

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: :

JOHNS-MANVILLE CORPORATION, :
et al., :

Chapter 11

Case No. 82-11656 (CGM)

Debtors. :

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**MANVILLE PERSONAL INJURY
SETTLEMENT TRUST,**

Plaintiff,

Adv. No. 17-01186 (CGM)

v.

**THORPE INSULATION COMPANY
ASBESTOS SETTLEMENT TRUST,**

Defendant.

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**MEMORANDUM DECISION GRANTING PARTIAL JUDGMENT FOR THE
PLAINTIFF AND DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

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CECELIA G. MORRIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Plaintiff and Counter-Defendant Manville Personal Injury Settlement Trust (“Manville”) filed this adversary proceeding against the Defendant and Counter-Claimant Thorpe Insulation Company Asbestos Settlement Trust (“Thorpe”). Compl., ECF No. 1.¹ The complaint seeks a declaratory judgment that the court-approved Trust Distribution Process (“TDP”) bars Manville from indemnifying Thorpe for payments it made to claimants who have already entered good faith settlements with Manville in the State of California. *Id.* at ¶ 50-51.

In response, Thorpe filed an answer and counterclaim. Answer & Countercl., ECF No. 11. Thorpe seeks judgment against Manville for breach of contract for failing to comply with their express indemnification agreement. *Id.* at, ¶ 129. Thorpe also seeks damages against Manville in an amount equal to what it would receive “under the Trust Documents,” plus pre-judgment interest and costs. *Id.* at Prayer for Relief.

Presently before the Court is Manville’s motion for partial judgment on the pleadings. Mot for Partial J. on the Pleadings, ECF No. 17. Manville asserts there is no express indemnity

¹ Unless otherwise indicated, all citations to litigation documents are to the docket of adversary proceeding 17-01186.

agreement with Thorpe and that, to the extent its indemnity claims arise from asbestos-related claims in California, Cal. Civ. Prac. Code § 877.6 (“Section 877.6”) is the applicable law to determine claim validity. Upon applying Section 877.6, Manville contends the Court should find that all settlements made under the TDP are, per se, “in good faith,” because the TDP was itself subjected to intense judicial scrutiny and deemed by this Court and other courts, under Fed. R. Civ. P. 23(e), to be fair and equitable.

Also before the Court is Thorpe’s motion for summary judgment. Mot. for Summ. J., ECF No. 19. Thorpe argues Section 877.6 is inapplicable due to an express indemnification agreement making valid all of Thorpe’s asbestos-related indemnification claims pursuant to the TDP.

For the reasons stated below, this Court grants partial judgment for Manville, denies summary judgment for Thorpe, and makes the following legal conclusions: 1) the TDP bars Manville from processing or paying any legally deficient indemnity claims as determined by applicable law; 2) there is no express indemnification agreement between Manville and Thorpe; 3) to the extent Thorpe’s indemnity claims arise from asbestos-related claims in California, Section 877.6 is the applicable law to determine claim validity; and 4) all of Manville’s claim settlements are “in good faith” for purposes of Section 877.6 if they are made in accordance with the TDP. For purpose of Section 877.6, genuine issues of material fact remain as to whether Manville settled the California claims in accordance with the TDP and how many of the indemnity claims asserted by Thorpe are valid.

JURISDICTION

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (O). Venue is proper pursuant to 28 U.S.C. § 1409. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157(a) and 1334 and the Order Confirming Debtors’ Second Amended and

Restated Plan of Reorganization entered by this Court in *In re Johns-Manville Corporation*, Nos. 82-B-11656, 82-B-11657, 82-B-11660, 82-B-11661, 82-B-11665 through 82-B-11673 inclusive, 82-B-11675, and 82-B-11676, on December 22, 1986. The Plan expressly reserved this Court's jurisdiction to determine "disputes arising under" the Plan, to enforce and administer the Plan, and "[t]o enter such orders as may be necessary or appropriate to facilitate implementation of the Plan." Plan, at 10.1(B), (G), (L). The TDP is integral to the implementation of the Plan and has been approved by this Court as essential to furthering Manville's mission of "us[ing] its limited assets to compensate bona fide Manville asbestos victims in the most fair, adequate, and equitable manner possible." *In re Joint E. & S. Districts Asbestos Litig.*, 237 F. Supp. 2d 297, 300, 317 (E. & S.D.N.Y. 2002).

BACKGROUND

Johns-Manville, once the largest producer and supplier of asbestos, filed for bankruptcy in 1982 along with many affiliated and subsidiary entities. *GAF Corp. v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 26 B.R. 405, 407 (Bankr. S.D.N.Y. 1983), *aff'd sub nom. Johns-Manville Corp. v. Asbestos Litig. Grp.* (*In re Johns-Manville Corp.*), 40 B.R. 219 (S.D.N.Y. 1984); *In re Johns-Manville Corp.*, 97 B.R. 174, 176 (Bankr. S.D.N.Y. 1989). The filing was due to the overwhelming threat of asbestos-injury related litigation and the refusal of Manville's insurance carriers to payout on Manville's insurance coverage. *In re Johns-Manville Corp.*, 36 B.R. 743, 750 (Bankr. S.D.N.Y. 1984). One of the main purposes of the bankruptcy filing and plan was to establish a trust that would serve as the exclusive remedy for existing and future asbestos health claims and third-party indemnity claims caused by the distribution and exposure to Johns-Manville products. This litigation arises out of the bankruptcy filing and the Manville Personal Injury Settlement Trust that was ultimately formed.

J.T. Thorpe was a distributor of Johns-Manville asbestos products based in Southern California. J.T. Thorpe asserted that it was entitled to indemnification from Manville because these claimants had been exposed to asbestos-containing products manufactured by Johns-Manville, which J.T. Thorpe had in turn distributed or installed. As the lawsuits of asbestos-related injury claims grew, J.T. Thorpe was forced to file its own bankruptcy proceeding. In 2010, Thorpe Insulation Company Asbestos Settlement Trust was created under 11 U.S.C. § 524(g) to maximize assets and pay claimants. Thorpe holds J.T. Thorpe's indemnity and contract claims against Johns-Manville.

The Manville Plan and the Channeling Injunction

Johns-Manville's Second Amended and Restated Plan of Reorganization (the "Manville Plan") was confirmed on December 22, 1986 and became effective on November 28, 1988. *See In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken)*, 129 B.R. 710, 752 (Bankr. E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

The Manville Plan limits "Indemnity Claims" to damages that a Person "has or may suffer as a result" of an action seeking damages for asbestos-related personal injury. Mehta Decl. Ex. 1, at Ex. A at C-52 (Compl. Ex. A at C-52).

A "cornerstone" of the Manville Plan was an injunction that "channels all asbestos related claims and obligations away from the reorganized entity and targets it towards [Manville] for resolution." *Matter of Johns-Manville Corp.*, 68 B.R. 618, 624 (Bankr. S.D.N.Y. 1986), *aff'd sub nom. In re Johns-Manville Corp.*, 78 B.R. 407 (S.D.N.Y. 1987), and *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). This injunction was so essential to reorganization that its entry was an express condition precedent to the consummation of the Manville Plan. *See id.* at 624.

In the Order Confirming Debtors' Second Amended and Restated Plan of Reorganization (the "Confirmation Order"), entered by this Court in *In re Johns-Manville Corp.* (Nos. 82-B-11656, 82-B-11657, 82-B-11660, 82-B-11661, 82-B-11665 through 82-B-11673 inclusive, 82-B-11675, and 82-B-11676), on December 22, 1986, the Court ordered that:

All Persons . . . are hereby . . . enjoined from taking one or more of the following actions for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any . . . Other Asbestos Obligation . . . :

(a) Commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding . . . against or affecting the Debtors . . . or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing, or any property of any such transferee or successor; . . .

(e) Proceeding in any manner and any place with regard to any matter that is subject to resolution pursuant to the Claims Resolution Facility, except in conformity and compliance therewith . . .

Mehta Decl. Ex. 2, at Ex. B (Answer & Countercl. Ex. B). This is referred to as the "Channeling Injunction".

The Agreements

On April 25, 1989, Thorpe entered into a letter agreement with Manville (the "Letter Agreement"). The Letter Agreement expressly provided that "[For] all asbestos health civil actions in which Thorpe is named as a Defendant, . . . [a]ll expense incident to the defense of such litigation will be borne by the Trust, and Thorpe's portion of any settlement agreed to by such attorneys as well as any judgment that may be rendered against Thorpe will likewise by [sic] borne by Manville." Mehta Decl. Ex. 2, at Ex. E (Answer & Countercl. Ex. E).

Indemnity claims by distributors were later rejected by the Court as contingent and a class action suit was subsequently filed in the U.S. District Courts for the Eastern and Southern Districts

of New York based upon the indemnity claims by Thorpe and other distributors seeking a share of the assets of Manville. *See Answer & Countercl.*, ¶ 88.

On July 25, 1994, Thorpe, Manville, and the other parties in the class action suit entered into a Stipulation of Settlement (the “Stipulation”). *See In re Joint E. & S. District Asbestos Litig. (Findley v. Falise)*, 878 F. Supp. 473, 492 (E.D.N.Y. 1995) (“Findley II”), *aff’d sub nom. In re Joint E. & S. Dist. Asbestos Litig.*, 100 F.3d 944 (2d Cir. 1996), and *aff’d sub nom. In re Joint E. & S. Dist. Asbestos Litig.*, 100 F.3d 945 (2d Cir. 1996), and *aff’d in part, vacated in part sub nom. In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764 (2d Cir. 1996).

Among other things, the Stipulation (which ratified the TDP) addressed claims for indemnification by the Distributor Subclass, of which Thorpe was a representative. *See id.* at 488.

The Stipulation notes Thorpe’s position in 1994 that, under the Letter Agreement, “all of its asbestos-related losses constitute Indemnity Claims which cannot be paid on a pro rata basis”—i.e., its contention that it was due 100 cents on the dollar for such claims. *Id.* at 577. However, the Stipulation provides that “[a]ny and all additional rights of [Thorpe] created by” the Letter Agreement “shall be extinguished by [Manville’s] payment of \$1.2 million to [Thorpe] and the processing of the Distributor Indemnity Claims of [Thorpe] at a fixed [Distributor Indemnity Claim Percentage] of 100% as defined and set forth in . . . the TDP.” *Id.* at 578.² The Stipulation further provides that “[a]ny and all Indemnity Claims arising from losses paid by members of the Manville Distributors Subclass after the date of execution of this Stipulation shall be governed by the TDP.” *Id.*

Manville and Thorpe Insulation Company (Thorpe’s predecessor) agreed that its Distributor Indemnity Claim Percentage for future claims would be 47.77%. Thorpe Insulation

² The 100% pay out was negotiated down when Manville became low on funds after the Stipulation was in place.

Company received payment on claims consistent with its Distributor Indemnity Claim Percentage. *See Answer & Countercl.*, ¶ 118. Thorpe’s current Distributor Indemnity Claim Percentage remains 47.77%. *Id.* at ¶ 68.

On January 18, 1995, the U.S. District Courts for the Eastern and Southern Districts of New York (Weinstein, J. (sitting by designation in the S.D.N.Y.)) and the U.S. Bankruptcy Court for the Southern District of New York (Lifland, J.), entered a final order approving the Stipulation, including the TDP, pursuant to Fed. R. Civ. P. 23(e), and the TDP became effective as of that date. *See Findley II*, 878 F. Supp. at 567, 575.

To backstop the TDP, Findley II reaffirmed the Channeling Injunction, *Id.* at 571-73, and further ordered that:

No proceedings may be . . . prosecuted against the Trust in any state or federal court arising from claimed exposure to asbestos, except as specifically set forth in the TDP. The assets of the Trust will remain subject to the Courts’ permanent stay, precluding payments to all Trust Beneficiaries with the exception of payments in accordance with the TDP . . .

Id. at 573-74. This is referred to as the “1995 Injunction”.

The TDP defines a Distributor as any entity that: “(i) was engaged in the business of distributing Manville asbestos or asbestos-containing products; (ii) was not engaged in the business of mining asbestos or manufacturing asbestos-containing products; and (iii) is not a member of the MacArthur Subclass.” *Id.* Thorpe is a Distributor. *See Answer & Countercl.*, ¶ 97.

The TDP defines the term “Distributor Indemnity Claim” to be an “Indemnity Claim by a Distributor which constitutes a valid claim for indemnification under applicable law.” *See Answer*, Ex. D.

Thorpe's 2014 and 2017 Claims

In 2014, Thorpe asserted a claim against Manville seeking indemnification for payments Thorpe made to California claimants between 2010 and 2014. In total, Thorpe sought indemnification for payments of approximately \$83 million made to 1,649 claimants. *See* Mehta Decl. Ex. 1 ¶ 18 (Compl. ¶ 18); Mehta Decl. Ex. 2 ¶ 18 (Answer & Countercl. ¶ 18).

Following Thorpe's submission of this indemnification claim, Manville and Thorpe exchanged extensive and detailed correspondence regarding Thorpe's indemnification claim. In this correspondence, Manville advised Thorpe that the TDP does not permit it to pay Thorpe's indemnification claim. *See* Mehta Decl. Ex. 1 ¶ 33; Mehta Decl. Ex. 1 at Ex. C (Compl. ¶ 33 & Ex. C); Mehta Decl. Ex. 2 ¶ 33 (Answer & Countercl. ¶ 33).

In 2017, Thorpe asserted a claim against Manville seeking indemnification for payments that Thorpe had made to California claimants between 2014 and 2017. In total, Thorpe sought indemnification for payments of approximately \$88 million made to approximately 2,700 claimants. Thorpe also threatened to sue Manville if it did not pay this claim and the claim submitted in 2014. This litigation followed. *See* Mehta Decl. Ex. 1 ¶¶ 19, 34; Mehta Decl. Ex. 1, at Ex. F (Compl. ¶¶ 19, 34 & Ex. F).

Manville Adversary Proceeding

Manville brought this adversary proceeding on October 27, 2017 because they dispute, pursuant to the terms of the TDP, that Thorpe has a right to indemnification of all or most of the California claimants. Compl., ECF No. 1.

On February 5, 2018, Thorpe filed its answer and counterclaim in this adversary proceeding. Answer & Countercl, ECF No. 11. The counterclaim alleges that Manville breached the TDP by refusing to pay Thorpe's claims for indemnification and asserts an entitlement to

indemnification for “payments that [Thorpe] made to claimants exposed to and injured by asbestos or asbestos-containing products manufactured by Johns-Manville.” *Id.* ¶ 75. The counterclaim seeks damages against Manville in an amount equal to what it would receive “under the Trust Documents,” plus pre-judgment interest and costs. *Id.* at Prayer for Relief.

On April 5, 2018, Manville filed a motion for partial judgment on the pleadings. Mot for Partial J. on the Pleadings, ECF No. 17. Manville seeks a declaration that there is no express indemnity agreement with Thorpe and that, to the extent its indemnity claims arise from asbestos-related claims in California, Cal. Civ. Prac. Code § 877.6 (“Section 877.6”) is the applicable law to determine claim validity. Upon applying Section 877.6, Manville contends the Court should find that all settlements made under the TDP are, per se, “in good faith,” because the TDP was itself subjected to intense judicial scrutiny and deemed by this Court and other courts, under Fed. R. Civ. P. 23(e), to be fair and equitable. Thorpe filed opposition on July 10, 2018. Mem. of Law in Opp’n to Mot. for Partial J. on the Pleadings, ECF No. 31. Manville filed a reply on August 15, 2018. Reply Mem. of Law in Supp. of Mot. for Partial J. on the Pleadings, ECF No. 36

On April 20, 2018, Thorpe filed a motion for summary judgment of its counterclaim. Mot. for Summ. J., ECF No. 19. Thorpe argues Section 877.6 is inapplicable because there exists an express indemnification agreement in the TDP that give it a valid right to indemnification from Manville on all asbestos-related claims. Manville filed opposition on July 10, 2018. Mem. of Law in Opp’n to Def.[’s] Mot. for Summ. J., ECF No. 32. Thorpe filed a reply on August 15, 2018. Reply Mem. of Law in Supp. of Summ. J., ECF No. 39.

Oral argument on Manville’s motion for partial judgment and Thorpe’s motion for summary judgment took place on September 5, 2018. Tr. Regarding Hr’g Held, ECF No. 45.

The main issue is whether the TDP provides an express indemnification between Manville and Thorpe and, if not, whether Cal. Civ. Prac. Code § 877.6 bars Thorpe's 2014 and 2017 claims for indemnification.

DISCUSSION

Motion for Judgment on the Pleadings

Manville moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), which is made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012. Rule 12(c) provides that “[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). The Rule goes on to state that “[i]f, on a motion under Rule . . . 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment . . .” Fed. R. Civ. P. 12(d).

The “pleadings” include any written instruments attached as exhibits to the complaint and answer. *See* Fed. R. Bank. P. 7010; Fed. R. Civ. P. 10(c) (“A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”). Courts may also consider documents incorporated by reference in the pleadings and may take judicial notice of matters of public record. *Grochocinski v. Spehar Capital, LLC (In re CMGT, Inc.)*, 384 B.R. 497, 506 (Bankr. N.D. Ill. 2008); *Martinez v. Bakery & Confectionary Union & Indus. Int’l Pension Fund (In re Bakery & Confectionary Union & Indus. Int’l Pension Fund)*, 865 F.Supp.2d 469, 472 (S.D.N.Y. 2012). As such, the Court will consider only the exhibits attached to the declarations that are public record or copies of documents that were filed with the pleadings.

“Judgment on the pleadings is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings.” *Sellers v. M.C. Floor Crafters Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). In considering a motion for judgment on the pleadings, the Court must accept the non-moving party’s allegations as true and draw all reasonable inferences in favor of the non-moving party. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999); *Bakery & Confectionery*, 865 F.Supp.2d at 471.

The Court will consider the motion under the standard outlined in Rule 12(c) for a motion for judgment on the pleadings rather than as a motion for summary judgment.

Whether Thorpe’s Claims are Distributor Indemnity Claims as defined by TDP § I.7(a)

The Court is asked to interpret § I.7 of the TDP. There is no dispute that Thorpe is a “Distributor” as defined by § I.7(a) of the TDP (quoted *supra* at 8). The dispute is whether Thorpe’s California claims are “Distributor Indemnity Claim[s]” under § I.7(a) of the TDP and, more generally, whether the TDP bars Manville from processing or paying any legally deficient indemnity claims as determined by applicable law.

New York adheres to the “sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language.” *R/S Assocs. v. N.Y. Job Dev. Auth.*, 98 N.Y.2d 29, 32 (2002) (internal quotation marks and citations omitted). “Terms in a document, especially terms of art, normally have the same meaning throughout the document in the absence of a clear indication that different meanings were intended.” *Md. Cas. Co. v. W.R. Grace & Co.*, 128 F.3d 794, 799 (2d Cir. 1997).

According to the plain language of the TDP, “[a] Distributor Indemnity Claim means any Indemnity Claim by a Distributor which constitutes a *valid* claim for indemnification *under applicable law*.” Compl. Ex. B (TDP) § I.7(a) (emphasis added). The Court finds this language

to be clear, unequivocal, and unambiguous. It means that a claim for indemnification must be permitted by the applicable state law governing the claim for it to be considered a “valid” Distributor Indemnity Claim. Manville argues that Thorpe does not hold a valid claim because under California law, Thorpe cannot sue Manville “for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.” Cal. Civ. Proc. Code § 877.6(c).

Thorpe disagrees. Thorpe argues that the Court should look to § I.7(c) to define its claim and not § I.7(a). Section I.7(c) of the TDP defines the “Distributor Indemnity Claim Percentage” as “the proportion of a Distributor’s asbestos-related loss in any particular case which shall be treated by the Trust as constituting a Distributor Indemnity Claim.” Compl. Ex. B (TDP) § I.7(c). The section goes on to set criteria to determine the percentage of indemnification.

Thorpe maintains that once a Distributor Indemnity Claim Percentage is assigned to a Distributor, Manville is required to treat any asbestos-related loss suffered by the Distributor in any case as constituting a Distributor Indemnity Claims. The Court finds this to be illogical. A Distributor Indemnity Claim is its own defined term and should have the same meaning throughout the TDP. It would not be redefined within the Distributor Indemnity Claim Percentage definition nor would it carry multiple meanings without “a clear indication that different meanings were intended.” *Md. Cas. Co. v. W.R. Grace & Co.*, 128 F.3d at 799. Here, § I.7(c) reads unambiguously using the definition of Distributor Indemnity Claim under § I.7(a). A Distributor Indemnity Claim Percentage shall only apply where there exists a Distributor Indemnity Claims in the manner the term is defined.

The Court finds that the TDP bars Manville from processing or paying any legally deficient indemnity claims as determined by applicable law. Whether Thorpe’s claims are barred by

California law is still subject to additional evidence and issues of material fact that are not yet before the Court.

Whether there is an Express Indemnification

Thorpe asserts that an express indemnification exists when the TDP is reviewed together with the Letter Agreement and Stipulation. Section 877 shall not apply where the parties “expressly agreed in writing to an apportionment of liability for losses or claims among themselves.” Cal. Civ. Proc. Code § 877(c). Thorpe would have a valid claim under applicable law if there is an express indemnification agreement.

Thorpe argues that the Letter Agreement and Stipulation, together, establish a contractual duty. The Letter Agreement, upon which Thorpe relies, is explicitly extinguished pursuant to the Stipulation and cannot create an explicit contract. *See* Stip ¶ 8, ECF No. 13. The Stipulation states: “Any and all additional rights of J.T. Thorpe Co. created by the April 25, 1989 letter agreement with the Trust . . . shall be extinguished by the Trust’s payment of \$1.2 million to J.T. Thorpe and the processing of the ***Distributor Indemnity Claims*** of J.T. Thorpe Co. at a fixed Distributor Indemnity Claim percentage of 100% and set forth in Section H of the TDP.”³ ¶ 8 (emphasis added). The Stipulation uses the defined term “Distributor Indemnity Claims” and is incorporated into the TDP.⁴

The district court’s decision in *In re Joint E. & S. Dists. Asbestos Litig.* does not change this Court’s opinion. In approving the Stipulation, the district court stated, “[i]ndemnity claims by Distributors may be processed by negotiating with the Trust agreed percentages of a Distributor’s asbestos-related losses *which will be treated as valid Indemnity Claims*. This process will enable

³ The 100% pay out was negotiated down when Manville became low on funds after this Agreement was in place.

⁴ Section H.7(a) of the 1995 TDP defines “Distributor Indemnity Claim” the same way as § I.7(a) of the 2002 TDP (revised Jan. 2012).

Distributors to expeditiously resolve their claims. All indemnity claims will be paid the same pro rata share applicable to all other claims by Beneficiaries. That bargained-for treatment is fair.” *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 568 (E.D.N.Y. 1995) (emphasis added). Thorpe asks the Court to focus on the phrase “which shall be treated as valid Indemnity Claims.” But, that phrase does not include the defined term “Distributor Indemnity Claims” and cannot be read out of the context of the 143-page decision, 53-page Stipulation, 41-page TDP, and this case’s 36-year history.

As already stated, the Court agrees with Manville’s interpretation of the definition of Distributor Indemnity Claims. The language is plain and its meaning clear. Only a “Distributor” holding a “Distributor Indemnity Claim” may present its claim to Manville “for processing and payment pursuant to the provisions of subsection 7.” Compl. Ex. B (TDP) § I.7. This Court finds no express indemnification agreement in the TDP itself or read together with the Stipulation and the extinguished Letter Agreement. The exception carved out of Cal. Civ. Proc. Code § 877(c) does not apply. Thorpe must hold a “valid claim for indemnification under applicable law.” To the extent Thorpe’s indemnity claims arise from asbestos-related claims in California, Section 877.6 is the applicable law to determine claim validity.

Whether the California Code of Civil Procedure Bars Enforcement

Cal. Civ. Proc. Code § 877 was created to encourage settlements in tort cases with joint tortfeasors. The common law provided a powerful disincentive to settlements between plaintiffs and individual tortfeasors in a multiple defendant action since the plaintiff’s release or dismissal of one joint tortfeasor for consideration released all the others. The theory behind this rule was that there could be only one compensation for a joint wrong and since each joint tortfeasor was

responsible for the whole damage, payment by any one of them satisfied plaintiff's claim against all. *S. Cal. White Trucks v. Teresinski*, 190 Cal. App. 3d 1393 (1987)

Section 877.6(c) states: "A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."

Manville argues this makes Thorpe's claim invalid and as such, does not meet the definition of a Distributor Indemnity Claim under the TDP. Thorpe argues that Section 877.6 applies to equitable indemnity and does not apply to express and contractual rights to indemnification, which it claims to have against Manville.

The Court has already held that the claim Thorpe has is defined by the TDP, which, although it is a contract between the parties, defines a claim as valid only if it is enforceable under applicable law. The TDP incorporates Section 877.6 into the contract. Whether this bars most of Thorpe's California claims depends on a finding of good faith settlements made by Manville.

Thorpe also argues that the Supremacy Clause and Doctrine of Preemption preclude application of Section 877.6. Again, as the Court has held that the TDP specifically incorporates state law into the contract, this argument is without merit.

Whether the Settlement was approved in "good faith"

California enacted this law to incentivize settlements as well as prevent one party from making a settlement that was inequitable (too small). For Section 877.6 to apply, the settlements must have been given in good faith.

Only where the good faith settlement is contested should a court consider and weigh the following non-exclusive factors identified by the California Supreme Court in *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 499 (Cal. 1985):

[1] a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, [2] the amount paid in settlement, [3] the allocation of settlement proceeds among plaintiffs, and [4] a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include [5] the financial conditions and insurance policy limits of settling defendants, as well as [6] the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants.

Manville contends the Court should find that all settlements made under the TDP are, per se, "in good faith," because the TDP was itself subjected to intense judicial scrutiny and deemed by this Court and other courts, under Fed. R. Civ. P. 23(e), to be fair and equitable.⁵ Because the TDP was created in connection with a Rule 23(e) settlement and that settlement was approved as having been made in good faith, it follows that any settlement made under the terms of the TDP is also made in good faith. *See Vincent v. Reser*, No. C 11-03572 CRB, 2013 U.S. Dist. LEXIS 22341 (N.D. Cal. Feb. 19, 2013); *see also Leonard v. Baumer (In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig.)*, Nos. MDL 726, CV 87-3962 KN(Gx), CV 86-3538 KN(Gx), 1989 U.S. Dist. LEXIS 19146, at *15-16 (C.D. Cal. Mar. 9, 1989) ("Many of these [Tech-Bilt] factors are the same as those which were examined in determining whether to approve a settlement under [] Rule 23. The only major factor relevant to "good faith" which the Court has not discussed is proportionality - whether the proposed settlement is fair in light of the comparative liability of the settling defendants.); *see also In re Lehman Bros. Holdings Inc.*, No. 08-13555

⁵ The Court should note that Manville is not asking the Court to review each settlement to determine whether it was made in accordance with the TDP but only to make a legal determination as to whether the settlements made in accordance with the TDP would be made in good faith.

(JMP), 2013 WL 5908057 (Bankr. S.D.N.Y. Nov. 4, 2013) (ruling that settlement satisfied the good faith test because New York and California bankruptcy courts approved it under Bankr. R. 9019).

Whether Manville has breached the TDP

The Court has already made the following conclusions of law: 1) the TDP bars Manville from processing or paying any legally deficient indemnity claims as determined by applicable law; 2) there is no express indemnification agreement between Manville and Thorpe; 3) to the extent Thorpe's indemnity claims arise from asbestos-related claims in California, Section 877.6 is the applicable law to determine their validity; and 4) settlements are "in good faith" for purposes of Section 877.6 if they are made in accordance with the TDP.

For purpose of Section 877.6, genuine issues of material fact remain as to whether the California claimants were settled in accordance with the TDP and if any of Thorpe's indemnity claims are valid. The Court denies Thorpe's motion for summary judgment.

Whether Thorpe's Counterclaim must be Dismissed

Manville argues that Thorpe's counterclaim for breach of contract warrants dismissal for three reasons: 1) The Channeling Injunction (quoted *supra* at 6) enjoins Thorpe's counterclaim for damages; 2) the 1995 Injunction (quoted *supra* at 8) bars Thorpe's counterclaim for damages; and 3) the counterclaim must fail to the extent that Thorpe received insurance proceeds that it used to cover the losses for which it now seeks indemnification as a form of double recovery.

Thorpe contends it had to file a compulsory counterclaim in this adversary proceeding because pursuant to Rule 13(a) of the Federal Rules of Civil Procedure, which extends to bankruptcy adversary proceedings through Bankruptcy Rule 7001, a litigant must "state as a counterclaim any claim that . . . arises out of the transaction or occurrence that is the subject matter

of the opposing party's claim . . .” Fed. R. Civ. P. 13(a)(1)(A). A compulsory counterclaim, under most circumstances, must be pleaded or it will be barred forever. *See, e.g., Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n. 1 (1974); *Harris v. Steinem*, 571 F.2d 119, 121-22 (2d Cir. 1978).

This Court fails to see how Rule 13(a) supersedes the Channeling Injunction or the 1995 Injunction. As this Court observed in 2017, “the channeling injunction exists to prohibit *all litigation* arising out of any alleged exposure to asbestos. . . . The Manville Plan and Confirmation Order channel all asbestos claims to [Manville].” *In re Johns-Manville Corp.*, 571 B.R. 69, 79 (Bankr. S.D.N.Y. 2017). (emphasis added); *see also In re Johns-Manville Corp.*, 552 B.R. 221, 247-52 (Bankr. S.D.N.Y. 2016) (Morris, C.G.) (ruling that the Channeling Injunction barred a state court action against the indirect post-confirmation successor of a Johns-Manville subsidiary). This counterclaim arises out of claims stemming from alleged exposure to asbestos.

The 1995 Injunction bars the counterclaim by “precluding payments to all Trust Beneficiaries with the exception of payments in accordance with the TDP.” Thorpe is a “Trust Beneficiar[y]” because it purports to hold, and seeks payment on, an “Other Asbestos Obligation.” Thorpe seeks an award of damages in litigation—not payment under the TDP. The fact it sought payment under the TDP prior to filing the counterclaim does not negate or justify the damages now being sought. The 1995 Injunction prohibits Manville from paying such an award.

Genuine issues of material fact still exist as to whether the California claimants were settled in accordance with the TDP and if any of Thorpe’s indemnity claims are valid. Once these issues are determined, the parties and the Court can better assess Thorpe’s counterclaim for breach of contract and whether declaratory relief is appropriate. Insomuch as Thorpe seeks a monetary judgment inclusive of pre-judgment interest and costs of this action, the Court finds these prayers

for relief to be enjoined by the Channeling Injunction and barred by the 1995 Injunction. Thorpe's counterclaim is dismissed as to all prayers for relief beyond their request for declaratory relief.

CONCLUSION

Manville's motion for partial judgment is granted and Thorpe's motion for summary judgment is denied as follows: 1) the TDP bars Manville from processing or paying any legally deficient indemnity claims as determined by applicable law; 2) there is no express indemnification agreement between Manville and Thorpe; 3) to the extent Thorpe's indemnity claims arise from asbestos-related claims in California, Section 877.6 is the applicable law to determine their validity; and 4) settlements are "in good faith" for purposes of Section 877.6 if they are made in accordance with the TDP.

For purpose of Section 877.6, genuine issues of material fact exist as to whether the California claimants were settled in accordance with the TDP and if any of Thorpe's indemnity claims are valid. For this reason, Thorpe's request for declaratory relief in its counterclaim will survive. However, Thorpe's counterclaim is dismissed as to all other requested prayers for relief because it is enjoined by the Channeling Injunction and barred by the 1995 Injunction.

Dated: March 28, 2019
Poughkeepsie, New York



/s/ Cecelia G. Morris

Hon. Cecelia G. Morris
Chief U.S. Bankruptcy Judge