

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re:

RED RIVER TALC LLC,<sup>1</sup>

Debtor.

Chapter 11

Case No. 24-90505 (CML)

**DEBTOR'S OMNIBUS REPLY IN SUPPORT OF ITS  
MOTION FOR AN ORDER APPOINTING RANDI S. ELLIS  
AS LEGAL REPRESENTATIVE FOR FUTURE TALC CLAIMANTS**

(Related to Docket Nos. 318, 455, 456, 479, 480, 482, 483)

Red River Talc LLC (the “Debtor”), the debtor in the above-captioned chapter 11 case, files this omnibus reply in support of the *Debtor’s Motion for an Order Appointing Randi S. Ellis as Legal Representative for Future Talc Claimants* [Dkt. 318] (the “Motion”)<sup>2</sup> and in response to: (a) the *Objection of Century and Certain Other Insurers to Debtor’s Motion for an Order Appointing Randi S. Ellis as Legal Representative for Future Claimants* [Dkt. 456] (the “Century Objection”) filed by Century Indemnity Company and certain other insurers (collectively, the “Insurers”); (b) the *United States Trustee’s Objection to Debtor’s Motion for an Order Appointing Randi S. Ellis as Legal Representative for Future Talc Claimants* [Dkt. 480] (the “UST Objection”) filed by the United States Trustee for the Southern District of Texas (the “U.S. Trustee”); (c) the *Opposition of Tamara Newsome to Debtor’s Motion for an Order Approving Randi S. Ellis as Legal Representative for Future Talc Claimants* [Dkt. 482] (the “Beasley Allen Objection”) filed by Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. on

<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 8508. The Debtor’s address is 501 George Street, New Brunswick, New Jersey 08933.

<sup>2</sup> Capitalized terms used herein but not otherwise defined have the meanings given to them in the Motion.

behalf of Ms. Tamara Newsome (“Beasley Allen”); and (d) the *Coalition of Counsel for Justice for Talc Claimants (I) Objection to the Debtor’s Motion for an Order Appointing Randi S. Ellis as Legal Representative for Future Talc Claimants and (II) Reply in Further Support of Its Amended Motion to Establish an FCR Protocol* [Dkt. 483] (the “Coalition Objection” and, together with the Century Objection, the UST Objection and the Beasley Allen Objection, the “Objections”) filed by the Coalition of Counsel for Justice for Talc Claimants (the “Coalition” and, together with the Insurers, the U.S. Trustee and Beasley Allen, the “Objectors”). In support of this omnibus reply, the Debtor respectfully states as follow:<sup>3</sup>

### **PRELIMINARY STATEMENT**

Ms. Ellis undoubtedly is uniquely qualified to serve as the Future Claimants’ Representative in this Chapter 11 Case, and has received support for her appointment from the Ad Hoc Committee of Supporting Counsel (the “Ad Hoc Committee”), which represent the vast majority of the talc claimants, and the official committee of talc claimants in this Chapter 11 Case (the “Committee”), which the U.S. Trustee appointed under section 1102 and has a duty to act in the best interest of its constituents under section 1103 of the Bankruptcy Code. The few Objectors are parties whose sole intention is to derail and delay this Chapter 11 Case through unstinting opposition to every step in the reorganization process. They consist of: (i) certain Insurers, which have no interest in this Chapter 11 Case because the Amended Plan fully preserves their rights;<sup>4</sup> (ii) Beasley Allen, an economically-conflicted plaintiff law firm, which is

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<sup>3</sup> The Debtor also incorporates by reference the arguments set forth in the *Debtor’s Omnibus Objection to the Motions to Establish a Protocol for the Appointment of a Future Claims Representative* [Dkt. 451] (the “Debtor’s Protocol Objection”) in support of Ms. Ellis’s appointment in this Chapter 11 Case.

<sup>4</sup> The Amended Plan does not alter the Insurers’ rights, defenses or obligations. See Amended Plan § 10.3.3 (No Impairment of Rights or Obligations of Talc Insurance Companies) “(a) . . . nothing contained in the Plan, the Plan Documents, or the Confirmation Order, including any provision that purports to be preemptory or supervening, shall in any way operate to, or have the effect of, **impairing, altering, supplementing, changing, expanding, decreasing, or modifying the rights or obligations of any Talc Insurance Company or the Debtor arising out of or under any Talc Insurance Policy**” . . . (b) The

leading the Coalition’s opposition to the appointment of Ms. Ellis and now doubling down on that opposition through a single claimant; (iii) the Coalition, a group of six plaintiff firms (including Beasley Allen), all of which have the same economic conflict as Beasley Allen, and all of which are seeking to benefit themselves at the expense of the claimants; and (iv) the U.S. Trustee, which inexplicably has been acting in lock step with the Coalition.

Ms. Ellis has dedicated almost three years to advocating for the interests of future talc claimants. She has done so despite challenging circumstances, including having been the target of meritless attacks in LTL II—attacks which the New Jersey bankruptcy court determined were meritless and “lack[ed] any legal or factual basis.”<sup>5</sup> Her participation in the prepetition negotiations with the Ad Hoc Committee and the Debtor, in addition to her experience representing the interests of future claimants in LTL I and LTL II, is the reason why her appointment here should be uncontroversial. It is the reason she is uniquely well qualified to serve as the Future Claimants’ Representative in this Chapter 11 Case.

The Objectors’ primary objection is that Ms. Ellis is conflicted because she was the prepetition future claimants’ representative. This argument is absurd. A prepetition future claimants’ representative is commonplace in prepackaged and prenegotiated asbestos chapter 11 cases, and does not create any disqualifying conflicts. In addition, Ms. Ellis’s selection as the prepetition future claimants’ representative is entirely reasonable and appropriate given that she previously represented the same future claimants in LTL I and LTL II. It was the talc claimant

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Plan, the Plan Documents, the Confirmation Order, and all proceedings, determinations, and findings in, of, or by the Bankruptcy Court **are neutral with respect to, and have no effect on, the rights, defenses, and obligations of the Debtor, the Talc Insurance Companies, and the Talc Personal Injury Trust under the Talc Insurance Policies.** Nothing in the Chapter 11 Case shall be construed otherwise or be used as evidence to support or suggest a construction to the contrary.”) (emphasis added).

<sup>5</sup> *Order Denying Mot. to Disqualify Randi S. Ellis as Legal Representative for Future Talc Claimants*, LTL II, Dkt. 1139 at 2 (finding that movant’s motion to disqualify Ms. Ellis “lacks any legal or factual basis”).

representatives themselves (including Beasley Allen), not LTL or Johnson & Johnson (“J&J”), who initially proposed Ms. Ellis as a candidate to serve as future claimants’ representative in LTL I.

Some of the Objectors argue that, because Ms. Ellis was compensated for her prepetition services, she is disqualified from continuing in that role in this case. But they do not explain why the receipt of compensation is problematic or how any prepetition future claimants’ representative can be expected to provide services without compensation. The Objectors also take issue with the amount of Ms. Ellis’s fees, but ignore the complexity of the issues and the fact that those amounts were incurred over a period of nearly a year.

Ms. Ellis has continually worked to represent future claimants—meeting with various parties, both creditor representatives and representatives of the Debtor, to gather facts and information relevant to her constituency. She has sought to remain informed of developments in the talc litigation that could impact her constituency, and working diligently with her professionals to assess the population of future talc claimants and the value of their claims. It is simply not true that Ms. Ellis was unduly influenced by the Debtor or J&J or acceded to their demands and desires. In fact, after Ms. Ellis and her professionals reviewed the Initial Plan and the Amended Plan, she negotiated significant protections for the future claimants’ representative in both versions. Because of Ms. Ellis’s efforts, the future claimants’ representative under the Amended Plan has expansive consent rights. Additionally, while Ms. Ellis supported the Initial Plan and continues to support the Amended Plan, she has made clear that she is continuing to assess the terms of the memorandum of understanding among the Debtor, J&J and The Smith Law Firm PLLC.

Disappointed that Ms. Ellis has acted independently and concluded that the Amended Plan is in the best interests of future talc claimants, the Objectors now seek to replace her with a different future claimants' representative they hope will promote the Objectors' financial interests by opposing the Amended Plan and thereby assist them in attempting to block the proposed \$9 billion settlement, one of the largest ever in a mass tort case. The Objectors' gamesmanship should not be countenanced. Regardless of the standard under which the Court considers the appointment of Ms. Ellis—disinterestedness or a fiduciary standard—Ms. Ellis's appointment is appropriate. The Objections should be seen for what they are: misguided efforts to cause significant delay for no legitimate reason. They should be summarily overruled.

### **REPLY**

#### **A. Ms. Ellis's Appointment Comports with Section 524(g) and Due Process.**

1. There is no disagreement that appointment of a Future Claimants' Representative is necessary in this Chapter 11 Case. Rather, the Objectors quibble with the appointment process; they object to the fact that the Debtor is proposing Ms. Ellis. But there is no set process courts are required to follow in appointing a future claimants' representative—the appointment is within the discretion of the bankruptcy court. See In re Duro Dyne Nat'l Corp., 2019 WL 4745879, at \*5 (D.N.J. Sept. 30, 2019) (“The Bankruptcy Code does not prescribe a process for appointing a future claimants' representative.”); In re Fairbanks Co., 601 B.R. 831, 837 (Bankr. N.D. Ga. 2019) (“The Code is silent as to who (if anyone) may nominate a candidate and whether it requires notice or hearing. The only explicit instruction is that the court make the appointment.”).

**1. It is Appropriate for the Debtor to Nominate a Future Claimants' Representative.**

2. The Insurers allege that the fact that the Debtor seeks to appoint Ms. Ellis as the Future Claimants' Representative creates a "conflict" precluding Ms. Ellis's appointment. See Century Obj. at 21-25; id. at 23 ("Here, the Court did not select Ms. Ellis; Debtor did. The fact that parties adverse to the future claimants selected and recommended Ms. Ellis is, therefore, enough to disqualify her."). The U.S. Trustee similarly argues that "Ms. Ellis was not independently appointed by any court to serve in the capacity of an FCR for the future claimants of the Debtor" and was instead selected by the Debtor's predecessor. See UST Obj. at 4; see also Beasley Allen Obj. at 3 ("Ms. Ellis's employment by the Debtor in connection with this case should alone disqualify her from being the FCR"). But any party in interest is able to nominate a future claimants' representative, and the bankruptcy court acts upon the motion of a party in interest, routinely a debtor, to appoint such representative. Duro Dyne, 2019 WL 4745879, at \*6.<sup>6</sup>

3. The Insurers, and to a certain degree the U.S. Trustee and Beasley Allen, make the unsupportable and illogical argument that no one other than "the Court alone should even have the right to nominate, let alone effectively choose" the Future Claimants' Representative. See Century Obj. at 23; UST Obj. at 1, 4; Beasley Allen Obj. at 3, 7, 16-17.<sup>7</sup> This is plainly incorrect. The question is not who nominates the candidate, but whether that

<sup>6</sup> See also In re Barretts Minerals Inc., No. 23-90794 (MI) (Bankr. S.D. Tex. Nov. 20, 2023) [Dkt. 307] (order appointing legal representative for future claimants on motion by debtor); In re DBMP LLC, No. 20-30080 (JCW) (Bankr. W.D.N.C. June 1, 2020) [Dkt. 310] (same); In re Imerys Talc Am., Inc., No. 19-10289 (LSS) (Bankr. D. Del. June 3, 2019) [Dkt. 647] (same); In re Maremont Corp., No. 19-10118 (KJC) (Bankr. D. Del. Mar. 13, 2019) [Dkt. 146] (same); In re Bestwall LLC, No. 17-31795 (LTB) (Bankr. W.D.N.C. Feb. 23, 2018) [Dkt. 278] (same).

<sup>7</sup> The Insurers cite no section 524(g) opinion that supports their position. Rather, throughout the Century Objection, the Insurers cherry pick general quotations about Future Claimants' Representatives and cite to cases outside of the bankruptcy context.

candidate should be approved by the bankruptcy court based on the facts and circumstances of the case. See Duro Dyne, 2019 WL 4745879, at \*6 (“[t]he legislative history supports the ability of any party in interest—including a debtor—to nominate a claimants’ representative” and “asbestos bankruptcies have followed this practice”) (citing to In re Imerys Talc Am., Inc., 2019 Bankr. LEXIS 1452, at \*10-15 (Bankr. D. Del. May 8, 2019) and Fed. Ins. Co. v. W.R. Grace, 2004 WL 5517843, at \*1, \*9 (D. Del. Nov. 22, 2004)).

4. Moreover, the Objector’s position has been rejected in other chapter 11 cases. As aptly addressed by the Imerys court: “The UST . . . argues that a debtor should not be able to select the individual who will represent the future claimants. . . **I agree with the many courts before me who have found that a nominee should not be disqualified solely on this basis.** While admittedly an unusual situation, this process has worked in the asbestos/mass tort cases for decades.” Imerys, No. 19-10289 (LSS) (Bank. D. Del. May 8, 2019), Dkt. 502 Hr’g Tr. at 25:7-16 (emphasis added); see also Duro Dyne, 2019 WL 4745879 at \*\*5-7 (rejecting nearly identical arguments made by insurers and stating that “[a]t issue is whether a bankruptcy court may appoint a future claimants’ representative nominated by the debtor” and affirming bankruptcy court’s appointment of future claimants’ representative nominated by the debtor).

5. Here, the facts and circumstances clearly support the appointment of Ms. Ellis as the Future Claimants’ Representative in this Chapter 11 Case. See Debtor’s Protocol Obj. ¶¶ 6-13 (describing appointment process in LTL I, LTL II and prepetition). Ms. Ellis was initially nominated by the talc claimants’ committee in LTL I, agreed to by the Debtor and subsequently appointed by the bankruptcy court. Id. ¶¶ 6-10. In LTL II, the Debtor moved to appoint Ms. Ellis to continue her role and the bankruptcy court once again approved her appointment. Id. ¶ 11. In response to the bankruptcy court’s encouragement for the parties

to continue their negotiations, the Debtor approached Ms. Ellis and asked her to continue as the prepetition representative for future talc claimants. *Id.* ¶¶ 12-13. She agreed to do so and to be compensated in the same manner as before. Based on her involvement in LTL I and LTL II, as well as her experiences as a representative, mediator and special master, the Debtor now seeks to have Ms. Ellis officially appointed as the Future Claimants’ Representative in this Chapter 11 Case. *See* Mot. ¶¶ 20-25. Moreover, the Committee, which has a duty to act in the best interest of its constituents under section 1103 of the Bankruptcy Code,<sup>8</sup> supports Ms. Ellis’s appointment. *See generally Response of the Official Committee of Talc Claimants to FCR Motions*, Dkt. 479. The Debtor’s Motion is proper and should be granted for all the reasons set forth in the Motion and the Debtor’s Protocol Objection.

**2. Ms. Ellis’s Prepetition Employment and Compensation Were Appropriate and Do Not Reflect a Lack of Independence.**

6. The Objectors also argue that Ms. Ellis’s prepetition service as future claimants’ representative together with the compensation she received to serve in that role demonstrate a lack independence. *See* Century Obj. at 26; UST Obj. at 4 (asserting that because Ms. Ellis “was selected by LLT (Debtor’s legal predecessor) and was compensated by LLT” prepetition, she “does not meet the standards of independence and undivided loyalty required of an FCR”); Beasley Allen Obj. at 21-23 (asserting Ms. Ellis was employed as one of the Debtor’s professionals and is financially conflicted); Coalition Obj. at 11-12 (asserting the “structural features of her prepetition contractual arrangements with LTL prevented Ms. Ellis from being free of LTL’s and J&J’s undue influence”).

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<sup>8</sup> Adv. Comm. of Major Funding Corp. v. Sommers (In re Adv. Comm. of Major Funding Corp.), 109 F.3d 219, 224-25 (5th Cir. 1997).



7. The Objectors disregard that courts frequently appoint individuals who represented future claimants' interests prepetition and were compensated prepetition for those services to continue in that role after a chapter 11 case is commenced.<sup>9</sup> See Debtor's Protocol Obj. ¶¶ 19-20. The Coalition's assertion that "[t]he Debtor cites to no case appointing an FCR in a prepackaged asbestos bankruptcy," see Coalition Obj. at 3, 10, is just wrong. In the Motion and the Debtor's Protocol Objection, the Debtor cited to In re Maremont Corp., a prepackaged asbestos bankruptcy case in which the bankruptcy court appointed the prepetition future claimants' representative as the postpetition future claimants' representative over the objection of the U.S. Trustee.<sup>10</sup> See Mot. at 7 n.10; Debtor's Protocol Obj. ¶ 19.

8. Although bankruptcy courts have noted that "prepetition relationships or compensation of a candidate on the surface suggest the possibility of an actual conflict and may raise concerns," courts have routinely found that "they do not alone demonstrate a lack of independence or partiality." Fairbanks, 601 B.R. at 841. **"[A]s pointed out by many courts, it would not be possible to propose a prepackaged case if a legal representative were not selected prepetition."** The question is not whether the proposed legal representative performed

<sup>9</sup> See, e.g., In re Barretts Minerals, Inc., No. 23-90794 (MI) (Bankr. S.D. Tex.) [Dkts. 126, 307]; In re Paddock Enters, LLC, No. 20-10028 (LSS) (Bankr. D. Del.) [Dkts. 58, 377]; In re Imerys Talc Am., Inc., No. 19-10289 (LSS) (Bankr. D. Del.) [Dkts. 100, 647]; In re Maremont Corp., No. 19-10118 (KJC) (Bankr. D. Del.) [Dkts. 44, 146]; In re Duro Dyne Nat'l Corp., No. 18-27963 (MBK) (Bankr. D.N.J.) [Dkts. 44, 191]; In re Yarway Corp., No. 13-11025 (BLS) (Bankr. D. Del.) [Dkts. 12, 88]; In re Metex Mfg. Corp., No. 12-14554 (BRL) (Bankr. S.D.N.Y.) [Dkts. 76, 93]; In re Mid-Valley, Inc., No. 03-35592 (JKF) (Bankr. W.D. Pa.) [Dkts. 12, 610].

<sup>10</sup> In Maremont, the debtors selected a prepetition future claimants' representative in February 2018, completed their prepetition solicitation process in December 2018 and filed their chapter 11 cases in January 2019. See Maremont, No. 19-10118 (KJC) (Bankr. D. Del. Jan. 22, 2019), Dkt. 3 at 9-15. The debtors moved to appoint the prepetition future claimants' representative as the postpetition future claimants' representative shortly after filing. Id. at Dkt. 44. The bankruptcy court thereafter overruled an objection filed by the U.S. Trustee and appointed the prepetition future claimants' representative as the postpetition future claimants' representative in March 2019. Id. at Dkt. 146. In May 2019, the bankruptcy court entered its findings of facts and conclusions approving the debtors' disclosure statement, prepetition solicitation procedures and confirming the modified joint prepackaged plan of reorganization (which included a channeling injunction pursuant to section 524(g)). Id. at Dkt. 241. The district court affirmed the bankruptcy court's findings of fact and conclusions of law in June 2019. Id. at Dkt. 292.

some work prepetition, but whether this is a reason to doubt [their] independence based on that selection.” Imerys, No. 19-10289 (LSS) (Bank. D. Del. May 8, 2019), Dkt. 502 Hr’g Tr. at 25:16-22 (emphasis added). The Prepetition FCR Agreement expressly provides that Ms. Ellis’s sole responsibility was to future claimants and the Debtor had “no right to control or influence” how Ms. Ellis carried out her duties. See Prepetition FCR Agreement at 1. That agreement thus has no bearing on her level of disinterestedness or independence. There is no reason—and, apart from conjecture, the Objectors point to none—to suggest Ms. Ellis is not independent.<sup>11</sup>

9. To adopt the Objectors’ position would contradict the many cases appointing Future Claimants’ Representatives who served in such capacity prepetition and would effectively result in the very due process concerns they allegedly seek to avoid. Adequate representation of future claimants, including in any prepetition process, is critical. See In re Combustion Eng., Inc., 391 F.3d 190, 245 (3d Cir. 2004) (emphasizing the need to have future claimants “be adequately represented throughout the process” and stating that the lack of such representation “in the first [prepetition] phase of this integrated settlement” was inadequate). The Insurers’ many references to Combustion Engineering<sup>12</sup> actually support the appointment of Ms. Ellis. Her prepetition representation of future claimants, the importance of which the Debtor recognized and sought to ensure, was entirely consistent with the Third Circuit’s reasoning in that case. If the Insurers’ position were to be accepted, a prepetition future

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<sup>11</sup> Practically speaking, the representatives for current and future claimants in a bankruptcy case are always compensated by a party with adverse interests—the debtor. There is no reason that Ms. Ellis’s prepetition compensation by a presumptive debtor should somehow impute conflicts that do not exist during a chapter 11 case.

<sup>12</sup> See, e.g., Century Obj. at 2 n.5, 3 n.7, 12-14, 16-17, 29. The Insurers attempt to suggest that the plan in Combustion Engineering failed because the debtor had suggested the future claimants’ representative, see id. at 25 n.84, is at best a misstatement.

claimants' representative would not be permitted and this critical protection against the very due process concerns the Insurers purport to raise, eliminated.

10. The prepetition terms of Ms. Ellis's compensation, as well as the potential for future employment, are in line with precedent and provide no basis to find she lacks independence. See Century Obj. at 27; see also Beasley Allen Obj. 22-23 (discussing Ms. Ellis's alleged financial conflict); Coalition Obj. at 4, 11-12 (asserting Ms. Ellis's role was a "lucrative assignment"). Here, the Prepetition FCR Agreement provided for the payment of the reasonable and documented fees and out-of-pocket expenses incurred by Ms. Ellis and her professionals in connection with Ms. Ellis's role as prepetition representative for future talc claimants, including the payment of a \$250,000 retainer for her and her professionals. See Prepetition FCR Agreement at 1-3.

11. This is consistent with compensation of prepetition future claimants' representatives in other mass-tort cases, including prepackaged or prenegotiated cases. See Barretts Minerals, No. 23-90794 (DRJ) (Bankr. S.D. Tex. Oct. 13, 2023), Dkt. 126 ¶ 16 (agreeing to pay, "[p]ursuant to the Prepetition FCR Agreement," the prepetition representative and his counsel at their regular hourly rates and three retainers of \$75,000 to the representative and his professionals); Imerys, No. 19-10289 (LSS) (Bankr. D. Del. June 3, 2019), Dkt. 100 ¶ 12 (agreeing to pay, "[p]ursuant to the Proposed FCR Agreement," the prepetition representative and his counsel at their "standard hourly rates for all reasonable fees and expenses incurred prepetition," a retainer of \$250,000 for the representative and his counsel and a retainer of \$150,000 for additional professionals); Maremont, No. 19-10118 (KJC) (Bankr. D. Del. Jan. 31, 2019), Dkt. 44 ¶ 13 (agreeing to pay, "[p]ursuant to the Pre-Petition Future Claimants' Representative Agreement," the prepetition representative and his counsel at "their regular

hourly rates for services rendered” and a retainer of \$100,000 that was subsequently increased to \$200,000); In re Duro Dyne Nat’l Corp., No. 18-27963 (MBK) (Bankr. D.N.J. Sept. 11, 2018), Dkt. 44 ¶ 20 (agreeing to pay the prepetition representative “at their regular hourly rates for services rendered” and to pay a retainer of \$50,000).

12. The U.S. Trustee, Beasley Allen and the Coalition also make much of the fact that Ms. Ellis received more than \$600,000 prepetition pursuant to the Prepetition FCR Agreement (UST Obj. at 4; Beasley Allen Obj. at 21-22; Coalition Obj. at 12), but largely ignore that this amount was incurred and paid over nearly a year, and that it encompassed work that ultimately culminated in a successful solicitation and the Amended Plan. In Maremont, the prepetition future claimants’ representative, who was subsequently appointed the future claimants’ representative in the chapter 11 cases, was compensated almost \$500,000 pursuant to a prepetition agreement with the debtors for slightly less than a year’s worth of time in 2019. See Maremont, No. 19-10118 (KJC) (Bankr. D. Del. Jan. 31, 2019) Dkt. 44, Ex. C.

13. Additionally, it is commonplace for a prepetition future claimants’ representative to be the nominee for that position in a chapter 11 case once filed; any other result would be, at best, impractical. As in the Prepetition FCR Agreement here, the debtors in Barretts Minerals, Imerys, Maremont and Duro Dyne all agreed that they would move to appoint the prepetition representative as the representative in the later filed chapter 11 cases. Compare Prepetition FCR Agreement at 2 (“LTL currently anticipates that it will ask the bankruptcy court to appoint you to represent future claimants as their FCR if it files a bankruptcy petition.”) with Barretts Minerals, No. 23-90794 (DRJ) (Bankr. S.D. Tex. Oct. 13, 2023), Dkt. 126-2 ¶ 7 (“In the event that the Company files a bankruptcy petition, the Company anticipates (but is not obligated, and does not hereby undertake) that it would ask the Bankruptcy Court to appoint me

to represent Future Claimants as their FCR.”); Imerys, No. 19-10289 (LSS) (Bankr. D. Del. Feb. 27, 2019), Dkt. 100-4 ¶ 7 (“In the event that the Company files a bankruptcy petition, the Company anticipates that it would ask the Bankruptcy Court to appoint me to represent future personal injury claimants as their FCR.”); Maremont, No. 19-10118 (KJC) (Bankr. D. Del. Jan. 31, 2019), Dkt. 44-3 ¶ 7 (“In the event that the Company files a bankruptcy petition, the Company anticipates that it would ask the Bankruptcy Court to appoint me to represent future asbestos personal injury claimants as their FCR.”); Duro Dyne, No. 18-27963 (MBK) (Bankr. D.N.J. Oct. 17, 2018), Dkt. 44-2 ¶ 7 (“In the event that the Company files a bankruptcy petition, the Company anticipates that it would ask the Bankruptcy Court to appoint Mr. Fitzpatrick to represent future asbestos personal injury claimants as their FCR”). All such representatives were subsequently appointed. Barretts Minerals, No. 23-90794 (MI) (Bankr. S.D. Tex. Nov. 20, 2023) [Dkt. 307]; Imerys, No. 19-10289 (LSS) (Bankr. D. Del. June 3, 2019) [Dkt. 647]; Maremont, No. 19-10118 (KJC) (Bankr. D. Del. Mar. 13, 2019) [Dkt. 146]; Duro Dyne, No. 18-27963 (MBK) (Bankr. D.N.J. Oct. 17, 2018) [Dkt. 191].

14. The Objectors’ assertions about the “considerable benefits” that will accrue to Ms. Ellis from her role in this Chapter 11 Case, see Century Obj. at 27; Beasley Allen Obj. at 22-23; Coalition Obj. at 12, disregard the extent of Ms. Ellis’s commitment in LTL I and LTL II and the likelihood that she would be attacked again, as she was in LTL II, to promote a litigation strategy opposed to any resolution in bankruptcy.<sup>13</sup> Over nearly three years, Ms. Ellis

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<sup>13</sup> Beasley Allen and the Coalition also raise Ms. Ellis’s potential appointment as future claimants’ representative of the proposed talc personal injury trust as an alleged conflict. See Beasley Allen Obj. at 22-23; Coalition Obj. at 12. But Beasley Allen’s “analogous situation in the Boy Scouts of America bankruptcy case,” in which the bankruptcy court terminated a mediator—a neutral third-party—upon disclosure of a post-confirmation appointment for the trust established in that case, is distinguishable. Id. Ms. Ellis’s role with the trust, if the Amended Plan is confirmed, would be to represent the same constituency Ms. Ellis represented prepetition and would continue to represent postpetition if appointed.

has worked to represent the interests of future claimants despite fierce attacks. See, e.g., LTL II, Dkt. 1046 (in a letter filed by Ms. Ellis’s counsel in LTL II, her counsel stating that a motion to disqualify Ms. Ellis based on a picture of her at dinner with representatives of LTL, J&J and the Ad Hoc Committee was “frivolous, malicious, unprofessional and consistent with a prior pattern of conduct . . . where filings are made with the apparent intent of seeking to intimidate and control the decisions of the FCR.”). The alleged concerns about Ms. Ellis’s “bias,” see Beasley Allen Obj. at 28, have only ever been raised by those who oppose, and have made clear they oppose, any resolution in bankruptcy. Yet Ms. Ellis has remained steadfast in her commitment to represent and protect future claimants. See Deposition of Randi S. Ellis, Nov. 7, 2024, Tr. at 35:21-36:2.<sup>14</sup>

15. The Objectors, relying largely on supposition, assert that the terms of the Prepetition FCR Agreement, including its termination provision, demonstrate that Ms. Ellis is not independent. See Century Obj. at 27-28; Coalition Obj. at 4, 11-12. But, the record demonstrates that Ms. Ellis was and remains independent. Among other things, Ms. Ellis submitted various requests for information from the Debtor’s predecessor and the Ad Hoc Committee in the negotiations culminating in the Amended Plan, to which the Debtor’s predecessor and the Ad Hoc Committee provided relevant documents and responses. See Declaration of Randi S. Ellis, Dkt. 318-1 ¶ 6. Indeed, Ms. Ellis testified that she worked to ensure the plan protected the rights of future claimants by ensuring that she would have important consent rights. See Deposition of Randi S. Ellis, Nov. 7, 2024, Tr. at 168:24-169:17. These protections are significant. Because of Ms. Ellis, the future claimants’ representative

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<sup>14</sup> The U.S. Trustee attached the transcript of Ms. Ellis’s deposition as Exhibit A to the UST Objection, which was filed under seal due to its confidential designation.

would have expansive consent rights. Far from acting to “satisfy” the Debtor, Ms. Ellis has acted to protect future claimants. Although she has determined to support the Amended Plan, Ms. Ellis has yet to approve the *Confidential Memorandum of Understanding & Agreement Regarding Talc Bankruptcy Plan Support* between J&J, the Debtor and The Smith Law Firm PLLC. Id. at 179:3-9.

16. There is thus no “appearance of potential impropriety” or financial conflict that would preclude Ms. Ellis’s appointment based on her prepetition engagement or prepetition compensation by the Debtor. The opposite is true—the evidence shows that Ms. Ellis is independent and worked diligently to represent her constituency.

**3. Efficiency Is a Proper Consideration and Further Supports the Appointment of Ms. Ellis.**

17. The Objectors assert that the Court should largely disregard the efficiencies that would be served by Ms. Ellis’s appointment. See Century Obj. at 29 (the “Debtor’s desire to move its [Amended Plan] quickly to confirmation cannot trump the constitutional due process interests implicated by the Motion.”); Coalition Obj. at 10 (“Thus, a prepacked bankruptcy should require the FCR to meet an even more exacting standard, not to be approved as a matter of expedience or efficiency simply because the debtor seeks prompt confirmation.”); see also Beasley Allen Obj. at 27 (incorrectly alleging Ms. Ellis “does not have any relevant institutional knowledge by virtue of her prior roles that cannot be obtained by another seasoned and untainted candidate.”). This argument is premised on the fallacy that the prepetition appointment of Ms. Ellis exhibits “an unseemly desire to accommodate Debtor’s business objectives” see Century Obj. at 30, or that efficiency is the sole basis for Ms. Ellis’s appointment. Neither is true. As noted above, Ms. Ellis at all times acted independently from the Debtor and properly represented the interests of future claimants. And, efficiency, in

prepackaged mass-tort bankruptcy cases and, more particularly, this Chapter 11 Case, is critical and should not be ignored or minimized.<sup>15</sup>

18. Delay, while potentially beneficial for the Objectors' financial interests and litigation strategy, will harm the claimants in this case. The Committee agrees, stating that "given the scheduling deadlines in place as well as significant matters raised by other pending motions that need to be promptly addressed," identifying a new Future Claimants' Representative would "lead to unnecessary delays the Committee believes would not be beneficial to the interests of the Committee's constituents." *See Response of the Official Committee of Talc Claimants to FCR Motions*, Dkt. 479 at 2.

19. Indeed, courts have found that a Future Claimants' Representative's prepetition engagement enables a more efficient administration of a debtor's estate, which facilitates prompt resolution, while preventing any due process concerns by affording future claimants a seat at the table as prepetition diligence and negotiations are conducted. *See Combustion Engineering*, 391 F.3d at 245 (highlighting need for a future claimants' representative to be engaged and included in negotiations early in the bankruptcy process); *Maremont*, No. 19-10118 (KJC) (Bankr. D. Del. Mar. 8, 2019) Dkt. 126, Hr'g Tr. at 102:6-10 ("Much money and time has already been spent . . . in his role as prepetition FCR and it seems under these circumstances counterintuitive to want to pay someone new to spend time and money getting caught up.").

20. Contrary to the Coalition's and Beasley Allen's assertions, there is no person better qualified to act as the Future Claimants' Representative in this case, in which the

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<sup>15</sup> For example, although impossible to have done so, the Insurers take issue with the Debtor's failure to file a motion in any bankruptcy court to have Ms. Ellis's appointment approved in advance. *See Century Obj.* at 31.



confirmation hearing is set to begin at the end of January (a little more than two months from now). Ms. Ellis is not only supported by the Debtor, the Committee and the Ad Hoc Committee as the Future Claimants' Representative, but she is also familiar with the Amended Plan and the proposed trust distribution procedures, and she is familiar with the talc claims against the Debtor given her experience in LTL I, LTL II and the negotiations leading up to the filing of this Chapter 11 Case. Far from acting to accommodate the Debtor or J&J, Ms. Ellis has established her independence and shown her commitment to serve as a fiduciary acting in the interests of future claimants.

**B. Ms. Ellis's Appointment as Future Claimants' Representative Is Appropriate Under the Imerys Standard.**

21. While the Bankruptcy Code does not address the standard for determining whether an individual qualifies to serve as a Future Claimants' Representative, courts have either applied a fiduciary standard or the disinterestedness standard under section 101(14) of the Bankruptcy Code. Compare In re Imerys Talc Am., Inc., 38 F.4th 361, 376 (3rd Cir. 2022) ("The statutory text of § 524(g) therefore suggests that an FCR appointed under that section must be more than merely disinterested, and instead be able to fulfill the heightened duties owed by fiduciaries") with Maremont, No. 19-10118 (KJC) (Bankr. D. Del. Mar. 8, 2019) Dkt. 126, Hr'g Tr. at 98:4-8 ("Because the Code lacks express guidance in [section] 524(g), the majority of recent decisions by bankruptcy courts have determined the appropriate standard for assessing the proposed appointment of an FCR is that of disinterestedness under Section 101(14) of the Bankruptcy Code.").<sup>16</sup>

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<sup>16</sup> The Coalition's statement that the "[t]he Debtor cites no cases, and the Coalition has found none, appointing an FCR in a prepackaged asbestos case," see Coalition Obj. at 10, is flatly incorrect. As mentioned herein, Maremont was a prepackaged asbestos case with a prepetition future claimants' representative appointed on a postpetition basis after the bankruptcy court applied the disinterestedness standard.

22. The Objectors urge this Court to apply the standard set forth by the Third Circuit in Imerys. See Century Obj. at 31-32; UST Obj. at 1-2; Beasley Allen Obj. at 1-2, 17-20; Coalition Obj. at 8-10. While the Debtor does not concede the applicability of this standard, the appointment of Ms. Ellis satisfies it.<sup>17</sup> See Mot. ¶ 12; Debtor’s Protocol Obj. ¶¶ 16-17.

23. The Objectors, in asserting that Ms. Ellis cannot satisfy the fiduciary standard, disregard that Imerys itself involved a challenge by insurers to the appointment of a future claimants’ representative who (a) served as the future claimants’ representative prepetition, (b) was nominated by the debtors post-petition to serve as the future claimants’ representative in the chapter 11 cases and (c) was compensated by the debtors prepetition for his and his professionals’ services. Imerys, 38 F.4th at 374. The bankruptcy court overruled the challenge and appointed the prepetition representative as the representative in the chapter 11 cases and that decision was subsequently affirmed by the District Court and the Third Circuit. Id. While Imerys was not a prepackaged case, the Objectors can hardly point to Ms. Ellis’s prepetition employment and compensation by the Debtor, as well as her nomination by the Debtor, as evidence that she does not satisfy the Imerys standard. There simply is no valid argument that the standard applicable to a prepetition future claimants’ representative in a “free-fall” bankruptcy should somehow be different than the standard applied in a prepackaged bankruptcy.

24. Moreover, the U.S. Trustee’s implicit suggestion and the Coalition’s assertion that Ms. Ellis is not independent or does not meet the standard of a fiduciary because

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<sup>17</sup> Indeed, the New Jersey bankruptcy court previously found that Ms. Ellis satisfied the standard set forth in Imerys in LTL II. See LTL II, May 9, 2023 Hr’g Tr. at 143:16-21 (“The Third Circuit noted that the standard is akin to those employed for guardian ad litem, yet in other contexts. This Court has employed the same standard in considering the present motion and, as instructed by the Circuit Court, has bottomed its analysis on Ms. Ellis’s ability to serve the future claimants’ interests effectively and impartially.”).

she was (a) only in contact with the Debtor’s predecessor and the Ad Hoc Committee regarding a potential bankruptcy filing and (b) signed a non-disclosure agreement with the Debtor’s predecessor are misguided. See UST Obj. at 3; Coalition Obj. at 3-5, 11-12. Discussions regarding potential bankruptcy filings commonly proceed on a confidential basis; the fact that negotiations are confidential does not demonstrate any lack of independence. Further, the suggestion that Ms. Ellis should have been in contact with the Coalition members or leadership of the MDL ignores both the Coalition’s and the leadership’s economic conflict and the repeated statements of their members that they will never agree to any bankruptcy resolution regardless of its terms.

25. Finally, Beasley Allen suggests that Ms. Ellis cannot act with independence on behalf of future claimants “because she has already prejudged” whether to support the Amended Plan “without having undertaken the necessary diligence.” See Beasley Allen Obj. at 23, 27. But Beasley Allen points to no evidence for this reasoning—instead asserting that there is no evidence that Ms. Ellis has estimates of the “number, nature, amount, and timing of future claims” or that she has prepared an analysis with respect to future claims. See id. at 24, 27. Ms. Ellis, however, has testified regarding the work performed by her professionals to develop a mathematical model for an estimation of such factors, including the expected future population of claimants who would be submitting claims under the Amended Plan as well as the total value of the future claims. See Deposition of Randi S. Ellis, Nov. 7, 2024, Tr. at 66:7-67:25. Ms. Ellis also testified that this work began during her employment in LTL I and continued through LTL II and her prepetition work here. See id. 68:1-69:12.<sup>18</sup>

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<sup>18</sup> Ms. Ellis’s testimony as to the work she has engaged in since LTL I also rebuts Beasley Allen’s incorrect assertions that Ms. Ellis’s familiarity with the talc claims against the Debtor is “not especially germane to the duties of the FCR in *this* case.” See Beasley Allen Obj. at 26-27 (emphasis in original).

26. Ms. Ellis has repeatedly demonstrated the independence demanded of her role and has freely taken “different views about the proper pathways for protecting, as a fiduciary, the interests of her constituency,” views that the Objectors oppose. See LTL II, May 9, 2023 Hr’g Tr. at 144:11-19 (emphasis added) (excerpt attached as Exhibit C to the Debtor’s Protocol Objection). At the same time, she has demonstrated her independence from the Debtor and J&J. See supra ¶ 15. Ms. Ellis satisfies the requirements of a fiduciary and has no conflict that would preclude her appointment.

### **CONCLUSION**

For the reasons set forth above, the Debtor respectfully requests that the Court enter an order (i) granting the relief sought in the Motion, (ii) overruling the Objections and (iii) granting such further relief to the Debtor as the Court may deem proper.

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Dated: November 11, 2024  
Houston, Texas

Respectfully submitted,

/s/ John F. Higgins

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**Certificate of Service**

I certify that on November 11, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas, and will be served as set forth in the Affidavit of Service to be filed by the Debtor's claims, noticing and solicitation agent.

/s/ John F. Higgins  
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