

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE IN THE LIQUIDATION OF THE
HOME INSURANCE COMPANY DISPUTED CLAIMS DOCKET

CENTURY INDEMNITY COMPANY, Claimant, v. ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY, Respondent.	Proceeding No. 2005-HICIL-14
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**MEMORANDUM OF FACT AND LAW IN SUPPORT OF METEX MFG.
CORPORATION'S MOTION TO INTERVENE AND PARTICIPATE**

INTRODUCTION¹

The Debtor is a claimant in The Home liquidation proceeding for approximately \$10.5 million in remaining unexhausted coverage under insurance policies issued by The Home. The Debtor maintains the remaining limits of the Policies should be exhausted pursuant to the terms of the proposed settlement between, among others, the Debtor and the Liquidator. It is anticipated that any monies recovered under the proposed settlement will be used to fund an asbestos trust for the benefit of asbestos personal injury claimants. The issue before the Referee of whether Century's \$5.5 million contribution claims should be allowed directly affects the Debtor's interests, including those under the proposed settlement. If Century's claim is allowed, it would reduce the Debtor's recovery under the proposed settlement, thereby reducing amounts

¹ Capitalized terms not defined herein shall have the meanings given to them in the *Motion to Intervene and Participate* (the "Motion").

available to the Debtor's creditors, asbestos personal injury claimants. Accordingly, the Debtor has moved to intervene to protect its interests and discharge its duties under the Bankruptcy Code.

The Debtor is supported in its motion by the Liquidator, who has filed a position paper supporting the Debtor's intervention and pointed out that to deny the Debtor's Motion would be to invite a potential stay of this disputed claim proceeding by the Bankruptcy Court. By virtue of the Bankruptcy Code's automatic stay, any act taken by a person to collect property of the Debtor's estate, *i.e.*, the Policies or proceeds thereof, is stayed by the filing of the bankruptcy petition and subject to annulment.² Nevertheless, the Debtor has sought and received authorization from the Bankruptcy Court to seek to intervene in this proceeding because the Debtor believes this is the best forum to adjudicate Century's claim, provided that the Debtor is permitted to intervene and participate in such proceeding.

The Debtor, therefore, maintains the interests of equity, orderly justice and efficiency support its motion to participate and intervene in this matter. If the Motion is granted, the Debtor's participation will be prospective in nature. The Debtor does not intend to seek discovery nor does it seek leave to frustrate or overturn the Referee's and the current parties' efforts thus far. Rather, it seeks only to obtain unredacted copies of the submissions to-date, to file a position paper, and participate in any arguments or hearings that may be scheduled.

BACKGROUND

A. THE DEBTOR'S HISTORY AND THE CURRENT BANKRUPTCY CASE

Metex, formerly known as Kentile Floors, Inc. ("Kentile"), commenced business in the late 1800's as a manufacturer of cork tile, and thereafter progressed to making composite tile for commercial and residential use. Until the mid-1980's, Kentile used asbestos as one of the

² See 11 U.S.C. § 363(a)(3); *In re 48th Street Steakhouse*, 835 F.2d 427, 431 (2d Cir 1987).

components in certain tiles. Once it could no longer use asbestos in its production, Kentile experienced severe difficulties in maintaining its sales of commercial and institutional tile. After its business had deteriorated quite significantly, Kentile filed a chapter 11 bankruptcy petition in the Bankruptcy Court at Case No. 92 B 46466 (BRL) in November 1992 (the “1992 Chapter 11 Case”). The following year, Kentile ceased operations and sold substantially all of its assets.

In December 1998, the Bankruptcy Court confirmed a Plan of Reorganization in Kentile’s 1992 Chapter 11 Case (“Kentile’s 1998 Plan”). As part of Kentile’s 1998 Plan, (i) all outstanding stock of Kentile was cancelled and new shares were issued to United Capital Corp. (“United Capital”), and (ii) Kentile’s name was changed to KF Real Estate Holdings Corporation (“KF”). Thereafter United Capital caused KF to be merged with Metex Corporation, a subsidiary of United Capital. KF was the survivor of the merger and its name was changed to “Metex Mfg. Corporation”, the name of the Debtor in the now pending Bankruptcy Case. Kentile’s 1998 Plan provided that all holders of prepetition and postpetition asbestos claims were entitled to pursue their claims solely to the extent of Kentile’s insurance coverage for such claims, and enjoined holders of such claims from commencing any actions against the debtor (Kentile) and/or the reorganized debtor (Metex). Accordingly, consistent with the provisions of Kentile’s 1998 Plan, since confirmation thereof, all matters involving Kentile’s asbestos claims have been resolved, and all settlements have been paid by the insurers providing coverage for those claims (the “Kentile Insurers”).³

Beginning in the mid-2000’s, a number of disputes arose among the Kentile Insurers and Metex regarding, among other things, the proper allocation of defense costs and

³ Based upon reports provided to Metex by the Kentile Insurers, as of the date the Debtor’s Bankruptcy Case commenced, there were approximately 6,000 active asbestos personal injury claims and over 20,000 inactive asbestos personal injury claims outstanding against Kentile, all of which were limited to recovery solely from, and channeled to, available insurance under Kentile’s 1998 Plan.

indemnity, and the available limits of coverage under the various policies. The parties were unable to resolve these disputes through negotiation, and in 2008 one of the Kentile Insurers initiated an insurance-coverage action against Metex and the other Kentile Insurers in the New York Supreme Court styled National Fire Insurance Company of Hartford, et al., v. Travelers Casualty and Surety Company, et al, Index No. 105522/2008 (the “Coverage Action”). The Coverage Action directly impacts the ability of Kentile’s asbestos claimants to recover under Kentile’s 1998 Plan. Although the Coverage Action remains pending, it was stayed by the parties in mid-2012 to allow a consensual resolution of all coverage disputes and, as an integral part thereof, solicitation of a Metex prepackaged plan of reorganization (the “Prepackaged Plan”).

Central to the Prepackaged Plan – and central to the Debtor’s Bankruptcy Case – were the settlement agreements between Metex (entered into with the consent and participation of the Prepetition Asbestos Claimants’ Committee and the Prepetition Future Claimants’ Representative) and the eight solvent Kentile Insurers (the “Insurance Settlement Agreements”), which, had the Prepackaged Plan been approved, would have resulted in excess of \$165 million being contributed by those Kentile Insurers to a section 524(g) trust for the benefit of current and future holders of Kentile asbestos claims. On June 29, 2012 Metex began solicitation of its Prepackaged Plan. Although more than 84% of those voting on the Prepackaged Plan cast votes in support, only 66.15% in amount of the claims voted in favor by the voting deadline. Accordingly, the Prepackaged Plan could not be confirmed.

Thereafter, on November 9, 2012, Metex filed a petition for relief under the Bankruptcy Code with the Bankruptcy Court, docketed as Case No. 12-14554 (BRL)(the “Bankruptcy Case”), because it determined that it was in its best interests to (i) continue the

stay of the Coverage Action and preserve the Insurance Settlement Agreements, and (ii) seek confirmation of a plan in order to fund a 524(g) trust with the proceeds of the Insurance Settlement Agreements together with an assignment of the Debtor's rights to other unresolved insurance assets. Metex continues in the management and operation of its business and property as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

B. THE DEBTOR'S INTEREST IN LIABILITY INSURANCE COVERAGE ISSUED BY THE HOME

The Debtor has rights under five umbrella insurance policies (the "Policies") issued by The Home to Kentile. Each of the Policies has a \$5 million limit, excess of five now exhausted \$1 million primary policies, bringing the total aggregate limits of the Policies to \$25 million. As noted above, the Policies provide coverage for Kentile asbestos personal injury claims.

In 2003, The Home became (and remains) the subject of the liquidation proceeding. On June 10, 2004, Metex filed a timely proof of claim in The Home liquidation proceeding seeking insurance coverage for, *inter alia*, the asbestos personal injury claims that have been made against Kentile.

C. THE DISPUTED CLAIM PROCEEDING REGARDING CENTURY'S CONTRIBUTION CLAIM

The Debtor recently learned that Century has asserted a \$5.5 million contribution claim in this proceeding as well as a right of setoff against its obligations to The Home, contending that it is entitled to that remedy based upon its prior payment of Kentile asbestos claims, which claim was denied by the Liquidator. Following the Liquidator's denial of the contribution claim, the Liquidator and Century jointly requested that the Referee adjudicate this matter as a disputed claim proceeding, which request was granted on February 10, 2011. Upon information and belief, a "Notice of Disputed Claim proceeding" was not mailed by the Liquidation Clerk in accordance with Section 9 of the Liquidation Procedures or R.S.A. 402-

C:41 following the Referee's decision to deem this matter a disputed claim proceeding.⁴ As of the date hereof, Metex has not received a "Notice of Disputed Claim proceeding."

In accordance with the Liquidation Procedures, Century sought review of the Liquidator's denial of its contribution claim and right of setoff. As a consequence of Metex's chapter 11 filing on November 9, 2012, the Referee ordered the Liquidator and Century to file a joint report by December 19, 2012 on whether a hearing on the merits could proceed. Upon learning of the Referee's order requiring the joint report, the Debtor sought Century's and the Liquidator's agreement to extend the deadline for such submission for 90 days. The Debtor's request was granted and the date for the joint submission on whether the disputed claim proceeding could proceed was extended to March 19, 2013.

Though Metex learned of the existence of this matter in the late summer of 2012, due to the confidentiality order with respect to this proceeding, Metex was unable to review either party's submissions. Accordingly, the Debtor, at that time, lacked specific knowledge that its interests could be affected by this proceeding.

Prior to the March 19, 2013 submission date, the Debtor sought copies of each of the Liquidator's and Century's submissions in this proceeding to determine whether Century's assertion of a setoff against The Home affected property of the estate. The parties provided the Debtor with redacted copies of their submissions. After reviewing the redacted submissions, the Debtor believed it needed additional information to further assess Century's \$5.5 million contribution claim and its asserted right of setoff against its obligations to The Home, and so it sought from the parties copies of their unredacted submissions in this proceeding. The Liquidator, agreeing with the Debtor, filed a motion to disclose the unredacted materials to the

⁴ Based upon a review of the docket for this proceeding, it does not appear that such notice was served on Metex.

Debtor. Century objected to the Liquidator's motion. The Liquidator's request was denied by order dated April 2, 2013.

On May 9, 2013, the Debtor filed the *Debtor's Motion for an Order Authorizing the Debtor to Use Estate Assets to Seek Intervention in The Home Insurance Company's New Hampshire Liquidation Proceeding In Order to Protect the Debtor's Policy Rights* (the "Motion for Authority") with the Bankruptcy Court, requesting authority to use assets of the Debtor's estate to seek leave to intervene and participate in this proceeding. By order dated June 5, 2013, the Bankruptcy Court approved the Debtor's Motion for Authority. A copy of the order is attached hereto as **Exhibit 1**.

D. THE NYLB SETTLEMENT PROPOSAL

Prior to the filing of the Bankruptcy Case, the NYLB, as agent for the Superintendent of Financial Services of the State of New York as Administrator of the New York Property/Casualty Insurance Fund, paid on behalf of The Home \$14,016,147.38 on account of Kentile asbestos personal injury claims arising from injuries alleged to have been sustained in New York. The Debtor has been advised by the NYLB that it believes unresolved New York-based asbestos personal injury claims against Kentile are sufficient to exhaust the remaining coverage under the Policies.

In light of the NYLB's analysis of the likely exhaustion of the remaining limits under The Home Policies, the NYLB proposed a settlement (the "Proposed NYLB Settlement") whereby in exchange for a release by the Debtor and protection of a Bankruptcy Code section 524(g) channeling injunction for the NYLB, the Liquidator, and The Home issued on the effective date of the Debtor's plan of reorganization, the NYLB will pay to an asbestos trust formed under the Debtor's plan of reorganization, the full remaining limits of the Policies (\$10,963,852.62), less amounts paid under the Policies prior to the effective date of the Debtor's

plan. The Proposed NYLB Settlement has been executed by all parties thereto; however, the Debtor has yet to seek Bankruptcy Court approval thereof but intends to do so in the near future at the same time that it seeks approval of the insurance settlement agreements it has with the eight solvent Kentile Insurers.

Under the Proposed NYLB Settlement, should Century prevail in this proceeding, any amounts recovered by Century on account of its \$5.5 million contribution claim and right of set-off will impair the limits of the Policies and, therefore, result in a dollar for dollar reduction in the amount that will be paid by the NYLB to the Debtor. *See* Proposed NYLB Settlement, Section I.RR.

ARGUMENT

A. LEGAL STANDARD FOR INTERVENTION

The Liquidation Procedures provide entities “directly affected” by a disputed claim proceeding with the right to intervene and participate in such proceeding. *See* Liquidation Procedures, § 9(b). Section 9(b) provides the “Motion to Participate” must be filed within thirty days of “Notice of Disputed Claim proceeding” being sent to the party seeking to intervene. *Id.* “Persons or entities granted leave to participate in the Disputed Claim proceeding shall not be considered parties to the Disputed Claim proceeding but may participate in the proceeding in all respects not specifically denied in these Procedures.” *Id.*

The Liquidation Procedures further provide that disputed claim proceedings shall be conducted “according to the rules of law or equity, as the case may be, pursuant to RSA 519:10, and shall be governed by the New Hampshire Superior Court Rules and the New Hampshire Rules of Evidence.” *Id.* at 10(b). Superior Court Rule 139 provides, in pertinent part, “Any person shown to be interested may become a party to any proceeding in equity on his

petition briefly setting forth his relation to the cause; or, upon petition of any party, such person may be made a party by order of court notifying him to appear therein.” N.H. Super. Ct. R. 139. “The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice.” *Lamarche v. McCarthy*, 158 N.H. 197, 200, 965 A.2d 992, 995 (2008) (citations omitted). “A trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein.” *Id.*

B. THE DEBTOR SHOULD BE GRANTED LEAVE TO INTERVENE

(a) The Debtor Satisfies the Requirements of Liquidation Procedures, Section 9(b).

The Debtor’s Motion in this proceeding is timely and the Debtor has established that its interests are directly affected by this proceeding, thus all elements of Section 9(b) of the Liquidation Procedures have been satisfied. Because, as set forth above, the “Notice of Disputed Claim proceeding” was never served on Metex, the thirty day period in which a party may seek leave to intervene has not been triggered. Accordingly, the Motion is timely under Section 9(b).

Additionally, the Debtor has demonstrated that its interests may be directly affected by this proceeding. Here, the Debtor has clear rights and interests involved in this disputed claim proceeding. Not only does it have interests in the Policies at issue, any recovery had by Century as a result of its claims made herein will directly affect the Debtor’s recovery under the Proposed NYLB Settlement. The Debtor believes that any rights that Century may have against The Home are subordinate to the Debtor’s interest in the Policies, and that the proceeds of any unexhausted coverage should first be provided to the Debtor for the benefit of Kentile asbestos personal injury claimants. Further, the Debtor believes that any payment by Century in respect of Kentile asbestos claims was made under policies issued by Century, rather than under The Home Policies, of which The Home has and will as a result of the Proposed NYLB Settlement pay the limits. If successful in overcoming Century’s asserted contribution

claim and right to setoff, the proposed NYLB settlement payment will be approximately \$5.5 million higher than if Century's claim were allowed in this disputed claim proceeding – significantly benefiting the estate and those persons with Kentile asbestos personal injury claims. Moreover, the Debtor, as a debtor-in-possession, is charged with collecting and protecting assets of its estate for the benefit of its creditors (Kentile asbestos personal injury claimants). *See* 11 U.S.C. §§ 704(a)(1), 1107(a). Accordingly, leave to intervene should be granted.

(b) Equity dictates that the Debtor should be permitted to intervene.

As set forth above, the Debtor has established a direct and apparent interest in the outcome of this proceeding, accordingly, equity dictates that leave to intervene should be granted. *See Lamarche*, 158 N.H. at 200, 965 A.2d at 995. Critically, permitting the Debtor to intervene will not prejudice either of the parties. The Debtor does not seek to restart the briefing process or to intervene for an improper purpose, but rather only to participate on a going-forward basis. Permitting the Debtor to participate will not subject either party to any undue hardships and should not cause substantial delay in this proceeding. In fact, the Debtor has been informed by the Liquidator that it will support this Motion and the relief requested therein. Moreover, since learning of the potential effect this proceeding may have on the Debtor's interests, it has moved expeditiously in seeking leave. Indeed, the Debtor filed its Motion for Authority on the same day that the parties executed the Proposed NYLB Settlement and a little more than one month after the Referee denied the Liquidator's request to disclose the unredacted submissions.

CONCLUSION

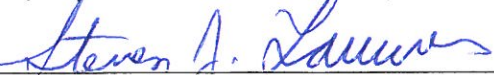
For the reasons set forth above, the Debtor has interests and rights that may be directly affected by the outcome of this proceeding. Accordingly, the Debtor respectfully

requests that the Motion be granted so that the Debtor may have an opportunity to be heard with respect to its rights and interests.

Dated: July 10, 2013

Respectfully submitted,

RATH, YOUNG & PIGNATELLI, P.C.

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EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	:
	:
	: Chapter 11
METEX MFG. CORPORATION,	:
(f/k/a Kentile Floors, Inc.),	:
	: Case No. 12-14554 (BRL)
	:
Debtor.	:
	x

**ORDER AUTHORIZING THE DEBTOR TO USE ESTATE ASSETS
TO SEEK INTERVENTION IN THE HOME INSURANCE COMPANY’S
NEW HAMPSHIRE LIQUIDATION PROCEEDING IN ORDER TO
PROTECT THE DEBTOR’S POLICY RIGHTS**

Upon consideration of debtor and debtor-in-possession Metex Mfg. Corporation’s (the “Debtor”) *Motion for an Order Authorizing the Debtor to Use Estate Assets to Seek Intervention in The Home Insurance Company’s New Hampshire Liquidation Proceeding in Order to Protect the Debtor’s Policy Rights* (the “Motion”)¹ and, upon the *Memorandum of Law and Declaration of Paul E. Breene, Esq.* filed in support thereof; and the Court having jurisdiction to consider the relief requested pursuant to 28 U.S.C. §§157 and 1334; and good and sufficient notice of the Motion having been given; and no other or further notice being required; and having provided an opportunity for a hearing on the matters contained in the Motion; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interests of the Debtor, its estate and creditors, and after due deliberation and sufficient cause appearing therefor, it is hereby:

ORDERED that:

¹ Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

1. The Debtor is authorized to seek leave to intervene in The Home Liquidation Proceeding, and if permitted to intervene, to participate therein to the extent the Debtor deems necessary and appropriate to protect its rights under The Home Policies; provided, however, nothing in this Order shall be deemed a determination that the Debtor is entitled to intervene in the Disputed Claims Proceeding, such determination to be made by the officer presiding over the Disputed Claims Proceeding.

2. The relief granted herein shall not be construed (i) as a determination that section 362(a) of the Bankruptcy Code applies to the Disputed Claims Proceeding or stays, precludes, or otherwise affects the assertion of Century's rights, claims, or defenses therein, or (ii) to limit or preclude the Debtor from seeking imposition of the automatic stay under section 362(a) to prevent Century from pursuing its contribution claim and setoff rights in the Disputed Claims Proceeding.

3. This Court shall retain jurisdiction with respect to any matters, claims, rights, or disputes arising from or related to the implementation of this Order.

4. Service of the Motion as provided therein shall be deemed good and sufficient notice of such Motion.

Dated: New York, New York
June 6, 2013

/s/Burton R. Lifland
HON. BURTON R. LIFLAND,
UNITED STATES BANKRUPTCY JUDGE