

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re:

BESTWALL LLC,¹

Debtor.

Chapter 11

Case No. 17-31795 (LTB)

**Re: Docket Nos. 27, 28, 36, 38, 109,
and 117**

**OMNIBUS MOTION TO RECONSIDER THE SCOPE OF *EX PARTE* ORDERS
APPROVING EMPLOYMENT OF EACH OF: (I) KING & SPALDING LLP AND
(II) SCHACHTER HARRIS LLP AS DEBTOR'S SPECIAL COUNSEL
PURSUANT TO SECTION 327(e) OF THE BANKRUPTCY CODE
EFFECTIVE AS OF THE PETITION DATE**

The Official Committee of Asbestos Claimants (the "Committee"), by and through its undersigned counsel, hereby files the instant motion (the "Motion") seeking partial reconsideration of: (i) this Court's order [Docket No. 36] (the "K&S Retention Order") granting Bestwall LLC's (the "Debtor") *Ex Parte Application to Employ King & Spalding LLP as Debtor's Special Counsel Pursuant to Section 327(e) of the Bankruptcy Code Effective as of the Petition Date* [Docket No. 27] (the "K&S Application"); and: (ii) this Court's order [Docket No. 38] (the "Schachter Retention Order") granting the *Ex Parte Application of the Debtor for an Order Authorizing It to Retain and Employ Schachter Harris as Special Litigation Counsel* [Docket No. 28] (the "Schachter Application"). In support this Motion, the Committee states as follows:²

¹ The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 100 Peachtree Street, N.W., Atlanta, Georgia 30303

² The underlying facts and law giving rise to Committee's requests to reconsider each of the K&S Retention Order and the Schachter Retention Order are identical. Accordingly, in the interest of efficiency, the Committee files this omnibus motion.

INTRODUCTION³

Facts Common to Both the K&S Retention Order and the Schachter Retention Order

1. The Debtor was formed on July 31, 2017 as part of a very carefully planned and executed corporate restructuring accomplished by Georgia-Pacific, LLC f/k/a Georgia-Pacific Corporation (“Old GP”). Moving to Texas for less than a day to utilize Texas’s divisive merger statute, Old GP spun off its asbestos liabilities into a newly-created entity with limited assets that became the Debtor. Specifically, the Debtor, an entity with no employees, certain limited holdings valued by the Debtor at approximately \$175 million, and a contractual right to certain payments under a “Funding Agreement,” assumed liability for all of Old GP’s asbestos liabilities (the “Georgia-Pacific Asbestos Liabilities”) and domiciled itself in North Carolina less than 100 days before the Petition Date in anticipation of a bankruptcy filing. The other entity resulting from this restructuring (“New GP”) was provided all of Old GP’s other assets and liabilities, as well as an indemnification for the Georgia-Pacific Asbestos Liabilities from the Debtor. New GP resumed operations in Delaware and was renamed “Georgia-Pacific.” On November 1, 2017, the day before its bankruptcy filing, the Debtor changed its name from Georgia-Pacific LLC to Bestwall LLC.

2. In the opening paragraph of its Informational Brief filed on the Petition Date [Docket No. 12] (the “Informational Brief”), the Debtor states:

Debtor Bestwall LLC . . . has commenced this proceeding under chapter 11 of title 11 of the United States Code . . . to resolve current and future asbestos-related claims permanently and equitably. In this proceeding, Bestwall will seek to establish a section 524(g) trust for the benefit of current and future asbestos claimants to pay fully asbestos claims in accordance with trust distribution procedures approved by this Court.

³ Capitalized terms used in this Introduction and not previously defined shall have the meanings ascribed to them *infra*.

Informational Brief at page 1.

3. The sole issue in this case is the treatment of the Georgia-Pacific Asbestos Liabilities. Indeed, from inception, the Debtor's entire corporate purpose was to provide Old GP and New GP with a resolution of the Georgia-Pacific Asbestos Liability without Old GP or New GP being subjected to a bankruptcy filing. Informational Brief at p. 8.

4. According to the Informational Brief, failing a consensual settlement between the parties, the Debtor intends to ask this Court to estimate the Debtor's aggregate current and future asbestos liabilities. See Informational Brief at pp. 41-42.

King & Spalding's Retention Should be Modified

5. The Debtor has sought to retain King & Spalding LLP ("K&S") in part to assist the Debtor in connection with an estimation trial. However, as set forth below, K&S will be a significant witness at any estimation trial based on its "extensive knowledge concerning Old GP's businesses, former asbestos-containing products, history related to asbestos litigation, scientific research relating to issues arising in the asbestos cases filed against Old GP, defenses to asbestos claims, and both Old GP's and the Debtor's management of the defense and settlement of asbestos claims", gained over its 13 years of representing Old GP and now the Debtor. See K&S Application at ¶8.

6. Accordingly, the scope of K&S' services to the Debtor's estate should be limited to matters other than the estimation proceeding, and any retention of K&S must be with the understanding and expectation that its lawyers are likely to be examined and may be called as witnesses with respect to K&S' pre-petition services.

7. By this Motion, the Committee respectfully requests that the Court enter the order, substantially in the form annexed hereto as Exhibit A, reconsidering the K&S Retention Order and modifying the scope of the K&S Retention Order.

Schachter Harris's Retention Should be Denied or Substantially Modified

8. The Debtor has sought to retain Schachter Harris LLP ("Schachter") "to assist the Debtor with: (a) specialized medical science expertise, (b) historical experience representing the Debtor in proceedings regarding Asbestos Claims and (c) technical knowledge regarding expert testimony and discovery in matters related to Asbestos Claims." Schachter Application at ¶ 10. The Schachter firm is identified as "special litigation counsel for medical science issues related to asbestos claims" in the *Ex Parte Application of the Debtor for an Order Authorizing it to Retain and Employ Jones Day as Counsel as of the Petition Date* [Docket No. 24] at ¶ 12.

9. As set forth in more detail below, the services proposed to be provided by Schachter with regard to its medical science expertise are unnecessary and irrelevant with regard to an estimation proceeding before this Court. In any estimation proceeding, this Court must apply the state law governing claimants' claims. An estimation proceeding is not a process in which the Debtor can globally re-litigate whether Georgia-Pacific's chrysotile-containing products cause mesothelioma. Such a determination is beyond the Court's jurisdiction.

10. Further, in any estimation proceeding, Schachter lawyers will be important fact witnesses as concerns its services as National Coordinating Counsel for Georgia-Pacific Asbestos Liabilities in the three years before this case.

11. Accordingly, the scope of Schachter's services to the Debtor's estate with respect to any estimation trial should be limited to matters other than any medical science issues or matters as to which they are fact witnesses, and should Schachter be retained, it must be with the

understanding and expectation that its lawyers are likely to be examined and may be called as witnesses with respect to Schacter's pre-petition services.

12. By this Motion, the Committee respectfully requests that the Court enter the order, substantially in the form annexed hereto as Exhibit B, reconsidering and denying the Schachter Retention Order, or in the alternative in order to modify the scope of the Schachter Retention Order.

JURISDICTION

13. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue for this Motion is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

14. The statutory bases for the relief sought are Rules 59 and 60 of the Federal Rules of Civil Procedure (the "Civil Rules"), made applicable to this proceeding by Rules 9023 and 9024 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 9013-1(f) of the Rules of Practice and Procedure of the United States Bankruptcy Court for the Western District of North Carolina (the "Local Rules").

BACKGROUND

15. On November 2, 2017 (the "Petition Date"), the Debtor commenced this proceeding (the "Chapter 11 Case") by filing a voluntary petition for relief under the Bankruptcy Code.

16. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor has continued as a debtor-in-possession since the Petition Date.

17. The Debtor filed each of the K&S Application and the Schachter Application on the Petition Date seeking *ex parte* approval pursuant to Local Rule 9013-1(f). The K&S Retention Order and the Schachter Retention Order were entered on the same day.

18. On November 16, 2017, the Bankruptcy Court entered an Order appointing the Committee. [Docket No. 97].

19. The Committee is composed of individuals suffering with mesothelioma, an always fatal form of asbestos-related cancer, and the families of individuals who have died as a result of mesothelioma.

20. Pursuant to Local Rule 9013-1(f), the deadline for reconsideration of the K&S Application was originally set for November 17, 2017—the day following this Court’s order appointing the Committee. Pursuant to an *Agreed Order Extending Time to Seek Reconsideration of Ex Parte Orders* entered November 21, 2017 [Docket No. 109], the *Agreed Order Further Extending Time to Seek Reconsideration of Certain Orders* entered on November 30, 2017 [Docket No. 117], and the *Second Agreed Order Further Extending Time to Seek Reconsideration of Certain Orders* entered on January 5, 2018 [Docket No. 166] the Court granted the Committee through and including January 26, 2018 to file this Motion.

ARGUMENT

I. THE COURT MAY RECONSIDER EACH OF THE K&S RETENTION ORDER AND THE SCHACTER RETENTION ORDER PURSUANT TO LOCAL RULE 9013-1(f)

21. Local Rule 9013-1(f) provides for reconsideration of certain ex parte orders issued by the Bankruptcy Court. *See* Local Rule 9013-1(f) (“Any party shall be entitled to request a hearing or to request that the Court reconsider any ex parte relief upon a request filed within 14 days of service of notice of the entry of ex parte relief.”). This Motion remains timely under the local rule pursuant to the consent orders entered by the Court extending the Committee’s time to file a motion for reconsideration to January 26, 2018.

II. K&S’ CRITICAL ROLE IN CONNECTION WITH PRE-PETITION MANAGEMENT OF THE DEBTORS’ ASBESTOS LIABILITY DEFENSE

PROVIDES IT WITH AN INTEREST THAT MAY BE ADVERSE TO THE BEST INTERESTS OF THE DEBTOR'S ESTATE

22. Section 327(e) of the Bankruptcy Code states:

The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11. U.S.C. § 327(e).

23. The Debtor sought to retain K&S pursuant to Bankruptcy Code section 327(e), in part, to provide the following services:

- a. assisting the Debtor with discovery relating to asbestos claims;
...
- c. assisting the Debtor in connection with any estimation proceeding for the Debtor's asbestos claims;
...
- f. providing such other specific services as may be requested by the Debtor from time to time relating to the . . . estimation . . . of the Debtor's asbestos-related claims in the Chapter 11 Case.⁴

K&S Application, at ¶11.

24. It is not in the best interests of the estate for K&S' engagement to include representation of the Debtor in connection with any estimation trial.

⁴ It is unclear whether the scope of the services K&S is to provide relates to any issue concerning the medical science surrounding chrysotile as a cause of mesothelioma. To the extent K&S is intended to provide such services, the Committee incorporates the arguments set forth infra as it relates to the request to reconsider the Schachter Retention Order.

A. K&S' Lawyers will be Central Fact Witnesses on the Approach Used by Old GP and the Debtor to Settle Georgia-Pacific Asbestos Claims

25. The Informational Brief argues, among other things, that the Debtor's settlement history has been tainted by information withheld and/or unknown to it in the tort system. For example, the Debtor states:

Revised or suspect recollections and the sudden serial absence of alternative exposure evidence, especially of amphibole exposure, drove this increase. For a chrysotile defendant like Bestwall, '[e]vidence of the plaintiffs' exposure to other co-defendants products was essential to its defense and its negotiating position.' But in many cases, this alternative exposure evidence was hidden away in the bankruptcy trust system. With these factors creating a greater risk of loss at trial, Bestwall was forced to pay higher settlements.

Informational Brief at 23-24 (citations omitted); *see generally* Informational Brief at 23-41.

26. The Debtor has put at issue the approach—including the evidence sought, received, and considered, and the due diligence conducted in connection with reaching decisions to settle—Old GP used in making decisions to settle asbestos related personal injury and wrongful death claims.

27. The K&S Application and accompanying Affidavit of Richard A. Schneider (the "Schneider Affidavit") state that K&S has served as special counsel for Old GP (and then the Debtor) in the asbestos litigation for more than a decade.

Since at least 2005, K&S has represented Old GP and now the Debtor in matters related to the defense of asbestos claims and possesses extensive knowledge concerning Old GP's businesses, former asbestos-containing products, history related to asbestos litigation, scientific research relating to issues arising in the asbestos cases filed against Old GP, defenses to asbestos claims, and both Old GP's and the Debtor's management of the defense and settlement of asbestos claims.

See K&S Application at ¶ 8, Schneider Affidavit at ¶ 4.

28. Central to Old GP's and the Debtor's decisions to address asbestos claims through litigation, settlement, or otherwise will be the conduct and advice of its counsel. Among other things, K&S' role in establishing settlement protocols and values, including what was known or should or could have been known in establishing such protocols and recommending such settlement values, will be at issue in any estimation trial. By placing at issue the information it considered in connection with settlement, the Debtor has put at issue communications that otherwise may have been subject to a claim of attorney-client privilege.

29. Should this case include an estimation trial, K&S will be an important witness as it relates to the Georgia-Pacific Asbestos Claims by reason of its "extensive knowledge" concerning "the management of the defense and settlement," including what information was sought and considered in connection with settlement. See K&S Application at ¶ 8, Schneider Affidavit at ¶ 4. For similar reasons, in the estimation litigation in *Specialty Products Holding Company, et al.*, Bankruptcy Case No. 10-11780 (Bankr. D. Del.) ("*Specialty Products*") each of the three former national coordinating counsel were deposed with regard to these issues.

30. K&S is also said to have substantial knowledge of the historical bases for Georgia-Pacific Asbestos Claims. K&S Application at ¶ 8, Schneider Affidavit at ¶ 4. K&S' lawyers may also be witnesses concerning such matters, including when, what, and why information was disclosed by Old GP concerning its knowledge of the dangers of asbestos in connection with asbestos litigation during the time that Old GP was defending asbestos claims in the tort system as well as its defense strategy.

31. To state it plainly, K&S' settlement advice, its defense strategy, and its management of trial counsel are likely to be at issue in any estimation trial.

32. While the Committee has no information to suggest that K&S' representation of Old GP and Bestwall in connection with the Georgia-Pacific Asbestos Claims was less than superb, if the investigation of other potential sources of recovery by Old GP was deficient, it is possible that K&S' interests and the interests of the Debtor's estate could conflict.

B. K&S Lawyers may also be Key Witnesses on Georgia-Pacific's Efforts to Manipulate the Medical Science Literature on Chrysotile Exposure as a Cause of Mesothelioma

33. The K&S Application provides, in pertinent part, "K&S has also served as Old GP's lead counsel for preparing and defending company witnesses addressing scientific issues." K&S Application at ¶9.

34. Beginning in 2005, Old GP funded certain research studies "to aid in its defense of asbestos-related lawsuits." *See, e.g., In re New York City Asbestos Litig.*, 966 N.Y.S.2d 420, 421 (N.Y. App. Div. 2013).

35. Among other things, Judge Andrias found:

Holm [Georgia-Pacific's Director of Toxicology and Chemical Management] co-authored nearly all of the studies, which were intended to cast doubt on the capability of chrysotile asbestos to cause cancer. On the two articles that he did not co-author, he and GP's counsel participated in lengthy "WebEx conferences" in which they discussed the manuscripts and suggested revisions. Despite this extensive participation none of the articles disclosed that GP's in-house counsel had reviewed the manuscripts before they were submitted for publication. Two articles falsely stated that "[GP] did not participate in the design of the study, analysis of the data, or preparation of the manuscript." For articles lead-authored by David M. Bernstein, Ph.D., and co-authored by Holm, the only disclosure was that the research was "sponsored" or "supported" by a grant from GP. The articles did not disclose that Holm was specially employed by GP for the asbestos litigation or that he reported to GP's in-house counsel. Furthermore, there were no grant proposals and Dr. Bernstein was hired by GP on an hourly basis. Nor did the articles reveal that Dr. Bernstein has been disclosed as a GP expert witness in NYCAL since 2009, that he had testified as a defense expert for Union Carbide Corporation in asbestos litigation, or that he had been paid by, and spoken

on behalf of, the Chrysotile Institute, the lobbying arm of the Quebec chrysotile mining industry.

Id. at 423.

36. While it is presently unclear whether Georgia-Pacific's efforts to manipulate the medical science will become relevant in this case, if it does, K&S' lawyers may be fact witnesses with regard to such efforts to influence the medical science literature.

37. Because the nature and extent of K&S's involvement in connection with preparing and defending company witnesses is unknown, it is possible that K&S's interests may conflict with the estate with regard to the matters as to which it is sought to be retained.

III. SCHACHTER HARRIS' ENGAGEMENT FOR PURPOSES OF AN ESTIMATION TRIAL IS NOT IN THE BEST INTERESTS OF THE DEBTOR'S ESTATE

38. As set forth in paragraph 22 above, section 327(e) of the Bankruptcy Code provides for the retention of special purpose counsel provided that it is in the best interests of the estate and such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed. 11 U.S.C. § 327(e).

39. The Schachter Application and accompanying Affidavit of Raymond P. Harris, Jr. (the "Harris Affidavit") state that Schachter has served as special asbestos defense counsel for Old GP (and then the Debtor) in asbestos litigation since 2014, focusing specifically on medical science issues. *See* Schachter Application at ¶ 8, Harris Affidavit at ¶ 3. The Debtor sought to retain Schachter pursuant to Bankruptcy Code section 327(e), in part, to provide the following services:

- a. assisting the Debtor in analyzing issues with respect to Asbestos Claims, particularly with respect to medical science issues;
- b. assisting the Debtors' other professionals in matters regarding Asbestos Claims, particularly with respect to medical science issues, including in

connection with any negotiations to resolve these claims consensually and any litigation related to estimation of these claims;

- c. assisting the Debtor in any formal and informal discovery regarding Asbestos Claims, particularly with respect to medical science issues;
- d. assisting as needed and as requested in any court hearings in this chapter 11 case, including in any proceedings relating to the estimation of Asbestos Claims; and
- e. providing such other specific services as may be requested by the Debtor from time to time.

Schachter Application, at ¶ 13.

40. It is not in the best interests of the estate for Schachter's engagement to include representation of the Debtor in connection with any estimation trial. In addition, Schachter could or may hold an interest adverse to the estate with respect to the matters as to which its retention is sought.

A. Schachter's Experience with regard to the Medical Science Relating to Chrysotile is Irrelevant for Purposes of an Aggregate Estimation of the Georgia-Pacific Asbestos Liability

1. State Law Governs the Validity and Amount of Claims

41. Section 524(g) of the Bankruptcy Code provides a unique mechanism for a company to resolve its present and future asbestos liability.

42. Among other things, section 524(g) provides for an aggregate estimation of the Debtor's present and future liability to assist in the formulation of a chapter 11 plan.

43. Any estimation of the Georgia-Pacific Asbestos Claims should approximate as reliably as possible the amount that would have been paid to dispose of pending and future asbestos personal injury claims in the tort system absent an interceding bankruptcy.

44. An estimation proceeding is not, and by statute cannot be, a trial on the merits of any case or group of cases.

45. It is a basic principle of bankruptcy law that state law governs the validity and amount of a claim. *See Raleigh v. Illinois Dep't of Rev.*, 530 U.S. 15 (2000) (“The ‘basic federal rule’ in bankruptcy is that state law governs the substance of claims, Congress having ‘generally left the determination of property rights in the assets of a bankrupt’s estate to state law.’”) (citations omitted); *In re W.R. Grace & Co.*, 346 B.R. 672, 674 n.10 (Bankr. D. Del. 2006) (“The validity of a claim is determined by reference to the state law governing the substance of that claim and those state interests are analyzed no differently . . . than if the interested parties were not in bankruptcy.”) (citations omitted).

46. Accordingly, state law is to be followed in claims-estimation proceedings. *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135 (3d Cir. 1982) (noting that when estimating a claim, the “bankruptcy court should be guided by the applicable state law”); *id.* at 138 (finding court is “bound by the legal rules which may govern the ultimate value of the claim.”). This rule applies with no less force in the estimation of asbestos-related claims. *See, e.g., In re Fed.-Mogul*, 330 B.R. 133, 155 (Bankr. D. Del. 2005).

47. Despite the Debtor’s desire to have this Court change state jurisprudence with which it disagrees, a bankruptcy court cannot use its equitable powers to ignore or reform state law, or to remove or alter the individual due process rights of asbestos claimants. *See U.S. v. Noland*, 517 U.S. 525, 541 (1996).

48. Under applicable jurisprudence, this Court may not decide which set of medical/science experts are correct on the issue of the extent to which Georgia-Pacific’s products caused or contributed to the mesothelioma claims against Old GP/the Debtor. The medical science relating to chrysotile and discussed at length in the Debtor’s Informational Brief was asserted by Old GP/the Debtor and responded to by plaintiffs in virtually every case that Old GP

and Bestwall did not settle as part of a settlement protocol in the tort system. State tort law is well developed on this issue.

49. According to the Debtor, Old GP was served with its first asbestos-related lawsuit over 40 years ago and has been in the state tort system for decades. Informational Brief at 6. Thus, Old GP had years of experience in asbestos litigation and has been the subject of nearly half a million claims. *Id.* Old GP and the Debtor made litigation and settlement decisions during that 40-year history that they believed to have been in their best interest, and which took into consideration — other things — the toxicity of the asbestos (amosite, chrysotile, tremolite, and Libby Amphibole) which was contained in GP products and the various forms of asbestos (crocidolite, amosite, chrysotile, tremolite, and Libby Amphibole) present in GP's premises.

50. The results of Georgia-Pacific's contention that chrysotile does not contribute to or cause mesothelioma or that it does so in only large doses (and its payment for medical science to support this contention), and the overwhelming evidence that it does, are reflected in the verdicts and settlements reached in the tort system.

51. The Debtor has neither contended that the plaintiffs presented evidence relating to chrysotile which was hidden to them and as to which they were unable to respond, nor asserted that there are new developments in the independent medical or scientific literature (that is, in the medical or scientific literature procured and financially supported by Georgia-Pacific). Thus, the Court must take the state of tort law as it exists and should not permit the Debtor to attempt to use this Court to serve as a legislator or as an alternative fact-finder to the state courts, which regularly serve as finder of fact on this very issue.

52. Further, principles of comity require this Court to decline the Debtor's invitation to question the findings of state courts which have been ruling on the issue of chrysotile's toxicity for decades.

53. Should this Court preside over an estimation trial, its role will be to estimate the Debtor's aggregate asbestos claims based on the state of the law as it exists.

2. *The Medical Science Evidence Presented in Garlock and Specialty Products was Irrelevant to those Courts' Estimation Decisions*

54. Importantly, in the estimation hearings in the two most recent contested estimation decisions, the courts were presented with extensive evidence on the medical science related to chrysotile which ultimately proved irrelevant to their holdings. *See In re Specialty Products Holding Corp.*, 2013 WL 2177694 (Bankr. D. Del. May 20, 2013); *In re Garlock Sealing Technologies*, 504 B.R. 71 (Bankr. W.D.N.C. 2013).

55. In *Specialty Products*, the Court based its estimation on the debtors' settlement history, observing only that which is already admitted by the Debtor, namely that "based on these studies and the current state of scientific research in the area, chrysotile has not been ruled out as a cause of mesothelioma, even if the chrysotile is uncontaminated or minimally contaminated with amphibole asbestos." *Specialty Products*, 2013 WL 3277694, at * 7.

56. In *Garlock*, a case on which the Debtor relies extensively in its Informational Brief, the Court reached an estimation not tied to the debtor's settlement history. In so doing, the *Garlock* Court concluded that it was unnecessary to make a determination on the toxicity of chrysotile. Specifically, the Court stated that "it is [not] necessary for it to determine—one way or the other—whether low dose exposure to chrysotile in Garlock gaskets could cause mesothelioma." *In re Garlock*, 504 B.R. at 82.

57. As was ultimately the case in *Specialty Products* and *Garlock*, there is no legitimate need for this Court to conduct an inquiry into the medical science of chrysotile as part of any estimation proceeding. Those issues have been considered by countless courts, and the resolutions they have reached have informed Old GP's and the Debtor's settlement and trial strategy, and its or their evaluation and valuation of asbestos claims.

B. Schachter's Lawyers will be Central Fact Witnesses in Any Estimation Proceeding on the Approach Used by Old GP and the Debtor to Settle Georgia-Pacific Asbestos Claims

58. As discussed above in paragraphs 25-26, the Debtor's Informational Brief argues, among other things, that the Debtor's settlement history has been tainted by information withheld and/or unknown to it in the tort system. Consequently, the Debtor has put at issue the approach—including the evidence sought, received, and considered, and the due diligence conducted in connection with reaching decisions to settle—Old GP used in making decisions to settle asbestos related personal injury and wrongful death claims. Central to these decisions will be the conduct and advice of its counsel regarding establishing settlement protocols and values, including what its counsel knew or should or could have known in establishing such protocols and recommending such values, and the impact on its settlement history of any changes made in such protocols or recommendations as Old GP became aware of the *Garlock* allegations and decision.

59. Should this case include an estimation trial, Schachter lawyers will be important witnesses as it relates to the Georgia-Pacific Asbestos Claims by reason of its “specialized medical science expertise” and “technical knowledge regarding expert testimony and discovery in matters related to Asbestos Claims.” *See* Schachter Application at ¶ 10. Of specific importance will be the type of information sought and considered in connection with settlement,

especially in light of Schachter’s “experience as special asbestos defense counsel” in the *In re Garlock Sealing Technologies* bankruptcy proceeding.

60. For similar reasons, in the estimation litigation in *Specialty Products*, each of the three former national coordinating counsel were deposed with regard to these issues.

61. Schachter also represents that it has substantial “historical experience representing the Debtor in proceedings regarding Asbestos Claims.” Schachter Application at ¶ 10; Harris Decl. at ¶ 5. Schachter’s lawyers may also be witnesses concerning such matters, including when, what, and why information was disclosed by Old GP concerning its knowledge of the dangers of asbestos in connection with asbestos litigation during the time that Old GP was defending asbestos claims in the tort system.

62. While the Committee has no information to suggest that Schachter’s representation of Old GP and Bestwall in connection with the Georgia-Pacific Asbestos Claims was less than superb, if the investigation of other potential sources of recovery by Old GP was deficient, the possibility of a conflict between Schachter’s interests and the interests of the Debtor’s estate could arise.

IV. THE GROUNDS FOR THIS MOTION ALSO SATISFY THE STANDARD SET FORTH IN BANKRUPTCY RULE 9024

63. Bankruptcy Rule 9024, incorporating Rule 60(b) of the Federal Rules of Civil Procedure (each, a “Civil Rule”), applies to final orders—such as the K&S Retention Order and the Schachter Retention Order—issued by a bankruptcy court. *See In re Energy Future Holdings Corp., et al.*, Case No. 14-10979, slip op. at 16 (Bankr. D. Del. Oct. 3, 2017). Each of the K&S Retention Order and the Schachter Retention Order is a final order for the purpose of reconsideration because “it finally dispose[d] of a discrete dispute within the larger case.” *See First Owners’ Ass’n of Forty Six Hundred v. Gordon Props., LLC*, 470 B.R. 364, 369 (4th Cir.

2012) (citing *In re Computer Learning Centers, Inc.*, 407 F.3d 656, 660 (4th Cir. 2005)); *see also A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986) (noting that “the concept of finality . . . has traditionally been applied in a more pragmatic and less technical way in bankruptcy cases than in other situations.” (internal quotation omitted)). The K&S Retention Order and the Schachter Retention Order each finally disposed of a discrete issue—whether the Debtor would be permitted to retain and employ each of King & Spalding LLP and Schachter Harris LLP as special counsels in this proceeding.

64. The United States Court of Appeals for the Fourth Circuit has held that a party seeking relief pursuant to Civil Rule 60(b) must satisfy certain threshold requirements, namely “that his motion is timely, that he has a meritorious defense to the action, and that the opposing party would not be unfairly prejudiced by having the judgment set aside.” *See Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894, 896 (4th Cir. 1987). Once these threshold issues are met, a movant must “satisfy one of the six specific sections of Rule 60(b).”⁵ *See Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 299 (4th Cir. 2017); *Compton v. Alton Steamship Co., Inc.*, 608 F.2d 96, 102 (4th Cir. 1979). Each of the threshold requirements are met here.

⁵ Civil Rule 60(b) provides that a party may be relieved from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

A. The Motion to Reconsider is Timely

65. The Bankruptcy Court issued each of the K&S Retention Order and the Schachter Retention Order *ex parte* before the Committee had been formed in accordance with the Local Rules. Since its formation, the Committee and its counsel have been working diligently to evaluate the Debtor's corporate reorganization, the events leading to the Debtor's decision to create venue to file this proceeding in North Carolina, and the first-day relief requested by the Debtor. In furtherance of this review, counsel for the Debtor and the Committee stipulated to two extensions of time for the Committee to seek reconsideration of certain first-day motions. The Bankruptcy Court entered these stipulations as consent orders, ultimately extending the Committee's deadline under Local Rule 9013-1(f) through and including January 26, 2018.

B. The Committee has Identified a Meritorious Basis for Reconsideration

66. As discussed at length in Parts II and III, *supra*, the Debtor's Informational Brief describes its intent to challenge the medical science underlying exposure to chrysotile asbestos and Old GP's (and the Debtor's) approach to settling asbestos-related litigation prepetition. K&S and Schachter will certainly be called as a witness in any Estimation Proceeding with respect to those two topics. The Debtor has chosen to put these topics at issue in this bankruptcy proceeding; neither K&S nor Schachter can properly serve as both estimation counsel and central fact witnesses.

C. No Prejudice Exists from Reconsidering the K&S Retention Order or the Schachter Retention Order

67. The Debtor will not be prejudiced by reconsideration and modification of the K&S Retention Order or the Schachter Retention Order as requested by the Committee.

68. This bankruptcy case is still in its infancy. Other than certain first day relief and consensual stay orders entered in connection with the adversary proceeding commenced on the

Petition Date, the overwhelming majority of motion practice before this Court to date has been ministerial.

69. As the Debtor and Committee have reported to the Court, the parties have been engaged in an effort to reach a consensual resolution of the Georgia-Pacific Asbestos Liabilities. *See* Tr. 1/19/2018 at 16:10-16.

70. As a result, many of the substantive deadlines in the case have been extended. To the extent that K&S has been assisting the Debtor “on issues relating to the resolution of asbestos claims in the Chapter 11 Case. . .”, *see* K&S Application at ¶8, those services are not the subject of this Motion.

71. At this stage of the proceedings, no or very little work of the type to which the Committee objects for either K&S or Schachter should have been required. Furthermore, the Debtor has retained estimation counsel (its local counsel Robinson, Bradshaw & Hinson, P.A.).

V. EVEN IF THE K&S RETENTION ORDER OR THE SCHACHTER RETENTION ORDER IS NOT A FINAL ORDER, THE COURT MAY RECONSIDER THE ORDERS PURSUANT TO BANKRUPTCY RULE 9023

72. Even if the Court was to determine that the K&S Retention Order or the Schachter Retention Order was interlocutory, the Committee would be entitled to seek reconsideration pursuant to Civil Rule 59(e), made applicable by Bankruptcy Rule 9023. *See Energy Futures, supra*, at 16. The Fourth Circuit has identified three grounds for altering or amending a judgment under Rule 59(e): “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *See Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Here, reconsideration of the K&S Retention Order and the Schachter Retention Order should be granted because when presented with the K&S Retention Application and the

Schachter Retention Application, the Court did not have the benefit of certain facts and circumstances which the Committee has detailed herein.

RESERVATION OF RIGHTS

The Committee expressly reserves all rights with respect to challenging the validity, propriety, jurisdiction and venue of this Chapter 11 Case, including without limitation seeking to dismiss the Chapter 11 Case pursuant 11 U.S.C. § 1112 and seeking to transfer the Chapter 11 Case pursuant to 28 U.S.C. §§ 1406, 1408 and 11 U.S.C. § 105.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Committee requests that with respect to the K&S Retention Order this Court: (a) GRANT the Motion and enter the proposed form of order attached as Exhibit A; (b) RECONSIDER the *Order Approving Employment of King & Spalding LLP as Debtor's Special Counsel Pursuant to Section 327(e) of the Bankruptcy Code Effective as of the Petition Date*; (c) REVISE the *Ex Parte Order Approving Employment of King & Spalding LLP as Debtor's Special Counsel Pursuant to Section 327(e) of the Bankruptcy Code Effective as of the Petition Date* to eliminate subparts (a), (c) and (f); and (d) grant such other and further relief as is just and proper.

WHEREFORE, for the reasons set forth herein, the Committee requests that with respect to the Schachter Retention Order this Court: (a) GRANT the Motion and enter the proposed form of order attached as Exhibit B; (b) RECONSIDER the *Ex Parte Order Authorizing the Debtor to Retain and Employ Schachter Harris LLP as Special Litigation Counsel*; (c) DENY the *Ex Parte Order Authorizing It to Retain and Employ Schachter Harris as Special Litigation Counsel* or in the alternative REVISE the *Ex Parte Order Authorizing It to Retain and Employ Schachter*

Harris as Special Litigation Counsel to deny its retention in connection with medical science issues; and (d) grant such other and further relief as is just and proper.

Dated: January 26, 2018
Charlotte, North Carolina

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Bestwall LLC*

EXHIBIT A

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re:

BESTWALL LLC,¹

Debtor.

Chapter 11

Case No. 17-31795 (LTB)

Re: Docket No. 27, 36, ____

**ORDER MODIFYING EMPLOYMENT OF KING & SPALDING LLP AS DEBTOR'S
SPECIAL COUNSEL PURSUANT TO SECTION 327(e) OF THE
BANKRUPTCY CODE EFFECTIVE AS OF THE PETITION DATE**

Upon the *Motion for Relief from the Court's Order Approving Employment of King & Spalding LLP as Debtor's Special Counsel Pursuant to Section 327(e) of the Bankruptcy Code Effective as of the Petition Date* (the "Motion"), filed by the Committee,² for an order, pursuant to Civil Rules 59 and 60, made applicable by Bankruptcy Rules 9023 and 9024, and Local Rule 9013-1(f) seeking reconsideration of the retention and employment of the law firm of King &

¹ The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 100 Peachtree Street, N.W., Atlanta, Georgia 30303

² Capitalized terms used herein and not otherwise defined shall have the meanings subscribed to them in the Motion.

Spalding LLP as special counsel to the Debtor; and the Court having found that it has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that consideration of the Motion and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Court having found that venue is proper for the purposes of this Motion before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the Committee provided due and proper notice of the Motion and such notice was adequate and appropriate under the circumstances; and the Court having held a hearing to consider the relief requested in the Motion (the “Hearing”); and upon consideration of the record of the Hearing and all proceedings before the Court; and the Court having found that the relief sought in the Motion is in the best interests of the Debtor’s estate, its creditors, and other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore, it is hereby ORDERED:

1. The Motion is hereby GRANTED as set forth herein.
2. All objections, if any, to the Motion that have not been withdrawn, waived, settled, or specifically addressed in this Order, and all reservations of rights included in such objections, are specifically overruled in all respects on the merits.
3. The *Order Approving Employment of King & Spalding LLP as Debtor’s Special Counsel Pursuant to Section 327(e) of the Bankruptcy Code Effective as of the Petition Date* [Docket No. 36] is modified as set forth in the Motion to Reconsider and based on the statements of the Court at the Hearing.
4. King & Spalding LLP is authorized to render professional services to the Debtor as follows:

- a. assisting the Debtor in the defense of privilege and work product issues relating to the asbestos matters;
 - b. assisting the Debtor in any stay issues or other matters relating to asbestos claims in non-bankruptcy forums; and
 - c. assisting the Debtor in negotiations relating to the resolution of asbestos claims in the Chapter 11 Case;
5. King & Spalding LLP shall be compensated for performed the above specified services and reimbursed for any related expenses in accordance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any other applicable orders or procedures of this Court;
6. Notwithstanding the possible applicability of Bankruptcy Rules 7062, 9014, or otherwise, the terms and conditions of this Order shall be effective and enforceable immediately upon entry.
7. The Court shall retain jurisdiction over any matter or disputes arising from or relating to the interpretation, implementation, or enforcement of this Order.

This Order has been signed electronically.
The judge's signature and court's seal
appear at the top of the Order.

United States Bankruptcy Court

EXHIBIT B

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re:

BESTWALL LLC,⁸

Debtor.

Chapter 11

Case No. 17-31795 (LTB)

Re: Docket No. ____

**ORDER GRANTING MOTION TO RECONSIDER ORDER AUTHORIZING THE
DEBTOR TO RETAIN AND EMPLOY SCHACHTER HARRIS LLP
AS SPECIAL LITIGATION COUNSEL**

Upon the *Motion to Reconsider Order Authorizing the Debtor to Retain and Employ Schachter Harris LLP as Special Litigation Counsel* (the “Motion”), filed by the Committee,⁹ for an order, pursuant to Civil Rules 59 and 60, made applicable by Bankruptcy Rules 9023 and 9024, and Local Rule 9013-1(f) seeking reconsideration of the retention and employment of the law firm of Schachter Harris LLP as special counsel to the Debtor; and the Court having found

⁸ The last four digits of the Debtor’s taxpayer identification number are 5815. The Debtor’s address is 100 Peachtree Street, N.W., Atlanta, Georgia 30303

⁹ Capitalized terms used herein and not otherwise defined shall have the meanings subscribed to them in the Motion.

that it has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that consideration of the Motion and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Court having found that venue is proper for the purposes of this Motion before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the Committee provided due and proper notice of the Motion and such notice was adequate and appropriate under the circumstances; and the Court having held a hearing to consider the relief requested in the Motion (the “Hearing”); and upon consideration of the record of the Hearing and all proceedings before the Court; and the Court having found that the relief sought in the Motion is in the best interests of the Debtor’s estate, its creditors, and other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore, it is hereby ORDERED:

1. The Motion is hereby GRANTED.
2. The Debtor and the Committee shall work together to propose a form of order consistent with this Court’s rulings made at the Hearing. If a proposed agreed order cannot be negotiated by the Debtor and Committee within 10 days of the date of this order, each of the Debtor and the Committee shall be authorized to submit its own version of the order to this Court for consideration.
3. The Court shall retain jurisdiction over any matter or disputes arising from or relating to the interpretation, implementation, or enforcement of this Order.

This Order has been signed electronically.
The judge’s signature and court’s seal
appear at the top of the Order.

United States Bankruptcy Court