

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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March 30, 2004

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LLC as successor-in-interest to  
Borden Chemicals and Plastics  
Operating Limited Partnership

**Re: BCP Liquidating LLC, as successor in interest to Borden  
Chemicals and Plastic Operating Limited Partnership, et al. v.  
Union Tank Car Company  
Adv. Proc. No. 03-52532**

Dear Counsel:

This is with respect to Union Tank Car Company's motion  
(Doc. # 7) to dismiss the complaint on the grounds that the  
plaintiff is not the real party in interest as contemplated by  
Fed.R.Civ.P. 17. For the reasons set forth below, the motion will  
be denied.

This matter invokes an interpretation of numerous provisions of the Third Amended Joint Plan of Liquidation ("the Plan") which was confirmed on February 5, 2003. While the Plan document is not a model of clarity, I am convinced that within its four corners the intent is that the plaintiff has standing to pursue "Causes of Action", including the subject preference action.

In reliance upon Article V.B.3 and V.D.1 of the Plan, the defendant argues that "[t]he right to *prosecute or pursue* Causes of Action, as defined in the Plan, including avoidance actions under Section 547, is vested 'exclusively' with the BCP LLC Agent, and not the Plaintiff." (Doc. # 7 at 3).<sup>1</sup> Then, citing Article V.B.2 of the Plan, the defendant notes that the BCP Liquidating LLC "*shall be established for the sole purpose of liquidating its Assets in furtherance of the Plan . . . .*" (Doc. # 7 at 3). Finally, in its reply memorandum (Doc. # 13 at 3) the defendant quotes Article IV.G. of the Plan which provides as follows:

[A]ll Persons are permanently enjoined from commencing or continuing in any manner any action or proceeding (whether directly, indirectly, derivatively or otherwise) on account of or respecting any Cause of Action of any Debtor, which the BCP LLC Agent or the BCPM LLC Agent, on behalf of BCP Liquidating LLC or BCPM Liquidating LLC, *shall retain the exclusive authority to pursue in accordance with the Plan.* (Italicized by the defendant.)

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<sup>1</sup>Defendant cites the Plan Article IV.B.3. In my copy of the Plan, I find no Article IV.B.3. I assume that the proper reference is to Article V.B.3.

There are numerous provisions of the Plan which run counter to the defendant's interpretation. I find the following provisions to be particularly relevant:

"Assets" means all assets of the applicable Debtor or Liquidating LLC of any nature whatsoever, including . . . the property of the Estate . . . , claims of right, interests and property, real and personal, tangible and intangible.

Article I.A.6.

"Causes of Action" means . . . all claims, demands, rights, actions, causes of action and suits of such Debtor's Estate . . . whether arising prior to, on or after the Petition Date . . . including without limitation the Causes of Action set forth in Exhibit V.E entitled "Preserved Causes of Action."

Article I.A.31.

As of the Effective Date, the property of the Estate of BCP shall be transferred to BCP Liquidating LLC and the property of the Estate of BCPM shall be transferred to BCPM Liquidating LLC in accordance with Section V.B.5. and Section V.C.5, respectively.

Article IV.A.1. (emphasis added).

BCP Liquidating LLC and BCPM Liquidating LLC, respectively, will exclusively retain and may enforce, and the Debtors expressly reserve and preserve for these purposes, in accordance with sections 1123(a)(5)(B) and 1123(b)(3) of the Bankruptcy Code, any Claims, demands, rights and Causes of Action . . . including without limitation the Causes of Action set forth in Exhibit V.E entitled "Preserved

Causes of Action . . . .<sup>2</sup>

Article IV.E. (emphasis added).

Upon the Effective Date, and in accordance with the Restructuring Transactions, BCP shall assign and transfer to BCP Liquidating LLC all of its right, title and interest in and to all of its Assets other than (i) any Cash and other Assets to be distributed on the Effective Date to holders of Claims in respect of BCP and (ii) any Assets that have been sold or otherwise disposed of pursuant to court order . . . .

Article V.B.5. (emphasis added).

The BCP LLC Agent shall, in an expeditious but orderly manner, liquidate and convert to Cash the Assets of BCP Liquidating LLC . . . liquidate the Assets of BCP Liquidating LLC to maximize recoveries. Such liquidations may be accomplished either through the sale of the Assets . . . or through the prosecution, compromise and settlement, abandonment or dismissal of any or all Claims, rights, or Causes of Action, or otherwise. The BCP LLC Agent, with the consent of the other BCP LLC Managers, shall elect whether or not to pursue any Causes of Action as they may determine are in the best interests of the members of BCP Liquidating LLC, consistent with the purposes of BCP Liquidating LLC.

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<sup>2</sup>Bankruptcy Code § 1123(a)(5)(B) provides:

[A] plan shall--

\* \* \*

(5) provide adequate means for the plan's implementation, such as--

\* \* \*

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan.

Article V.B.11. (emphasis added).

BCP Liquidating LLC and BCPM Liquidating LLC, respectively, will exclusively retain and may enforce . . . any Claims, demands, rights and Causes of Action . . . .

Article V.D.1. (emphasis added).

[A]ll entities . . . will be permanently enjoined from taking any of the following actions on account of any such discharged Claims, debts or liabilities or terminated Interests or rights: . . . (d) commencing or continuing in any manner any action or proceeding (whether directly, indirectly, derivatively or otherwise) on account of or respecting any Cause of Action of any of the Debtors, which BCP Liquidating LLC or BCPM Liquidating LLC, as applicable, holds exclusive authority to pursue in accordance with the Plan . . . .

Article XI.B.1. (emphasis added).

Based on the above noted Plan provisions, I conclude that:

- (1) the liquidation of Assets includes the prosecution of Causes of Action;
- (2) all of BCP Debtor's Assets (subject to non-relevant exceptions) were transferred to BCP Liquidating LLC;
- (3) BCP Liquidating LLC has exclusive authority to pursue Causes of Action; and
- (4) BCP LLC Agent is an agent of BCP Liquidating LLC and the latter is the real party in interest as contemplated by Fed.R.Civ.P. 17.

On the facts here, even if BCP LLC Agent were deemed the real party in interest, an amendment to the complaint would be appropriate and that amendment would relate back. See Maritime Inspection Servs., Inc. v. Thermo-Valves Corp., No. 90 Civ. 7286, 1992 WL 42238, at \*3 (S.D.N.Y. Feb. 25, 1992) ("Typicaly where the authority of an agent or other party to bring an action is tested, any resulting deficiency is addressed by joinder or substitution of the real party in interest."); see also Scheufler v. Gen. Host Corp., 126 F.3d 1261, 1270 (10th Cir. 1997) ("[T]he language of [Rule 17(a)] mandated that, once the district court concluded the tenants were real parties in interest and allowed them to join as plaintiffs, their claims automatically related back to the original filing of the action.").

The defendant's motion to dismiss is denied.

Very truly yours,



Peter J. Walsh

PJW:ipm

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re: ) Chapter 11  
)  
BORDEN CHEMICALS AND PLASTICS ) Case No. 01-1268 (PJW)  
OPERATING LIMITED PARTNERSHIP, )  
a Delaware limited partnership, ) Jointly Administered  
et al., )  
)  
Debtors. )  
\_\_\_\_\_)  
BCP LIQUIDATING LLC, as )  
successor in interest to BORDEN )  
CHEMICALS AND PLASTIC OPERATING )  
Plaintiff, )  
)  
v. ) Adv. Proc. No. 03-52532  
)  
UNION TANK CAR COMPANY, )  
)  
Defendant. )

ORDER

For the reasons stated in the Court's letter ruling of this date, Union Tank Car Company's motion (Doc. # 7) to dismiss the complaint is DENIED.

  
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Peter J. Walsh  
United States Bankruptcy Judge

Dated: March 30, 2004