IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: BOY SCOUTS OF AMERICA and DELAWARE BSA, LLC, Debtors.	Civil Action No. 20-cv-00774 (RGA)
CENTURY INDEMNITY COMPANY, WESTCHESTER FIRE INSURANCE COMPANY and WESTCHESTER SURPLUS LINES INSURANCE COMPANY, Appellants, v. BOY SCOUTS OF AMERICA and DELAWARE BSA, LLC, Appellees.	On appeal from the U.S. Bankruptcy Court for the District of Delaware Bankruptcy Case No. 20-10343 (LSS) Bankruptcy BAP No. 20-13

APPELLANTS' REPLY BRIEF ON APPEAL

O'MELVENY & MYERS LLP
Jonathan D. Hacker
1625 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
jhacker@omm.com

O'MELVENY & MYERS LLP
Tancred Schiavoni
Janine Panchok-Berry
Andrew Kirschenbaum
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
tschiavoni@omm.com
jpanchok-berry@omm.com
akirschenbaum@omm.com

STAMOULIS & WEINBLATT LLC
Stamatios Stamoulis (#4606)
800 N. West Street, Third Floor
Wilmington, DE 19801
Telephone: (302) 999-1540
Facsimile: (302) 762-1688
stamoulis@swdelaw.com

Counsel for Appellants Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Indemnity Insurance Company of North America, Westchester Fire Insurance Company and Westchester Surplus Lines Insurance Company

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INTRODUCTION

Appellants'[1] request in this appeal is modest and straightforward: a clarification that submissions via the Claim Form are not entitled to prima facie validity because they do not require claimants to provide sufficient facts to establish a prima facie claims against BSA.

BSA's response makes no sense. BSA insists that any proof of claim *must* be given prima facie validity, but the only cases cited by BSA explicitly state—in the very passages quoted by BSA—that proofs of claim are given prima facie validity *if* they "allege sufficient facts to support liability." *In re Lampe*, 665 F.3d 506, 514 (3d Cir. 2011) (citing *In re Allegheny, Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992)). The Form here plainly does not satisfy that requirement. It was never even intended to. To be sure, as BSA observes, the Form requires a variety of information, but what matters is what it omits, *viz.*, any information bearing on why *BSA* should be liable for the incidents of abuse alleged. As explained in Century's opening brief, courts have consistently dismissed abuse claims against BSA as legally inadequate when the claimant alleged no facts connecting the national organization to incidents of abuse inflicted by agents of local affiliates.

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[1] Appellants in this matter are Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Indemnity Insurance Company of North America, Westchester Fire Insurance Company and Westchester Surplus Lines Insurance Company (collectively, "Century").

BSA also suggests that the Claim Form's glaring deficiencies can be ignored because a post-confirmation trust may eventually process the claims fully. But if the proof of claim is presumptively valid, objectors—i.e., those called upon to fund the trust—will be forced to *disprove* BSA's liability, despite the lack of critical information bearing on that liability. Eliminating the claimant's burden of proof creates a magnet for mass marketers who can gin up inventories of claims with little or no due diligence. Indeed, the inadequate Claim Form with the promise of presumptive validity has already provoked massive over-claiming—claims have exploded from 275 at the petition date to roughly 15,000, and they continue to grow rapidly. *See* Bankr. Dkt. 16, ¶ 7; Bankr. Dkt. 1161 ¶ 3 & n.4. This overclaiming frenzy will inevitably undermine the efficiency of the claims adjudication process and its fairness to claimants with genuine injuries.

The rest of BSA's brief consists largely of red herrings. Century's request will not require claimants to provide additional information to preserve their claims, will not prevent a trust from identifying the universe of potential claims or otherwise interfere with a trust's operation (if one is formed), and will not frustrate BSA's notification efforts. It will, however, enforce the Third Circuit's requirements for prima facie viability, and it may be the last opportunity to impose order on a bankruptcy case quickly spiraling out of control.

ARGUMENT

I. CENTURY HAS STANDING TO APPEAL THE BAR DATE ORDER

BSA's response reiterates the standing objection advanced in its motion to dismiss. For the reasons stated in Century's opposition to that motion, Century has standing to appeal the Bar Date Order under *In re Congoleum*, 426 F.3d 625 (3d Cir. 2005), the controlling precedent BSA once again fails to mention. Century MTD Opp. 7–10, Dist. Ct. Dkt. 12. Century incorporates those arguments by reference.[2]

II. SUBMISSIONS VIA THE CLAIM FORM DO NOT MERIT THE LEGAL EFFECT OF PRIMA FACIE VIABILITY BECAUSE THEY CANNOT ESTABLISH BSA'S LIABILITY FOR ABUSE CLAIMS

Century's appeal seeks to require the bankruptcy court to issue a new order that does not grant prima facie validity to claims submitted with the Claim Form. BSA's principal response is a proof of claim form—*any* proof of claim form, it seems—necessarily "establishes a presumptively valid claim." BSA Br. 16, Dist. Ct. Dkt. 21. A bankruptcy court thus lacks authority to issue an order stating that its "proof of claim is not entitled to prima facie viability." *Id*. at 17.

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[2] BSA also again contends that Century "failed to file a motion for leave to appeal as required by Bankruptcy Rule 8004(a)(2)." BSA Br. 14, Dist. Ct. Dkt. 21. As Century has explained, if the Bar Date Order is a final order, it is appealable as of right under Rule 8003. Century MTD Opp. 10–14, Dist. Ct. Dkt. 12. If the Order is interlocutory, this Court has discretion to grant leave to appeal even in the absence of formal Rule 8004(a)(2) motion. *See In re Allegheny Int'l, Inc.*, 107 B.R. 518, 522 (W.D. Pa. 1989).

BSA does not cite a single case holding courts are legally required to give *any* proof of claim form—even an inadequate form—presumptively valid effect. The cases BSA does cite (BSA Br. 17, 21, Dist. Ct. Dkt. 21) hold the exact opposite: in the very passages BSA quotes, the cases state that a court must give presumptively valid effect to a "proof of claim *that alleges sufficient facts to support liability* satisfies the claimant's initial obligation to proceed." *In re Lampe*, 665 F.3d 506, 514 (3d Cir. 2011) (emphasis added); *see In re Allegheny, Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992) (same). BSA's entire brief proceeds as if the underscored language does not exist. But it does, and it flatly refutes BSA's position. The principle is straightforward: if a claim does not allege "sufficient facts to support liability," then it is not filed "'in accordance with' the rules" within the meaning of Rule 3001(f). *In re Chain*, 255 B.R. 278, 280 (Bankr. D. Conn. 2000). There is accordingly no legal barrier to modifying the Bar Date Order to clarify that the legally inadequate proofs of claim here do not establish a presumptively valid claim. Indeed, the bankruptcy court *must* modify the Order to ensure that the proofs of claim are *not* given that improper effect.

Failure to do so would grant Abuse Claims special pleading treatment, absolving claimants of the burden to prove facts adequate to state a claim. BSA cites no precedent authorizing that result. There is no reason to construe the Bankruptcy Code as mandating such an unprecedented and counterintuitive

interpretation. *See Dewsnup v. Timm*, 502 U.S. 410, 427 (1992) (courts "avoid construing the [Bankruptcy Code] in a way that produces … absurd results").

BSA offers no meaningful response to Century's showing that the Claim Form fails to solicit the information necessary to establish BSA's liability for Abuse Claims. Century Br. 17–22, Dist. Ct. Dkt. 19. BSA does not deny that the form was designed for claimants' ease of use rather than to cover the legal elements of Abuse Claims against BSA. Nor does BSA address the case law Century identified (*id.* at 16-19) identifying knowledge-based requirements for BSA's liability for third-party sexual abuse. Instead, BSA cites questions on the Form asking whether the claimant (1) "told anyone involved in Scouting about the sexual abuse," (2) "report[ed] the sexual abuse to law enforcement," (3) can identify "anyone [they] may have ever told about the sexual abuse at the time, including anyone involved with Scouting," and (4) is "aware of anyone who knew about the sexual abuse." APP615, Bankr. Dkt. 695-7, Claim Form Questions N, O, P, R; *see* BSA Br. 18, Dist. Ct. Dkt. 21.

Taken together, the answers to these questions could at most identify whether someone at BSA learned of the abuse *after the fact*.[3] But they say nothing

[3] Moreover, these questions do not even specifically probe *BSA's* after-the-fact knowledge (although it is theoretically possible that the answers to some of these questions could implicate individuals at BSA). Questions N and P ask whether the claimant notified anyone involved with "Scouting." But BSA is a national-level organization that merely acts as a franchisor for the local councils

about BSA's prior knowledge that a given abuser posed a risk of harm, or the nature of BSA's relationship with the abuser, as required for BSA's liability for third-party conduct. None addresses, for example, BSA's prior awareness of the abuser's "dangerous propensities," *Boy 1 v. Boy Scouts of America*, 993 F. Supp. 2d 1367, 1372 (W.D. Wash. 2014), the existence of a "definite, established and continuing relationship" between BSA and the abuser, *id*., or BSA's prior "knowledge of" or "right to control" the abuser, *Gold Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 289-90 (Tex. 1996). The issue is not whether the responses are "detailed," as BSA asserts. BSA Br. 25, Dist. Ct. Dkt. 21. The problem is that the Claim Form was not designed to—and in fact does not—solicit the facts sufficient to establish liability against BSA.

BSA misses the point in complaining that evidence of BSA's knowledge is not available to claimants because it "is in control of the BSA." BSA Br. 27, Dist. Ct. Dkt. 21. Century is not seeking to require claimants to provide those facts. Rather, Century argues only that because the Form does not require such information, claims submitted in connection with the Form should not be deemed presumptively allowed.

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that run scouting activities. In other words, most individuals "with Scouting" are not agents for BSA.

BSA gets no farther in reciting the bankruptcy court's statement that a returned Claim Form suffices so long as it identifies "what it is that the claimant has alleged, for example, breach of contract, breach of my employment agreement, services performed," is "signed under oath," and "otherwise, meets the requirements." BSA Br. 24, Dist. Ct. Dkt. 21 (quoting APP491, Bankr. Dkt. 675 at 70:9–14). That vague statement says nothing about the elements required to establish BSA's tort liability, nor does it even purport to explain why the Claim Form's questions encompass information sufficient to prove those elements. To the extent the court means to suggest that a claimant obtains presumptive allowance simply by identifying the *type* of claim being brought and providing a notarized signing, its suggestion is plainly contrary to controlling Third Circuit precedent. *See supra* at 4.

III. A POST-CONFIRMATION TRUST DOES NOT JUSTIFY GRANTING PRIMA FACIE VIABILITY HERE AND WOULD NOT LESSEN PREJUDICE TO CENTURY

Unable to show that the Claim Form solicits the information required to establish BSA's liability for Abuse Claims, BSA essentially urges the Court to simply overlook the Bar Date Order's mandate that all submissions with that form are presumptively allowed. In BSA's view, the implementation of a post-confirmation trust will overcome any flaws in the Form, because BSA thinks a trust will ensure that all claims are properly "reviewed, objected to, allowed or

disallowed, and eventually distributed upon." BSA Br. 10, 15, 18, 28, Dist. Ct. Dkt. 21.

But BSA's hope that a trust will wield its powers judiciously is no basis for jettisoning pleading standards. As Century has shown, the substantive requirements governing tort claims are established by state law, not by the Bankruptcy Code. Century Br. 15, Dist. Ct. Dkt. 19. The bankruptcy court cannot discard those state-law requirement at the pleading stage based on how BSA predicts those claims will be processed at a later stage. Indeed, enforcing pleading standards at the pleading (i.e., claim-submission) stage is essential to the efficient and fair processing of claims, just as it is in normal civil litigation. If submissions via the Claim Form are not presumptively allowable, objectors can weed out meritless claims by identifying pleading deficiencies, and at a minimum will have access to the facts a given claimant presents to support his case. But if all proofs of claim are treated as establishing presumptively valid claims, objectors will be forced to litigate each claim individually, discover all relevant facts, and ultimately carry the burden of disproving any claim it seeks to disallow. Such an arrangement thwarts the very purpose of pleading standards, *viz.*, to prevent "a plaintiff with 'a largely groundless claim'" from "tak[ing] up the time of a number of other people." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007). Indeed, under BSA's logic, the Civil Rules, too, could dispense with meaningful pleading

requirements, because after all the court and jury will eventually "process" the complaint even if it omits essential allegations about defendant's liability. That approach would make no sense for civil litigation, and it makes no more sense for bankruptcy adjudications.

If anything, it is even *more* important in bankruptcy proceedings to provide information essential to a claim at the outset of a case. This case illustrates the problem with allowing inadequate claims to establish a prima facie right to a payout. Since the Bar Date Order issued, the case has suffered from a fevered rush of "overclaiming." Century Br. 22–23, Dist. Ct. Dkt. 19. BSA says Century's concerns are "misplaced," BSA Br. 28, Dist. Ct. Dkt. 21, but *BSA itself* has now raised the problem of overclaiming before the bankruptcy court. In a recent motion to supplement the Bar Date Order, BSA warned that an advertising spree by opportunistic plaintiffs' firms "in the wake of the entry of the Bar Date Order" threatened to "encourage fraudulent claims, imposing additional burdens on the Debtors and … creating increased uncertainty around the universe of valid Sexual Abuse Claims." Bankr. Dkt. 1145 at 3–4. On that point, BSA has it right: lax pleading requirements have made this case a magnet for apparent fraud, to the severe detriment of claimants with genuine injuries.

Even if a "trust process" is a common feature of "mass tort bankruptcies," BSA Br. 29–30, Dist. Ct. Dkt. 21, it cannot solve the problems already emerging

from the Bar Date Order. In practice, post-confirmation trusts are often dominated by plaintiffs' attorneys favoring the interests of creditors. *See* Andrew J. Morris, *Clarifying the Authority of Litigation Trusts: Why Post-Confirmation Trustees Cannot Assert Creditors' Claims Against Third Parties*, 20 Am. Bankr. Inst. L. Rev. 589, 596 (2012) (noting the tendency for post-confirmation trustee to act "as a plaintiff's lawyer who wears the white hat of a bankruptcy-related trustee championing the rights of many injured investors," which has "decided advantages over appearing in court as a private plaintiff who merely seeks to collect on a personal claim"). Plaintiffs' attorneys seize effective control of proceedings when they "can deliver sufficient votes to satisfy the supermajority vote requirement," giving them "considerable control over the design of the trust, appointments to leadership roles within the trust, and the distribution procedures that define the process for reviewing and paying claims." S. Todd Brown, *How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buff. L. Rev. 537, 557 (2013).

Even if a trust acted as the neutral arbiter that BSA imagines, the sheer number of claims spawned by the Bar Date Order would overwhelm the trust's and objectors' ability to review claims, develop evidence, and lodge objections. As a practical matter, presumptive validity could operate as conclusive validity, which is why the problem needs to be addressed now.

CONCLUSION

For the foregoing reasons, and the reasons previously stated, the Court should reverse the Bar Date Order and remand with instructions that the bankruptcy court to issue a new order that does not grant prima facie validity to claims submitted via the Claim Form.

Dated: September 9, 2020

Respectfully Submitted,

By: */s/ Stamatios Stamoulis*
Stamatios Stamoulis (#4606)

STAMOULIS & WEINBLATT LLC
800 N. West Street
Third Floor
Wilmington, DE 19801
Telephone: (302) 999-1540
Facsimile: (302) 762-1688

O'MELVENY & MYERS LLP
Jonathan D. Hacker (*pro hac vice*)
1625 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

O'MELVENY & MYERS LLP
Tancred Schiavoni (*pro hac vice*)
Janine Panchok-Berry (*pro hac vice*)
Andrew Kirschenbaum (*pro hac vice*)
Times Square Tower
7 Times Square
New York, NY 10036-6537
Telephone: (212) 326-2000
Facsimile: (212) 326-2061

Counsel for Appellants Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Indemnity Insurance Company of North America, Westchester Fire Insurance Company and Westchester Surplus Lines Insurance Company

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Bankruptcy Procedure 8015(h), the undersigned certifies that the above memorandum complies with the applicable type-volume limitation of Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)(i) because, excluding the parts of the memorandum exempted by Federal Rule of Bankruptcy Procedure 8015(g), this brief contains 2,524 words. The above brief also complies with the typeface requirements of Federal Rule of Bankruptcy Procedure 8015(a)(5) and type-style requirements of Federal Rule of Bankruptcy Procedure 8015(a)(6).

Date: September 9, 2020

/s/ Stamatios Stamoulis
Stamatios Stamoulis (#4606)