UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In re:	)	Chapter 11
	)	
	)	Case No. 18-41768-PWB
THE FAIRBANKS COMPANY,	)	
	)	
Debtor.	)	
	)	
	)	

AMENDED OBJECTION OF THE UNITED STATES TRUSTEE TO DEBTOR'S MOTION FOR AN ORDER APPOINTING JAMES L. PATTON, JR., AS LEGAL REPRESENTATIVE FOR FUTURE ASBESTOS CLAIMANTS

The United States Trustee, by his undersigned counsel, objects to the motion of The Fairbanks Company (the "Debtor") for an order appointing James L. Patton, Jr., as the legal representative of future asbestos claimants (the "FCR") in the above-captioned case under 11 U.S.C. § 524(g)(4)(B)(i) (the "Motion").

The United States Trustee does not object to the Debtor's general request that an FCR should be appointed, which is an important and appropriate form of relief in a chapter 11 case involving significant asbestos liabilities. But the United States Trustee does object to the appointment of Mr. Patton as FCR through the Motion, which neglects the Court's statutory authority to select independently the FCR and exercise its discretion in soliciting or considering other candidates. The absence of any statutory role for the debtor or present claimants in the selection of the FCR confirms that it is a highly sensitive role that requires complete independence. For this reason, and in order to ensure that the Court is able to choose from the broadest and best possible pool of candidates, the United States

Trustee requests that the Court: (i) deny the motion seeking to appoint Mr. Patton; (ii) defer naming an FCR for at least thirty days; and (iii) during such period, expressly authorize additional candidates to submit their qualifications to the Court, or to be nominated by parties in interest, for the Court's consideration. Finally, if the Court chooses to consider Mr. Patton, he and the Debtor should be required to supplement their disclosures by providing additional information about the circumstances of Mr. Patton's selection; the existence of possible conflicting interests held or represented by Mr. Patton because of his and his firm's duties in other asbestos-related cases; and the process, if any, by which Mr. Patton and his firm propose to address and resolve any conflicts that arise in the future.

BACKGROUND

1. The Motion is the second motion filed by the Debtor seeking appointment of an FCR in this case. On August 10, 2018, the Debtor filed a motion for an order appointing Lawrence Fitzpatrick as FCR. (Dkt. 33). Notwithstanding that his own appointment had not yet been approved, Mr. Fitzpatrick sought court approval to retain two law firms, including Young, Conaway Stargatt & Taylor, LLP ("YCST"). (Dkt. 38). Mr. Fitzpatrick withdrew both law firm applications on August 15, 2018. On November 20, the Debtor withdrew the motion for appointment of Mr. Fitzpatrick and filed the present Motion—which seeks appointment of Mr. Patton, the chairman of the YCST firm.

2. In his declaration submitted in support of the Motion (the "Patton Declaration"), Mr. Patton discloses that YCST currently serves as counsel to the FCR in four other pending chapter 11 cases. In addition, Mr. Patton serves as the legal representative for future claimants for four asbestos-related trusts that have been created in confirmed chapter 11 cases, and YCST serves or has served as

counsel to the legal representative in approximately two dozen other such cases. (Patton Decl. ¶ 4). With a few exceptions, the list of cases in which Mr. Patton and YCST have participated appears to include nearly every major asbestos-related chapter 11 bankruptcy case filed within the last 20 years, most of which were notable for the absence of anti-fraud protections and of safeguards against mismanagement and inflated professional fees built into the trusts.[1] *See* footnote 4, *infra*, p. 10.

3. No disclosure statement or plan of reorganization has been filed. Furthermore, despite YCST's earlier, withdrawn application for retention by Mr. Fitzpatrick, the Motion and the accompanying declaration of Mr. Patton do not disclose whether Mr. Patton or YCST have rendered services in connection with this case or the Debtor.

[1] Mr. Patton is not necessarily responsible for the positions taken by his clients when he acted only as counsel to the FCR. But his own role as an asbestos trust fiduciary, coupled with the law firm's frequent representation of fiduciaries in asbestos cases, illustrates the closed network of professionals who administer asbestos cases and recycle many of the same trust terms that omit important anti-fraud provisions and cost controls that the United States Trustee Program ("USTP") deems essential for reasons discussed *infra*. Based on the disclosures made in the application, Mr. Patton's involvement in asbestos trust matters does not demonstrate the independence needed to vindicate the interests of those who may suffer from asbestos disease years into the future.

DISCUSSION

A. The Critical Role of the FCR in Asbestos Bankruptcy Cases

4. As the Debtor has acknowledged, a principal objective of the eventual plan will be to resolve the Debtor's historic and future asbestos liabilities, which may be accomplished through an injunction under section 524(g) of the Bankruptcy Code. *See* Motion ¶ 15. The FCR will play a critical role in this process. In contrast to a traditional chapter 11 case, where current creditors and equity holders are the only parties whose rights will be directly affected, a case that seeks an asbestos channeling injunction under 11 U.S.C. § 524(g) will also affect the rights of future asbestos victims who have not yet manifested harm from the Debtor's products and who may not even be aware of these bankruptcy cases. For those victims—who may not show signs of illness for years or even decades after the plan is confirmed—the section 524(g) injunction will cut off any right they may have to recover against the reorganized debtor, the debtor's insurers, and certain related parties and will force them to look exclusively to a post-bankruptcy trust for compensation. *See In re Federal-Mogul Global Inc.*, 684 F.3d 355, 357 (3rd Cir. 2012) (section 524(g) injunction "channel[s] all current and future claims based on a debtor's asbestos liability to a personal injury trust").

5. To protect the due process rights of these future claimants and to ensure that they would receive effective and independent representation, Congress created the position of FCR—a unique type of bankruptcy fiduciary that exists only in chapter 11 asbestos cases involving a section 524(g) injunction. *See* 11 U.S.C. § 524(g)(4)(B)(i). Although the Bankruptcy Code does not specify any particular duties for the FCR, the FCR will typically participate in the negotiation of the plan of reorganization and may object to any plan that is unfair to future

claimants. The FCR is not a mere adjunct to the debtor or to the committee of present asbestos claimants. Rather, the FCR is expected to represent interests that are equally adverse both to the debtor and to all current asbestos claimants. *See In re Amatex Corp.*, 755 F.2d 1034, 1043 (3d Cir. 1985) ("[B]ecause of the adverse interests of the other parties, it would appear that future claimants require their own representative").

6. Not only is the FCR adverse to the debtor and the debtor's insurers, against whom future tort claims will be asserted, but the FCR is also adverse to present claimants, who have competing interests regarding, among other things, the amount of funds that should be set aside to pay future claims. For this reason, as one bankruptcy court has noted, the FCR and present claimants "have a natural antagonism." *In re Quigley Co., Inc.*, No. 04-15739 SMB, 2009 WL 9034027, at *5 (Bankr. S.D.N.Y. Apr. 24, 2009).

7. The debtor (and its insurers), present claimants, and the FCR may also have conflicting interests regarding the appropriate level of safeguards against invalid or fraudulent claims. Once the plan is confirmed and the trust is funded, the debtor and its insurers are usually indifferent to how the trust funds are distributed: it should make no difference to them what proportion of those funds are paid to meritorious claimants, to fraudulent claimants, or for trust expenses and administration, since the injunction ensures that their own liability will in no way be affected. *See Pittsburgh Corning Corp.*, 308 B.R. 716, 727 (Bankr. W.D. Pa. 2004). So long as there is no threat that the fund will be exhausted before their own claims can be paid, first-in-line present claimants may also be indifferent to whether fraudulent claims are being allowed along with their own—but they may object to an overly vigilant claims review process that would delay or reduce their own distributions. By contrast, future claimants have a vital interest in ensuring

that the plan contains strong protections against fraud and mismanagement because unchecked payment of non-meritorious claims could well exhaust the trust before some valid future claims can be paid, and they therefore bear a disproportionate share of the harm if the trust is depleted through fraud or mismanagement.

B. The Court's Role in Selecting an Independent and Effective FCR

8. The FCR differs from most other bankruptcy fiduciaries in that instead of being selected by the debtor (for a professional representing the estate) or the United States Trustee (for a trustee or examiner), the FCR is selected and appointed directly by the Court. *See* 11 U.S.C. § 524(g)(4)(B)(i) (stating that "the court appoints" the FCR). Although parties are certainly free to suggest candidates, as the debtor has done here, nothing in section 524(g) requires the Court to be bound by or defer to their preferences.

9. Like other fiduciaries in the bankruptcy process, any person the Court appoints as FCR should be free from conflict, held to the highest possible standard of independence, and be a rigorous and effective advocate for his or her constituency. Importantly, when enacting section 524(g), Congress did not write on a blank slate. The FCR mechanism of section 524(g) was closely modeled on two earlier asbestos bankruptcy cases, *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986), and *In re UNR Industries, Inc.*, 46 B.R. 671 (Bankr. N.D. Ill. 1985), in which the courts had appointed similar fiduciaries to protect the rights of future claimants. *See* H.R. Rep. No. 103-835 at 41, *reprinted in* 1994 U.S.C.C.A.N. 3340, 3348. Those courts, in turn, expressly based the asbestos FCR on various well-established models for fiduciaries representing absent parties. *Manville* determined that there were three possible models for the proposed FCR: (i) the guardian ad litem, (ii) the court-appointed amicus curiae on behalf of an

absent party, and (iii) the section 1104 examiner. *See Manville*, 36 B.R. at 758 n.7; *UNR*, 46 B.R. at 675 (stating agreement with *Manville*). Notably, in each of these models the fiduciary is required to be completely independent of adverse parties and is subject to a stringent duty of undivided loyalty and disinterestedness. *See, e.g.*, *Meeker v. Kercher*, 782 F.2d 153, 155 (10th Cir. 1986) (guardian ad litem owes "undivided loyalty" to minor); *United States v. Michigan*, 940 F.2d 143, 164–65 (6th Cir. 1991) (orthodox view of amicus curiae "was, and is, that of an impartial friend of the court"); *In re Big Rivers Elec. Corp.*, 355 F.3d 415, 433 (6th Cir. 2004) (section 1104 examiner may not "in the slightest degree . . . have some interest or relationship that would color the independent and impartial attitude required by the Code").[2]

10. The requirement for a fully disinterested FCR with undivided loyalty can also be inferred from the function and purpose of section 524(g). Because nearly all asbestos plans depend on the ability to channel future as well as present claims, section 524(g) would be meaningless without the ability to bind unknown future claimants. But any such alteration of the rights of future litigants must be consistent with constitutional due process. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 n.45 (3d Cir. 2004) (noting that statutory requirements of section 524(g) are "specifically tailored to protect the due process rights of future claimants"). In similar circumstances, courts have recognized that due process not only requires that the absent litigants be effectively represented, but that their

[2] The subsequent history of *Manville* does not make clear which of these models was ultimately used, except insofar as the FCR's powers were later described as "nonbinding." *See In re Johns-Manville Corp.*, 52 B.R. 940, 943 (S.D.N.Y. 1985); *G-I Holdings, Inc. v. Bennet (In re G-I Holdings, Inc.)*, 328 B.R. 691, 698 (D.N.J. 2005) (discussing *Manville*). For purposes of the present discussion, it is sufficient to note that all three of the models considered in *Manville* require a similarly high level of disinterestedness and independence.

representative be free from conflicting duties to other parties. *Id.* at 245 (noting that future claimants "must be adequately represented throughout the process"); *In re Johns-Manville Corp.*, 551 B.R. 104, 114 (S.D.N.Y. 2016) (trust mechanism that did not provide future claimants with adequate representation would not satisfy due process). As a result, it is not enough under section 524(g) for this Court simply to appoint an FCR; the Court must also determine that the FCR will provide representation that is effective, disinterested, and independent.

11. Despite the clear purpose of section 524(g), not all courts have required a high degree of independence from the FCR, and in some cases, courts have approved an FCR who was handpicked by his adversaries. *See, e.g., In re Duro Dyne Nat'l Corp.*, No. 18-27963 (Bankr. D.N.J. Oct. 16, 2018) (ruling that appointment of FCR selected by debtors and ad hoc committee of present claimants would be approved unless objectors proved that nominee was "disqualified" within the meaning of 11 U.S.C. § 101(14)). But this approach, which creates a powerful incentive for debtors and present claimants to nominate FCR candidates who are unlikely to litigate vigorously against them, has had generally poor results for the future claimants. As several studies have pointed out, future claimants have not fared well in asbestos trusts: "[A]lthough trusts are established on the promise to pay all current and future victims equitably, this promise has already been broken at all but a few trusts. The threat to future victims has become pressing given the dramatic growth of the bankruptcy trust system." S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 538-39 (2013).

> The bankruptcy trust system is long past the point where participants can look at the rapid depletion of newly established trusts as unanticipated and unintended consequences of generous compensation criteria. . . . If we can be reasonably assured of anything, it is that a trust that employs

> the same criteria and follows the same practices as its predecessors is extremely unlikely to "value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner" as required by section 524(g).

Id.

12. According to one more recent study, between 2008 and 2018, 60% of asbestos trusts were forced to reduce their "payment percentages," which is the mechanism that determines the actual payment that a claimant with a particular disease or settlement will receive. *See* Peter Kelso and Marc Scarcella, *Dubious Distribution: Asbestos Bankruptcy Trust Assets and Compensation*, U.S. Chamber of Commerce, March 2018, at 9.[3] For those trusts, an asbestos claim today is worth, on average, 46% less than it would have been worth a decade earlier. *Id*. This erosion of trust assets—which disproportionately prejudices future claimants—is the precise harm that the FCR was meant to prevent.

13. And far from providing the strong and independent voice that Congress intended, in many bankruptcy cases these FCRs have done little to challenge plans that unfairly favored present claimants and defendants (debtors and their insurers) at the expense of future claimants. *See*, *e.g.*, *In re ACandS, Inc.*, 311 B.R. 36, 43 (Bankr. D. Del. 2004) (denying, as fundamentally unfair, approval of pre-packaged asbestos plan whose terms reflected "unbridled dominance" of certain present claimants' attorneys whose clients were paid in full at the expense of other creditors, including future claimants). Notably, in *ACandS*—a case in which YCST represented the FCR—the FCR not only failed to object to the plan provisions that the bankruptcy court criticized as unfair to future claimants (among

[3] Available at https://www.instituteforlegalreform.com/research/dubious-distribution-asbestos-bankruptcy-trust-assets-and-compensation.

other disfavored parties), but he even joined the debtors and the present claimants' committee in appealing the bankruptcy court's ruling. *See ACandS Inc. v. Travelers Casualty*, No. 04-cv-00123-JJF (D. Del.).

14. The need for a truly independent and effective FCR is especially pertinent in light of recent court findings of impropriety in the asbestos claims process. *See In re Garlock Sealing Technologies, LLC*, 504 B.R. 71, 86 (Bankr. W.D.N.C. 2014) (finding "startling pattern of misrepresentation" in sample of asbestos claims). Because future claimants are the parties who will be most directly harmed by payment of fraudulent or invalid present claims, the FCR should play a leading role in investigating present claims and in ensuring that the plan contains sufficient safeguards to ensure that only meritorious claims will be paid and that professional fees and costs will be controlled. But it is difficult to imagine how this function can be performed by an FCR who is subject to conflicts of interest and divided loyalties, particularly where those conflicts involve the very same law firms he should be investigating or against whom he should be negotiating.

15. From this perspective, there is little question that the practice of appointing debtor-selected FCRs with close associations to the lawyers for the current claimants has not resulted in the vigorous oversight that Congress intended. For example, although the specific details vary from case to case, the majority of section 524(g) trusts have included provisions that: (i) lack transparency in the filing and payment of trust claims; (ii) obligate trusts to resist discovery; and (iii) otherwise prevent any effective outside oversight over whether only legitimate

claims are being paid.[4] *See* Dixon, McGovern, and Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts,* RAND Institute for Civil Justice, 2010 at xvii (noting lack of publicly available information about trust payments); Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 MEALEY ASBESTOS BANKR. REP. 9 (June 2013) (discussing expanded non-disclosure language added to many trusts after 2006 and noting that such provisions "raise questions about the overall lack of transparency and external oversight of trust operations"). As *Garlock* demonstrates, the lack of transparency has allowed the asbestos claims process to become "infected with . . . impropriety." 504 B.R. at 73. But even though the

[4] The foregoing provisions have consistently appeared, with very little variation, as part of the trust distribution procedures in many of the cases in which Patton has served as the FCR or YCST has served as counsel to the FCR. *See, e.g.*, Leslie Controls, Inc. Form of Asbestos Personal Injury Trust Distribution Procedures at ¶ 6.6, available at http://leslie.mfrclaims.com/Resources/Leslie_Controls_-_amended_TDP.pdf ("All submissions to the Asbestos PI Trust by a holder of an Asbestos Personal Injury Claim, including the proof of claim form and materials related thereto, shall be treated as made in the course of settlement discussions between the holder and the Asbestos PI Trust and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including, but not limited to, those directly applicable to settlement discussions"); Yarway Asbestos Personal Injury Trust Distribution Procedures at ¶ 6.5, available at http://www.yarwaytrust.com/wp-content/uploads/2018/04/565d1d617259e5027803393b9302f2f3.pdf) (same); First Amended United Gilsonite Laboratories Asbestos Personal Injury Trust Distribution Procedures at ¶ 6.6, available at http://www.ugltrust.com/documents/tdp.pdf (same); Metex Asbestos PI Trust Distribution Procedures in Connection With Metex Asbestos PI Trust Agreement at ¶ 6.6, available at http://metex.mfrclaims.com/Resources/METEX%20API%20TRUST_TDP.PDF (same); Form of Specialty Products Holding Corp. Asbestos Personal Injury Trust Distribution Procedures at ¶ 6.6 (same); ACandS, Inc. Asbestos Settlement Trust Distribution Procedures at ¶ 6.5 (same), available at http://www.acandsasbestostrust.com/wp-content/uploads/2018/05/9644f5811bba6744a445e5dd78fae97c.pdf.

future victims represented by the FCR would be among the most immediate victims of any fraud or mismanagement, there have been virtually no reported instances of an FCR objecting to such provisions or demanding greater transparency in the claims process.

C. The Court May Consider, But Should Give No Deference to, the Debtor's Nomination for FCR

16. Although the Debtor is free to propose an FCR, the Court is not required to defer to the Debtor's selection. Because section 524(g) directs the Court to appoint the FCR in the first instance, the Court's function differs from the review it would typically perform in an application to retain a section 327 estate professional, where courts generally defer to the debtor's selection. *See In re Huntco Inc.*, 288 B.R. (Bankr. E.D. Mo. 2002) (bankruptcy court should give "significant deference" to debtor-in-possession's choice of counsel); *but see In re Wheatfield Business Park LLC*, 286 B.R. 412 (Bankr. C.D. Cal. 2002) (debtor "does not have absolute right to counsel of its choice"). But there is no reason for the Court to give any deference at all to the Debtor's choice of the FCR, because the FCR does not represent the Debtor and will in fact often be adverse to the Debtor.

17. Had Congress intended to give a party other than the court a right to make an initial selection subject to court approval or disapproval, Congress presumably would have said so directly, as it has done with other types of fiduciary selections under the Bankruptcy Code. *Compare* 11 U.S.C. § 701(a) (United States Trustee "shall appoint" interim trustee); § 702(b) (creditors "may elect one person to serve as trustee" in chapter 7 case if certain conditions are met); § 327(a) ("the trustee, with the court's approval, may employ" professionals); § 1104(d) (United States Trustee "shall appoint" trustee or examiner). The absence of any

statutory role for the debtor or present claimants in the selection of the FCR makes clear that the highly sensitive role of the FCR requires complete independence.

18. The United States Trustee is unaware of any other circumstance in bankruptcy in which it would be appropriate for a party to select the fiduciary representing the very interests against which it will negotiate or litigate. The request of the debtor to have an FCR of its own choosing is comparable to the target of an investigation being allowed to choose the section 1104 examiner who will conduct that investigation, to the debtor-in-possession being allowed to appoint the members of a creditors' committee, or to a creditor with a disputed claim being allowed to select the chapter 7 or 11 trustee against whom his claim will be litigated. *See In re TBR USA, Inc.*, 429 B.R. 599, 629 (Bankr. N.D. Ind. 2010) ("Congress did not intend to allow creditors who had disputed claims against the estate to participate in an election and choose their opponent"); *In re Williams*, 277 B.R. 114, 118 (Bankr. C.D. Cal. 2002) (noting that "any creditor with a disputed claim would love to select her future opponent"). Moreover, the practice of allowing parties (and their attorneys) to select the fiduciaries and attorneys for their own opponents creates a risk that the interests of future claimants will become subordinated to the interests of a closed circle of professionals—one of the very evils that Congress sought to prevent when enacting the Bankruptcy Code in 1978. *See* H.R. Rep. No. 95-595, 92, 95-96 *reprinted in* 1978 U.S.S.C.A.N. 5963, 6053, 6056-57 (noting concerns about the "bankruptcy ring" that "operates more for the benefit of attorneys than for the benefit of creditors"). Indeed, the USTP was created to be the "watchdog" for the bankruptcy system to ensure that cases are not administered for the narrow benefit of the lawyers and other professionals instead of stakeholders such as creditors and employees. Given the critical role that the

FCR plays in acting as a check on a debtor and on present claimants, the Debtor's request that the Court ratify its nominee is unreasonable.

D. The Court Should Allow a Reasonable Period for Additional Candidates to be Identified and Considered

19. In deciding whom should be appointed as FCR, the Court should consider not only whether the candidate is qualified, but also whether he or she is the best possible candidate given the important function that the FCR will perform. The United States Trustee submits that it is difficult for the Court to determine the best possible candidate when only one has been presented to represent the interests of unknown parties who cannot propose their own. For this reason, the United States Trustee requests that the Court delay appointing the FCR for a brief period to permit other interested candidates to come forward or to permit other parties in interest to nominate alternative candidates.

20. The need for multiple candidates for the Court to consider is also important because there are numerous factors that this Court may wish to weigh when deciding on the best candidate, including billing rates, familiarity with this court and its procedures, other competing demands on the candidate's time, the candidate's relationships with other professionals and parties in this case, the existence of actual or potential conflicts, and the candidate's ability or willingness to advocate vigorously against those parties on behalf of future claimants. The Court should have the opportunity to weigh the strengths and weaknesses of multiple candidates in order to make the most informed decision possible.

21. By providing all parties in interest with an opportunity to identify and nominate candidates, and by allowing other interested individuals to submit their qualifications directly, the process proposed here will help ensure that the eventual FCR will be truly neutral because no single party will have controlled the FCR's

selection. This process will resemble the model of the early asbestos cases on which section 524(g) was based, *see UNR*, 46 B.R. at 676 (ordering that FCR would be selected from list of candidates submitted by United States Trustee and other parties in interest), as well as the procedures that have been followed by courts in certain other contexts in which fiduciaries are selected directly by the court. *See In re City of Detroit, Michigan*, No. 13-53846 (Bankr. E.D. Mich. Aug. 2, 2013) (order soliciting suggestions for appointment as fee examiner) (attached as Exhibit A to this Limited Objection).

E. If the Court Considers Mr. Patton's Nomination, Further Disclosures Are Required.

22. If the Court, however, does consider the Debtor's nomination of Mr. Patton, the Debtor should provide additional information about the process used to select Mr. Patton following Mr. Fitzpatrick's withdrawal. In particular, the Debtor should disclose: (i) whether any other party or professional proposed Mr. Patton; (ii) any actions taken by the Debtor to investigate whether Mr. Patton's nomination would be in the interest of future claimants; and (iii) whether any other candidates were considered or interviewed.

23. Similarly, Mr. Patton and YCST must likewise make additional disclosures. In his Declaration in support of the Motion, Mr. Patton discloses a lengthy list of other asbestos-related bankruptcy cases and asbestos trusts in which YCST is or has been involved, including several trusts for which Mr. Patton currently serves as the post-bankruptcy representative for future claimants. Mr. Patton should fully disclose any connections that he or YCST has with other professionals (including creditor professionals) in this case as a result of those engagements. In particular, Mr. Patton should disclose: (i) whether any of the professionals in this case currently serves in a fiduciary capacity for any of the

bankruptcy cases or trusts in which Mr. Patton or YCST also serves; (ii) whether, as a result of those engagements, Mr. Patton or YCST is subject to any obligations, including confidentiality or cooperation obligations, that may affect the performance of his duties in this case; and (iii) whether any of the professionals in this case has routinely been involved in the hiring of, or approval of the hiring of, Mr. Patton or YCST in other cases.

24. The appointment of Mr. Patton also should not be approved unless Mr. Patton and YCST can demonstrate that there are no inherent conflicts arising from their simultaneous service in multiple asbestos cases and trusts. In particular, because the funding of most trusts is fixed, conflicts may arise when the same present claimants file claims with multiple trusts; in this scenario, the various future claimants would have conflicting interests regarding how liability for the present claimants' injuries should be allocated among the various trusts (because any payment to a present claimant reduces the assets potentially available to future claimants for the same trust). Absent an explanation of why this inherent conflict would not prevent Mr. Patton from acting as a fiduciary for the Debtor's future claimants, Mr. Patton's appointment should not be approved.

25. In addition, because there appears to be a significant overlap in the claims that have been filed among many of these trusts and cases, there is a possibility that the Debtor may become involved in contested discovery requests involving some of these trusts or that other disputes may arise in which the future claimants in this case have interests that are adverse to entities for which YCST or Mr. Patton is a fiduciary. *See Garlock*, 504 B.R. at 84 (noting contested document discovery between chapter 11 debtor and trusts established from previous asbestos cases). Mr. Patton and YCST should accordingly disclose (i) any matters in which the debtor has interests that may be adverse to other debtors or trusts for which

YCST or Mr. Patton serves in a fiduciary role and (ii) their proposed procedure for resolving any such conflicts that may arise later in this case.

WHEREFORE, the United States Trustee requests that the Court: (i) deny the Motion seeking to appoint Mr. Patton as FCR; (ii) defer appointing an FCR for a period of at least 30 days from the scheduled hearing date of the Motion; (iii) authorize individuals who wish to be considered for appointment as FCR to submit their qualifications to the Court; (iv) authorize all parties in interest in this case to nominate additional individuals to be considered for appointment as FCR. If the Court does not deny Mr. Patton's appointment and intends instead to consider his nomination, then the Court should require the Debtor to disclose further details about the process by which Mr. Patton was selected and require Mr. Patton to provide supplemental disclosures including about his and YCST's connections with other professionals in this case, any matters in which the Debtor is currently adverse to another debtor or trust in which Mr. Patton or YCST serves in a professional or fiduciary role, and the procedures that they will adopt to resolve any such conflicts that may arise in the future; and (v) grant such other relief as is necessary and appropriate.

DANIEL M. MCDERMOTT,
UNITED STATES TRUSTEE, REGION 21
s/ Martin P. Ochs
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, I served a copy of this:

OBJECTION OF THE UNITED STATES TRUSTEE TO DEBTOR'S MOTION FOR AN ORDER APPOINTING JAMES L. PATTON, JR., AS LEGAL REPRESENTATIVE FOR FUTURE ASBESTOS CLAIMANTS

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