

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN RE:

THE FAIRBANKS COMPANY,

Debtor.

Chapter 11

Case No. 18-41768-PWB

Judge Bonapfel

**REPLY IN FURTHER SUPPORT OF DEBTOR’S MOTION FOR
AN ORDER APPOINTING JAMES L. PATTON, JR., AS LEGAL
REPRESENTATIVE FOR FUTURE ASBESTOS CLAIMANTS**

The Fairbanks Company (the “Debtor”), the debtor and debtor-in-possession in the above-captioned chapter 11 case (this “Chapter 11 Case”), hereby replies to the objection [Doc. No. 133] (the “Objection”) filed by the Office of the United States Trustee (the “UST”) to the Debtor’s motion [Doc. No. 117] (the “Motion”) for the entry of an order, pursuant to sections 105(a), 524(g)(4)(B)(i), and 1109(b) of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”), appointing James L. Patton, Jr. as the legal representative (the “Future Claimants’ Representative”) for future asbestos personal injury claimants of the Debtor and, in further support thereof, respectfully represents as follows:¹

PRELIMINARY STATEMENT

1. This is a pre-planned chapter 11 case of a small, local business that was filed for the sole purpose of resolving all existing and future Asbestos Claims, arising from the production of an asbestos-containing product in a Binghamton, New York facility that the Debtor sold in 1986, through formation of a plan of reorganization pursuant to section 524(g) of the Bankruptcy Code. To resolve the Asbestos Claims, the Debtor intends to seek confirmation of a plan of reorganization that will provide for the establishment of an asbestos personal injury trust

¹ Capitalized terms used but not defined in this reply have the meanings given in the Motion.

into which certain assets of the Debtor, including the proceeds of a pre-petition settlement agreement with Liberty Mutual Insurance Company and certain other insurance rights, will be transferred. The trust will assume liability for all Asbestos Claims and use its assets to review and resolve the Asbestos Claims and, if eligible, compensate holders of Asbestos Claims. In conjunction with the establishment of the trust, the Debtor will seek the issuance of a Channeling Injunction under section 524(g) of the Bankruptcy Code to enjoin any entity from recovering on such Asbestos Claims from the Debtor and certain other protected parties. The principal terms of the Debtor's proposed plan of reorganization were set forth in a pre-petition plan support agreement signed by Weitz & Luxenberg, P.C., on behalf of holders of approximately half of the current Asbestos Claims pending against the Debtor. See Doc. No. 68.

2. Understanding that the principal source of funding for the asbestos personal injury trust was secured by a pre-petition settlement agreement and that approximately half of holders of current Asbestos Claims supported a general outline of a proposed plan, the Debtor was optimistic at the outset of this Chapter 11 Case that it could limit its time in bankruptcy and keep administrative expenses relatively low, thereby preserving as much value as possible for holders of Asbestos Claims and minimizing the business disruptions attributable to a lengthy stay in bankruptcy that this small company of approximately thirty-six local employees can ill afford. To maintain the positive momentum built by the Debtor pre-petition, the Debtor emphasized at the first-day hearing the need for the prompt appointment of an official committee of asbestos claimants and a Future Claimants' Representative. See Transcript of First Day Hearing ("Fairbanks Tr.") at 9 and 18, In re The Fairbanks Co., No. 18-41768-PWB (Bankr.

N.D. Ga. Aug. 2, 2018).² In an asbestos-related chapter 11 case, a debtor simply cannot make meaningful progress towards confirmation of a plan without these appointments.

3. To aid in the appointment process, the Debtor filed (i) a list of the ten law firms that represent the largest number of asbestos claimants on the Petition Date from which the UST could solicit interest in serving on a committee, Doc. No. 1, and (ii) a motion for an order appointing Lawrence Fitzpatrick as the Future Claimants' Representative on August 10, 2018—only ten (10) days after the Petition Date. Doc. No. 33. At the request of the UST, the Debtor (a) provided additional documentation to the UST to assist in its appointment of a committee in mid-August, and (b) agreed not to set its motion for appointment of a Future Claimants' Representative for hearing pending the appointment by the UST of a committee and the committee's retention of counsel. See Fairbanks Tr. at 44-45. Despite the Debtor's encouragement to appoint a committee quickly, the UST did not appoint the Committee until October 11, 2018—more than two months after the Petition Date. See Doc. No. 92. The Committee filed applications to retain counsel on November 13, 2018, Doc. Nos. 104 and 105, and the Court entered orders granting those applications on November 15, 2018. Doc. Nos. 107 and 108.

4. Pursuant to the Debtor's prior agreement with the UST, it was only after November 15, 2018, that the Debtor could proceed with its motion to appoint a Future Claimants' Representative. Unfortunately, by that time, Mr. Fitzpatrick requested that the motion seeking his appointment be withdrawn due, in part, to the time commitment required as a result of the ongoing challenges by the UST to his appointment as Future Claimants' Representative in In re Duro Dyne Nat'l Corp., No. 18-27963-MBK (Bankr. D.N.J.). Although

² A certification of counsel containing copies of each of the certified transcripts cited in this reply is attached hereto as an exhibit for the convenience of the Court and parties in interest.

Duro Dyne is addressed herein, it is important to note at the outset that all of the UST's objections to Mr. Fitzpatrick's appointment as Future Claimants' Representative in that case were overruled, and the debtors' motion to appoint Mr. Fitzpatrick was granted, subject to a pending appeal by the UST. *Order Appointing a Legal Representative for Future Asbestos Personal Injury Claimants Effective as of the Petition Date, In re Duro Dyne Nat'l Corp.*, No. 18-27963-MBK (Bankr. D.N.J. Oct. 17, 2018), Doc. No. 191; *Transcript of Court Decision on Debtors' Motion* ("Duro Dyne Oct. 16 Tr.") at 23, *In re Duro Dyne Nat'l Corp.*, No. 18-27963-MBK (Bankr. D.N.J. Oct. 16, 2018). With Mr. Fitzpatrick no longer available to serve in this Chapter 11 Case, the Debtor resumed its search for a Future Claimants' Representative and, in consultation with counsel to the Committee, determined to move the Court for the appointment of Mr. Patton. The Motion seeking Mr. Patton's appointment was filed with the Court on November 20, 2018.

5. Now, after this Chapter 11 Case has been pending for nearly five months, and with the understanding dating back to the Petition Date that the Debtor desired to appoint a Future Claimants' Representative as quickly as possible to move this Chapter 11 Case forward, the UST for the first time indicates its desire for the Court to run a thirty-day open application process for the role of Future Claimants' Representative. The UST asks the Court to implement this time-consuming and wasteful exercise despite the facts that (i) there is no precedent for the UST's proposed process, (ii) despite the opportunity, no party-in-interest in this Chapter 11 Case other than the Debtor has filed a motion in the last five months to appoint any alternative candidate, and (iii) there already is a pending motion before the Court to appoint a disinterested and eminently-qualified individual to the role that, if granted, will allow the Debtor to finally move this Chapter 11 Case forward rather than remaining at the starting gate for at least another

thirty days. The UST's delay in seeking the requested relief is prejudicial to the Debtor and constitutes sufficient cause, by itself, to overrule the objection. If the UST wanted to use this small business Debtor as the nationwide exemplar for a new and untested process for the appointment of a Future Claimants' Representative—setting aside years of established precedent—it should have filed a motion seeking such relief at the outset of this Chapter 11 Case so that the issue could have been resolved well before now.

6. The reality is that the UST never filed such a motion, and the only requested relief that is properly before the Court is the Motion to appoint Mr. Patton as the Future Claimants' Representative. The Motion should be granted. The procedure utilized by the Debtor to seek Mr. Patton's appointment is consistent with the Bankruptcy Code and years of applicable precedent. Mr. Patton is "disinterested," as such term is defined in section 101(14) of the Bankruptcy Code, and undoubtedly is well-qualified. The Court's inquiry should end there. Any attempt by the UST to impose some perceived higher, yet ill-defined standard for the appointment of a Future Claimants' Representative, that cannot be found anywhere in the Bankruptcy Code and that has no precedent, should be denied. Further, the process proposed by the UST should not be approved because it is an impractical, time-consuming, and wasteful exercise that is without precedent and that will benefit no one.

ARGUMENT

I. THE MOTION SHOULD BE GRANTED BECAUSE IT IS PROCEDURALLY PROPER AND MR. PATTON IS "DISINTERESTED" AND WELL-QUALIFIED TO SERVE AS FUTURE CLAIMANTS' REPRESENTATIVE.

7. The only motion relating to appointment of a Future Claimants' Representative currently pending before the Court is the Motion, pursuant to which the Debtor has requested that the Court appoint Mr. Patton. The only relevant inquiries to the Court's determination of whether to grant or deny the Motion are whether the Motion is proper from a

procedural perspective and, if so, whether Mr. Patton is “disinterested” and qualified to serve as Future Claimants’ Representative. The UST objects to the procedure used by the Debtor to seek Mr. Patton’s appointment. The UST also objects on the basis of its belief that additional disclosures should be required to satisfy some ill-defined standard other than “disinterestedness.” The Objection should be overruled and the Motion should be granted because (a) the appointment of a Future Claimants’ Representative by the Court upon the motion of a debtor, after notice and hearing, is consistent with the Bankruptcy Code and years of applicable precedent and (b) Mr. Patton is “disinterested” and qualified to serve as Future Claimants’ Representative.

A. The Appointment Of A Future Claimants’ Representative By The Court Upon Motion Of The Debtor Is Consistent With The Bankruptcy Code And Years Of Applicable Precedent.

8. The Debtor and the UST agree on a number of fundamental principles relating to the necessity of and procedure for appointing a Future Claimants’ Representative. *First*, section 524(g) of the Bankruptcy Code requires the appointment of a Future Claimants’ Representative as a prerequisite to the issuance of a Channeling Injunction. 11 U.S.C. § 524(g)(4)(B)(i). *Second*, a Future Claimants’ Representative must be appointed in this Chapter 11 Case for the Debtor to achieve its reorganization goals. *Third*, only the Court has the authority to appoint a Future Claimants’ Representative. 11 U.S.C. § 524(g)(4)(B)(i); Fed. Ins. Co. v. Grace, No. CIV.A. 04-844, 2004 WL 5517843, *8 (D. Del. Nov. 22, 2004). *Fourth*, the appointment of a Future Claimants’ Representative is within the Court’s discretion. Grace, 2004 WL 5517843, *5. *Fifth*, the Bankruptcy Code does not prescribe the method, timing, or standard for selecting the Future Claimants’ Representative. Id. *Sixth*, the UST does not have statutory authority to propose candidates for the role of Future Claimants’ Representative and historically has declined to become involved in the appointment process. *Transcript of Second Day Hearing*

(“Duro Dyne Oct. 1 Tr.”) at 36, In re Duro Dyne Nat’l Corp., No. 18-27963-MBK (Bankr. D.N.J. Oct. 1, 2018); *United States Trustee’s Statement Regarding Application of the Debtors for the Appointment of a Legal Representative for Future Asbestos Claimants*, In re W.R. Grace, No. 01-01139 (Bankr. D. Del. May 14, 2004), Doc. No. 5575, at 3 (“The UST must respectfully decline this invitation [to appoint an FCR], and requests that the Court not order the UST to make the appointment, because the UST lacks statutory authority to select the Futures Representative.”).

9. The dispute raised by the Objection is the appropriate method for selecting the Future Claimants’ Representative. The method utilized by the Debtor in this Chapter 11 Case—proposing a specific candidate for the Court’s consideration through a motion and upon notice and a hearing—is consistent with the Bankruptcy Code and has been accepted by bankruptcy courts considering this issue across the country for many years.

10. Section 524(g)(4)(B)(i) of the Bankruptcy Code provides that a Channeling Injunction is enforceable against the holder of a future demand if, “as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind.” 11 U.S.C. § 524(g)(4)(B)(i).

11. Consistent with section 524(g) of the Bankruptcy Code, the Motion requests that *the Court* appoint Mr. Patton as Future Claimants’ Representative in the exercise of *the Court’s* discretion. Although not expressly mandated by the Bankruptcy Code, this procedure is entirely consistent with the text of the statute. Indeed, there is nothing in section 524(g) or anywhere else in the Bankruptcy Code that suggests that the debtor (or any other party-in-interest) should *not* propose the individual to be appointed as Future Claimants’

Representative. To the contrary, since section 524(g) is a plan provision and a Future Claimants' Representative does not exist outside of the confines of a plan that proposes a Channeling Injunction, it is appropriate that the debtor, as the plan proponent, propose a Future Claimants' Representative for the Court's consideration, just like the plan proponent proposes all other plan provisions. Further, it is the identity of the person sponsored, not the identity of the sponsor, that is relevant to the Court's determination, and the Court is free to appoint or reject the proposed individual within its discretion.

12. Not only is the procedure utilized by the Debtor in this Chapter 11 Case consistent with the text of the Bankruptcy Code, but it has been the predominant practice for the appointment of Future Claimants' Representatives in asbestos chapter 11 cases. *See, e.g., Order Appointing a Legal Representative for Future Asbestos Person Injury Claimants Effective as of the Petition Date, In re Duro Dyne Nat'l Corp.*, No. 18-27963-MBK (Bankr. D.N.J. October 17, 2018), Doc. No. 191; *Order Appointing Sander L. Esserman as Legal Representative for Future Asbestos Claimants, In re Bestwall LLC*, No. 17-31795-LTB (Bankr. W.D.N.C. Feb. 23, 2018), Doc. No. 278; *Amended Order Appointing Lawrence Fitzpatrick as Legal Representative for Future Asbestos Claimants Nunc Pro Tunc to July 18, 2017, In re Sepco Corp.*, No. 16-50058-AMK (Bankr. N.D. Ohio Sept. 18, 2017), Doc. No. 275; *Default Order Granting Application to Employ Gary Philip Nelson as the Legal Representative of Holders of Future Asbestos Demands Nunc Pro Tunc as of 11/30/2015, In re Geo. V. Hamilton, Inc.*, No. 15-23704-GLT (Bankr. W.D. Pa. Dec. 23, 2015), Doc. No. 199; *Order Appointing Lawrence Fitzpatrick as Legal Representative for Future Claimants, In re Kaiser Gypsum Co., Inc.*, No. 16-31602-JCW, (Bankr. W.D.N.C. Oct. 19, 2016), Doc. No. 99; *Order Approving and Authorizing the Appointment of Lawrence Fitzpatrick as the Future Claimants' Representative, Nunc Pro Tunc*

to July 11, 2013, In re Rapid-American Corp., No. 13-10687-SMB (Bankr. S.D.N.Y. Sept. 3, 2013), Doc. No. 129; *Order Appointing Legal Representative for Future Claimants*, In re Metex Mfg. Corporation, No. 12-14554-CGM (Bankr. S.D.N.Y. Jan. 16, 2013), Doc. No. 93; *Order Authorizing and Appointing Eric D. Green as Legal Representative for Future Claimants*, In re Specialty Prods. Holding Corp., No. 10-11780-JKF (Bankr. D. Del. Oct. 18, 2010), Doc. No. 449; see also Eric D. Green *et al.*, *Prepackaged Asbestos Bankruptcies: Down But Not Out*, 63 N.Y.U. ANN. SURV. AM. L. 727, 756 (2008). In short, the Motion follows a well-established and proper procedure for the appointment of a Future Claimants' Representative. The UST does not dispute that this historical practice has been used and endorsed by bankruptcy courts around the country.

13. A similar procedural argument was raised by the UST in Duro Dyne. The UST complained that “the Debtors’ request to ratify their nominee” for the role of Future Claimants’ Representative was “unreasonable” and argued that there should be an “open” selection process. See *Objection of the United States Trustee to Debtors’ Motion for an Order Appointing Lawrence Fitzpatrick as Representative for Future Claimants*, No. 18-27963-MBK (Bankr. D.N.J.), Doc. No. 94 at ¶¶ 18-20. Despite the UST’s protestations, the Bankruptcy Court considered the debtors’ motion to appoint Mr. Fitzpatrick on the merits, analyzed Mr. Fitzpatrick’s “disinterestedness” and qualifications, and appointed Mr. Fitzpatrick without opening the process for consideration of other candidates. See Duro Dyne Oct. 16 Tr. at 10-23.

14. Because the Motion is consistent with the Bankruptcy Code and follows well-established precedent, the UST cannot in good faith argue that the Motion is procedurally improper. Rather, the UST can propose only what it views as a better procedure, albeit one that is time-consuming, untested, and unsupported by any precedent. But, the UST has failed—for

almost five months since this Chapter 11 Case was filed—to file a motion asking the Court to approve alternative appointment procedures and explaining why such procedures are in the best interest of the Debtor’s estate. The UST’s delay should be fatal to its request. The Court should decline to entertain the UST’s improper and late request to set new and different appointment procedures and focus instead on adjudicating the merits of the Motion to appoint Mr. Patton.

B. The Applicable Standard In Appointing A Future Claimants’ Representative Is The Disinterestedness Test.

15. In the absence of express guidance in section 524(g) of the Bankruptcy Code, courts have held uniformly that the applicable standard for assessing the proposed appointment of a Future Claimants’ Representative is “disinterestedness” under section 101(14) of the Bankruptcy Code. The “correct disqualification standard” for assessing the appointment of a legal representative under section 524(g) is the “disinterested” person standard. Fed. Ins. Co. v. W.R. Grace (In re W.R. Grace), No. 04-00844 (RLB), 2004 WL 5517843, *7 (D. Del. Nov. 22, 2004) (“As the *UNR* court employed this [disinterested] disqualification standard, this Court believes that courts appointing future claimants’ representative should do so as well in order to maintain the ‘high standards’ of *UNR*, which were referenced by Congress.”).

16. As explained by Judge Christopher S. Sontchi in the context of a motion to appoint a Future Claimants’ Representative, the “disinterested” standard under section 101(14) is the highest standard prescribed in the Bankruptcy Code:

Specifically in connection with what standard applies, I am going to apply the disinterestedness test. And I would note that the disinterested test is the highest level of duty or standard in the Bankruptcy Code for the appointment of anybody. It—the legislative history of the disinterestedness test goes back 70 years and came out of the equity receivership issues that were identified in the 1930’s as being abusive. And were designed specifically to get pre-petition committees like they existed in those days, as well as, lawyers who were appointing themselves all the time out of the system and it’s very strict. So I don’t think the disinterestedness

test is some sort of layup, it's quite stringent. And I also think it's the appropriate standard to apply in this case since none is specifically identified.

Transcript of Proceedings (“Leslie Tr.”) at 70-71, In re Leslie Controls, Inc., No. 10-12199-CSS (Bankr. D. Del. August 9, 2010).

17. The applicable standard was most recently addressed in connection with the UST's objection to the appointment of Mr. Fitzpatrick as Future Claimants' Representative in Duro Dyne. Judge Michael B. Kaplan declined to deviate from precedent and rejected the UST's call for the application of a standard other than “disinterestedness,” remarking:

Disinterestedness is the standard for Chapter 11 trustees on 1104 who are representatives of the bankruptcy estate who need to address the concerns of multiple constituent bodies, all claimants. . . . And yet we look to them to be disinterested and I am unfamiliar with any cases that impose a higher burden, so why would I impose a differing standard by another type of representative of even a smaller group in essence, a smaller segment of the creditor constituency.

Duro Dyne Oct. 1 Tr. at 79-80.

18. Mr. Patton is “disinterested.” As stated in the Patton Declaration, he (i) is not a creditor, equity security holder, or insider of the Debtor, (ii) is not and was not, within two years of the Petition Date, a director, officer, or employee of the Debtor, and (iii) does not have an interest materially adverse to the interest of the Debtor's estate or any class of creditors or equity security holders, including future asbestos claimants. Patton Decl. ¶ 8; see 11 U.S.C. § 101(14).

19. Mr. Patton also undoubtedly is experienced and well-qualified. Mr. Patton is the chairman of the law firm Young Conaway and a partner in its Bankruptcy and Corporate Restructuring section. Patton Decl. ¶ 2. He has more than thirty years of experience with asbestos litigation, bankruptcies, and settlement trusts. Id. He specializes in corporate

restructurings, mass tort insolvencies, complex asbestos bankruptcies, and post-confirmation settlement trusts. Id. Mr. Patton has served as the Future Claimants' Representative in three asbestos-related bankruptcy cases, having been found by the courts in those cases to have possessed the experience and qualifications necessary to serve in that role. Id. at ¶¶ 3-4 In addition, Mr. Patton and Young Conaway have represented the Future Claimants' Representative in more than twenty other asbestos-related bankruptcy cases. Id. The UST does not and cannot challenge Mr. Patton's credentials.

20. Mr. Patton also has an excellent reputation among the bench and bar. One of the arguments raised by an insurer in opposition to Mr. Patton's appointment as Future Claimants' Representative in Leslie Controls is similar to that posed by the UST in this Chapter 11 Case—that the Court should not appoint Mr. Patton because he was proposed by debtors and not *sua sponte* by the Court. Overruling the insurer's objection, Judge Sontchi not only endorsed the procedure utilized by the debtors to propose Mr. Patton, but also Mr. Patton himself, stating:

Obviously, Mr. Patton is well-known to the asbestos bar. He's well-known to the bankruptcy bar nationally. He's well-known to the Delaware bar. And I have no doubt in my mind that he will work diligently on behalf of the future claimants. And I think it's an interesting comment to say well the Court should appoint him and not the debtor. Well I am—the act that I'm being asked to do is to appoint him. He's been brought forward by the debtor. But if the debtor were simply to come to me and say look, Judge, you need to find us a future claims representative, quite frankly I would have called Mr. Patton because I know of his experience in the area and I know of his reputation.

Leslie Tr. at 72-73. As part of certain additional findings of fact in support of the order affirming confirmation of the Leslie Controls plan, Judge Jerome B. Simandle made the following findings with respect to Mr. Patton's appointment and expertise:

Mr. Patton . . . was clearly a qualified choice for the position, who exercised his responsibilities in good faith. He spoke with knowledge and evident wisdom with respect to the challenges of

representing the future claimants, revealing a reassuring level of sophistication in his analysis of the issues.

Additional Findings in Support of Affirmation Order (“Leslie Add’l Findings”) at ¶ 10, In re Leslie Controls, Inc., No. 10-12199-CSS (Bankr. D. Del. March 25, 2011), Doc. No. 28.

21. In light of Mr. Patton’s disinterestedness, his extensive experience in asbestos-related bankruptcy cases, and his sterling reputation among the bench and bar, the Debtor requests that the Court exercise its discretion by appointing Mr. Patton as the Future Claimants’ Representative in this Chapter 11 Case.

II. EVEN IF THE COURT IS INCLINED TO ENTERTAIN THE UST’S REQUEST TO ESTABLISH NEW APPOINTMENT PROCEDURES, SUCH PROCEDURES SHOULD BE REJECTED AS A WASTEFUL EXERCISE THAT IS NOT IN THE BEST INTERESTS OF THE ESTATE.

22. The UST’s request for an order imposing alternative appointment procedures—which was made in the Objection rather than upon a motion and after notice and a hearing—is not properly before the Court. See Fed. R. Bankr. P. 9014(a) (“[i]n a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought.”). Even if the UST’s request was properly before the Court, the UST’s delay in requesting this bespoke and unprecedented procedure for nearly five months—until the two business days before the hearing on the Motion—when the Debtor had a motion to appoint a Future Claimants’ Representative on file with the Court since August 10, 2018, is prejudicial to the Debtor and should be overruled for that reason alone.

23. Even if the Court is inclined to entertain the UST's request to establish new appointment procedures, such procedures should be rejected given the circumstances of this case.³

24. *First*, the Debtor already has proposed a "disinterested" and qualified candidate with an exemplary reputation who has the support of the Committee and who is ready, able, and willing to serve as the Future Claimants' Representative in this Chapter 11 Case. As a result, there is no need or benefit to the Debtor or its creditors to waste valuable time and estate resources holding an open application process over thirty days for the mere possibility of finding a second or third qualified candidate. Indeed, it is more likely than not that such an open application process would not yield any other candidate nearly as experienced and qualified as Mr. Patton for this role.

25. Experience is important in this context. As Judge Simandle observed, having a Future Claimants' Representative that is experienced with asbestos trusts brings "unique value" to an asbestos-bankruptcy case because "the successful establishment and operation of such trusts turns on difficult predictions that are easier to make in the light of the experience of similar trusts." Leslie Add'l Findings at ¶ 10. Judge Kaplan recently noted his agreement with "Judge Simandle's admonitions and assessments as to the true value of having an experienced FCR in the process." Duro Dyne Oct. 1 Tr. at 75. The Debtor also values prior experience serving as Future Claimants' Representative. An inexperienced Future Claimants' Representative would need to use precious time and resources learning on the job that this Chapter 11 Case cannot support.

³ In the event that the Court permits supplemental briefing in connection with the Motion, the Debtor reserves its right to make additional arguments as to why section 524(g)(4)(B)(i) does not permit the procedure for which the UST advocates.

26. *Second*, the UST desires a process whereby any party-in-interest may propose a candidate to serve as Future Claimants' Representative. Yet, that is no different than the process available currently. The Debtor does not claim to be the only party-in-interest that has a right to move the Court to appoint a Future Claimants' Representative. Indeed, just as there is nothing in the Bankruptcy Code prohibiting a debtor from proposing a candidate, there also is nothing in the Bankruptcy Code prohibiting any other party-in-interest from proposing a candidate to serve as Future Claimants' Representative. Despite this case being filed nearly five months ago, no other party-in-interest has come forward with another proposal.

27. *Third*, further delay of the Debtor's ability to move this Chapter 11 Case forward through plan negotiations with the Committee and an appointed Future Claimants' Representative would be detrimental to the estate. Asbestos cases are expensive, in large part because they involve complicated issues and numerous parties-in-interest. As the Debtor explained during the first-day hearing, the Debtor's operating cash flow cannot support the payment of administrative expenses in this Chapter 11 Case. Rather, the professionals' fees and expenses incurred in this Chapter 11 Case are being funded by a cash advance that Liberty Mutual made available to the estate prior to the Petition Date against Liberty Mutual's settlement payment. Consequently, the longer the Debtor's stay in bankruptcy and the more fees and expenses incurred, the less that will be available for ultimate distributions to asbestos claimants. For these reasons, it is in all parties' best interest to move this Chapter 11 Case forward as efficiently as possible. There is nothing efficient about the UST's open application process.

28. At bottom, the UST is asking the Court to implement a process that will delay any progress in this Chapter 11 Case for at least another thirty days, consume valuable estate resources that could otherwise be saved for the benefit of creditors, and yet would leave

the future claimants in no better position than they would have been with the immediate appointment of Mr. Patton. The UST's proposal elevates its desire to change the status quo and set new precedent in asbestos bankruptcy cases nationally over the best interests of the parties in this Chapter 11 Case. In the context of this Chapter 11 Case, the UST's proposal is an impractical, time-consuming, and wasteful exercise that will benefit no one.

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form attached to the Motion as Exhibit B, (i) overruling the Objection, (ii) granting the Motion, (iii) appointing James L. Patton, Jr. as the Future Claimants' Representative in this Chapter 11 Case, and (iv) granting such other and further relief as may be just and proper.

Dated: December 17, 2018

Respectfully submitted,

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