IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MAREMONT CORPORATION, *et al.*,[1]	Case No. 19-10118 (KJC)
Debtors.	(Jointly Administered)
	Ref. Docket Nos. 44, 63

DEBTORS' REPLY TO THE UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER APPOINTING JAMES L. PATTON, JR., AS LEGAL REPRESENTATIVE FOR FUTURE ASBESTOS CLAIMANTS, *NUNC PRO TUNC* TO THE PETITION DATE

Maremont Corporation ("Maremont") and its affiliated debtors and debtors-in-possession (collectively, the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), hereby submit this reply (this "Reply") to the objection filed by the Office of the United States Trustee [Docket No. 63] (the "UST Objection") to the *Debtors' Motion for Entry of an Order Appointing James L. Patton, Jr., as Legal Representative for Future Asbestos Claimants*, Nunc Pro Tunc *to the Petition Date* [Docket No. 44] (the "Motion")[2] and, in further support of the Motion, respectfully state as follows:

PRELIMINARY STATEMENT

1. In objecting to the Debtors' motion to appoint Mr. Patton as the legal representative for future asbestos claimants (the "Future Claimants' Representative") in these Chapter 11 Cases, the United States Trustee (the "U.S. Trustee") seeks to upset an appointment procedure that has been followed in asbestos-related bankruptcy cases within the Third Circuit

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal taxpayer identification number, are: Maremont Corporation (6138); Maremont Exhaust Products, Inc. (9284); AVM, Inc. (9285); and Former Ride Control Operating Company, Inc. (f/k/a ArvinMeritor, Inc., a Delaware corporation) (9286). The mailing address for each Debtor for purposes of these chapter 11 cases is 2135 West Maple Road, Troy, MI 48084.

[2] Terms not defined in this Reply shall have the meanings ascribed to them in the Motion.

and other jurisdictions, and instead implement a policy that is wholly unsupported by section 524(g) of the Bankruptcy Code or relevant legal precedent. It is well-established in the Third Circuit that the Bankruptcy Court appoints a legal representative for future claimants pursuant to section 524(g)(4)(B)(i) of the Bankruptcy Code. It is also well-established that the relevant legal standard for the Bankruptcy Court to apply is the highest standard set forth in the Bankruptcy Code: the disinterestedness standard.

2. Here, the Debtors have demonstrated through the Motion that their proposed Future Claimants' Representative, Mr. Patton, is disinterested, and that he is well-qualified to serve as Future Claimants' Representative. Despite having more than a month since the filing of these Chapter 11 Cases to propose alternative candidates or propound discovery to challenge Mr. Patton's disinterestedness or qualifications, the U.S. Trustee has not effectively done either,[3] and instead makes what essentially amounts to a Plan objection with no evidentiary support. The U.S. Trustee has thus failed to demonstrate that Mr. Patton is not disinterested.

3. In effect, the UST Objection seeks a ruling that would force this Court to legislate on behalf of the U.S. Trustee and impose additional requirements into section 524(g) of the Bankruptcy Code. For practical reasons, such a ruling would eviscerate an asbestos debtor's ability to reorganize in a prepackaged case such as this one. This effort defies 25 years of precedent and conflicts with clear Third Circuit precedent endorsing the use of pre-negotiated asbestos bankruptcy cases. This Court should not depart from the strong statutory and policy

[3] The U.S. Trustee filed a motion to appoint a future claimants' representative (the "UST Motion") just hours before the Debtors were required to reply to the UST Objection as provided by the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (and only two business days prior to the February 25, 2019 hearing (the "February 25 Hearing")) despite seeking contrary relief (30 day delay) in the UST Objection. The Debtors have not had a chance to fully review the UST Motion prior to filing this Reply, but given the request to have such motion heard at the February 25 Hearing, the UST Motion is not procedurally proper, prejudices the Debtors and other parties in interest in these Chapter 11 Cases, conflicts with relief sought by the U.S. Trustee in the UST Objection, and the candidates proposed therein should not be considered by the Court at the February 25 Hearing. The Debtors expect to file a separate objection to the UST Motion and the U.S. Trustee's attendant motion to shorten in due course.

imperatives endorsing the appointment of legal representatives for future claimants by the Bankruptcy Court and the use of pre-negotiated cases by asbestos debtors. The UST Objection is part of a larger effort by the U.S. Trustee Program to enhance its statutorily prescribed role and inject itself into the operation of 524(g) trusts by seizing control of the appointment of future claimants' representative candidates – including by objecting to candidates whom numerous courts repeatedly have found to be highly qualified and experienced for the role – and challenging the operation and distribution procedures of the 524(g) trusts.[4] The intent of the UST Objection is not to raise a legitimate objection to the Debtors' proposed appointment of Mr. Patton as Future Claimants' Representative, but rather to build a platform on which to air grievances about the 524(g) trust system generally and attempt to judicially expand the statutory authority of the U.S. Trustee with respect thereto. The upcoming hearing on confirmation of the Debtors' Plan is the more appropriate forum for many of the issues raised in the UST Objection, and the U.S. Trustee will have a chance to raise such issues as they relate to the Debtors' 524(g) trust proposed under the Plan at that time.

4. In the absence of actual legislation revising the Bankruptcy Code and providing the U.S. Trustee's office with the clear ability to do so, the U.S. Trustee should not be allowed to wield what would amount to a pocket plan veto outside of the plan confirmation process without demonstrating that Mr. Patton is not disinterested. Insinuations and attempts to blur the

[4] The U.S. Trustee has filed similar challenges to the proposed legal representatives for future claimants in the bankruptcy cases of *Duro Dyne National Corporation* and *The Fairbanks Company*. *See In re The Fairbanks Co.*, Case No. 18-41768-PWB (Bankr. N.D. Ga. Dec. 14, 2018), Objection of the United States Trustee to Debtors' Motion for an Order Appointing James L. Patton, Jr., as Legal Representative for Future Asbestos Claimants [Docket No. 133]; *In re Duro Dyne Nat'l Corp.*, Case No. 18-27963 (MBK) (Bankr. D.N.J. Sept. 26, 2018), Objection of the United States Trustee to Debtors' Motion for an Order Appointing Lawrence Fitzpatrick as Representative for Future Claimants [Docket No. 94]. Relatedly, the Department of Justice filed a "Statement of Interest" in the *Kaiser Gypsum* case, raising concerns about the section 524(g) trust to be established in that case. *In re Kaiser Gypsum Co.*, Case No. 16-31602 (JCW) (Bankr. W.D.N.C. Sept. 13, 2018), Statement of Interest on Behalf of the United States of America Regarding Plans of Reorganization for Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. [Docket No. 1150].

applicable legal standard are insufficient. Mr. Patton is disinterested and has the relevant knowledge, experience and expertise to zealously advocate on behalf of the future claimants in these Chapter 11 Cases, just as he did prior to the Petition Date. Accordingly, the Court should overrule the UST Objection and promptly enter an order appointing Mr. Patton as the Future Claimants' Representative.

ARGUMENT

I. Mr. Patton Satisfies the Standards for Appointment of a Future Claimants' Representative Under Section 524(g) of the Bankruptcy Code.

A. Section 101(14) "Disinterestedness" Is the Standard for Appointment of a Future Claimants' Representative

5. In a bankruptcy case seeking a section 524(g) channeling injunction, section 524(g)(4)(B)(i) of the Bankruptcy Code requires that "the court appoint[] a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands." 11 U.S.C. § 524(g)(4)(B)(i). The Bankruptcy Code does not specify the standard for appointment of such a legal representative; however, every court to address the standard for appointing a legal representative for future claimants under section 524(g) has applied the disinterestedness test set forth in section 101(14) of the Bankruptcy Code. *See In re Leslie Controls, Inc.*, No. 10-12199 (CSS) (Bankr. D. Del. Aug. 9, 2010), Transcript at 70:15-71:4 (hereafter "Leslie Tr. at __"); *Fed. Ins. Co. v. W.R. Grace (In re W.R. Grace)*, No. 04-844 (RLB), 2004 WL 5517843, *7 (D. Del. Nov. 24, 2004); *In re Duro Dyne Nat'l Corp.*, No. 18-27963 (MBK), Transcript of Court Decision on Debtors' Motion (Oct. 16, 2018) at 17:22-24 (hereafter "*Duro Dyne* Tr. at __"); *In*

re Thorpe Insulation Co., No. 2:07-19271-BB (Bankr. C.D. Cal. Dec. 12, 2007), Tr. at 44:14-45:4 (hereinafter "Thorpe Tr. *at* __").[5]

6. Chief Judge Sontchi described section 101(14) as 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.

Leslie Tr. at 70:15-71:4 (emphasis added).[6]

7. Faced with a similar objection from the U.S. Trustee, the New Jersey Bankruptcy Court recently followed that precedent in *Duro Dyne*:

> [T]his Court acknowledged that Section 524(g) does not explicitly state the standards that the FCR must satisfy to be eligible for appointment. The Court followed the approach taken nearly universally by other courts in applying the disinterested person standard set forth in 11 U.S.C. Section 101(14) as the correct disqualification standard for asserting the appointment of a legal representative under Section 524(g), and the Court referred to the decisions of *W.R. Grace*, and *In re Leslie Control[s]* and *In re Thorpe Insulation*.

[5] The C*ompendium of Unreported Authorities Cited in Debtors' Reply to the United States Trustee's Objection to Debtors' Motion for Entry of an Order Appointing James L. Patton, Jr., as Legal Representative for Future Asbestos Claimants, Nunc Pro Tunc to the Petition Date* is being filed contemporaneously herewith.

[6] *See also* Thorpe Tr. at 44:17-45:4 ("THE COURT: [W]henever I look at professionals in bankruptcy, I'm asked to appoint somebody only if they're disinterested. And that's a pretty high standard. As we all know, it's different from what would be a conflict of interest out in the real world. And to be disinterested, it seems to me that disinterested in the standard is sufficient here, and that the kinds of connections that you're talking about, the kinds of past experiences, the kind of - - you know, having done this work before, having worked in cases where the other - - the other parties have played similar roles is not enough to disqualify you or to keep you from being disinterested.").

Duro Dyne Tr. at 9:15-23. The *Duro Dyne* court further questioned whether evaluating a professional's "effectiveness" was an appropriate addition to the disinterestedness standard (as the U.S. Trustee suggests in the UST Objection):

> The term effective does not appear either in the definition of disinterested under 101(14) or the provisions of [section] 524(b).
>
> Demanding proof of effectiveness can become a dangerous and slippery slope for all professionals in a bankruptcy proceeding. This Court is not anxious to go down that road.
>
> Moreover, the Court is at a loss to understand just how at the inception of a case any court can ever be assured of the effectiveness of any professional or representative. As acknowledged by the Office of the U.S. Trustee at oral argument, when asked how the Court could be assured of any applicant's effectiveness at the early stage of the proceeding, the obvious answer to the Court was that the Court must look to the applicant's experience and knowledge. Well, then [the proposed FCR's] 38 years and vast experience in pending cases involving the asbestos industry should end the discussion.

Id. at 17:3-21.

8. Contrary to this clear precedent, the U.S. Trustee argues that a standard other than "disinterestedness" applies by adding the words "effective[ness]" and "independent" as a requirement without further explanation of how the Court should determine effectiveness or independence in this context, and identifying three models for a legal representative (guardian ad litem, amicus curiae, and examiner) purportedly considered by the *Manville* and *UNR* Courts in the 1980s. (UST Objection at ¶ 11). However, as the U.S. Trustee admits, the *Manville* court did not specifically adopt any of these models in appointing a legal representative for future claimants. *See In re Johns-Mansville Corp.*, 36 B.R. 743, 758-59 & n.7 (Bankr. S.D.N.Y. 1986) (noting that the three identified models were preliminary formulations and not preclusive of other considerations, and requiring supplemental briefing regarding the role of the future claimants representative); *see also In re G-I Holdings, Inc.*, 328 B.R. 691, 698 (Bankr. D.N.J.

2005) (specifically rejecting the guardian ad litem model for the future claimants representative, and observing that the *Manville* court ultimately appointed a legal representative with the powers of a committee, but without the power to bind such future claimants). In *UNR*, the court requested suggestions for "a disinterested party to serve as Legal Representative for putative asbestos disease victims." *In re UNR Industries, Inc.*, 46 B.R. 671, 676 (Bankr. N.D. Ill. 1985). More importantly, none of those models or heightened standards were adopted by Congress when it enacted section 524(g) in 1994[7] or by the courts in the substantial precedent issued since. The UST Objection provides no basis for this Court to depart from the section 101(14) disinterestedness standard applied by other courts in appointing a legal representative for future claimants.

9. As set forth in the Motion and Declaration of James L. Patton, Jr., in support of the Motion, Mr. Patton is disinterested. The Debtors have thus made a *prima facie* showing that Mr. Patton should be appointed. The U.S. Trustee has failed to point to any evidence of a materially adverse interest or other disabling conflict, and, consequently, has not met its burden to effectively challenge Mr. Patton's appointment.[8]

B. The Debtors' Nomination of a Future Claimants' Representative Is Entirely Appropriate.

10. The Debtors do not dispute that this Court has the statutory authority to appoint the legal representative for future claimants pursuant to section 524(g). However, it is not improper or unreasonable for a debtor to nominate a disinterested candidate for appointment by the Court. Indeed, court appointment of a legal representative for future claimants nominated by

[7] The legislative history accompanying the enactment of Section 524(g) notes that *Johns-Manville* and *UNR* "met and surpassed the standards imposed in this section." H.R. Rep. 103-835 at *41 (1994).

[8] *See* Duro Dyne Tr. at 18:8-14 ("As to the burden of proof in this matter, clearly the burden of persuasion rests with the debtor throughout the motion from the outset as the proponent of the application is to establish that [the proposed FCR] satisfies the disinterested requirement. Notwithstanding, the burden of producing evidence shifts to the objectors when they seek to establish the existence of a materially adverse interest.").

a debtor is the process that has been routinely followed in all pre-negotiated and pre-packaged asbestos bankruptcy cases[9] and in all other asbestos bankruptcy cases.[10]

11. There is nothing in section 524(g) or anywhere else in the Bankruptcy Code that precludes, or even suggests that a debtor should not propose the individual to be appointed.[11] 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 representative. To

[9] *See, e.g., In re Duro Dyne Nat'l Corp.*, No. 18-27963-MBK (Bankr. D. N.J. October 16, 2018), Doc. No. 191, Order Appointing a Legal Representative for Future Asbestos Person Injury Claimants Effective as of the Petition Date; *In re Metex Mfg. Corporation*, Case No. 12-14554 (BRL), Doc. No. 93 (Bankr. S.D.N.Y. Jan. 16, 2013), Order Appointing Lawrence Fitzpatrick, Esq., as Legal Representative for Future Claimants; *In re Yarway Corporation*, Case No. 13-11025 (BLS), Doc. No. 88 (Bankr. D. Del. May 28, 2013), Order Appointing James L. Patton, Jr., Esq. as Legal Representative for Future Asbestos Personal Injury Claimants *Nunc Pro Tunc* to the Petition Date; *In re Leslie Controls, Inc*., Case No. 10-12199 (CSS) (Bankr. D. Del. Aug. 11, 2010), Order Appointing A Legal Representative for Future Asbestos Personal Injury Claimants [Docket No. 130]; *Combustion Eng'g*, 295 B.R. 459 (Bankr. D. Del. 2003); *In re Mid-Valley, Inc.*, Case No. 03-35592-JKF, Doc. No. 610 (Bankr. W.D. Pa. Feb. 18, 2004), Final Order Granting Debtors' Application to Appoint Legal Representative for Purposes of Sections 105 and 524(g) of the Bankruptcy Code; *In re Fuller-Austin Insulation Co.*, Case No. 98-2038 (JJF), Order Approving and Authorizing Appointment of Legal Representative Eric D. Green, Esq. Doc. No. 8 (Bankr. D. Del. Sept. 9, 1998) (Order appointing Eric D. Green as future claimants' representative and finding that his "investigation of the Debtor's affairs prior to the commencement of this case, his participation in the negotiation of a reorganization plan with the Debtor and other interested parties prior to the commencement of this case, . . . and his receipt and his professionals' receipt of payments from the Debtor in connection with the foregoing investigation and negotiation prior to the commencement of this case, would not conflict with his obligations as the legal representative in this case"); *In re Thorpe Insulation Co.*, Case No. 2:07-19271-BB (Bankr. C.D. Cal. Dec. 20, 2007), Order Granting the Application of Thorpe Insulation Company for Appointment of the Honorable Charles B. Renfrew (Ret.) as Futures Representative; *In re ABB Lummus Global Inc.*, Case No. 06-10401 (JKF), Doc. No. 138 (Bankr. D. Del. May 16, 2006), Order Appointing Richard B. Schiro as Legal Representative for Purposes of Sections 105 and 524(g) of the Bankruptcy Code *Nunc Pro Tunc* to the Petition Date; *In re A.P.I. Inc.*, Case No. 05-30073 (GFK), Doc. No. 93 (Bankr. D. Minn. Jan. 21, 2005), Order Appointing a Legal Representative for Future Unknown Asbestos Claimants.

[10] *See, e.g., 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; *Order Appointing Lawrence Fitzpatrick as Legal Representative for Future Claimants, In re Kaiser Gypsum Co.*, 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 Lawrence Fitzpatrick, Esq., as 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; *Order Appointing a Legal Representative for Future Asbestos Personal Injury Claimants, In re Leslie Controls, Inc.*, No. 10-12199 (CSS) (Bankr. D. Del. Aug. 11, 2010), Doc. No. 130; *see also Green* at 756.

[11] In fact, like the instant case, all of the recent appointments of legal representatives were initiated by application made by the respective debtors. *See* footnotes 9 and 10, *supra.*

ensure future claimants would have adequate representation during pre-petition negotiations concerning the terms of a plan of reorganization and 524(g) trust, the Debtors "selected Mr. Patton based on his reputation for integrity, renown in the field of complex mass tort proceedings, and extensive experience with asbestos-related personal injury litigation."[12] This selection occurred months prior to the Debtors approaching any representative of current claimants to engage in pre-petition negotiations. In fact, the UST Objection is purely speculative and provides no actual reason to believe that Mr. Patton is not disinterested or would ever breach his duties to future claimants. Instead, the U.S. Trustee argues that no candidate proposed by the Debtors should be appointed, an argument that is not compelling given the Debtors' prima facie demonstration of Mr. Patton's disinterestedness and the accepted practice for appointing future claimants' representatives in the Third Circuit and in other jurisdictions.

12. Asking the Court to ignore the common-accepted practice of appointing debtor-nominated future claimants' representatives, along with other arguments in the UST Objection, is a thinly-veiled attempt to have the Court impose a heightened standard, similar to the "appearance of impropriety" standard, that has been rejected by the Third Circuit and this Court. *See In re Marvel Entmt. Group, Inc.*, 140 F.3d 463, 477 (3d Cir. 1998) (holding that the court is required to disqualify a professional if he has an actual conflict of interest, the court has discretion to disqualify a professional that has a potential conflict of interest, but the court may not disqualify on the "appearance of impropriety" alone because to do so would impermissibly allow "'horrible imaginings alone' to carry the day" and "'[n]ot every conceivable conflict must result in sending [the professional] away to lick his wounds.'" (quoting *In re Martin*, 817 F.2d 175, 183 (1st Cir. 1987))); *see also* Leslie Tr. at 70:15-71:5; *Grace*, 2004 WL 5517843, at *7;

[12] Declaration of Carl D. Anderson, II in Support of First Day Pleadings, Docket No. 3, at ¶19.

Thorpe Tr. at 44:14-45:4. Not surprisingly, the U.S. Trustee does not cite to a single case where a bankruptcy court applied this heightened standard, nor does it provide any statutory support from the Bankruptcy Code itself, for the relief it seeks.

13. Moreover, the Debtors' ability to propose a future claimants' representative is consistent with the Debtors' exclusive right to propose a plan of reorganization. Pursuant to section 1121(b) of the Bankruptcy Code, Congress "established a scheme for the orderly submission, consideration and confirmation of a plan of reorganization." *Matter of Interco Inc.*, 137 B.R. 999, 1001 (Bankr. E.D. Mo. 1992). "The exclusivity period affords the debtor the opportunity to negotiate the settlement of its debts by proposing and soliciting support for its plan of reorganization without interference—in the form of competing plans—from its creditors or others in interest." *see In re Geriatrics Nursing Home, Inc.*, 187 B.R. 128, 131 (D.N.J. 1995) ("The exclusivity period affords the debtor the opportunity to negotiate the settlement of its debts by proposing and soliciting support for its plan of reorganization without interference—in the form of competing plans—from its creditors or others in interest." (citations omitted)).

14. The Debtors commenced these Chapter 11 Cases and filed the Plan after nearly a year of extensive negotiations with parties in interest, and with the unanimous support of Holders of Asbestos Personal Injury Claims that voted on the Plan. The centerpiece of the Plan is the establishment of the Asbestos Personal Injury Trust pursuant to section 524(g) of the Bankruptcy Code – a plan provision which *requires* the appointment of a future claimants' representative. 11 U.S.C. § 524(g)(4)(B)(i). Particularly in the context of a pre-packaged plan of reorganization, it is appropriate and necessary that the Debtors, as the Plan proponents, propose a future claimants' representative for the Court's consideration, just like plan proponents propose all other plan

provisions, and disclose the identity of the proposed candidate to claimants entitled to vote on the Plan.

15. Here, preventing the Debtors from proposing a qualified, disinterested candidate to serve as legal representative for future claimants in connection with the proposed plan of reorganization would compel the debtor to re-conceptualize their reorganization (which in this case has been unanimously accepted by the sole voting class), which violates the fundamental purpose of the exclusivity period. *See In re Spansion, Inc*., 426 B.R. 114, 140 (Bankr. D. Del. 2010) (refusing to compel debtors to re-conceptualize their reorganization and agreeing that such a holding would "deprive the Debtors of their exclusive right to formulate and propose their manner of reorganization as they see fit, subject, of course, to the limitations of the Bankruptcy Code"); *In re Texaco Inc.*, 81 B.R. 806, 809 (Bankr. S.D.N.Y. 1988) (noting that section 1121(b) was designed to give the debtor "the *unqualified opportunity* to negotiate a settlement and propose a plan of reorganization without interference from creditors and other interests") (emphasis added) (citing H.R.Rep. No. 595, 95th Cong., 2d Sess. 221–222 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787). That the U.S. Trustee take a different view about the Debtors' proposed future claimants' representative is not sufficient to deprive the Debtors of their statutory right to propose the reorganization they negotiated and the Plan their creditors unanimously voted to accept. *See In re Geriatrics Nursing Home, Inc.*, 187 B.R. at 134; *In re Borders Grp., Inc.*, 460 B.R. 818, 822 (Bankr. S.D.N.Y. 2011) ("[M]ere 'dislike' of the Debtors' proposals is, by itself, not considered a factor analyzed when considering an extension of the Debtors' Exclusive Periods.").

C. The Approach Advocated by the U.S. Trustee Would Effectively Prohibit Pre-Petition Negotiations for Cases Under Section 524(g) to the Detriment of All Claimants

16. As described in the Motion, after deciding to pursue a pre-negotiated plan of reorganization, Maremont determined that it was necessary and appropriate to engage an independent third-party representative for the purpose of protecting the rights of future claimants. As part of the pre-petition negotiations, Mr. Patton, personally or through his advisors YCST and Ankura, conducted extensive due diligence concerning the background, nature, and scope of the Asbestos Personal Injury Claims, examined the Debtors' corporate and transactional history, and spent considerable time negotiating the terms of a plan of reorganization with representatives of the Debtors, Meritor, and the Ad Hoc Committee. This extensive pre-petition work resulted in the Plan, which was accepted by 100% of the voting holders of Asbestos Personal Injury Claims. The U.S. Trustee's request to appoint a legal representative for future claimants that is entirely unfamiliar with the Debtors or the Asbestos Personal Injury Claims would require significant duplication of the work that was already performed by Mr. Patton and his advisors, at the expense of current and future claimants.

17. Further, in objecting to any future claimants' representative proposed by a debtor, and seeking to nominate its own candidates, the U.S. Trustee seeks to discard any work performed prior to the commencement of a chapter 11 case, effectively cutting future claimants out of pre-petition negotiations and prohibiting pre-packaged asbestos bankruptcy cases. Pre-packaged and pre-negotiated bankruptcy cases offer several substantial benefits: because much of the work is conducted outside of court proceedings, the duration of the bankruptcy case is decreased, burden to the bankruptcy courts is reduced, the administrative fees the debtor's estate must bear are minimized, and the parties' ability to maximize the estate from which creditors

will recover is improved.[13] The Court of Appeals for the Third Circuit repeatedly has endorsed the use of pre-packaged plans under section 524(g). *See In re Congoleum Corp.*, 426 F.3d 675, 693 (3d Cir. 2005) ("Pre-packaged plans offer a means of expediting the bankruptcy process by doing most of the work in advance of filing."); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2004) ("Pre-packaged bankruptcy may yet provide debtors and claimants with a vehicle for the general resolution of asbestos liability[.]").[14] Further, pre-packaged cases "are fully consistent with the goals of § 524(g) and the fiduciary duties and obligations undertaken by an FCR." Eric D. Green, et al., Prepackaged Asbestos Bankruptcies: Down But Not Out, 63 NYU Ann. Surv. Am. L. 727, 735 (2008) (hereafter "*Green* at __").

18. Without the ability to nominate a future claimants' representative for the purposes of pre-petition negotiations, subject to later court approval, debtors would lose the ability to seek a pre-negotiated or pre-packaged plan under section 524(g).[15] A future claimants' representative cannot be presented post-petition with a *fait accompli* that provides no opportunity to shape the plan or assure fair treatment to the future claimants. *See Combustion Eng'g*, 391 F.3d at 245 (future claimants must be "adequately represented throughout the reorganization process"). Even if a post-petition future claimants' representative were somehow able to review a pre-

[13] *See, e.g., In re TS Indus., Inc.*, 117 B.R. 682 (Bankr. D. Utah 1990); 7 Collier on Bankruptcy ¶ 1126.03[2][a] (16th ed. 2018) (such plans are "advantageous because they generally reduce the time and expense of the chapter 11 case" and "allow a debtor to implement the plan and emerge from chapter 11 sooner"); Daniel S. Bleck et al., "Need for Speed: Pre-Packaged and Pre-Negotiated Plans," 070810 ABI-CLE 335, 5 (2010).

[14] The Maremont Plan contains none of the elements criticized as unfair to claimants in other cases where a pre-packaged plan has been denied confirmation. *See, e.g., Congoleum.*, 426 F.3d at 693 (reversing order approving retention of special insurance counsel for debtors based on actual conflict of interest); *Combustion Eng'g*,, 391 F.3d at 239-46 (reversing confirmation of plan based upon, inter alia, a two-trust structure with pre-petition settlements and use of stub claims to secure confirmation votes).

[15] *Leslie* Findings at 6-7 ("In a pre-negotiated asbestos-related bankruptcy case, as a practical matter, the debtor considering a Chapter 11 filing is the only entity in a position to retain and pay an individual to represent the interests of future claimants. Future claimants would otherwise be unrepresented in the process, and counsel for current claimants would have a conflict if asked to simultaneously represent future claimants in negotiations over limited funding resources.")

packaged plan, the delay involved, as well as the lack of knowledge the future claimants' representative would labor under, would wipe out any benefits to debtors and future claimants. *See* Thorpe Tr. at 45:13-20 ("[W]ere we to disqualify [the pre-petition FCR] at this point and have to start afresh, you'd be making new phone calls, you'd be trying to get somebody around the holidays to get involved in this case, to learn something about this case, and I think you'd get nowhere on this case for a couple of months down the road until you had somebody new at the table. And I'd like to see us move forward more quickly than that."). Here, Mr. Patton and his advisors had almost a year to conduct due diligence, retain consultants, actually participate in negotiations of the Plan, and provide feedback on the Plan and Disclosure Statement documents.

19. Chief Judge Sontchi rejected a similar argument from insurers objecting to the appointment of Mr. Patton as FCR in *Leslie*:

> I think the appointment of a future claims representative to assist in connection with negotiating the prepackaged plan is appropriate and in many ways I would say preferable. . . . There is no such thing in the Bankruptcy Code as a pre-negotiated plan. It is something that is developed over time and is a very efficient way to get in and out of bankruptcy usually.

Leslie Tr. at 71:9-72:8. Likewise, the New Jersey Bankruptcy Court recently rejected the U.S. Trustee's position:

> This Court has serious concerns that implementing the standards and employing the disqualifying criteria espoused by the U.S. Trustee . . . would for all practical purposes render a pre-negotiated plan impossible for those seeking a channeling injunction.
>
> The pre-petition selection of, negotiations with and payment to any pre-petition FCR is critical for a successful pre-negotiated asbestos case. As made clear in the *Congoleum* case, the Third Circuit continues to regard pre-negotiated asbestos cases as a valid and valuable tool for expeditious and effective employment to serve the needs of debtors and all claimants alike. This Court is not prepared to second guess Congress is its implementation or the Third Circuit in its positive assessment of the process. . . .
>
> This Court will not however imperil this Company's reorganization, add

> layers of additional administrative expenses, place at risk the jobs of hundreds of employees, or unnecessarily jeopardize the recoveries for present and future claimants by delaying this reorganization through the appointment of a new future rep, who must retain professionals, engage in his or her own due diligence, only to reach the same point of review to which [the proposed FCR] assents at this present time.

Duro Dyne Tr. At 20:25-22:10.

D. Mere Involvement in Other Matters with Overlapping Professionals is Not Disqualifying

20. While the UST Objection fails to rebut Mr. Patton's disinterestedness or general qualifications, the U.S. Trustee would disqualify Mr. Patton based on his involvement in other asbestos matters or with other professionals. To say that Mr. Patton's roles in other asbestos matters pose a conflict is to ignore the realities of bankruptcy cases generally, and asbestos bankruptcy cases and settlement trusts specifically. It is common for professionals in bankruptcy cases to work with or against each other in various roles in multiple cases. Before this Court, the U.S. Trustee previously rejected the notion that mere service in multiple matters was a conflict:

> [Objectors] sugges[t] that Messrs. Trafelet and Green have a conflict because they are acting as Futures Representatives in other cases and will be disabled from taking positions in this case contrary to those taken in other cases. The UST does not believe that the objectors have adequately explained why representing the same interest in more than one case would constitute a conflict. Nothing in the Application or in the objections suggests that any of the candidates are representing interests in this or any other case that conflict with the interests of future claimants – thus distinguishing this application from the Debtors' previous application to appoint Mr. Hamlin, who was serving in a conflicting role. Nor do the objectors identify any positions that the candidates have taken in the other cases that would restrict their ability to advocate zealously for the interests of future claimants in this case. Therefore, the UST disagrees with the suggestion of the objecting insurers that only persons who have never served as a future claims representative may be considered.

Grace, No. 01-01139 (Bankr. D. Del. May 14, 2004), United States Trustee's Statement Regarding Application of the Debtors for the Appointment of a Legal Representative for Future Asbestos Claimants, Docket No. 5575, at 2-3 and n.1.[16]

21. In *Thorpe*, the bankruptcy court rejected an objection to the proposed FCR and his counsel on the basis that they had "too cozy a relationship" with the law firm Morgan Lewis because they were involved in other cases where Morgan Lewis represented debtors:

> If that's a basis for disqualification, nobody but brand new lawyers who have never done anything before would ever get cases. How many cases have one lawyer in this town worked on with the other side on the same capacities, in different capacities. You know, one time they're – one is debtor's counsel, the other is committee counsel, the other one is committee counsel in the next case and the other one is debtor's counsel. Sometimes they represent equity. Sometimes they're on the same side of the table. Sometimes they're on different sides of the table. That is not a basis for disqualification or to say that somebody is disinterested – not disinterested.

Thorpe Tr. At 18:25-19:12.

22. The *Thorpe* court found that the proposed FCR's experience in other matters was an asset and not an indicator of cronyism:

> [T]he fact that [the proposed future claimants' representative] has served as a futures representative in other cases, I think that's a good thing. He's got experience. He knows how this process works. I don't seriously believe the contention is on the part of the insurers that Judge Renfrew is going to sell out the future representatives and therefore not adequately represent them.

Thorpe Tr. At 19:12-18.

[16] *Accord* S. Todd Brown, "How Long is Forever This Time? The Broken Promise of Asbestos Trusts," 61 Buff. L. Rev. 537, 557 (2013) ("Although affording a relatively small group of lawyers the power to exercise considerable control over the process may give courts and others pause, it does not necessarily follow that this authority has been abused. Indeed, some trusts have become more restrictive in their injury standards and payments to unimpaired claims in recent years, and other recent developments may suggest that some trusts have become more vigilant in testing the intrinsic merit of the claims submitted.").

23. Mr. Patton's experience is a primary reason why Maremont selected him as the Future Claimants' Representative. An experienced future claimants' representative has previously dealt with the discrete, complicated issues that affect future claimants.[17] The future claimants are best served by having a representative who has "the unique value of experience with these types of trusts" 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." *In re Leslie Controls*, Inc., No. 11-0013 (Simandle, J.) (D. Del. Mar. 25, 2011), Additional Findings in Support of Affirmation Order at 14 (hereafter "*Leslie* Findings at __").

24. An experienced future claimants' representative is better situated to be an effective advocate, as Judge Simandle noted in affirming confirmation of the pre-negotiated plan in *Leslie*:

> The incentives for selecting a responsible and independent future claimants representative were in play in this case. The FCR needed to be knowledgeable about asbestos litigation and trusts, and to command respect from others in the negotiation process. The FCR must have the credibility and preparation to press for the best deal possible for the future claimants under the particular circumstances, or else the negotiated plan would not be approvable by the Bankruptcy Court. The FCR's prepetition conduct would have to pass muster with the Bankruptcy Judge or the proposed FCR would not be appointed by the Bankruptcy Court. . . .

Leslie Findings at 6-7. As Judge Simandle recognized, an experienced future claimants' representative benefits the future claimants precisely because he or she has experience to build

[17] *See* Green, at 741-42 ("The benefits of retaining an experienced FCR in an asbestos bankruptcy case cannot be overstated. Contrary to the assertions of some commentators, the appointment of an FCR who is not a 'repeat player' (i.e., experienced) in the field of asbestos bankruptcies may result in a less favorable outcome for future claimants. In asbestos bankruptcies, the negotiations among the debtor, current claimants, and other liable third-parties often revolve around complex or otherwise 'fine print' points of the reorganization plan: the structure and timing of the contributions made by the debtor and insurers, the scope of the channeling injunction, the insurance neutrality language in the plan of reorganization, and the trust distribution procedures and trust agreement for the § 524(g) trust. Because of the complex statutory requirements of § 524(g), much of the negotiation between the parties focuses on structuring a plan that is agreeable to the parties yet still satisfies the statutory requirements. Because of the technical nature of these discussions, prior experience becomes paramount to an FCR's ability to successfully represent the future claimants.").

upon and knows what to look at and what corners to look around, and how to negotiate on behalf of his or her future claimant constituency in what are tough multi-party negotiations. There is nothing untoward or nefarious about selecting professionals expert in the process, and it is certainly not evidence of a lack of disinterestedness or an otherwise disqualifying factor.

25. As set forth in the Motion and Mr. Patton's supporting declaration, Mr. Patton and Young Conaway do not represent any interests in other matters that conflict with the interests of Future Claimants. While the U.S. Trustee may disagree with certain provisions governing the trusts in which Mr. Patton serves as legal representative for future claimants, Mr. Patton also has not taken any positions in other matters that restrict his ability to be a zealous advocate for the Maremont Future Claimants. Additionally, the limits on the future claimants' representative's role in the administration of a 524(g) trust (including the 524(g) trust proposed under the Plan) render conflicts highly unlikely. *See* Duro Dyne *Tr. At* 14:12-15 (crediting proposed FCR's testimony that his concurrent work in other pending cases will not pose a conflict because it is the trustee who manages the trust). For these reasons, Mr. Patton's involvement in other asbestos trusts is not a disqualifying factor, nor does it upset his satisfaction of the disinterestedness standard governing the appointment of a future claimants' representative.

II. The UST Objection is a Back-Door Attempt to Alter the Statutory Jurisdiction of the U.S. Trustee Program.

26. Twenty-five years of precedent under section 524(g) affirm the role of the debtor in a future claimants' representative appointment. That same precedent confirms the absence of the U.S. Trustee in future claimants' representative appointments under section 524(g). When Congress wanted the U.S. Trustee involved in appointments, it expressly provided for such a role. *See* 11 U.S.C. §§1102(a)(1) ("[T]he United States Trustee shall appoint . . ."), *id*. § 1104(d)

(delineating U.S. Trustee role in appointment of trustee or examiner). Congress did not so provide in section 524(g).

27. Prior to September 2018, the U.S. Trustee Program declined to get involved in FCR appointments. In *Duro Dyne*, counsel for Mr. Vara (the objector here and there), acknowledged that Congress did not give the U.S. Trustee a role in the FCR appointment process. *See In re Duro Dyne Nat'l Corp.*, Case No. 18-27963-MBK (Bankr. D.N.J. Oct. 1, 2018), Transcript of Second Day Hearing at 36:22-25 (attorney for U.S. Trustee noted "[t]he duty to appoint [an FCR] falls on this Court, not the parties. In the *W.R. Grace* case we're talking about, we pointed out that it didn't fall on [the U.S. Trustee], and that's right, Congress didn't give it to [the U.S. Trustee].").

28. Before this Court in *Grace*, the U.S. Trustee expressly declined to participate in the FCR appointment, saying it "must respectfully decline this invitation [from certain objecting insurers], and requests that the Court not order the UST to make the appointment, because the UST lacks statutory authority to select the Future Representative." *Grace*, No. 01-01139 (Bankr. D. Del. May 14, 2004), United States Trustee's Statement Regarding Application of the Debtors for the Appointment of a Legal Representative for Future Asbestos Claimants, Docket No. 5575, at 3.

29. Consistent with that statement, in June 2017 the Director of the U.S. Trustee Program told Congress that "[t]he USTP plays no role in the selection of a FCR[.]" Responses to U.S. House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law's Questions for the Record to Clifford J. White, III, Director of U.S. Trustee Program, Department of Justice (June 8, 2017). Nearly a year after that submission, a U.S. Senate bill was filed that would have expanded the statutory authority of the U.S. Trustees with

respect to section 524(g) and trusts established pursuant to that section. *See* S.2564, 115th Cong., 2d Sess. (introduced March 16, 2018) (the "Providing Responsible Oversight of Trusts to Ensure Compensation and Transparency for Asbestos Victims Act of 2018" or "PROTECT Asbestos Victims Act of 2018," introduced March 16, 2018 (115th Congress, second session). That proposed legislation provided for the U.S. Trustees to appoint the FCR and conduct sweeping audits and investigations of all asbestos trusts established under section 524(g). *Id*. The PROTECT Act did not advance beyond referral to committee.

30. The public record thus shows that the U.S. Trustee program, and even Congress, acknowledge that a U.S. Trustee lacks statutory authority to intrude into the future claimants' representative appointment process. There has been no legislative or judicial change to the U.S. Trustee's authority in the past year to countenance the sweeping changes requested in the UST Objection. Despite the U.S. Trustee's admitted lack of statutory authority to select the future claimants' representative, the U.S. Trustee proposes a convoluted, protracted, and open-ended mechanism for finding other future claimants' representative candidates, ostensibly to provide the Court "the opportunity to weigh the strengths and weaknesses of multiple candidates in order to make the most informed decision possible." UST Objection at ¶23.[18]

31. In the UST Motion, the U.S. Trustee proposes four competing candidates, but contrary to its assertions at the first-day hearing in these Chapter 11 Cases, *see* Transcript of First Day Hearing at 27:12-31:14 [Docket No. 45], the U.S. Trustee never filed a motion to set up a formal process for the Court to evaluate and select among such competing nominations. Regardless of the process suggested by the U.S. Trustee, any process of evaluating other candidates would cause delay and increase costs, reducing estate resources that otherwise are

[18] Following the logic of the arguments raised by the U.S. Trustee, a candidate nominated by the U.S. Trustee would be beholden to the U.S. Trustee, and may lack the freedom to make his or her own judgments and negotiate on the trust distribution procedures and other issues outside the policy directives of the U.S. Trustee.

available to fund the 524(g) trust. In addition, the Debtors and the Committee of Asbestos Personal Injury Claimants would likely need (and have the right) to vet the candidates, which may involve discovery and require material time to conclude. The relief sought by the U.S. Trustee in the UST Motion is unnecessary and wasteful in light of the fact that the Debtors have proposed a disinterested, qualified candidate with extensive experience in asbestos matters generally and in the Debtors' pre-petition negotiations and unanimously-accepted Plan, specifically.

32. While the *Fairbanks* court has permitted the U.S. Trustee to suggest future claimants' representative candidates in the face of similar objections, *Fairbanks* is factually distinct from these Chapter 11 Cases. *Fairbanks* did not involve any pre-petition diligence or negotiations with a representative for future claimants, is not a pre-packaged case, no plan of reorganization has been filed, and the debtor's exclusivity period for proposing a plan has expired. But even the *Fairbanks* court expressed doubt about the process and how it will assist the Court's determination:

> THE COURT: [W]hat am I supposed to do[,] interview people? Have a hearing? Have five, ten people come up here and sit in the stand and I, you know[,] sit back and maybe we can make an exception and have coffee in the courtroom, have a little discussion about, you know, a job interview. It doesn't work that way I don't think.
> MR. OCHS: Your Honor makes light of the process.
> THE COURT: I'm not making – I am making light of it Mr. Ochs, but I'm serious about it. I don't think I can do that and I'm not going to so there's really nothing more to discuss about that.

In re the Fairbanks Co., Case No. 18-41768 (PWB) (Bankr. N.D. Ga. Dec. 18, 2018), Transcript of Hearing on Debtor's Motion for an Order Appointing James L. Patton, Docket No. 167, at 9:24-14:24; 26:18-27:4 [Docket No. 167].[19]

33. The Debtors have proposed Mr. Patton to serve as the post-petition Future Claimants' Representative – a well-qualified, disinterested candidate with familiarity of the Debtors' asbestos liabilities, assets, and corporate and transactional history, as well as the terms of the proposed Plan, based on extensive pre-petition diligence and negotiations – in accordance with the well-established procedures used in every other bankruptcy case seeking a 524(g) trust and channeling injunction. The U.S. Trustee's efforts to disrupt this process in order to achieve a greater role for itself in the appointment process are unwarranted, would disrupt this case to the detriment of all creditors, and set precedent effectively prohibiting asbestos debtors from attempting pre-negotiated 524(g) restructurings.

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[19] It remains to be seen how the process will play out in *Fairbanks.* The U.S. Trustee has proposed three candidates (also proposed here) in addition to the Debtor's candidate (Mr. Patton), and the parties are currently engaged in discovery regarding those candidates.

CONCLUSION

For the reasons set forth above and in the Motion, the Debtors respectfully request that the Court overrule the UST Objection, grant the Motion, and appoint Mr. Patton as the Future Claimants' Representative.

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SIDLEY AUSTIN LLP
James F. Conlan
Andrew F. O'Neill
Allison Ross Stromberg
Blair M. Warner
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036

-and-

SIDLEY AUSTIN LLP
Alex R. Rovira
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599

-and-

COLE SCHOTZ P.C.

/s/ J. Kate Stickles
Norman L. Pernick (No. 2290)
J. Kate Stickles (No. 2917)
500 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 652-3131
Facsimile: (302) 652-3117

PROPOSED ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION