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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re: : Chapter 11
: :
Chemtura Corporation, *et al.*, : Case No. 09-11233 (REG)
: :
Debtors. : (Jointly Administered)
-----X

**REPLY OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF CHEMTURA CORPORATION, *ET AL.*, TO THE MEMORANDUM OF
POINTS AND AUTHORITIES IN OPPOSITION TO THE OBJECTION OF
THE CREDITORS' COMMITTEE TO THE COUNCIL FOR EDUCATION
AND RESEARCH ON TOXICS' CLAIM NOS. 12051, 12053, AND 12055**

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TO THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Unsecured Creditors (the “**Creditors’ Committee**”) of Chemtura Corporation, *et al.* (collectively, the “**Debtors**”), by and through its undersigned counsel, hereby replies (the “**Reply**”) to the Memorandum of Points and Authorities in Opposition (the “**Memorandum**”) to the Objection of the Creditors’ Committee to the Council for Education and Research on Toxics’ (“**CERT’s**”) Claim Nos. 12051, 12053 and 12055 (the “**Objection**”). In support of this Reply, the Creditors’ Committee respectfully submits as follows:

REPLY¹

1. The Creditors’ Committee objected to the three proofs of claim (the “**Proofs of Claim**”) filed by CERT on the grounds that (i) CERT was not a creditor of the Debtors’ estates and, thus, did not have standing to file claims in the cases and (ii) the Proofs of Claim failed to contain sufficient information to substantiate any valid claims against the Debtors’ estates. In response to the Objection, CERT filed its 575 page Memorandum, which included, among other things, 18 declarations from individual members of CERT and members of the scientific community. The Memorandum, which is filled with conjecture, hyperbole and unsubstantiated allegations of injury to humans, wildlife and the environment, fails to provide any legal or factual basis to grant CERT standing to bring claims against these estates in the name of the “public interest” or for any other purpose. Indeed, the legal precedent and statutory predicates

¹ Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Objection.

relied on by CERT in its Memorandum belie CERT's ability to bring the \$9 billion in damage claims it has asserted against the Debtors.

2. Moreover, CERT's 575 page submission, which was proffered nearly 150 days after the Court-established bar date in these cases, asserts entirely new claims not alleged in its Proofs of Claim. Conspicuously absent from CERT's papers, however, is any attempt to justify why these novel arguments and facts should now be considered by the Court and why these documents could not have been timely filed as attachments to its Proofs of Claim.

3. As set forth below, the claims alleged by CERT suffer from a multitude of fatal legal and procedural defects that, as a matter of law, prevent this Court from ever reaching the underlying merits of CERT's allegations. Accordingly, CERT's Proofs of Claim should be expunged and disallowed in their entirety.

I. CERT Does Not Have Standing to Assert the Claims in the Proofs of Claim

4. In support of its Proofs of Claim, CERT incorrectly argues that it has organizational or associational standing to assert claims on behalf of its members against the Debtors' estates. CERT's argument is predicated on the erroneous conclusion that it need only satisfy the three-part test espoused by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) to have allowable claims. In *Lujan*, the Supreme Court articulated a three-part test to be applied where an individual seeks standing to bring a claim or cause of action on his or her own behalf, which is not the standard applicable to an entity seeking organizational standing.² Where an organization seeks standing to pursue claims on behalf of its

² The *Lujan* test requires an individual claimant to establish the following: (i) "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical;'" (ii) "there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;" and (iii) "it

members (as CERT purports to do for the first time in its Memorandum), the correct standard to be applied was articulated by the Supreme Court in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The *Hunt* test requires an organization to establish that: (i) the organization's members would otherwise have standing to sue in their own right;³ (ii) the interests sought to be protected by the organization are germane to such organization's purpose; and (iii) neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. *Id.* All three prongs of the *Hunt* test must be satisfied in order for organizational standing to be obtained.

5. CERT cannot satisfy any part of the *Hunt* test, including the requirement that its members have standing in their own right to bring viable claims against the Debtors and, therefore, does not have organizational standing to bring claims for money damages against the Debtors' estates. Because CERT cannot meet the third prong as a matter of law, the first and second prongs of the *Hunt* test are not addressed in this Reply.⁴ CERT therefore does not have standing to assert any claims, let alone claims for \$9 billion in damages, against the Debtors.

6. Consideration of the third prong of the *Hunt* test, whether the cause of action requires the participation of individual members, often necessitates an examination of the form of relief sought by the association or organization. The Supreme Court in *Warth v. Seldin* held that an organization "seeking to recover damages on behalf of its members lack[s] standing because 'whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of the injury would require individualized proof.'" *Bano*

must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* (emphasis added).

³ The first prong of the *Hunt* test requires the organization be able to prove that its members can satisfy the *Lujan* test articulated above.

v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). Organizational standing may only be appropriate, therefore, if the organization is seeking an injunction, declaration or other form of prospective relief:

whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed in all of the cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Warth v. Seldin, 422 U.S. at 515. Similarly, in *Bano*, the Second Circuit denied standing to an organization seeking to assert claims for medical monitoring costs on behalf of its individual members because the organization could not meet the third prong of the *Hunt* test. The *Bano* Court stated that "we know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members." *Bano v. Union Carbide Corp.*, 361 F.3d at 714. The *Bano* Court went on to note that even where an organization asserts a claim for injunctive or declaratory relief, the organization does not automatically have standing to assert such claim. *Id.* at 714.

7. As noted above, CERT's Proofs of Claim seek an aggregate of \$9 billion on account of injuries for "pollution, contamination, and toxic injuries to animals and humans" due to exposure to PBDEs. Attachment "A" to the Proofs of Claim. None of CERT's Proofs of Claim request any form of injunctive, declaratory or other prospective relief. Indeed, in its Memorandum CERT does not cite to a single case in which an organization seeking money

⁴ The Creditors' Committee reserves its right to address CERT's failure to meet either the first or the second prong of the *Hunt* test if necessary.

damages has been granted standing to pursue its claims. As CERT cannot establish organizational standing to seek money damages from any of the Debtor entities, its Proofs of Claim must be disallowed in their entirety and expunged.

II. CERT Should Not be Authorized to Amend its Proofs of Claim to Cure Procedural and Substantive Infirmities

8. CERT's three Proofs of Claim are identical; each seeks \$9,000,000,000 for "Pollution/Contamination/Personal Injury," and each is substantiated by a one page attachment in which CERT claims that PBDEs are responsible for injury to humans, animals and the environment.⁵ No further documentation was attached to the Proofs of Claim to support any of these assertions, and nowhere in the Proof of Claim materials does CERT allege what specific claims it may hold against the Debtors or how it determined that \$3,000,000,000 would be an appropriate sum to redress the injuries allegedly inflicted. Moreover, CERT alleges that it holds claims "in the public interest," but does not disclose in its Proofs of Claim that it also intends to pursue claims on account of the injuries allegedly suffered by certain of its members.

9. In apparent acknowledgement of the defects in its Proofs of Claim, by its Memorandum, CERT articulates for the first time four separate claims for damages related to the Debtors' production and distribution of PBDEs: (i) claims for medical monitoring costs to be incurred by CERT's members; (ii) public nuisance claims; (iii) claims for restitution owed to members of CERT due to the Debtors' engagement in unfair business practices; and (iv) environmental claims arising under various federal statutes. These claims are predicated on a drastically different set of legal issues and factual underpinnings than the Proofs of Claim

⁵ For additional information on the Debtors' production of PBDEs, please see the Declaration of Robert Campbell in Support of Debtors' Joinder to the Official Committee of Unsecured Creditors of Chemtura Corporation's Reply in Support of Its Objection to the Council for Education and Research on Toxics' Claim Nos. 12051, 12053 and 12055 filed by the Debtors on April 2, 1010.

previously evidencing CERT's "entitlement" to \$9,000,000,000 in damages. Before addressing whether CERT has standing to bring each of these claims under applicable law, the Court must first determine whether the Memorandum amounts to an attempt by CERT to amend its Proofs of Claim to add these new claims and, if so, whether it should grant CERT leave to make such amendments. The Creditors' Committee believes that (i) the Memorandum does constitute an attempt to amend the Proofs of Claim and (ii) the equities weigh against allowing CERT to amend its claims.

10. In order to assert a claim against a debtor's estate, a creditor is typically required to file a proof of claim in the debtor's bankruptcy proceeding. 11 U.S.C. §§ 501, 502. The filing of a proof of claim is, with limited exception, a prerequisite to the allowance of such claim. 4 COLLIER ON BANKRUPTCY § 501.01[2][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (citing Fed. R. Bankr. P. 3002(a), 3003(c)(2)). The basic policy underlying section 501 and the notice of claim rules is to ensure that all parties in interest (including the debtor) are aware of and can contest claims asserted against the debtor's estate where appropriate. Because a bankruptcy proceeding by its very nature requires collective action, section 501's primary objective is to keep all parties informed. *In re PCH Assoc.*, 949 F.2d 585, 605 (2d Cir. 1991) (citing 3 COLLIER ON BANKRUPTCY § 501.01-501.04); *In re Chateaugay Corp.*, 94 F.3d 772, 777 (2d Cir. 1996).

11. While neither the Bankruptcy Code nor the Bankruptcy Rules specifically define what constitutes an amendment to a proof of claim, courts have found that claims asserted after the filing of a proof of claim are amendments to the original proof of claim where the subsequent claim is asserted in order to (i) correct a defect in the form of the original claim, (ii) describe the original claim with greater particularity or (iii) plead a new theory of recovery on the facts set

forth in the original claim. *In re McLean Indus., Inc.*, 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990) (citing *In re G.L. Miller & Co.*, 45 F.2d 115, 116 (2d Cir. 1930); see also *In re Enron Corp.*, 328 B.R. 75, 87 (Bankr. S.D.N.Y. 2005) (same) (citing *In re W.T. Grant Co.*, 53 B.R. 417, 420 (Bankr. S.D.N.Y. 1985)).

12. The Bankruptcy Code and Bankruptcy Rules are silent as to when amendments to proofs of claim should be allowed. Courts within the Southern District of New York and elsewhere, however, have held that creditors must obtain court approval to amend previously filed proofs of claim after the bar date has passed. *In re W.T. Grant Co.*, 53 B.R. at 420; see also, *In re Wilson*, 136 B.R. 719 (Bankr. S.D. Ohio 1991) (party seeking to amend its claim after the bar date must obtain leave of court); *Bishop v. United States (In re Leonard)*, 112 B.R. 67, 71 (Bankr. D. Conn. 1990) (leave of court is required to amend).

13. In determining whether to permit a requested amendment, courts typically apply a two part test. First, courts examine whether the proposed amendment is reasonably related to a timely filed claim. *Bishop v. United States (In re Leonard)*, 112 B.R. at 71. An amendment will not be allowed if it is merely a thinly veiled attempt to file a new claim. *Bishop v. United States (In re Leonard)*, 112 B.R. at 71 (internal citations omitted); *In re Enron Corp.*, No. 01-16034, 2007 WL 610404 at *4 (Bankr. S.D.N.Y. Feb. 23, 2007).

14. Second, courts question whether allowing the amendment would be equitable. *Bishop v. United States (In re Leonard)*, 112 B.R. at 71 (citing *In re Black & Geddes, Inc.*, 58 B.R. 547, 553 (S.D.N.Y. 1983), and *In re Wilson*, 96 B.R. 257, 262 (B.A.P. 9th Cir. 1988)). Factors considered by courts under the second prong include: (i) undue prejudice to the opposing party; (ii) bad faith or dilatory behavior on the part of the claimant; (iii) whether other creditors would receive a windfall were the amendment not allowed; (iv) whether other claimants might

be harmed or prejudiced; and (v) the justification for the inability to file the amended claim at the time the original claim was filed. *Maxwell Macmillan Realization Liquidating Trust v. Aboof (In re Macmillan, Inc.)*, 186 B.R. 35, 49 (Bankr. S.D.N.Y. 1995). In application, courts tend to look at all the facts and circumstances of a given case to determine whether allowing the amendment would be fair and equitable.

15. Upon application of the foregoing factors, courts in the Southern District of New York have repeatedly denied requests to amend proofs of claim after the bar date has passed. *In re Enron Corp.*, 2007 WL 610404; *Aristeia Capital v. Calpine Corp. (In re Calpine Corp.)*, 2007 WL 4326738 (S.D.N.Y. Nov. 21, 2007); *In re Spiegel, Inc.*, 337 B.R. 816 (Bankr. S.D.N.Y. 2006); *Liddle v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 159 B.R. 420 (S.D.N.Y. 1993). In *Calpine*, the court denied certain convertible noteholders leave to amend their proofs of claim to add a new claim for conversion rights where the request came more than seven months after the bar date. *Aristeia Capital v. Calpine Corp. (In re Calpine Corp.)*, 2007 WL 4326738. The *Calpine* Court held that the original proof of claim did not provide the debtors with reasonable notice of the newly alleged conversion claim, and observed that “bar dates would be rendered meaningless if creditors were granted leave to amend to assert new novel claims based on broad language in a timely-filed Proof of Claim.” *Id.*, at *5-6.

16. Courts in other jurisdictions similarly limit the ability of creditors to amend proofs of claim long after the bar date. The Southern District of Texas, for example, considered whether a creditor should be allowed to amend its claim nearly 100 days after the bar date in *In re North Bay Gen. Hosp., Inc.* 404 B.R. 443, 456 (Bankr. S.D. Tex. 2009). In *North Bay Gen. Hosp., Inc.*, the creditor had filed a timely proof of claim, but had not provided sufficient documentation to

substantiate its claim as is required by Fed. R. Bankr. P. 3001.⁶ Nearly 100 days after the bar date, the debtor objected to the claim and sought to have it disallowed in full. In response, the creditor attempted to submit the supporting documentation required by Fed. R. Bankr. P. 3001, including documentation that would identify the individuals whose claims comprised the proof of claim in question. The court denied the creditor's efforts to further substantiate its claim, holding that because the original proof of claim (i) did not disclose the names of the individual claimants, and (ii) failed to attach the documents that formed the basis of each such claim, the debtor's objection to the proof of claim should be sustained. *Id.*

17. As in *Calpine* and *North Bay Gen. Hosp., Inc.*, CERT's efforts to remedy the defects in its proofs of claim (which efforts, to date, have *not* included a request for leave to amend its claims) should not be countenanced by this Court. Until recently, CERT's \$9 billion in claims were "substantiated" by a single page attachment in which CERT leveled unfounded accusations of injury and contamination to all of humanity, wildlife and the environment. Whereas CERT's initial filing appeared to limit the relief sought by CERT purely to compensatory damages in the public interest, CERT now purports to have standing to bring a number of previously unidentified claims because certain of its members have allegedly suffered an attenuated and novel injury attributable to such individuals' exposure to PBDEs and yet still seeks the same \$9 billion in damages. CERT's efforts come nearly 150 days after the Court-approved bar date in these cases, and only after the Creditors' Committee expended substantial resources to investigate and object to a claim which, in the aggregate, is multiples of the Debtors' total enterprise value and yet is predicated on a four paragraph description.

⁶ Fed. R. Bankr. P. 3001(a) requires that a proof of claim conform substantially to the appropriate Official Form, which in this case is Official Form 10. Official Form 10 requires that creditors attach copies of any documents that support the claim.

18. As stated above, the policy underlying CERT's obligation to file a proof of claim is to provide other parties in interest with notice of the asserted claim and to afford such parties an opportunity to object. Given the nature and amount of information produced by CERT in response to the Creditors' Committee's Objection, its Proofs of Claim as filed cannot be said to have put any party on notice as to the true substance of the claims alleged therein. CERT will likely argue that its recent submissions relate back to its original filing, but CERT should not be granted authority to supplement its single page recitation with literally hundreds of pages of allegations and causes of action all under the theory that the documents relate back to its timely filed Proofs of Claim. Such a result would violate both the fundamental policy justification necessitating the filing of a proof of claim and the Bankruptcy Rules themselves.

19. Even if this Court were to find that CERT's Memorandum and declarations are "reasonably related" to CERT's initial Proofs of Claim, it is difficult to imagine a case in which allowing a creditor to amend a claim would result in greater prejudice to an estate and its creditors. As the Court is aware, the Debtors are in the process of negotiating a plan of reorganization with its primary constituencies. Needless to say, plan discussions thus far have centered around, among other things, the value of the Debtors' businesses and the estimation and treatment of diacetyl claims and not on how the Debtors would or could address a \$9 billion contingent liability associated with exposure to a chemical the Debtors no longer produce.

20. CERT has not presented this Court with a compelling, or indeed with any, justification as to why its submission was not attached to its initial Proofs of Claim. Indeed, CERT's declarants maintain that the harms allegedly inflicted on humanity and the environment by PBDEs have been known to the scientific community for years. *See e.g., Declaration of Theodora Colborn, Ph.D.; Declaration of Susan Shaw, D.P.H.; Declaration of Ake Bergman,*

Ph.D. CERT's actions (or, in this case, inactions) are therefore wholly without justification and should not be tolerated by the Court. The equities clearly weigh against allowing CERT to amend and supplement its Proofs of Claim.

III. A Multitude of Procedural Defects Prevent CERT From Bringing any of the Claims Identified in Its Memorandum and Declarations

21. Even if this Court were to grant CERT leave to amend its Proofs of Claim to incorporate all of the documentation filed in response to the Objection, CERT's claims should still be disallowed because CERT has failed to state even a single claim for which it can seek relief. CERT's purported claims suffer from a number of legal and procedural defects, each of which is set forth below and which, taken separately or as a whole, necessitate the disallowance of CERT's claims.

22. As stated above, the four types of claims CERT seeks to bring on behalf of its members and, in some instances, on behalf of the public are as follows: (i) claims for medical monitoring costs; (ii) public nuisance claims; (iii) claims alleging damages due to the Debtors' unfair business practices; and (iv) various statutory claims arising under federal environmental statutes. Each of these claims is discussed in detail below.

A. Medical Monitoring

23. Claims for medical monitoring seek to compensate an injured plaintiff for the extra medical checkups that the plaintiff expects to incur as a result of such plaintiff's exposure to, in this case, an allegedly toxic chemical. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 438 (1997). In *Buckley*, the Supreme Court considered whether a railroad worker who had been exposed to asbestos repeatedly over the course of his career but had not exhibited any symptoms of exposure should be entitled to recover the costs of medical monitoring. The Supreme Court declined to permit the award of such costs absent manifestations of an actual

disease, noting that to hold otherwise in a case where the claimant had not exhibited an injury could “threaten both a ‘flood’ of less important cases (potentially absorbing resources better left available to those more seriously harmed [...]) and the systematic harms that can accompany ‘unlimited and unpredictable liability.’” *Id.* at 442. This is particularly true when one considers that “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.” *Id.*

24. As noted above, the Second Circuit considered whether an organization has standing to pursue medical monitoring claims on behalf of its members in *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004). In *Bano*, a toxic gas was released into the air by a chemical manufacturing facility in India that was a partially-owned subsidiary of a U.S. corporation. A lawsuit was brought by, among others, organizations whose members lived near the chemical manufacturing facility and who allegedly suffered personal injury and property damage as a result of the gas leak. Among the claims asserted by the organizations on behalf of their individual members were claims for medical monitoring costs. The Second Circuit declined to grant the organizations relief on this basis, concluding “that the organizations’ claims seeking relief for their members in the form of reimbursement for the costs of medical monitoring of their physical condition were dismissible for lack of associational standing.” *Id.* at 715. The Second Circuit went on to state that it could not “envision a medical monitoring program that would not require the participation of the organizations’ individual members.” *Id.* at 715.

25. The Supreme Court of California came to a similar conclusion in *Lockheed Martin Corp. v. Superior Court*, in which the court refused to certify a class of individual claimants seeking medical monitoring damages arising from the alleged contamination of a

municipal water supply with toxic chemicals. *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096 (Cal. 2003). As in *Bano*, the *Lockheed* Court held that the plaintiffs failed to demonstrate that common issues predominate, because “each class member’s actual toxic dosage would remain relevant to some degree,” and “causation and damage issues raised by plaintiffs’ claims must be counted among those that would be litigated individually, even if the matter were to proceed on a class basis.” *Id.* at 1109-1111. Although *Lockheed* did not address the question of whether an organization can obtain standing to assert a medical monitoring claim, the Supreme Court of California expressly found that the claims must be litigated individually because issues related to each individual’s right to recovery are “numerous and substantial.” *Id.* at 1111. The foregoing analysis applies with equal force to medical monitoring claims asserted by an organization on behalf of its allegedly injured constituents. Based on the foregoing, CERT’s medical monitoring claims must be disallowed for lack of standing because, under applicable law, medical monitoring claims require the participation of the affected individuals.

26. In response, CERT may request that the Court grant it authority to add CERT’s individual members to its Proofs of Claim. As outlined above in section II, the balance of the equities weighs against allowing CERT to amend its Proofs of Claim. Thus, for the reasons already stated and those set forth below, such a request should also be denied.

27. In an analogous situation, the Southern District of New York recently considered whether a creditor should be allowed to amend its claim to name an additional debtor. In *Enron*, creditor Midland Cogeneration Venture Limited Partnership (“**Midland**”) held claims against two debtor entities; (i) Enron North American Corp. for obligations related to a sale transaction, and (ii) Enron Corp. for related guarantee obligations. *In re Enron Corp.*, 298 B.R. 513, 516 (Bankr. S.D.N.Y. 2003). Midland timely filed a proof of claim against Enron North American

Corp. and, approximately six months later, moved to amend the proof of claim to include a claim against Enron Corp. *Id.* at 517-18. The *Enron* Court ultimately denied Midland's request for leave to amend its claim and its request to file a late proof of claim, concluding that although the amendment did relate back to the timely filed proof of claim, Midland had not satisfied its burden in establishing that the equities weighed in favor of allowing the amendment or permitting the new claim to be deemed timely filed. *Id.* at 525-27. The *Enron* Court was particularly concerned that if the late amendments or claims were allowed, the Debtors would be "unduly prejudiced by possibly opening the floodgates" to other late-filed claims. *Id.* at 525. The *Enron* decision is instructive here; if the Court were to allow the substitution of one creditor for another on CERT's Proofs of Claim and if the claims were amended to include claims for medical monitoring, the floodgates could open for other creditors whose claims would otherwise be disallowed to seek similar relief. Indeed, the issue of whether a creditor can add another related entity to a proof of claim that arguably should have filed the proof of claim itself is already pending before the Court.

28. Moreover, any such future amendment would be futile. Even if the Court were to allow CERT to substitute individual plaintiffs on its Proofs of Claim, it has not pled sufficient information to show that it or its members holds even a tenable medical monitoring claim. In *Abuan v. Gen. Elec. Co.*, the Ninth Circuit held that a plaintiff seeking to recover the costs of medical monitoring must prove that (i) the "plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant, (ii) as a proximate result of exposure, plaintiff suffers a *significantly increased risk* of contracting a serious latent disease, (iii) the increased risk makes periodic diagnostic medical examinations reasonably necessary, and (iv) monitoring and testing procedures exist which make the early detection and treatment of

the disease possible and beneficial.” *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993). Moreover, recovery for medical monitoring costs must be denied where potential injury from exposure to toxic substances is only “possible, but conjectural.” *Miranda v. Shell Oil Co.*, 17 Cal.App.4th 1651, 1657 (Cal. Ct. App. 1993). Stated differently, plaintiff’s evidence must show that it is reasonably certain that the exposure to toxic substances will result in a detrimental aftereffect. *Id* at 1658; *Abuan v. Gen. Elec. Co.*, 3 F.3d at 332. Finally, plaintiffs may not recover for preventative medical care and checkups to which prudent members of the general public should submit. *Miranda*, 17 Cal.App.4th at 1660.

29. Neither CERT nor its individual “afflicted” members have alleged facts sufficient to show that a colorable medical monitoring claim can be asserted by anyone against the Debtors. While a comprehensive application of the exhaustive test set forth above is not appropriate at this time, the following general observations summarize the deficiencies in any medical monitoring claims brought by CERT or its members. First and most importantly, CERT does not and cannot demonstrate any causal link between the injuries allegedly inflicted upon its members and the PBDEs produced and distributed by the Debtors. Stated differently, CERT has not shown that PBDEs are a “proven hazardous substance.” *Abuan*, 3 F.3d at 334. Without a causal link, CERT cannot demonstrate that it is reasonably certain that exposure to PBDEs will necessitate future medical monitoring costs for its members. Moreover, CERT has not proffered any evidence to suggest that there is a clinical value to the early detection and diagnosis of PBDE-related injuries, in large part because it has not and cannot proffer any evidence that PBDE exposure results in injury. Finally, neither CERT nor its members have demonstrated that monitoring the levels of PBDEs in an individuals' body will do more to prevent the onset of any disease than the checkups and annual physicals a prudent person would otherwise receive.

Accordingly, neither CERT nor its members should be authorized to pursue claims for medical monitoring costs against the Debtors.

B. Public Nuisance

30. CERT alleges that it can properly assert public nuisance claims both “on behalf of the citizens of the State of California,” and in a representational capacity to recover damages for the “special injuries” suffered by CERT’s members. For the reasons set forth below, CERT lacks standing to bring either public nuisance cause of action.

31. Public nuisance claims arising under California law are governed by section 731 of the California Code of Civil Procedure and section 3493 of the California Civil Code. CAL. CIV. PROC. CODE §731 (2010); CAL. CIV. CODE §3493 (2010). Section 731 requires that a party asserting a public nuisance claim be either (i) a person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, or (ii) the district attorney or the city attorney of any county, town or city in which such nuisance exists on behalf of the people of the State of California. CAL. CIV. PROC. CODE §731 (2010). Section 731 also limits the remedies available to the district or city attorney pursuing a public nuisance claim to abatement, and does not authorize such entity to seek money or other damages. CAL. CIV. PROC. CODE §731 (2010). Section 3493 allows a private person to maintain an action for public nuisance only where such person has suffered an “injury different in kind and not merely in degree from that suffered by the general public.” CAL. CIV. §3493 (2010); *Mangini v. Aerojet-Gen. Corp.*, 230 Cal.App.3d 1125, 1137 (Cal. Ct. App. 1991).

32. Turning first to CERT’s asserted claim on behalf of the people of the State of California, CERT maintains that the facts of this case authorize CERT to bring a public nuisance cause of action for the restitution of California’s water supply. By the plain language of section

731, however, claims “on behalf of the people of the State of California” may only be brought by either the district attorney or the city attorney of any county, town or city in which the alleged nuisance exists. As CERT is neither a district attorney or city attorney, CERT lacks standing under California law to assert a claim for public nuisance on behalf of the people of the State of California. Moreover, public entities are only authorized under section 731 of the California Code of Civil Procedure to seek abatement of the alleged nuisance, and cannot recover money damages. Thus, even if CERT was granted leave to bring a public nuisance claim on behalf of California’s citizens and even if it was successful in prosecuting the claim, it would not have a “right to payment” under the Bankruptcy Code and would therefore not have a claim against the Debtors’ estates. 11 U.S.C. § 101(5).

33. CERT also alleges that it has authority to bring a public nuisance claim against the Debtors because certain of its members have suffered “special injuries,” thus satisfying the standing requirement embodied in section 731. As an initial matter, CERT has not demonstrated that an organization has standing under California law to bring a public nuisance claim on behalf of an individual whose person or property has suffered an injury. CERT maintains that “public nuisance actions can be pursued on a representational basis,” and cites to *Mangini*. However, the court in *Mangini* simply acknowledged that an individual can bring an action for public nuisance. The *Mangini* court never addressed whether an organization purporting to act as a representative for that same individual has standing to assert a claim in lieu of the individual under section 731. CERT has not cited to, and the Creditors’ Committee has not been able to locate, a decision in which a California court has recognized that an organization has standing to sue for its individual members’ specific injuries under a public nuisance theory. As CERT has

also not alleged that it has itself suffered an injury attributable to the “nuisance” perpetrated by the Debtors, CERT cannot bring a claim for public nuisance under California law.

34. Aside from the fact that CERT lacks organizational standing to bring a claim under section 731, the Creditors’ Committee disputes that any of its individual members have standing to pursue a public nuisance claim against the Debtors. As stated above, section 731 requires an individual asserting a public nuisance claim to allege an injury “different in kind and not merely in degree from that suffered by the general public.” *Aerojet-Gen. Corp.*, 230 Cal.App.3d at 1137. CERT’s own pleadings, however, undercut its requested relief and demonstrate that neither CERT nor its members can properly assert a public nuisance claim. CERT states in its response that the Debtors’ PBDEs are “ubiquitous,” and can be detected in the bodies of “nearly all Americans.” While CERT contends that several of its members have “extraordinarily high” amounts of PBDEs in their bodies, even assuming this allegation to be true CERT has not pled that its members have an injury that is different in kind, just different in degree.

C. Unfair Business Practices

35. CERT alleges that it can assert a representative claim against the Debtors for unfair business practices pursuant to California's Business and Professions Code section 17200, *et seq.* for injunctive relief and restitution. Memorandum at 12. Under section 17203 of California's Business and Professions Code, a private party may bring an unfair competition action on behalf of others if the individual can demonstrate "injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. Prof. Code §§ 17203, 17204. As described below, the statute was recently amended to prevent the continued abuse of its provisions.

36. In 2004, the State of California passed Proposition 64 in an effort to curb the filing of frivolous suits commenced "on behalf of the public interest" by plaintiffs firms who sought to recover attorneys' fees under section 17200. *See* 2004 Cal. Legis. Serv. Prop. 64. Proposition 64 amended the citizen suit standing requirement of section 17200 to require that the entity bringing the claim must itself have suffered an injury in fact. *See* Cal. Bus. & Prof. Code § 17204; *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 209 P.3d 937, 944 (Cal. 2009). CERT is, or at least should be, aware of the passage of Proposition 64, having cited a case that states "in approving Proposition 64, the voters found and declared that the amendments were necessary to prevent abusive actions by attorneys whose clients had not been 'injured in fact' or used the defendant's product or service, and to ensure 'that only the California Attorney General and local public officials [are] authorized to file and prosecute actions on behalf of the general public.'" *Buckland v. Threshold Enter., Ltd.*, 155 Cal.App.4th 798, 812-13 (Cal. Ct. App. 2007) (internal citations omitted); *see also* Memorandum at 12.

37. In requiring each individual or organization alleging an unfair business practices claim to demonstrate that it has an “injury in fact” before obtaining standing, the California legislature expressly elected not to incorporate the federal associational standing requirements outlined in *Hunt* for claims brought under section 17200, *et seq.* See *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 209 P.3d at 944 (“This standing requirement [in Proposition 64] is inconsistent with the federal doctrine of associational standing. The *Hunt* doctrine applies only when the plaintiff association has *not* itself suffered actual injury but is seeking to act on behalf of its members who have sustained such injury.”) (internal citations omitted). Stated differently, Proposition 64 imposes a substantially higher standing threshold than that adopted by the Supreme Court in *Hunt* by requiring an association to itself have sustained an injury, rather than relying on the injuries allegedly sustained by its members to obtain standing. Because CERT does not allege that it has suffered an injury in fact as a result of the Debtors’ alleged unfair business practices, CERT does not have standing to bring a claim for unfair business practices against the Debtors.

38. Moreover, even if Proposition 64 had never been enacted and CERT had standing to assert an unfair business practices claim against the Debtors, CERT’s recovery (as CERT itself observes), is limited to injunctive relief and restitution. Because the Debtors stopped manufacturing and distributing the PBDEs identified in CERT’s Proofs of Claim in 2004, CERT has no action to enjoin. CERT instead maintains that it can seek environmental cleanup costs as restitution for the Debtors’ unfair business practices. Memorandum at 13. CERT cites *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 834 (Cal. 1990) in support of its argument that the costs of remediation constitute “restitution,” however *AIU* is completely inapposite to the facts at issue in an unfair business practices claim. See *Id.* (In *AIU*, the court considered whether insurers were

obligated to provide coverage for cleanup and other response costs under general liability insurance policies; unfair business practice claims were not implicated in any way). The definition of restitution that is in fact applicable to claims under section 17200 was articulated by the Supreme Court of California in *Korea Supply Co.*, which held that an order for restitution compels a defendant “to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property.” *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 947 (Cal. 2003) (citing *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal.4th 116, 126-127 (Cal. 2000)). CERT has not alleged an ownership interest in any funds currently in the Debtors’ possession, and is therefore not entitled to seek money damages in the guise of “restitution” in connection with an unfair business practices claim.

D. Statutory Claims

39. CERT alleges that it also has viable claims under a number of federal environmental statutes including the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Safe Drinking Water Act and the Endangered Species Act (collectively, the “**Environmental Statutes**”). Memorandum at 16. Although CERT is accurate in stating that private individuals are permitted to pursue actions under the citizen enforcement provisions of the Environmental Statutes, the Supreme Court has held that these provisions cannot be invoked to sue for past violations. *See* Memorandum at 16; *see also, Friends of the Earth Inc., v. Laidlaw Env'tl. Serv., Inc.*, 528 U.S. 167 (2000) (holding that individuals lack standing under the citizen enforcement provision of the Clean Water Act to sue for violations that have ceased by the time the complaint is filed). The Debtors are no longer producing or distributing the PBDEs identified in CERT’s proof of claim materials. Any action brought by CERT against the Debtors

for violation of the Environmental Statutes would therefore relate to alleged past violations of such statutes and is expressly precluded by the Supreme Court.

40. Further, CERT's remedies under the Environmental Statutes are limited to injunctive relief and civil penalties. Civil penalties awarded under the Environmental Statutes are paid to the United States Treasury. *See Ailor v. City of Maynardville, Tenn.*, 368 F.3d 587, 590 (6th Cir. 2004) (remedies available under the Clean Water Act are limited to injunctive relief and civil penalties which are payable to the United States Treasury); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (noting that the legislative history of citizen enforcement suits provides that they are limited to injunctive relief); *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 307 F.3d 1318, 1326 (11th Cir. 2002) (“[C]itizen suits under the Endangered Species Act may only seek equitable relief, damages are not available.”). As previously stated, the Debtors are no longer engaged in conduct that CERT could seek to enjoin or for which the assessment of civil penalties would be appropriate. *See Laidlaw*, 528 U.S. at 174-75 (recognizing that civil penalties are intended to deter a defendant from future violations). Any civil penalties imposed on the Debtors would be paid to the United States Treasury in any event, and would not be recoverable by CERT or its attorneys. Accordingly, CERT cannot establish a right to payment under the Environmental Statutes or under any other applicable law and, therefore, cannot assert a claim in the Debtors' bankruptcy cases. 11 U.S.C. § 101(5).

WHEREFORE, Akin Gump respectfully requests that the Court (i) sustain the Objection, and (ii) grant the Creditors' Committee such other and further relief as the Court deems just, proper and equitable.

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