quotation marks omitted)). Thus, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *see also In re Nat'l Energy & Gas Transmission, Inc.*, 492 F.3d 297, 302 (4th Cir. 2007) ("The Bankruptcy Code, of course, provides parameters

within which courts must exercise their equitable powers in administering an estate."); *In re Dyer*, 381 B.R. 200, 205 (Bankr. W.D.N.C. 2007) ("It is well established that equitable principles cannot override the clear dictates of a statute.").[10]

24. The above admonitions apply directly here because the Complaint, through the guise of substantive consolidation, effectively seeks to force the Non-Debtor Affiliates into involuntary bankruptcies. *See* Compl., ¶ 4. Section 303, however, solely and specifically governs when and how a creditor may commence an involuntary bankruptcy against an entity. It provides, as relevant here, that an involuntary bankruptcy may be commenced:

> by three or more entities, each of which is either a holder of a claim against such person that is ***not contingent*** as to liability or the subject of a ***bona fide dispute as to liability or amount*** . . . .

11 *U.S.C.* § 303(b)(1) (emphasis added). Critically, petitioning creditors can obtain relief under Section 303 only by establishing that:

> (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or
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> (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

§ 303(h)(1)-(2).[11]

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[10] *See, e.g.*, *In re Kaiser Gypsum Co., Inc.*, No. 16-31602, 2020 WL 6737641, at *21 (Bankr. W.D.N.C. Nov. 13, 2020) (rejecting "end-run around section 502(e)(1)(B) to achieve the outcome it expressly prohibits"); *In re Crink*, No. 08-10824, 2008 WL 2944652, at *2 (Bankr. M.D.N.C. July 31, 2008) (refusing request to use alternative methodology to calculate a debtor's current monthly income because it would "overrule 'the clear language and meaning' of section 101(10A)(A)(i) and [] insert in its place a procedure that is not provided for in the bankruptcy statutes and rules").

[11] Section 303 further provides that (i) the petitioning creditors may be required to post a bond to indemnify the alleged debtor in an amount set by the court if the petition is dismissed, § 303(e), (ii) the alleged debtor may continue to operate its business in the normal course until the court enters an order for relief, § 303(f), and (iii) if the involuntary

25. "The Code's provisions and the rules of procedure governing involuntary cases are strict because of the severe nature of involuntary relief and the extreme consequences to the debtor in being forced into bankruptcy." *In re Murray*, 543 B.R. 484, 496 (Bankr. S.D.N.Y. 2016); *see also In re Forster*, 465 B.R. 97, 102 (Bankr. W.D. Va. 2012) ("The strict criteria for qualification to file and for allowance of individual petitions are enforced because of the serious consequences involuntary bankruptcy may have on the alleged debtor."). Courts have rejected attempts, like the Committee's, to bypass Section 303's strict prescriptions through substantive consolidation. They recognize that "allowing substantive consolidation of non-debtors under § 105(a) circumvents the stringent procedures and protections relating to involuntary bankruptcy cases imposed by § 303 of the Bankruptcy Code. Section 303 authorizes an involuntary petition of an entity, provided specific rules are followed to protect the putative debtor." *In re Cordia Commc'ns Corp.*, No. 11-06493, 2012 WL 379776, at *3 (Bankr. M.D. Fla. Feb. 2, 2012).[12]

26. The Committee satisfies none of the Section 303 predicates for filing an involuntary petition. The Committee, preliminarily but dispositively, does not represent creditors of the Non-Debtor Affiliates.[13] The Committee also does not represent creditors holding claims "***not contingent*** as to liability or the ***subject of a bona fide dispute as to liability or amount***." 11 *U.S.C.*

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petition is dismissed, the alleged debtor may be awarded costs, attorneys' fees, compensatory damages, and punitive damages, § 303(i).

[12] *See also In re Archdiocese of Saint Paul & Minneapolis*, 888 F.3d 944, 953 (8th Cir. 2018) (refusing to substantively consolidate hundreds of non-debtors with a debtor because it would unnecessarily pull non-debtors "into bankruptcy involuntarily in contravention of § 303(a)"); *In re Concepts Am., Inc.*, No. 14 B 34232, 2018 WL 2085615, at *6 (Bankr. N.D. Ill. May 3, 2018) (dismissing complaint seeking to substantively consolidate debtors with a non-debtor because, among other things, "[t]he Bankruptcy Code already provides a mechanism for filing an involuntary petition that protects the rights of the proposed debtor and its creditors"); *In re Big Foot Properties, Inc.*, No. 11-6868, 2012 WL 6892645, at *4 (Bankr. M.D. Fla. May 25, 2012) (dismissing claim for substantive consolidation because it did "not (and cannot) allege that [the non-debtor] is a debtor in this Court").

[13] As this Court found in the PI Decision, asbestos creditors of Ingersoll-Rand and "old" Trane became creditors of the Debtors through the Texas divisional mergers. *See* PI Decision, ¶ 177 ("By virtue of the TBOC, Aldrich is liable for Old IRNJ's asbestos liabilities, and Murray is liable for Old Trane's asbestos liabilities . . . .").

§ 303(b)(1) (emphasis added). The Non-Debtor Affiliates, moreover, continue paying their debts as they become due. *See, e.g.*, Compl., ¶ 31 ("TTC, Trane, and their operating subsidiaries are also timely paying their creditors in the ordinary course of business."). The Committee, finally, certainly cannot dispute that no custodian, receiver, or agent has been appointed with respect to, or taken possession of, any of the Non-Debtor Affiliates' property for any reason.

27. Because, moreover, the Committee seeks to force the Non-Debtor Affiliates into bankruptcy proceedings through substantive consolidation rather than through Section 303, the Committee avoids any requirement that it post a bond to indemnify the Non-Debtor Affiliates should the Court grant this motion. The Committee's end run further precludes the Non-Debtor Affiliates from potentially recovering from the Committee costs, attorneys' fees, compensatory damages, and punitive damages if the Court dismisses the Complaint, all as allowed by Section 303.

28. No amount of linguistic alchemy can erase the fact that substantive consolidation would have exactly the same effect as an involuntary bankruptcy on the Non-Debtor Affiliates and their creditors, employees, customers, business partners, and equity holders, albeit without Section 303's rigorous and carefully designed protections. The Committee offers no compelling reason for this Court to force the Non-Debtor Affiliates and other interested parties into an involuntary bankruptcy. *See In re Howland*, 518 B.R. 408, 414 (Bankr. E.D. Ky. 2014).

29. Any reliance on *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941) as a basis for sidestepping Section 303's requirements is misplaced. *Sampsell* did not sanction the substantive consolidation of a debtor with a non-debtor. That case concerned solely the priority of claims. *See id.* at 217 (stating the Court granted the petition for certiorari seeking review of the Court of Appeals' decision "holding that respondent's claim should be accorded priority against

the funds realized from the liquidation of the corporation's property"). *Sampsell* did not address substantive consolidation because no party appealed the bankruptcy court's substantive consolidation order. Thus, as one court correctly observed with respect to *Sampsell's* substantive consolidation remarks: "Such language is dicta and does not provide a sound precedent for non-debtor substantive consolidation." *Big Foot Properties*, 2012 WL 6892645, at *3; *see also In re Lease-A-Fleet, Inc.*, 141 B.R. 869, 874 (Bankr. E.D. Pa. 1992) (rejecting request to substantively consolidate a non-debtor with a debtor, and holding "[a]ll that was at issue in *Sampsell* was the proper status of a claim of a creditor of a corporation which was effectively consolidated with the bankruptcy case of the corporation's principal"). *Sampsell*, moreover, arose prior to the Bankruptcy Code's (including Section 303's) enactment and, as established above, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Ahlers*, 485 U.S. at 206. Courts ordering the substantive consolidation of non-debtors with debtors, therefore, erred by overriding the express provisions of Section 303, designed to prevent abusive practices by creditors and others.[14] No court, in any event, ever has granted substantive consolidation of a debtor and a non-debtor at the request of a creditor constituency comprised entirely of disputed claims.

30. The Court, therefore, should dismiss Count I of the Complaint as a matter of law.

[14] Insofar as some courts have suggested a distinction between substantive consolidation and an involuntary bankruptcy under Section 303, they incorrectly construed, and improperly relied on, *Sampsell*. *See, e.g.*, *OMS, LLC v. Bank of Am., N.A.*, No. 15-3876, 2015 WL 12712307, at *3 (C.D. Cal. Nov. 6, 2015) (relying on *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000), which in turn relied on *Sampsell*); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 516 (W.D. Tex. 2000); *In re S & G Fin. Servs. of S. Fla., Inc.*, 451 B.R. 573, 580 (Bankr. S.D. Fla. 2011); *In re NM Holdings Co., LLC*, 407 B.R. 232, 275 (Bankr. E.D. Mich. 2009); *In re Munford, Inc.*, 115 B.R. 390, 397 (Bankr. N.D. Ga. 1990).

III. EVEN ASSUMING SECTION 105(A) EMPOWERS A COURT TO SUBSTANTIVELY CONSOLIDATE A NON-DEBTOR WITH A DEBTOR, THE COMPLAINT FAILS TO ALLEGE FACTS STATING A PLAUSIBLE CLAIM FOR RELIEF

31. "There appears nearly unanimous consensus that [substantive consolidation] is a remedy to be used 'sparingly.'" *In re Owens Corning*, 419 F.3d 195, 208–09 (3d Cir. 2005); *accord In re Fas Mart Convenience Stores, Inc.*, 320 B.R. 587, 594 (Bankr. E.D. Va. 2004). Indeed, "because substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this 'rough justice' remedy should be . . . one of last resort after considering and rejecting other remedies (for example, the possibility of more precise remedies conferred by the Bankruptcy Code)." *Owens Corning*, 419 F.3d at 211. The proponent of substantive consolidation bears the heavy burden of proving a court should resort to this rare and extreme remedy. *Id.* at 212.

32. Although the Fourth Circuit Court of Appeals has yet to adopt a test for substantive consolidation, lower courts rely on the factors set forth in *Augie/Restivo*.[15] Pursuant to *Augie/Restivo*, one of "two critical considerations" must exist before a court even can entertain substantive consolidation: "(i) 'whether creditors dealt with the entities as a single economic unit ***and*** did not rely on their separate identity in extending credit, . . . or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors.'" *In re Convalescent Ctr. of Roanoke Rapids, Inc.*, No. 00310-8, 2006 WL 3377055, at *3 (Bankr. E.D.N.C. Aug. 7, 2006) (emphasis added) (alteration in original) (quoting *Augie/Restivo*, 860 F.2d at 518). The Complaint fails to allege facts sufficient to establish either factor under *Augie/Restivo*.

[15] *See, e.g.*, *In re AuditHead, LLC*, 624 B.R. 134, 146 (Bankr. D.S.C. 2020); *In re City Loft Hotel, LLC*, 465 B.R. 428, 433 (Bankr. D.S.C. 2012); *In re Smith*, No. 08-04530, 2009 WL 1241316, at *2 (Bankr. E.D.N.C. Apr. 29, 2009).

33. The Complaint is devoid of any allegations supporting the first prong of the *Augie/Restivo* test. Nowhere in the Complaint does the Committee allege that creditors dealt with the Debtors and the Non-Debtor Affiliates as a single economic unit. Nor does the Committee allege anywhere in the Complaint that creditors did not rely on the separate identity of the Debtors and the Non-Debtor Affiliates in extending credit. An asbestos claimant's view of the Debtors and the Non-Debtor Affiliates as potential defendants in the prosecution of tort claims bears no relevance whatsoever to the first prong of the *Augie/Restivo* test. *See Altered Egos: Deciphering Substantive Consolidation*, 59 U. Pitt. L. Rev. 381, 418 (1998) (discussing how the *Augie/Restivo* reliance requirement "eliminates tort . . . claimants, who, as involuntary creditors, by definition did not rely on anything in becoming creditors"). The Committee does not allege that any asbestos claimant ever "dealt with" the Debtors and the Non-Debtor Affiliates as a "single economic unit." Nor does the Committee allege that any asbestos claimant ever "extended credit" to the Debtors or the Non-Debtor Affiliates. The Complaint, in short, is devoid of any allegation supporting the first prong of the *Augie/Restivo* test. *See In re Du Hancourt*, No. 20-00041, 2020 WL 6927616, at *8 (Bankr. D.D.C. Nov. 24, 2020) (dismissing trustee's claim for substantive consolidation because, among other things, the complaint did not allege that creditors dealt with that entities as "a 'single economic unit' and 'did not rely on their separate identity in extending credit.'"); *In re Verestar, Inc.*, 343 B.R. 444, 463 (Bankr. S.D.N.Y. 2006) (dismissing substantive consolidation claim because creditors dealt with two entities individually and there was no evidence that creditors looked to a sister entity's financials in extending credit).

34. The Complaint also fails to allege facts sufficient to establish *Augie/Restivo's* second "entanglement" factor. The Complaint alleges only that Defendants operate as part of the same enterprise, possess overlapping leadership, and the Debtors rely on New TTC to provide

certain services. If such facts satisfy the second *Augie/Restivo* factor, then substantive consolidation will become the rule rather than the very limited exception of last resort. Indeed, large corporate enterprises commonly feature overlapping leadership and centralized services. *See McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132, 145 (E.D.N.Y. 2009) ("[O]verlapping directors and officers between parent and subsidiary corporations—are commonplace as generally-accepted corporate form, and are insufficient without more, as a matter of law, to eviscerate the presumption of corporate separateness."); *Nat'l Prod. Workers Union Tr. v. CIGNA Corp.*, No. 05-5415, 2007 WL 1468555, at *10 (N.D. Ill. May 16, 2007) ("[P]rovision of support services (including advanced costs) . . . are part and parcel of the normal incidents of a parent-subsidiary relationship."); *Action Mfg. Co. v. Simon Wrecking Co.*, 375 F. Supp. 2d 411, 425 (E.D. Pa. 2005) (finding shared services, "such as human resources and information technology services, and office space and infrastructure," do not indicate a lack of corporate formality). The Complaint does not allege that the affairs of the Debtors and the Non-Debtor Affiliates have become so entangled and incapable of being unwound that only substantive consolidation provides a way out of the morass. All evidence, in fact, demonstrates the Non-Debtor Affiliates and the Debtors maintain separate corporate identities,[16] which this Court cannot set aside lightly.[17]

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[16] *See, e.g.*, Compl., Ex. 6 (Minutes of Joint Meeting of Aldrich and Murray Board of Managers); *id.*, Ex. 19 (Certificate of Conversion New TTC); *id.*, Ex. 20 (Certificate of Conversion New Trane), *id.*, Ex. 22 (Certificate of Conversion Aldrich); *id.*, Ex. 23 (Certificate of Conversion Murray).

[17] *See IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 309 n.5 (4th Cir. 2003) ("'Mere control and even total ownership of one corporation by another is not sufficient to warrant the disregard of a separate corporate entity' and 'a common central management alone is not a proper basis for disregarding separate corporate existence.'" (alteration in original) (quoting *Skouras v. Admiralty Enterprises, Inc.*, 386 A.2d 674, 681 (Del. Ch. 1978)); *Campbell v. Keystone Aerial Survs., Inc.*, 138 F.3d 996, 1006 n.14 (5th Cir. 1998) ("[U]nder Texas law, the separate corporate existence of an entity is generally respected . . . ."); *Inland Dev. Co. v. Comm'r of Internal Revenue*, 120 F.2d 986, 988–89 (10th Cir. 1941) ("The fact that a parent corporation owns all of the stock of its subsidiary, of itself and alone, does not warrant the disregard of their separateness of corporate entity.").

35. The Complaint, perhaps most critically, contains no allegation that substantive consolidation would benefit ***all*** of the Non-Debtor Affiliates' ***and*** Debtors' ***creditors***. *Augie/Restivo*, 860 F.2d at 518. The Complaint only alleges (and incorrectly) that substantive consolidation will benefit the Debtors' asbestos creditors, although without specifying how same would increase any asbestos claimant's recovery.[18] Notwithstanding any benefit substantive consolidation may provide to the Debtors' asbestos claimants, the Court should dismiss the Complaint because substantive consolidation indisputably would have deleterious effects on the Non-Debtor Affiliates' stakeholders, including their creditors.[19] *See* PI Decision, ¶ 151 (noting that chapter 11 bankruptcies would have "deleterious effects" on the "entire enterprise and its other stakeholders").[20] For that reason alone, the Court should dismiss Count I of the Complaint. *See In re Huntco Inc.*, 302 B.R. 35, 40 (Bankr. E.D. Mo. 2003) (denying substantive consolidation on the ground that a "court should not employ it when it would benefit one set of creditors at the expense of another"); *accord Archdiocese of Saint Paul & Minneapolis*, 562 B.R. at 761.

36. The Complaint, in sum, fails to state a claim for substantive consolidation. The Court, therefore, should dismiss Count I of the Complaint.

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[18] The Debtors currently hold assets and financial resources designated exclusively for the payment of asbestos claims. The Committee's request for substantive consolidation would, if granted, subject the Debtors' assets to the claims of other creditors. To the extent the Committee seeks substantive consolidation as leverage in future negotiations, the Court should dismiss the Complaint as improvidently filed. *See Owens Corning*, 419 F.3d at 215 (explaining that substantive consolidation should not be used "offensively to achieve advantage").

[19] *See In re Stewart*, No. 15-12215, 2017 WL 3575698, at *4 (Bankr. W.D. Okla. Aug. 17, 2017), ("[T]he movant for consolidation must allege equitable grounds exist for consolidation for the ***benefit of all creditors***, both those of the current debtors and those to be forcibly made debtors." (emphasis added) (citing *Augie/Restivo*, 860 F.2d at 518)); *In re Sarner*, No. 10-17487, 2010 WL 3282589, at *5 (Bankr. D. Mass. Aug. 19, 2010) (denying substantive consolidation based on an *Augie/Restivo* analysis because it would "not benefit all creditors and will, in fact, harm some").

[20] For an illustration of the harmful effects an involuntary bankruptcy would impose on the Non-Debtor Affiliates, the Non-Debtor Affiliates refer the Court to the direct testimony of Laureen Ryan during the hearing on the Debtors' motion for a preliminary injunction. 5/6/2021 Hearing Tr., 230:11-262:9.

IV. THE COURT SHOULD DISMISS COUNT II BECAUSE IT FAILS TO PLEAD A LEGALLY PLAUSIBLE CAUSE OF ACTION

37. Count II fails to state a claim because an affirmative cause of action for unconscionability does not exist. Texas law provides clearly and unmistakably that a party cannot plead the doctrine of unconscionability as an affirmative cause of action.[21] *Kennedy v. Harber*, No. 05-17-01217, 2018 WL 3738091, at *4 (Tex. App. Aug. 7, 2018).[22] A party, instead, may assert unconscionability only as a defense to the enforcement of a contract. *Garcia v. Universal Mortg. Corp.*, No. 12-2460, 2013 WL 1858195, at *10 (N.D. Tex. May 3, 2013); *see also Lopez v. Garbage Man, Inc.*, No. 12-08-00384, 2011 WL 1259523, at *13 (Tex. App. Mar. 31, 2011) ("[C]laim of unconsionability is an affirmative defense on which [defendant] has the burden of proof."). This affirmative defense would arise only where the Non-Debtor Affiliates seek to compel the Debtors' performance of a contractual obligation – a hypothetical scenario that does not presently exist. The Court, therefore, should dismiss Count II as a matter of law. *See Rogers v. Specialized Loan Servs.*, No. 14-499, 2014 WL 12496576, at *15 (W.D. Tex. Oct. 10, 2014) (dismissing affirmative claim for unconscionability because it cannot be asserted as an independent cause of action).

38. Even if the Committee could plead unconscionability as an affirmative claim, Count II nevertheless would fail for three additional reasons. ***First***, the Committee lacks standing to attack the Plans of Divisional Merger as unconscionable because its constituents are neither parties to, nor third party beneficiaries of, those documents. *See Morlock, L.L.C. v. Bank of New*

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[21] The Plans of Divisional Merger state they shall be governed by and construed in accordance with Texas Law. Compl., Ex. 9, ¶ 12; *id.*, Ex. 15, ¶ 12.

[22] North Carolina law provides the same. *See Levy v. Infilaw Corp.*, No. 17-00026, 2017 WL 3573825, at *6 (W.D.N.C. Aug. 17, 2017) ("[U]nder North Carolina law, unconscionability is an affirmative defense, not an independent cause of action." (citation and internal quotation marks omitted)).

York, 448 S.W.3d 514, 517 (Tex. App. 2014) (finding a third party lacked standing to challenge a voidable defect in a contract); *Ardmore, Inc. v. Rex Grp., Inc.*, 377 S.W.3d 45, 55 (Tex. App. 2012) (concluding appellant could not challenge a sublease as fraudulently induced because it was not a party to the contract).[23] ***Second***, the doctrine of unconscionability only applies to contracts, not valid corporate acts such as the Plans of Divisional Mergers.[24] *See Dinkins v. Deutsche Bank Nat'l Tr. Co.*, No. 12-0133, 2012 WL 13103535, at *6 (N.D. Tex. Aug. 30, 2012) (dismissing request for declaration that defendants acted unconscionably because, as a contract doctrine, it had no applicability to the case). ***Third***, the Complaint fails to plead any facts remotely suggesting any of the documents or corporate acts comprising the Corporate Restructuring rise to the level of substantive unconscionability by shocking the conscience or that the underlying transactions contained even a hint of procedural unconscionability. *See Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex. App. 2005) ("[T]he party asserting unconscionability of a contract bears the burden of proving both procedural and substantive unconscionability.").[25] For the foregoing reasons, the Court should dismiss Count II of the Complaint.

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[23] The Committee would lack standing under North Carolina law as well. *See Country Boys Auction & Realty Co. v. Carolina Warehouse, Inc.*, 636 S.E.2d 309, 314 (N.C. Ct. App. 2006) (finding a non-party to a contract lacked standing to challenge the contract's validity).

[24] *See* PI Decision, ¶ 159 (noting that the "Corporate Restructuring met all applicable state-law requirements to effect divisional mergers," such as making "the necessary filings, including filing plans of merger").

[25] "Substantive unconscionability refers to the fairness of the [contract] itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the" contract. *Delfingen US-Texas, L.P. v. Valenzuela*, 407 S.W.3d 791, 797 (Tex. App. 2013).

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint.

Dated: December 20, 2021

Respectfully submitted,

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