

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE: . Case No. 18-27963 (MBK)
. .
. .
DURO DYNE NATIONAL . United States Courthouse
CORP., et al. . 402 East State Street
. Trenton, NJ 08608
Debtors. .
. October 16, 2018
. 1:56 p.m.

TRANSCRIPT OF COURT DECISION ON DEBTORS' MOTION
BEFORE HONORABLE MICHAEL B. KAPLAN
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: The Duro Dyne National Corp. matters from
2 yesterday, these were two matters, Numbers -- Document Number
3 92, a motion for stay relief to proceed in state court, and
4 Document 44, the motion for an order appointing a legal
5 representative for future asbestos personal injury claimants.
6 CourtCall operator, can you just confirm that the lines are
7 open?

8 COURTCALL OPERATOR: They are, Your Honor.

9 THE COURT: All right. Thank you. I am not taking a
10 roll call, needless to say because it is my intent simply to
11 place on the record my decisions in these two pending motions.
12 I have also asked my court recorder to tag the hearing this
13 afternoon for ease in ordering transcripts, if appropriate.

14 Let me start, for Mr. Calhoun's benefit, Number 92,
15 the motion for relief from the automatic stay to proceed in
16 state court. It's the far less complicated matter. With
17 respect to the motion, the Court is neither denying or granting
18 the motion, but carrying the hearing to December 17th at -- of
19 2018 at 1 -- I'm sorry, at 2 p.m.

20 The Court, for the reasons that will follow,
21 determines that the automatic stay does indeed apply to the New
22 York litigation, and the Court deems it appropriate that the
23 movants and the Asbestos Committee and the future claims
24 representative have an opportunity to address the issues that
25 are involved with respect to the plan and disclosure statement

1 and trust documents, that the breathing spell afforded under 11
2 U.S.C. Section 362(a)(1) and (a)(3) is necessary and
3 appropriate to allow this debtor to focus on restructuring and
4 negotiating its outstanding obligations to pre -- to existing
5 and future claimants.

6 The New York litigation has been pending for five
7 years without any meaningful discovery. It is hard for the
8 Court to believe that a 60-day period in which the debtors and
9 other parties can focus on the needs of this Chapter 11 will
10 prejudice the interests of the insurers of this matter, rather
11 the Court certainly does not want to see the time and resources
12 dedicated to that litigation, which at some point must go
13 forward, as opposed to addressing the concerns that have been
14 raised to date with the debtors' proposed plan of
15 reorganization.

16 With respect to whether or not the automatic stay
17 applies, I believe that this issue has been addressed and
18 answered at least in two decisions within this circuit, Judge
19 Wizmur's decision in the matter of GB Holdings in 2006, 2006
20 Westlaw 4457350, where in Footnote 7 Judge Wizmur states, it is
21 also recognized that an act to diminish future recoveries from
22 the debtor's insurance policies may be violative of the
23 automatic stay under 11 U.S.C. Section 362(a)(3). The Third
24 Circuit recently so held in ACandS. The possession or control
25 language of Section 362(a)(3) has consistently been interpreted

1 to prevent acts that diminish future recoveries from a debtor's
2 insurance policies. That's a cite to ACandS, 435 F.3d 261.

3 In ACandS, an arbitration award entered after the
4 debtor filed a bankruptcy petition, which reduced substantially
5 the extent of coverage available to the debtor under its
6 insurance policies, was vacated on the ground the award was
7 entered in violation of the automatic stay.

8 The -- so in looking to ACandS v. Travelers, 435 F.3d
9 252, I also see language that reads, Subsection 362(a)(1) and
10 Subsection 362(a)(3) differ in that the stay of actions and
11 proceedings provided for and by Section 362(a)(1) applies only
12 to actions brought against the debtor. The statute does not
13 address actions brought by the debtor, such as the
14 counterclaims at issue in the New York litigation, which would
15 ensure -- which would inure to the benefit of the bankruptcy
16 estate, and they cite to St. Croix, 682 F.2d at 448.

17 Section 362(a)(3), on the other hand, applies to
18 actions against third parties, as well as actions against the
19 debtor. And further on the third Circuit has stated, we agree
20 that the automatic stay applied to the arbitration and that the
21 panel should have halted the arbitration once it became
22 apparent that the proceeding further could negatively impact
23 the bankruptcy estate.

24 In the pending motion movants have admitted and
25 acknowledged that the counterclaim by the debtors, in essence,

1 are equivalent to the movant's claims and that at issue would
2 be the breath and scope and availability of insurance funds.
3 Those policies and funds are property of the bankruptcy estate
4 and, therefore, 362(a)(3) would apply.

5 So, in sum, the Court does find that the automatic
6 stay applies under 362(a)(3) to the entire action, and rather
7 than deny the motion, I'm going to carry it to December 17th,
8 again at 2 p.m., at which time the Court will certainly have a
9 better handle on whether or not the Chapter 11 proceedings are
10 at a stage where it makes sense to allow this litigation to go
11 forward. I'll enter the appropriate order.

12 Moving to the motion with respect to the appointment
13 of a legal representative for future asbestos personal injury
14 claimants, I hope you all are sitting comfortably with soda or
15 coffee or anything else while I read my thoughts into the
16 record.

17 Before the Court is the motion filed on behalf of the
18 debtors seeking to appoint Lawrence Fitzpatrick as the legal
19 representative of the future asbestos claimants, FCR for
20 purposes of this opinion, pursuant to 11 U.S.C. Section
21 524(g)(4)(B)(i).

22 This court has jurisdiction over this matter pursuant
23 to 28 U.S.C. Section 1334, and this is a core proceeding under
24 28 U.S.C. Section 157(b)(2). Venue is properly placed in this
25 court under 28 U.S.C. Section 1408.

1 The Court makes the following findings of facts and
2 conclusions of law consistent with Federal Rule of Bankruptcy
3 Procedure 7052. On September 7th of 2018 debtors and these
4 administratively consolidated cases each filed for relief under
5 Chapter 11 of the Bankruptcy Code, and on that same date the
6 debtors filed a pre-negotiated plan of reorganization and
7 disclosure statement.

8 The purposes of the bankruptcy filings were to
9 preserve the debtors' remaining assets and confirm a plan of
10 reorganization that would allow the debtors to satisfy present
11 and future asbestos personal injury claims through the use of a
12 channeling injunction available under 11 U.S.C. Section 524(g).

13 As noted by the U.S. Trustee, Section 524(g)
14 injunction is unique in the Bankruptcy Code because it binds
15 not only present creditors, but also potential future asbestos
16 victims in whom harm from the debtors' products have not
17 manifested as of the filing. Section 524(g) injunction
18 discharges the rights of future victims to recover against the
19 reorganized debtors, its insurers and related parties, while
20 assuring that a post-bankruptcy trust is adequately funded to
21 address all current and future claims on an equal basis.

22 Prior to establishing -- I'm sorry, prior to
23 establishing the channeling injunction, Section 524(g)(4)(B)
24 requires that the Court appoint a legal representative for the
25 purposes of protecting the rights of victims that may in the

1 future assert asbestos claims.

2 In July of 2015 the debtors began negotiations with
3 counsel for asbestos personal injury plaintiffs, who eventually
4 formed an ad hoc committee to represent all asbestos present
5 claimants. The focus of the negotiations was the feasibility
6 of a pre-negotiated Chapter 11 plan of reorganization that
7 would include an asbestos personal injury trust for present and
8 future claimants, as well as a channeling injunction under
9 524(g).

10 In order to satisfy the requirements under
11 524(g)(4)(B) the debtors retained in June of 2017 Lawrence
12 Fitzpatrick to serve as a pre-petition FCR, and ultimately Mr.
13 Fitzpatrick, the ad hoc committee and the debtors agreed upon
14 the terms of a plan of reorganization, a disclosure statement,
15 an asbestos personal injury trust, the trust distribution
16 procedures, which is TDP, and other related documents.

17 On September 26th of 2018 the U.S. Trustee appointed
18 an Official Committee of Asbestos Claimants. The debtors
19 thereafter filed the within motion to appoint Mr. Fitzpatrick
20 as the representative for future asbestos claimants, again FCR,
21 and objections to his appointment were filed by the U.S.
22 Trustee, Federal Insurance Company, North River Insurance
23 Company, Hartford Accident and Indemnity, as well -- which
24 objections contend that Mr. Fitzpatrick does not satisfy either
25 of the posited applicable standards, that those being

1 disinterestedness or the appearance of impropriety.

2 And the objector sought additional discovery into
3 areas such as the circumstances which gave rise to Mr.
4 Fitzpatrick's hiring, his ongoing and prior relationships with
5 members of the ad hoc committee, his financial incentives in
6 accepting the position as FCR, his actions taken as a pre-
7 petition FCR, and the impact of his current roles as post-
8 confirmation FCR in several other asbestos bankruptcies.

9 At the initial hearing held on October 1st of this
10 year the Court directed that Mr. Fitzpatrick and the debtors'
11 representative appear for depositions and provide additional
12 discovery on these issues. The Court also ruled that the
13 insurers were parties in interest entitled to be heard and
14 inquire on these issues that are pending in this motion.

15 Finally, this Court acknowledged that Section 524(g)
16 does not explicitly state the standards that the FCR must
17 satisfy to be eligible for appointment. The Court followed the
18 approach taken nearly universally by other courts in applying
19 the disinterested person standard set forth in 11 U.S.C.
20 Section 101(14) as the correct disqualification standard for
21 assessing the appointment of a legal representative under
22 Section 524(g), and the Court referred to the decisions of W.R.
23 Grace and In re Leslie Control and In re Thorpe Insulation.

24 The Court specifically noted how incongruous it would
25 be to demand that Mr. Fitzpatrick satisfy a higher appearance

1 of impropriety standard, where under Section 1104, for example,
2 Congress demanded less from a Chapter 11 Trustee who serves as
3 a fiduciary and representative for all creditors and their
4 constituencies and not a small subset such as future claimants.

5 After a period of limited discovery and a plenary
6 hearing held on October 15th, at which Mr. Fitzpatrick was
7 examined by all parties, the Court heard additional legal
8 argument and now makes the following additional findings and
9 rulings.

10 Mr. Fitzpatrick has been working in the field of
11 asbestos personal injury and property claims recovery for
12 approximately 38 years through claims facilities with
13 participating manufacturers and insurers, including as an
14 officer of the Asbestos Claims Facility, as well as an officer
15 of the Center for Claims Resolutions.

16 He has received ongoing court appointments as FCRs in
17 several asbestos bankruptcies including Durabla, ACandS,
18 Pittsburgh Corning, Global Industries, NARCO, which is North
19 American Refractories, Metex, as well as Kaiser Gypsum. He is
20 presently involved in pending unconfirmed Chapter 11 asbestos
21 cases, such as Kaiser Gypsum and Sepco. These bankruptcies
22 have been pending in Ohio, New York, Pennsylvania, Delaware and
23 North Carolina.

24 Mr. Fitzpatrick was first contacted by his attorney,
25 Mr. Harron, inquiring as to his interest in becoming a pre-

1 petition FCR for the debtor on or about May 23rd of 2017. He
2 first spoke with the debtor by phone on May 24th through a call
3 with the debtors' CEO, their respective attorneys, as well as
4 his counsel.

5 Mr. Fitzpatrick had no prior contact with the debtor
6 or any individuals associated with the debtor. He had no prior
7 contact with the Law Firm of Caplin Drysdale as attorneys for
8 the ad hoc committee and never spoke with the ad hoc committee
9 members directly with respect to this case, the Duro Dyne
10 matter.

11 Mr. Fitzpatrick has had no social contact with the
12 asbestos personal injury counsel and his interactions have been
13 limited to court appearances and periodic trust meetings.

14 Throughout the course of his pre-petition
15 negotiations Mr. Fitzpatrick worked and spoke through his
16 counsel. The engagement letter with the debtors was negotiated
17 between his attorney and Mr. Prol representing the debtors.
18 Mr. Fitzpatrick testified that he required indemnification
19 language to ensure that his independence would exist in the
20 event of litigation.

21 Mr. Fitzpatrick's hourly fee of approximately \$520
22 was not capped, apart from a notice requirement, and in the
23 event his fees and those of his professionals exceeded \$25,000
24 in any one month, he would give notification.

25 In his engagement letter there were provisions for

1 termination upon the finding of cause and such cause would
2 include a change in the direction by the debtors, a decision
3 not to pursue the Chapter 11, or failure to pursue the
4 negotiations in a productive manner.

5 In providing services Mr. Fitzpatrick did not act at
6 the direction of the debtors, did not receive salary or
7 benefits and his billings averaged approximately \$2,000 per
8 month.

9 Mr. Fitzpatrick testified and the Court finds
10 credible that at the time he was retained there were -- there
11 was no deal in place with the debtors and the ad hoc committee
12 and that he engaged in substantial negotiations and worked
13 towards modifications of the existing and initial term sheet
14 that had been presented. He further testified that he would
15 never accept an assignment in which he was brought in at the
16 last moment to rubberstamp prior concluded negotiations. The
17 term sheet presented to him did not obligate Mr. Fitzpatrick to
18 support any specific plan.

19 During an eight-month period following his retention
20 Mr. Fitzpatrick undertook due diligence on the debtors'
21 insurance and financial resources through the professionals
22 retained by the ad hoc committee. These were Gilbert and
23 Charter Oaks. In his view this made sense to share these
24 professionals given the interest of the future claimants and
25 the present claimants were aligned at this juncture.

1 Indeed, in ruling today this Court determines that
2 during the plan negotiation process the interest of the future
3 and present claimants were sufficiently aligned in efforts to
4 secure the highest level of funding from the debtor and its
5 insurers. As the Court in Thorpe Insulation noted, it was not
6 a problem for the FCR to engage in aligned representation as
7 part of the pre-petition negotiations.

8 Testimony confirms that Mr. Fitzpatrick through
9 counsel negotiated changes to the proposed draft plan,
10 disclosure statement, trust agreement and TDP. Mr. Fitzpatrick
11 confirmed that his retention by the debtors required that he
12 need only support a plan to which he consented and which
13 complied with the dictates of Section 524(g).

14 In reviewing the draft plan and trust documents, he
15 was given a black lined draft which referenced and compared
16 terms to documents previously used in prior cases in which he
17 was involved.

18 Importantly to this Court, in his testimony Mr.
19 Fitzpatrick confirms that his consent to the currently filed
20 plan and disclosure statement does not tie his hands or
21 preclude his consideration of any objections or proposed
22 modifications.

23 As to his pecuniary interest in being appointed, Mr.
24 Fitzpatrick confirms and the Court again finds credible that he
25 never demanded nor requested appointment as a post-confirmation

1 FCR, the practice was just followed in a way that had been done
2 in the past in prior cases, and that he has been and is willing
3 to serve as the FCR in this case without any such commitment
4 for post-confirmation employment. However, the Court notes Mr.
5 Fitzpatrick testified that he believes it is in the best
6 interest of claimants given his case knowledge to serve in a
7 future capacity.

8 According to Mr. Fitzpatrick, it is offensive to him
9 to suggest that the \$2,000 in monthly income is sufficient to
10 persuade him to undercut or sell out his obligation to future
11 claimants.

12 As to his concurrent work as an FCR in other pending
13 cases, he notes that the conflicts will not arise given that
14 the FCR does not manage or oversee the trusts and that that
15 responsibility is held by independent trustees.

16 Against this factual backdrop the U.S. Trustee and
17 the previously identified insurers contend that this Court
18 should elect not to appoint Mr. Fitzpatrick as he is not
19 disinterested and cannot establish that he has neither been nor
20 can be effective in protecting the interest of future
21 claimants.

22 In general, the objector suggests that his pre-
23 petition selection payments by the debtors and relationships
24 with the ad hoc committee members, along with his concurrent
25 role as FCR in other asbestos bankruptcy matters, serve as

1 disqualifying factors precluding his appointment.

2 Specifically and in no intended order, objectors
3 posit that the following should be disqualifying factors:

4 His selection and payment by an adversary, meaning
5 the debtors, with the approval by other adversaries, meaning
6 the present claimants.

7 The failure of the debtor to conduct a comprehensive
8 search for an FCR or to undertake a conflict review. Moreover,
9 the fact that the debtor did not retain Mr. Fitzpatrick's
10 services until two years into the negotiations after the
11 decision to file Chapter 11 had been made.

12 The fact that Mr. Fitzpatrick did not participate in
13 drafting the initial term sheet presented to him upon his
14 retention.

15 The fact that Mr. Fitzpatrick has asserted in
16 discovery the joint defense and common interest privilege with
17 respect to draft documents.

18 The fact that under his engagement with the debtor
19 Mr. Fitzpatrick was constrained and limited in his
20 consideration of avenues apart from a Chapter 11 plan which
21 would include a 524(g) injunction and that he was hired after
22 preparation of a term sheet.

23 The fact that Mr. Fitzpatrick was also constrained
24 because he could be terminated by the debtor for cause.

25 The fact that there was a lack of evidence that Mr.

1 Fitzpatrick substantially participated in the formulation of
2 the plan.

3 And probably most critical to the list put forward by
4 the U.S. Trustee and insurers is the fact that Mr. Fitzpatrick
5 has allegedly failed to challenge certain plan and trust
6 provisions in the -- and TDP provisions which have been
7 identified in studies and by parties in interest as being
8 improvident and the foundation for fraud and abuse.

9 Finally, objectors challenge Mr. Fitzpatrick's
10 independence given the carrot held out under the plan that he
11 serve as the future claims rep for the trust on a post-
12 confirmation basis.

13 The U.S. Trustee and insurers ask this Court to deny
14 appointment of Mr. Fitzpatrick contending that the debtors have
15 not established that he's disinterested, alternatively that he
16 can effectively represent future claimants due to his prior
17 role in pre-petition negotiations, and that he cannot provide
18 the fresh unbiased analysis of the plan or provide future or --
19 of the plan or future iterations of the plan.

20 Based on the existing record, this Court disagrees
21 and finds that the debtor have indeed established that Mr.
22 Fitzpatrick's disinterestedness as laid out in 11 U.S.C.
23 Section 101(14).

24 Moreover, this Court finds that the Mr. Fitzpatrick
25 has during the pre-petition period negotiated effectively and

1 can effectively represent the interest of the future claimants
2 going forward.

3 Indeed, this Court questions whether an inquiry into
4 a proposed representative or professional's ability to be
5 effective is appropriate at all. The term effective does not
6 appear either in the definition of disinterested under 101(14)
7 or the provisions of the 524(g)(4).

8 Demanding proof of effectiveness can become a
9 dangerous and slippery slope for all professionals in a
10 bankruptcy proceeding. This Court is not anxious to go down
11 that road.

12 Moreover, the Court is at a loss to understand just
13 how at the inception of a case any court can ever be assured of
14 the effectiveness of any professional or representative. As
15 acknowledged by the Office of the U.S. Trustee at oral
16 argument, when asked how the Court could be assured of any
17 applicant's effectiveness at the early stage of the proceeding,
18 the obvious answer to the Court was that the Court must look to
19 the applicant's experience and knowledge. Well, then Mr.
20 Fitzpatrick's 38 years and vast experience in pending cases
21 involving the asbestos industry should end the discussion.

22 As this Court stated, the standard applicable to
23 appointment of an FCR is whether he is disinterested under 11
24 U.S.C. 101(14). That section defines a disinterested person as
25 one who (a) is not a creditor, an equity security holder or an

1 insider, (b) is not and was not within two years before the
2 date of the filing of the petition a director, officer or
3 employee of the debtor, and (c) does not have an interest
4 materially adverse to the interest of the estate or of any
5 class of creditors or equity security holders by reason of any
6 direct or indirect relationship to, connection with or interest
7 in the debtor or for any other reason.

8 As to the burden of proof in this matter, clearly the
9 burden of persuasion rests with the debtor throughout the
10 motion from the outset as the proponent of the application to
11 establish that Mr. Fitzpatrick satisfies the disinterested
12 requirement. Notwithstanding, the burden of producing evidence
13 shifts to the objectors when they seek to establish the
14 existence of a materially adverse interest.

15 No one questioned that Mr. Fitzpatrick is not a
16 creditor, an equity security holder or an insider pursuant to
17 101(14)(A). The true inquiry focuses on whether Mr.
18 Fitzpatrick is also disinterested under both Sections
19 101(14)(B) and 101(14)(C).

20 The argument that Mr. Fitzpatrick is not
21 disinterested because his engagement constituted employment is
22 nonsensical and a nonstarter. His retention had none of the
23 traditional attributes of employment. His fees -- he received
24 no salary or benefits. His fees certainly were not capped.

25 The mere fact that he could be terminated if he

1 wasn't productive or if the debtor chose another direction is
2 not determinative. As in virtually all consulting
3 relationships, there must be an end or shelf life. Only kings,
4 queens and Article 3 judges have lifetime jobs.

5 The fact that he was paid by the debtor is likewise
6 not dispositive since this is consistent with the manner in
7 which all professionals in a bankruptcy, such as committee
8 counsel, financial advisors, investment bankers, are
9 compensated, whether or not they were engaged pre-petition.

10 As I've noted, Mr. Fitzpatrick's fees were not capped
11 and the agreement specifically provided that there would be no
12 employment relationship created, nor did Mr. Fitzpatrick
13 receive a promise of future employment. Indeed, in this
14 regard, Mr. Fitzpatrick testified and this Court accepts that
15 the future employment as an FCR post-confirmation was not and
16 is not a requirement, that the plan provides for such a role
17 for Mr. Fitzpatrick post-confirmation was not determinative in
18 his acceptance of the engagement, and that the Court accepts
19 his testimony that such process was simply the practice in
20 prior cases that was followed and in his view likewise serves
21 the interest of future claimants.

22 Mr. Fitzpatrick does not hold a material interest
23 adverse to the future claimants as defined under 11 U.S.C.
24 101(14)(C). Nothing about Mr. Fitzpatrick's service as the
25 pre-petition FCR gives rise to a relationship to, connection

1 with or interest in the debtors that poses a material interest
2 adverse to the future claimants.

3 Likewise, nothing about his service as a pre-petition
4 FCR for the debtors or his service as an FCR in other matters
5 gives rise to a material adverse interest for another reason,
6 as reflected in the Code.

7 The "or for any other reason" at the end of Section
8 101(14)(C) is a catchall clause that is sufficiently broad to
9 include any professional with an interest or relationship that
10 would even faintly color the independence or impartial attitude
11 required by the Code, and I'm citing to In re LTHM Houston -
12 Operations, LLC, 2014 WL 5449737 (Bankruptcy Southern District
13 of Texas 2014). This requires a fact-based inquiry based on
14 the totality of the circumstances and take into account all of
15 the facts of a particular bankruptcy case and the overall
16 objective of the bankruptcy system, and that's a cite to In re
17 Barnes, 2013 WL 3760570 (Bankruptcy District of Oregon, July
18 16th of 2013).

19 In evaluating the facts present in this case and with
20 a special regard for the congressional rehabilitative and
21 remedial objectives underlying Section 524(g), this Court does
22 not find that the objectors have come forward and produced
23 evidence of sufficient other reasons to disqualify Mr.
24 Fitzpatrick.

25 This Court has serious concerns that implementing the

1 standards and employing the disqualifying criteria espoused by
2 the U.S. Trustee and the insurers would for all practical
3 purposes render a pre-negotiated plan impossible for those
4 seeking a channeling injunction.

5 The pre-petition selection of, negotiations with and
6 payment to any pre-petition FCR is critical for a successful
7 pre-negotiated asbestos case. As made clear in the Congoleum
8 case, the Third Circuit continues to regard pre-negotiated
9 asbestos cases as a valid and valuable tool for expeditious and
10 effective employment to serve the needs of debtors and all
11 claimants alike. This Court is not prepared to second guess
12 Congress in its implementation or the Third Circuit in its
13 positive assessment of the process.

14 Have the recent studies, academic articles and
15 judicial examinations of the prepackaged and ordinary Chapter
16 11 asbestos cases raised valid concerns for this Court?
17 Absolutely. Does this Court take the Third Circuit's directive
18 in Congoleum to heart in mandating enhanced scrutiny of the
19 process? Again, absolutely. This Court intends to fulfill its
20 role as a gatekeeper by holding the debtor and Mr. Fitzpatrick
21 to their commitments to negotiate and review the objections
22 raised.

23 Once again this Court accepts Mr. Fitzpatrick's
24 testimony that he is under no constraints or restrictions from
25 considering or agreeing to modification of the plan or the

1 trust documents.

2 This Court will not however imperil this company's
3 reorganization, add layers of additional administrative
4 expenses, place at risk the jobs of hundreds of employees, or
5 unnecessarily jeopardize the recoveries for present and future
6 claimants by delaying this reorganization through the
7 appointment of a new future rep, who must retain professionals,
8 engage in his or her own due diligence, only to reach the same
9 point of review to which Mr. Fitzpatrick assents at this
10 present time.

11 It is this Court's hope and expectation that through
12 continued negotiation the parties here will reach an accord on
13 a plan, trust and TDP documents which address valid criticisms
14 and concerns and serve as a protocol for future cases and for
15 use by future FCRs. This Court will strive to ensure that such
16 efforts are undertaken.

17 Finally, as to the issues relative to Mr.
18 Fitzpatrick's failure to previously raise certain objections or
19 on -- as to issues in the current plan and trust documents, I
20 note the obvious, no court previously has mandated the changes
21 proffered in the objections raised to date, and it is
22 unsurprising that professionals have continued to use
23 approaches which they regard as successful and appropriate.
24 This Court does not view such positions taken by Mr.
25 Fitzpatrick or his counsel as necessarily disqualifying him as

1 the FCR in this case.

2 That being said, the debtor, the committee and Mr.
3 Fitzpatrick should understand that there can be value and valid
4 reasons to -- I'm sorry, to challenge and reconsider the status
5 quo. However, the Court likewise recognizes that academic
6 articles and studies by think tanks may often be bottomed on
7 inaccurate assumptions or specific agendas.

8 In sum, the Court commits to according the issues
9 heightened scrutiny, but sees no reason to retard the process
10 by appointing a different FCR.

11 For these reasons the motion filed by the debtors to
12 retain Mr. Fitzpatrick as an FCR will be granted. The Court
13 will enter the order that was annexed to the original motion.
14 Thank you, all. See you at the next hearing. The matter --

15 UNIDENTIFIED ATTORNEY: Your Honor.

16 THE COURT: Yes?

17 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

18 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

19 THE COURT: All right. Thank you.

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C E R T I F I C A T I O N

I, COLETTE MEHESKI, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Colette Meheski

COLETTE MEHESKI

J&J COURT TRANSCRIBERS, INC. DATE: October 17, 2018