

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

MAREMONT CORPORATION, *et al.*,¹

Debtors.

Chapter 11

Case No. 19-10118 (KJC)
(Jointly Administered)

Re: D.I. 112

**RESPONSE OF THE OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS
TO THE OBJECTION OF THE ACTING UNITED STATES TRUSTEE
TO THE DISCLOSURE STATEMENT AND JOINT PREPACKAGED PLAN
OF REORGANIZATION OF MAREMONT CORPORATION AND ITS DEBTOR
AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

The Official Committee of Asbestos Claimants (the “Committee”), by and through its proposed undersigned counsel, hereby submits this response (the “Response”) to the *Objection of the Acting United States Trustee to the Disclosure Statement and Joint Prepackaged Plan of Reorganization of Maremont Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [D.I. 112] (the “Objection”) filed by the United States Trustee (the “UST”), and in support thereof, states as follows:

PRELIMINARY STATEMENT

1. The Objection appears to be part of a nationwide policy objective masquerading as a challenge to the *Joint Prepackaged Plan of Reorganization of Maremont Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [D.I. 10] (collectively with its related documents, as such may be amended, modified, or supplemented prior to confirmation, the “Plan”). It seeks to upend a lengthy, arms-length, good-faith negotiation

¹ The Debtors (“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.

among the Debtors, the Future Claims Representative (“FCR”), and the pre-petition committee of asbestos claimants to resolve the Debtors’ significant legacy asbestos-related personal injury liabilities. The Objection jeopardizes months of negotiations, disregards the unanimous approval of the only impaired creditor body under the Plan, and threatens the formation of the Plan’s centerpiece protection for asbestos victims—a Trust formed pursuant to section 524(g) of the Bankruptcy Code²—all because the UST perceives “fraud” is possible in the Trust following the issuance of two factually distinguishable decisions and publication of a handful of partisan studies critical of asbestos trusts authored by acknowledged defense-side adherents.

2. The Trust will be a privately funded settlement trust governed by a Trust Agreement with payments made to qualified claimants in accordance with Trust Distribution Procedures (“TDPs”). A Trustee will oversee the Trust; a Trust Advisory Committee and a FCR will provide guidance to the Trustee. Notwithstanding the fiduciary obligations owed to all Trust claimants by the Trust, the Objection assumes—without proof—that each fiduciary *of this Trust* intends to abdicate their fiduciary duties by simply acquiescing to the demands of the Trust’s present claimants.³ The Objection not only fails to identify a single instance where estate fiduciaries have abdicated their duties in this case, but also fails to establish the existence of a systemic failure by fiduciaries of the other section 524(g) asbestos personal injury trusts. In short, the Objection advocates for a solution in search of a problem.

² Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Plan.

³ The UST’s alleged improprieties and fraudulent activity by trust claimants (i) in the tort system and (ii) against the section 524(g) asbestos trusts, are outside the purview of the role of a UST in any single case. Resolution of any such concerns is best left to the legislature and not the Court. See *In re Maremont Corp.*, Case No. 19-10118, 3/8/2019 Hr’g Tr. at 101:25-102:3 (“If its correct that investigation into the process of FCR appointments is necessary or to the extent the system is flawed, that seems to be an exercise to be undertaken by authorities other than the judiciary.”); see also *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 362 (3d Cir. 2012) (addressing section 524(g) trusts and concluding that “[n]evertheless, we leave such systemic public policy questions to Congress”).

3. The UST's efforts to challenge the Plan's good faith through unsupported concerns of fraud and a lack of trust transparency threatens increased estate expenses through re-solicitation, and potentially the unraveling of the Plan, for nebulous modifications of dubious benefit that will certainly result in the unwarranted and unnecessary increase in the Trust's administrative costs—increases which will be indirectly borne by the asbestos victims. The Plan represents the best outcome for all of the Debtors' asbestos victims, both present and future claimants, under the circumstances. Delaying confirmation of the fully consensual and unanimously supported Plan disadvantages all of all of the Debtors' creditors, including the very creditors—the unknown future claimants—that the UST claims it is protecting by filing the Objection.

4. The current Plan is the result of lengthy and arms-length good faith negotiations; it was unanimously approved by the only impaired class of creditors. No other party in interest has raised concerns with respect to the Plan except the UST. The UST's Objection, however, seeks judicial approval of a fallacy—that two court opinions and a handful of partisan publications critical of asbestos litigation means that pervasive fraud and a general lack of transparency exists with respect to all section 524(g) asbestos trusts. The nonsequitur continues: without any specific evidence of wrong-doing by the estate (and Trust) fiduciaries in these cases, the alleged “pervasive fraud” is so rampant that the Plan and the Trust simply could not have been proposed in good faith. The Objection goes a bridge too far and the Court should decline the UST's invitation to tread where Congress has, so far, refused to go. The Court should confirm the Plan without further delay.

BACKGROUND FACTS

5. After being named as a defendant in asbestos lawsuits for approximately 40 years, the pre-petition Debtors decided to investigate a potential restructuring to establish and fund a trust pursuant to section 524(g). In furtherance of this decision, they engaged professionals to estimate the present value of their potential current and future liabilities. *See Declaration of Carl D. Anderson, II in Support of First Day Pleadings* [D.I. 3] at ¶¶ 13, 18.

6. The Debtors then worked to select a FCR to protect the interests of persons who have been exposed to asbestos but have not manifested an asbestos-related disease. *Id.* at ¶ 19. The Debtors chose James L. Patton, Jr. who in turn engaged Young Conaway Stargatt & Taylor, LLP as counsel, and Ankura Consulting Group, LLC as claims estimation advisor. *Id.* Mr. Patton and his professionals conducted diligence and had preliminary non-binding settlement negotiations with the intended Debtors. *Id.* at ¶ 20.

7. In May, 2018, the Debtors worked to identify firms with pending asbestos cases against the Debtors and/or with recent settlements with Maremont. From these firms, a three firm committee was formed (the “Pre-Petition-Committee”).⁴ The Pre-Petition Committee engaged Montgomery McCracken Walker & Rhoads LLP and Legal Analysis Systems to provide legal and estimation-related services.⁵ The Pre-Petition Committee and its advisers conducted diligence, ran forecasts, and examined potential claims and causes of action. Additionally, these experts estimated the current and future value of the Asbestos Personal Injury Claims that would conceivably be channeled to a trust. This analysis included a review of a data room prepared by the pre-petition Debtors and their advisers as well as examination of a

⁴ Two of the five law firms representing members of the Committee served on the Pre-Petition Committee.

⁵ Shortly before the Petition Date, the team from Montgomery McCracken Walker & Rhoads LLP involved in the negotiations left to join the firm of Robinson & Cole LLP.

database the pre-petition Debtors maintained in connection with their experience as an asbestos defendant.

8. The Debtors, the Debtors' non-debtor parent, the Pre-Petition Committee, and the FCR took part in negotiations that extended over a period of months. Negotiations included not only those with the intended Debtors and their non-Debtor parent in order to establish, among other things, treatment of the various Classes within the Plan, but also the amount of the contribution that would be made by each of the Debtors and their parent to the Asbestos Personal Injury Trust.

9. As between the FCR and the Pre-Petition Committee, the negotiations included the terms of the Trust Agreement and the TDPs. Among other things, the FCR and the Pre-Petition Committee, with the help of their advisers, negotiated: (i) the initial payment percentage under the TDPs; (ii) the various disease levels recognized under the TDPs; and (iii) the difference between Occupationally Exposed Claims and Shade Tree Mechanic Claims (each as defined in the TDPs).

10. All negotiations that led to the Plan were arm's-length, fair, and governed by the necessary checks and balances that typically overlay the relationship between a committee and its adversaries.

11. Based on the Pre-Petition Committee's and pre-petition FCR's diligence, the full value of the Debtors will be contributed to the Trust. Additionally, the Debtors' non-Debtor parent is making a significant contribution to the Plan generally and to the Trust specifically. Among other things, the non-Debtor parent will assume significant Environmental Claims so that the only wholly Impaired Class of Claims is composed of Asbestos Personal Injury Claims.

12. Though the Trust may provide only a fraction of the payment that asbestos victims historically received from the Debtors in the tort system, the Pre-Petition Committee believed, and the Committee presently believes, that the proposals embodied in the Plan provide the holders of Asbestos Personal Injury Claims with the best available relief going forward. Moreover, the Committee believes that the TDPs present fair and balanced procedures for submitting and evaluating claims for payment from the Trust and that the mechanism in place for overseeing and auditing such claims properly ensures that the Trust's assets will not be dissipated prematurely or unfairly to those victims seeking compensation from it now and in the future.

ARGUMENT

I. THE PLAN AND ITS RELATED DOCUMENTS ARE PROPOSED IN GOOD FAITH AND SATISFY THE REQUIREMENTS OF 11 U.S.C. § 1129(a)(3)

13. The Objection is based on the UST's belief that the TDPs contain provisions that accommodate a lack of transparency that if not checked by the UST will ultimately facilitate fraud and abuse in the tort system while depleting the funds available for future claimants in the trust system. *See* Obj. ¶¶ 19-22. In support, the UST relies on several biased articles criticizing trust transparency and two court decisions describing purported fraudulent activity in asbestos-related litigation: *Kananian, et al. v. Lorillard Tobacco Company*, No. CV-442750, 2007 WL 4913164 (Ohio Ct. Com. Pl., Jan. 19, 2007) and *In re Garlock Sealing Technologies, LLC, et al.*, 504 B.R. 71 (Bankr. W.D.N.C. 2014). The UST cites these trust transparency publications, as well as *Kananian* and *Garlock*, as justification for interceding in confirmation without

demonstrating any actual evidence of similar intent by, or similar behavior from, the Trust's fiduciaries or the Trust.⁶

14. The UST's reliance on one-sided articles to discredit the integrity of the bankruptcy process as it relates to an asbestos trust's treatment of claimants generally and the alleged lack of procedural safeguards in trust documents leading to the dissipation of funds for future claimants specifically, *see* Obj. ¶¶1, 19, has itself been recently doubted. *See In re Duro Dyne Nat'l Corp.*, Case No. 18-27963, 10/16/2018 Hr'g Tr. at 23:5-7 (Bankr. D.N.J.) (acknowledging that "academic articles and studies by think tanks may often be bottomed on inaccurate assumptions or specific agendas"). Further, the UST neglects to cite to a pre-*Garlock* study of asbestos trust claims processing issued by the U.S. Government Accountability Office which found no evidence of fraud or mismanagement in asbestos settlement trusts.⁷

15. Similarly, *Kananian* and *Garlock* are distinguishable and ultimately do not support the allegations of fraud and abuse made in the Objection. *Kananian* is a twelve year old case that revoked *pro hac vice* privileges for one lawyer and one law firm in a single state court proceeding. If *Kananian*, decided twelve years ago, is the UST's principal basis for proceeding with its program to upend the asbestos trust system, then the UST's belated effort to legislate through the Objection should be denied. Further, *Garlock* does not justify the UST's

⁶ "Without any tangible evidence of actual wrongdoing or harm to the Debtors, suspicion of a potential conflict is not sufficient to demonstrate bad faith." *In re Tribune Co.*, 464 B.R. 126, 156 (Bankr. D. Del. 2011); *see also In re Wash. Mutual, Inc.*, 442 B.R. 314, 364 (Bankr. D. Del. 2011) ("More than mere innuendo and speculation is needed to establish a lack of good faith.").

⁷ U.S. Government Accountability Office, *Report to the Chairman, Committee on the Judiciary, House of Representatives: Asbestos Injury Compensation – The Role and Administration of Asbestos Trusts*, Report No. GA-11-819 (Sept. 2011), at 22-23 (noting lack of fraud in existing trusts and commitment by then constituted trust management to implement procedures to combat fraudulent or misleading claims filings). The GAO is "an independent, nonpartisan agency that works for Congress . . . [that] examines how taxpayer dollars are spent and provides Congress and federal agencies with objective, reliable information to help the government save money and work more efficiently." *About GAO, Overview*, <https://www.gao.gov/about/> (last visited Mar. 12, 2019). By definition, the GAO is more independent than the reports and studies relied upon by the UST in the Objection.

intervention in the proposed Trust provisions or mandate oversight of asbestos-related bankruptcy trusts. The *Garlock* decision was a case decided without the benefit of response or input by the plaintiffs and law firms that the court questioned.⁸

16. The Third Circuit has acknowledged the success of trusts in accomplishing Congress's intended purpose of serving the interests of both current and future claimants. *See generally In re W.R. Grace & Co.*, 729 F.3d 332 (3d Cir. 2013) (approving trust distributions procedures serving as model to the present TDPs); *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 362 (3d Cir. 2012) (“[T]he trusts appear to have fulfilled Congress’s expectation that they would serve the interests of both current and future asbestos claimants and corporations saddled with asbestos liability.”). This success emanates from trust fiduciaries fulfilling their duties by *inter alia* determining trust payment percentages appropriate to provide substantially the same treatment to current and future claimants. Making such a determination is neither an exact science nor a haphazard decision. The trust fiduciaries must evaluate complex financial analyses while balancing fluctuating trust asset valuations with an ongoing reviews of claim projections. The provisions governing payment percentages are carefully negotiated by the parties prior to formation of the trust and periodically reviewed and voted upon by all interested parties over the course of a trust existence. Section 524(g) requires mechanisms like a payment percentage to protect the interests of future claimants and the fact that certain trusts have reduced a payment percentage is entirely consistent with the FCRs at those trusts advocating effectively to preserve the corpus for future claimants. *Garlock* has not been recognized as the “game changer” that the UST asserts it is, and certainly has not prevented other courts—including courts in this district—

⁸ The Committee does not agree with the finding of the *Garlock* court. Rather, the Committee believes that the *Garlock* Court incorrectly relied on statistically anomalous cases that evidenced human error, or at the further extreme, were susceptible to multiple interpretations.

from approving the formation of trusts with claim resolution procedures similar to the TDPs negotiated for this Trust.⁹

17. Thus, the Court should overrule the Objection and find that the Plan, Trust, and TDPs are proposed in good faith following a lengthy, arms-length negotiation between the Debtors, the FCR, and the asbestos claimants. Relying on suspect studies and a statistically insignificant sampling of asbestos cases, the Objection attempts to implement a policy objective rather than demonstrate the need, based on evidence, for such additional TDP provisions in this case. The Court should decline the opportunity to lend credence to the Trustee's logical leap and confirm the Plan (as such may be modified by the Debtors).

II. THE OBJECTION HIGHLIGHTS THE UST'S MISINTERPRETATION OF THE VERY TRUST PROVISIONS ADDRESSED IN THE OBJECTION

A. Confidentiality Provisions/Limitations of Discovery

18. The UST objects to Section 6.5 of the TDPs which it terms the "claims secrecy provision" asserting that it promotes the filing of fraudulent or unmeritorious claims leading to the depletion of assets for future claimants and legitimately sick current claimants. The UST asserts that submission of a trust claim is like filing of a personal injury complaint in the tort system or a proof of claim in a bankruptcy case and that such claims should be subject to full disclosure and accessed freely in the tort system through discovery. *See* Obj. ¶¶ 31-32.

19. An asbestos trust, however, is a privately funded settlement payment mechanism for asbestos claims by a particular defendant or defendants. When a co-defendant exits the tort system and commences a bankruptcy case which results in the formation and funding of a trust

⁹ *See, e.g., In re Geo. V. Hamilton, Inc.*, Case No. 15-23704 (GLT) (Bankr. W.D. Pa. Feb. 27, 2018); *In re Flintkote Co.*, Case No. 04-11300 (MFW) (Bankr. D. Del. Aug. 10, 2015); *In re Yarway Corp.*, Case No. 13-11025 (BLS) (Bankr. D. Del. Apr. 8, 2015); *In re Specialty Prods. Holding Corp.*, Case No. 10-11780 (PJW) (Bankr. D. Del. Dec. 10, 2014); *In re Metex Mfg. Corp.*, Case No. 12-4554 (CGM) (Bankr. S.D.N.Y. June 23, 2014); *In re United Gilsonite Labs.*, Case No. 11-02032 (RNO) (Bankr. M.D. Pa. Dec. 8, 2014).

pursuant to section 524(g) of the Bankruptcy Code, the trust acts as the settlement vehicle for the payment of a particular co-defendant's obligations as they existed in the tort system. The trust replaces the debtor as a co-defendant and the distributions from the trust replace the debtor/co-defendant's share of liability to the asbestos claimant through a negotiated settlement process. The trust pays only that debtor/co-defendants' several share of tort liability.

20. While a complaint filed by a plaintiff may be a publicly filed document, a settlement reached between a plaintiff and defendant in the tort system is confidential. The confidential nature of the settlement is made to protect the plaintiff and the defendant, both of whom require confidentiality.¹⁰ The same holds true for a trust payment: even though multiple defendants may share responsibility for a claimant's illness, a section 524(g) trust will only pay the debtor's portion of an asbestos personal injury claim; it does not pay to total cost of the overall liability owed to the asbestos victim.

21. Moreover, there are other processes in place to address the UST's concerns. For example, many state courts have enacted specific discovery rules and case management procedures to ensure trust transparency in state court litigation.¹¹ Section 6.5 of the TDPs

¹⁰ Indeed, many asbestos tort plaintiffs never even file complaints in the tort system. Their claims are settled through other mechanism that both the defendant and plaintiff have agreed to in resolving claims. Confidentiality of the settlements is always required by both plaintiffs and defendants.

¹¹ See e.g., Case Management Order, *In re N.Y.C. Asbestos Litig. (NYCAL)*, No. 782000/2017 (N.Y.C. June 20, 2017) (controlling timing of trust claims); *id.* at Ex. C, "Defendants' Fourth Amended Standard Set of Interrogatories and Request for Production of Documents," *In re N.Y.C. Asbestos Litig. (NYCAL)*, No. 40000/88 (N.Y.C.) (requiring production of bankruptcy trust claims); Standing Case Management Order for All Asbestos Personal Injury Case, *In re All Asbestos Litigation Filed in Madison County* (Ill. Cir. Ct. Madison Cty. Aug. 19, 2016) (providing for Standard Asbestos Interrogatories Directed to Plaintiffs specifically requesting information on claim submitted to trusts including name, amount and date of submission, and nature of claim); Corrected Case Management Order Requiring Disclosure of Bankruptcy Trust Claims, Claims-Related Materials and Asbestos Exposure Facts, *In re LAOSD Asbestos Cases*, JCCP Case No. 4674 (Cal. Super. Ct. Los Angeles Cty. Jul. 15, 2015) (requiring production of bankruptcy trust related documents); Standing Order No. 1 – Amended on Oct. 10, 2013, *In re Asbestos Litig.*, C.A. No. 77C-ASB-2 (Del. Super. Ct. Oct. 10, 2013) (requiring production of executed proofs of claim and supporting materials provided to asbestos claims trusts).

provides that nothing in the TDPs, Plan, or Trust Agreement “expands, limits, or impairs the obligation *under applicable law* of a claimant to respond fully to lawful discovery in any underlying civil action regarding his or her submission of factual information to the Asbestos Trust for purposes of obtaining compensation for asbestos-related injuries from the Asbestos Trust.” *See* TDPs, § 6.5 (emphasis added). Further, the TDPs provide for the disclosure of the contents of a claimant submission to the Trust with permission of the claimant or in response to a subpoena. *Id.*

22. Therefore, the UST’s assertion that the confidentiality provisions embedded in Section 6.5 of the TDPs will engender abuse of the asbestos trust system is without merit.

B. Allowance of Claims Notwithstanding Denial of Exposure

23. The UST’s assertion that the Plan is not proposed in good faith is based, in part, on the UST’s misinterpretation of the following TDP language:

[F]ailure to identify Debtor Product Lines in the claimant’s underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the Asbestos Trust, *provided the claimant otherwise satisfies the medical and exposure requirements of this TDP.*

TDPs § 5.7(b)(3) (emphasis added).

24. The UST mistakenly contends this provision allows a claimant to submit a claim to the Trust for payment notwithstanding a “denial of exposure” and asserts that this type of provision prevents a Trust from asserting the defense of estoppel based upon a claimant engaging in dishonest or deceptive conduct other proceedings. *See* Obj. ¶¶ 36-39. This provision merely states that the failure to identify a specific Debtor Product Line in the claimant’s underlying tort action or other bankruptcy trusts does not preclude recovery from this Trust if *the claimant otherwise satisfies the medical and exposure requirements of this TDP*. *See* TDPs, § 5.7(b)(3). The medical and exposure requirements required for payment under this Trust are set forth at

length under charts in section 5.3(a) on pages 23 and 24 of the TDPs. These charts clearly require evidence of Debtor Exposure in order to be compensated from the Trust. Asbestos trusts replace insolvent defendants in the tort system and are settlement vehicles; therefore, trusts do not contest liability when a plaintiff proves exposure to products for which the trust is responsible. So long as this exposure evidence is submitted to the Trust along with the requisite medical diagnosis, the claim is entitled to payment.

25. The UST incorrectly surmises that there is rampant fraud in claims being submitted and that failure to identify a specific product line in the underlying tort action or another trust is evidence of “denial.” That is not the case. A claimant may file a claim in an underlying tort action or even a trust under compulsion of a statute of limitation or without the benefit of extensive discovery. Therefore, a claimant’s inability to identify a specific Debtor Product Line does not equate into a “denial” of exposure. So, for example, a claimant may have been exposed to asbestos in the shipyards and also while working on automobiles as a hobby. The claimants inability to identify the specific type of boiler or insulation in the ship where he worked forty years ago, or the brand of brakes he purchased for his automobile 30 years ago, at the time a complaint was filed would not preclude recovery under the Trust so long as the claimant provides credible evidence when submitting a Trust claim. Nor does his ability to submit claims to more than one trust for different exposures amount to fraud in submitting a claim.

26. Contrary to the position argued by the UST, the Trust will only compensate claimant who can demonstrate exposure to the Debtor Product Lines. Consequently, the Court should overrule the Objection with respect to the UST’s allegations regarding section 5.7(b)(3) of the TDPs.

C. Withdrawal and Refiling Provisions

27. The UST contends that a claimant's ability "to withdraw an Asbestos Claim at any time upon written notice to the Asbestos Trust and file another claim subsequently without affecting the status of the claim for statute of limitations purposes" serves no legitimate purpose having been put in place solely to perpetuate fraudulent behavior by allowing a claimant to strategically avoid disclosing the existence of such claim in a non-Trust proceeding. *See* Obj. ¶ 40 (citing to TDP § 6.3). Once again, the UST jumps to the conclusion that fraud is the only basis for such a provision. Contrary to the mantra espoused by the UST, multiple *non-fraudulent* reasons exist for a claimant to withdraw a claim. In fact, it is a regular occurrence for claimants to file, amended, transfer, correct, withdraw, or withdraw and refile proofs of claim (and complaints in federal and state court litigation, subject to court rules and state statute), throughout a bankruptcy case. Nevertheless, the TDPs already contain a protection designed to prevent improper filings—the filing fee.

28. The withdrawal and deferral provisions are similar to a tolling provision for claims that are not yet ready for processing.¹² For example, there may be insufficient evidence at time of the claim is submitted to the trust or additional information on the claim may come to light after the claim is being submitted. These provisions also ease the administrative burden placed on the Trust of carrying claims that required additional discovery or are otherwise not yet ready for final processing (*i.e.*, the Trust does not have to issue a deficiency notice). Future claimants also benefit from deferred claims because such pending claims are incorporated in the

¹² *See Pittsburgh Corning*, 2013 WL 2299620, at *38 (describing similar TDP withdrawal provision as a tolling provision).

forecasting and evaluation to determine any changes to the payment percentage to benefit current and future claimants.¹³

D. Discretionary v. Mandatory Third-Party Audits

29. Contrary to the UST's beliefs, trusts are committed to ensuring that no fraudulent claims are paid by the trust, which aligns with their goals of preserving assets for future claimants. As noted earlier, since asbestos trusts replace insolvent defendants and are a settlement vehicle, a trust does not contest liability when a plaintiff proves disease and exposure to products for which the trust is responsible. However, trusts frequently reject and audit claims. The Trust here provides for a mandatory audit with claims selected randomly to identify claims that required further review for potential fraudulent activities. *See* TDP, § 5.8. The objective of the audit is to ensure that appropriate amounts of money were paid to the proper claimants and medical documentation was valid.¹⁴ The Trust reserves the right to hire an independent third-party to conduct the audit and contains adequate measures to ensure that no unreliable claims are paid, and further, that any individual or entity that engages in a pattern of submitting unreliable claims may be barred from submitting claims to the Trust. *See* TDP, § 5.8.

30. The decision to utilize an outside audit is left to the discretion of those authorized in a fiduciary capacity to oversee the trust and it is often involves a cost analysis. The administration of the trusts include stable, stream-lined procedures for handling claims, similar to the processes for handling claims by an insurance company. As the trust model is designed to

¹³ 3/8/2019 Hr'g Tr. at 42:17-24.

¹⁴ U.S. Government Accountability Office, *Report to the Chairman, Committee on the Judiciary, House of Representatives: Asbestos Injury Compensation – The Role and Administration of Asbestos Trusts*, Report No. GA-11-819 (Sept. 2011), at 22-23; Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163, 169-75 (2006).

distribute all assets to claimants, the incentive is claim-oriented and is not designed to reserve funds for shareholders or other stakeholders.

31. Indeed, the professionals involved in trusts take precautions to make sure that only valid and compensable claims are paid through the trust through vigorous negotiations of the TDPs and which vary case by case depending on the circumstances. For example, the TDPs here limited recovery to either Occupationally Exposed Claims or Shade Tree Mechanic Claims. *See* TDP, at p. 3). The TDPs provide for separate cash flow models for each type of claim designed to establish Maximum Annual Payments under the Trust, *see* TDP, § 2.4, and only provide for payment of certain diseases upon proof of certain types of exposures. *See* TDPs § 5.3(a)(3). Further, Shade Tree Mechanic Claims have significantly increased exposure and proof requirements as well as a requirement that such claims can only be paid at the end of the year following payment of Occupational Claims.

32. So, contrary to the UST's assertions, the professionals in these cases have taken many precautions to ensure that only factually supported claims are paid by the Trust.

E. Release of Information

33. The UST suggests that the failure of the TDPs to include provisions allowing the Trust receive copies of other claims submissions undermines the Trusts ability to flag fraudulent claims. *See* Obj. ¶¶ 43-44. Again, the UST's argument misses the overall purpose of the Trust and the provisions crafted for this particular Trust. The Trust is required to pay legitimate claims issued to the Trust and so long as the claimant submits the necessary proof of exposure and disease, there is no need to audit claims submitting to other trusts based upon some broad and unfounded allegation of rampant fraud for which no evidence has been demonstrated in these cases.

34. The UST's focus on enhanced payment for "Extraordinary Claims" is also unfounded. Under the TDPs, only Shade Tree Mechanics with mesothelioma seeking treatment as an "Extraordinary Claim" are eligible for individual review. *See* TDPs, § 5.4(a). To qualify for individual review, a Shade Tree Mechanic must satisfy a very high burden of proof regarding his exposure—his mesothelioma is a product of "exposure to asbestos [that] was at least 75% the result of exposure to asbestos-containing product, or to conduct that exposed the claimant to an asbestos-containing product, for which the Debtors have legal responsibility, and there is little likelihood of a substantial recovery elsewhere." TDPs, § 5.4(a). There is nothing in this provisions that would prevent a Trust from seeking information on claims submitted to other Trusts so the UST's concerns over flagging fraudulent trust submission is simply misguided.

F. Attorney Fee Caps

35. Finally, the UST seeks to impose fee caps on attorneys submitting claims to the Trust. However, the agreement between an attorney and client is a private matter of contract law and is governed by the applicable rules of professional conduct, court rules, and/or state statutes.¹⁵ That relationship is outside the purview of the Trust. Moreover, submission of trust claims is not simply a rote process but rather is usually part of an attorney's overall representation of a client in recovering against all defendants who may have caused the plaintiff's harm. Such representation varies client to client and may involve an extensive

¹⁵ *See, e.g.*, Cal. Bus. & Prof. Code § 6146 (West 2019) (limiting contingency fees in medical malpractice actions based on the amount recovered); Rule 4-200 of the Cal.R.P.C. (setting forth guidelines for payment of attorney fees and stating that fees shall not be "unconscionable"); Rule 1.5 of N.J. R.P.C. (setting forth guidelines for payment of attorney fees and stating fees shall not be "unreasonable"); N.Y. Jud. Law § 474-a (McKinney 2019) (setting statewide limits on contingent fees for medical, dental and podiatric malpractice cases); N.Y. Rules App. Div. 1st Dept. § 603.25 (limiting fees for personal injury and wrongful death actions in the counties in the First Appellate Department (Manhattan and the Bronx) either to a maximum based on the level of recovery, or a total not exceeding 33% of the amount recovered); Rules Regulating the Florida Bar § 4-15(f) (regulating contingency fees in personal injury suits by setting maximum percentages based on the amount of recovery and/or the stage when the litigation terminates).

interview of the client or surviving relatives, friends, and former co-workers, research into past employers and products, and other discovery. Neither the Trust or the UST should have any say on the price to be paid for such services.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Committee respectfully requests that the Court: (i) overrule the Objection; (ii) enter an order approving the Disclosure Statement and confirming the Plan; and (iii) grant such other and further relief as is just and proper.

Dated: March 12, 2019
Wilmington, Delaware

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