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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	:	**Chapter 11**
HOPEMAN BROTHERS, INC.,	:	**Case No. 24-32428 (KLP)**
Debtor.	:	

CHUBB INSURERS' OPPOSITION TO DEBTOR'S MOTION IN *LIMINE* TO EXCLUDE THE EXPERT TESTIMONY OF MARC C. SCARCELLA

Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America ("Century") and Westchester Fire Insurance Company (on its own behalf and for policies issued by or novated to Westchester Fire Insurance Company) ("Westchester Fire") (Century and Westchester Fire the "Chubb Insurers"), oppose Debtor's motion in *limine* (the "Motion", Dkt. No. 1089) for an order to exclude the testimony of expert Marc C. Scarcella at the upcoming hearing (the "Confirmation Hearing") relating to final approval

of the Disclosure Statement and confirmation of the Amended Plan of Reorganization (the "Plan").[1]

PRELIMINARY STATEMENT

1. Desperate to distract the Court from the Plan Proponents' failure to offer evidence demonstrating compliance with § 1129(a)(7), and to foreclose the devastating impact of the expert evidence of Mr. Scarcella at the Confirmation Hearing, Debtor's Motion improperly seeks a backdoor ruling on a confirmation issue through the guise of an evidentiary challenge. The Court should not take the bait. Whether the Plan complies with § 1129(a)(7) is a confirmation issue. Consistent with the Plan Proponents' arguments and the Court's rulings on other contested matters in this case, that issue cannot be resolved prior to the Confirmation Hearing through an evidentiary motion. On that basis alone, the Court must deny the Motion.

2. The Motion should also be denied on the merits. Expert evidence like that offered by Mr. Scarcella, relating to claims estimation projections and insurance asset recoveries, is common and often necessary in bankruptcy confirmation hearings involving asbestos or other mass tort issues. Indeed, applying Rule 702 to exclude Mr. Scarcella's expert testimony would be particularly inappropriate here, where Debtor's creditors largely consist of holders of Asbestos Claims and the sole source of recoveries for those creditors, whether through the proposed Plan or in liquidation, is Debtor's insurance. Section 1129(a)(7) requires the Court to determine independently, based on evidence adduced at the Confirmation Hearing, that "each creditor or interest holder [ ] will receive at least as much in reorganization as it would in liquidation."[2] The

[1] The Chubb Insurers request that the Court regard the herein facts, arguments, and citations as a written memorandum of reasons and authorities combined with the response herein, as permitted by Local Bankruptcy Rule 9013-1(G)(2).

[2] *In re Smith*, 357 B.R. 60, 67 (Bankr. M.D.N.C. 2006), citing 7 COLLIER ON BANKRUPTCY ¶ 1129.03[7] (15th ed. rev.2006)

Chubb Insurers should not be precluded from presenting expert evidence on this issue just because the Plan Proponents disagree as to the requisite scope of the analysis. Unlike with jury trials, the presentation of expert evidence to a fact-finding court does not pose a risk of confusion. The Court should take in all of the evidence presented at the Confirmation Hearing and then make its findings.[3] Any other path runs the risk of improper prejudice.

3. Moreover, even if a motion to preclude under Rule 702 were a proper vehicle to determine the proper scope of the Court's analysis under § 1129(a)(7) – and it is not – Debtor's interpretation of § 1129(a)(7) is wrong. Applying the plain language of § 1129(a)(7) and § 524(g), Supreme Court and other relevant caselaw, and common sense, § 1129(a)(7) requires an analysis of whether individual asbestos claimant creditors eligible to vote on the Plan – *i.e.*, current creditors – will receive as much through the Plan as they would in a Chapter 7 liquidation. Unlike the Plan Proponents' Liquidation Analysis, that is the exact focus of Mr. Scarcella's report.

4. Finally, Mr. Scarcella is qualified to serve as an expert in this matter, which is the only relevant inquiry for a Rule 702 motion. An economist, Mr. Scarcella has worked as a consultant and expert on mass tort and insurance cases for his entire career, starting for the Claims Resolution Management Corporation, which provides claims processing services for the *Johns-Manville* asbestos trust (and others), and he has testified as an expert (either at a hearing or deposition) more than forty (40) times, including hearing testimony before the U.S. Bankruptcy Courts for the District of New Jersey (multiple times), the Southern District of Texas, and the District of Delaware, the U.S. District Court for the Southern District of New York, and state courts in Ohio, Missouri, Tennessee, with the vast majority of those in the context of asbestos and other

[3] *See, e.g.*, *In re Islet Sciences, Inc.*, 640 B.R. 425, 474 – 483 (Bankr. D. Nev. 2022) (overruling parties' objections to expert testimony adduced from several witnesses during the confirmation hearing because the expert testimony "would be given the weight, if any, as determined by the court.").

mass tort and insurance matters. Mr. Scarcella also has testified several times before Congress regarding asbestos trust issues. Here, where the Debtor's most significant liabilities are for asbestos claims and its only assets to pay such claims are insurance policy proceeds, the Liquidation Analysis is (or should have been) an exercise in estimating asbestos liabilities and comparing them to estimated insurance recoveries, both under the terms of the Plan and in a hypothetical Chapter 7 liquidation as of the proposed Effective Date. In that context, Mr. Scarcella's expertise is paramount.

BACKGROUND

5. Pursuant to § 1129(a)(7), the Court may confirm a Chapter 11 plan of reorganization "only if…[w]ith respect to each impaired class of claims or interests (A) each holder of a claim or interest of such class (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date…."[4] While the Motion refers to the test required under § 1129(a)(7) as the "Best Interests Test," it is actually known as the "Best Interests ***of Creditors*** Test."[5] Under § 1129(a)(7), the Chapter 11 plan proponents bear the burden of proving that "each creditor or interest holder in an impaired class must receive (i) property (ii) that has a present value equal to (iii) that participant's hypothetical chapter 7 distribution (iv) if the debtor were liquidated instead of reorganized on the effective date of the plan."[6] While the focus is in part on whether each impaired class of creditors has voted for the plan, the U.S. Supreme Court has explained that

[4] 11 U.S.C. § 1129(a)(7)(A)(i)-(ii).

[5] *See, e.g.*, *In re Smith*, 357 B.R. at 67 ("This provision commonly is referred to as the best interests of creditors test.").

[6] *Id*. (citing 7 COLLIER ON BANKRUPTCY 1129.03[7] (15th ed. rev. 2006) (emphasis added)).

the analysis pertains specifically to "individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."[7]

6. Chapter 11 plan proponents commonly establish their compliance first by preparing a "liquidation analysis" comparing the potential recoveries of each class of creditors under the proposed plan and a hypothetical Chapter 7 liquidation.[8] Then, at the confirmation hearing, the plan proponents provide fact or expert evidence to support the liquidation analysis.[9]

7. In this matter, the Liquidation Analysis sponsored by the Plan Proponents that appears in the Disclosure Statement was prepared by the Committee's financial consultant, FTI.[10] Plan Proponents also intend to call Conor Tully of FTI, who was responsible for preparing the Liquidation Analysis, as a witness at the Hearing. Significantly, although the Liquidation Analysis acknowledges it was "prepared so that the Bankruptcy Court may determine that the Plan is in ***the best interest of creditors who reject the Plan*** and equity holders," it does not actually attempt to demonstrate that the current asbestos creditors of Hopeman voting on the Plan are better off under the Plan than a Chapter 7 liquidation.[11] Indeed, the Liquidation Analysis does not even estimate the value of the pending asbestos creditor claims (or, for that matter, the claims of future demand-

[7] *Bank of America Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'Ship*, 526 U.S. 434, 441 n.13 (1999). *See also In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 29 – 30 (Bankr. D. Kan. 2001) ("The plain language of § 1129(a)(7) makes clear that this test applies to each creditor rather than to each class of creditors").

[8] *In re Smith*, 357 B.R. at 67 ("In order to show that a payment under a plan is equal to the value that the creditor would receive if the debtor were liquidated, there must be a liquidation analysis of some type that is based on evidence and not mere assumptions or assertions.").

[9] *See, e.g.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("At the confirmation hearing, Manville presented an extensive liquidation analysis based on documentary evidence and expert testimony."); *In re W.R. Grace & Co.*, No. 11-199, 2012 U.S. Dist. LEXIS 80461, at *258 – 259 (D. Del. June 11, 2012) (detailing the factual and expert evidence submitted about the liquidation analysis at the confirmation hearing).

[10] *See* Liquidation Analysis, Dkt. 767, at pp. 213 – 217.

[11] *Id*. (emphasis added).

holders), claiming that "Hopeman does not have sufficient information to estimate the total amount of these claims with certainty for purposes of this analysis."[12] Instead, the Liquidation Analysis only offers an estimation of the potential insurance recoveries under the Plan and a Chapter 7 liquidation.[13]

8. Mr. Scarcella's expert report undertakes the critical inquiry that the Liquidation Analysis omits -- namely, a determination of whether the impaired asbestos claimant creditors that would be voting (or eligible to vote) on the Plan will receive as much under the Plan as they would in liquidation.[14] In doing so, Mr. Scarcella conducts a detailed analysis as to the aggregate value of the "Pending" and "Bankruptcy" asbestos claims, using well-recognized asbestos claim valuation techniques and factors, and assesses how much of that aggregate value such asbestos claimant creditors would expect to receive under either the Plan or in a Chapter 7 liquidation.[15] He then concludes that "under the Chapter 7 liquidation option, the Pending and Bankruptcy Claims will be liquidated at an amount that is 100% or greater of their value but for the bankruptcy," but "these same Pending and Bankruptcy Claims will be liquidated at a discount to their respective values but for the bankruptcy under the competing 524(g) option."[16]

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[12] *Id*. at p. 217, note 14. This claim is belied by the fact that both the Debtor and the Committee retained experts – at *significant* cost to the estate – ***who did exactly that***. *See* Chubb Insurers' Objection to (1) Final Approval of Disclosure Statement and (2) Confirmation of Plan of Reorganization of Hopeman Brothers, Inc. Under Chapter 11 of the Bankruptcy Code ("Chubb Objections"), Dkt. No. 958, at Exhibit E (Expert Report of Ross I. Mishkin) (Debtor's expert) and Exhibit F (Expert Report of Yvette Austin) (Committee's expert).

[13] Liquidation Analysis, Dkt. 767, at p. 215. That analysis itself is wrong, and it does not serve the purpose of showing holders of current asbestos claims their anticipated distributions under the Plan as compared to a Chapter 7 liquidation on the Effective Date.

[14] *See* Chubb Objections, Dkt. No. 958, at Exhibit I (Affirmative Expert Report of Marc C. Scarcella, M.A.) (hereinafter, the "Scarcella Report"), at 4 ("Scope of Charge," third bullet: "Determine if the Pending Claims and Bankruptcy Claims would financially benefit from a Chapter 7 Plan of Liquidation, as compared to a competing Plan of Reorganization under Section 524(g) that is currently proposed.")

[15] *Id*. at 5 – 26.

[16] *Id*. at 5.

ARGUMENT

9. Debtor offers two purported justifications for precluding Mr. Scarcella's testimony under Rule 702. First, Debtor asserts that Mr. Scarcella's expert evidence is "irrelevant and unhelpful" because he supposedly misapplies the test required under § 1129(a)(7).[17] Second, Debtor asserts that Mr. Scarcella lacks the necessary "specialized knowledge, skill, experience, training or education" to support his claimed expertise.[18] Both of Debtor's arguments are wrong.[19]

A. Debtor's Premature, Backdoor Attempt At A Confirmation Ruling On Section 1129(a)(7) Is Inappropriate

10. The Plan Proponents bear the burden of proving by a preponderance of the evidence that the Plan complies with the Best Interests of Creditors Test under § 1129(a)(7), with the Court required to make an "independent" finding on that issue.[20] That "independent" finding has two elements. First, the Court must determine, as a legal matter, what the Plan Proponents must prove in order to comply with § 1129(a)(7). Second, the Court must determine, as a factual matter, whether the Plan Proponents put forth sufficient proper evidence to carry their burden of proof.

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[17] Motion at 10 – 14.

[18] *Id*. at 14 – 15.

[19] While not a basis for the Motion, Debtor devotes pages of the Motion asserting that the Chubb Insurers were dilatory in disclosing Mr. Scarcella's expert report. That is baseless. Debtors did not file their Plan Supplement, which was the first document disclosing the Litigation Trustee's role and fee structure, until June 6th. *See* Dkt. 853. Similarly, the Plan Proponents did not complete their document productions until June 25, 2025. The discussion before the Court cited in the Motion referred to a "fact stipulation" in lieu of presenting a Chubb witness, which had nothing to do with expert testimony. *See* Motion at 6. Indeed, as Chubb's counsel explained during that hearing, the Chubb Insurers could not even know what expert(s) they may need until the Plan Proponents filed all of the contemplated Plan documents and finished discovery. Moreover, if Debtor truly believed Mr. Scarcella's report was out of time, it would have moved to strike the report on that basis. Instead, the Plan Proponents used the pretense of needing to identify a rebuttal expert and prepare a rebuttal expert report -- which the Plan Proponents ultimately *did not do* -- in order to secure weeks of additional time to file their brief in support of Plan confirmation and a six-week delay to the Confirmation Hearing – before filing the present Motion to exclude Mr. Scarcella's testimony on supposed admissibility grounds. Finally, it remains accurate that due to the needlessly rushed schedule, the Chubb Insurers were not able to secure an expert to address the Plan's impact on their insurance rights.

[20] *See, e.g., In re W.R. Grace & Co.*, 2012 U.S. Dist. LEXIS 80461, at *256 – 258.

Moreover, that factual finding must be based on evidence adduced at the Hearing, rather than on non-evidentiary assumptions and assertions.[21]

11. The Debtor's Motion seeks to short-circuit these twin obligations by having the Court prematurely rule on both the legal question of what § 1129(a)(7) requires and to foreclose Chubb Insurers from offering any evidence on this issue at trial. That is inappropriate. As the Plan Proponents have repeatedly asserted in this case, and as the Court has ruled in agreement with the Plan Proponents' positions, confirmation issues can only be decided following the hearing and a proper examination of all of the evidence.[22]

12. Here, there is no dispute that the Plan's compliance with § 1129(a)(7) is a confirmation issue. Based on exactly the same rationale the Plan Proponents previously espoused, the Court should decline Debtor's invitation to issue a premature ruling on that issue, or any legal or factual aspect thereof, in the context of the pending Motion. Instead, the Court should deny the Motion and render judgment on the legal requirements of § 1129(a)(7), and Plan Proponents'

[21] *Id*. (citations omitted). *See also In re Multiut Corp*., 449 B.R. 323, 344 – 346 (Bankr. N.D. Ill. 2011) (noting that "[t]he best interests valuation is to be based on evidence not assumptions," and holding that "the Plan's liquidation analysis is insufficient to meet the requirements of § 1129(a)(7)" because "[o]ther than the conclusory testimony from [debtor's principal] and assertions in the Disclosure Statement, there is no actual evidence or analysis to indicate what creditors would receive in a Chapter 7 case versus a Chapter 11 case").

[22] *See, e.g.*, Reply In Support of Joint Application of the Debtor and the Official Committee of Unsecured Creditors for an Order Appointing Marla Rossoff Eskin, Esq. as Future Claimants' Representative, Dkt. No. 722, at 14 – 15 (arguing that confirmation issues should not be decided through "an otherwise unrelated motion or objection" and decisions on Plan confirmability "are premature" in advance of the confirmation hearing); Omnibus Reply in Support of Solicitation Procedures Motion, Dkt. No. 759, at 5 (the Chubb Insurers' objection "address[es] the standards for confirmation and should be considered by the Court at the confirmation hearing"); Omnibus Reply of the Official Committee of Unsecured Creditors in Support of the Interim Fee Applications of its Professionals, Dkt. No. 757, at 8 (arguing that "an objection to a fee application is not a vehicle for challenging plan confirmation," and that "a court should not be prematurely swayed to 'conclude that the . . . plan cannot be confirmed' before a proper 'examination of the evidence offered at the hearing on confirmation' has taken place.") (emphasis added). In each instance, the Court agreed with the Plan Proponents. The Plan Proponents' arguments to the contrary now that it is expedient in hopes of hiding from the Court devastating evidence concerning a central confirmation issue should be rejected outright.

factual compliance with those requirements, only after hearing all of the evidence and testimony at the Hearing, including that of Mr. Scarcella.

B. Mr. Scarcella's Expert Evidence Is Relevant, Appropriate, and Admissible

13. Debtor asks the Court to exercise its "gatekeeping role" under Rule 702 and exclude Mr. Scarcella's expert report and testimony because, in Debtor's view, his opinion that the asbestos creditors will be impaired under the Plan but compensated in full in a hypothetical Chapter 7 liquidation "is not relevant and, thus, not helpful because that is not the correct inquiry under the Best Interests Test." Motion at 9 – 10. Debtor misconceives and misapplies Rule 702, which should not be used to exclude Mr. Scarcella's expert testimony.

14. Rule 702 was intended to "liberalize" the introduction of relevant expert evidence.[23] It permits an expert to testify if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[24] A motion to exclude an expert under Rule 702 turns on whether the expert's testimony is (1) based on sufficient facts or data, (2) the product of reliable principles and methods, and (3) applied reliably to the facts of the case.[25] Mr. Scarcella's testimony satisfies each requirement.

15. The only issue on a Rule 702 motion to exclude expert testimony is admissibility. "[T]here is no requirement in *Daubert*, or any other controlling authority, that the proffering party must 'prove' anything to the court before the testimony in question can be admitted."[26] Instead, all that is required is the Court make a "preliminary assessment' of whether the proffered testimony is "both reliable (i.e. based on 'scientific knowledge') and helpful (i.e. of assistance to the trier of

[23] *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999).

[24] Fed. R. Evid. 702.

[25] *Id.*

[26] *Maryland Cas. Co. v. Therm-O-Disc., Inc.*, 137 F.3d 780, 783 (4th Cir. 1998).

fact in understanding or determining a fact in issue)."[27] "Relevancy simply requires that '[t]he evidence. . . logically advance a material aspect of the party's case."[28]

16. Debtor's Motion does not challenge whether Mr. Scarcella's opinion is based on scientific knowledge. In fact, Debtor admits that Mr. Scarcella "may be qualified to offer expert opinions regarding claim valuation in asbestos and other mass-tort cases."[29] Instead, Debtor challenges the helpfulness of Mr. Scarcella's testimony, claiming that his opinions supposedly "misapply" the test set forth in § 1129(a)(7).[30]

17. As discussed below, that is wrong. It is also an illegitimate basis for excluding Mr. Scarcella's expert testimony. As outlined above, Debtor's Motion is the wrong vehicle for deciding, legally, the correct standard to be applied to a liquidation analysis under § 1129(a)(7). That is a confirmation issue, and Mr. Scarcella's opinions "logically advance a material aspect of" the Chubb Insurers' case with respect to the § 1129(a)(7) analysis.[31] On that basis alone, the Court should deny the Motion.[32]

18. Debtor is also wrong about the specific application of Rule 702. Under the "helpfulness" prong of *Daubert*, the only inquiry is "whether the opinion is relevant to the facts at

[27] *Id*.

[28] *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (quoting *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007)).

[29] Motion at 14. Debtor challenges Mr. Scarcella's qualifications not with respect to claim valuation and insurance issues, but with respect to presenting a liquidation analysis. In the context of this case, Debtor's arguments must be rejected for the reasons addressed below.

[30] *Id*. at 9.

[31] *Barabin*, 740 F.3d at 463.

[32] *See Johns Hopkins Univ. v. Alcon Labs. Inc.*, No. 15-525, 2018 WL 4178159, at *21 (D. Del. Aug. 30, 2018) ("A motion in *limine* is not the proper vehicle by which to eliminate issues from a case" and "elimination of a legal issue is the proper function of a summary judgment motion").

issue."[33] Here, that standard is met. One of the facts for independent determination by the Court is whether the Plan satisfies § 1129(a)(7). On that issue, the Plan Proponents prepared the Liquidation Analysis and apparently intend for Mr. Tully of FTI to testify about it at the Confirmation Hearing. Mr. Scarcella's report and testimony likewise go directly to the issue of the Plan's factual compliance with § 1129(a)(7).

19. In fact, numerous asbestos bankruptcy confirmation hearings have involved liquidation analyses premised on precisely the type of expert evidence proffered by Mr. Scarcella here. For instance:

- At the confirmation hearing in the seminal *Johns-Manville* asbestos bankruptcy case, "Manville presented an extensive liquidation analysis based on documentary evidence and expert testimony."[34]

- At the confirmation hearing in the *W.R. Grace* asbestos bankruptcy case, several witnesses that "testified about the liquidation value of creditor claims," and two experts – an expert witness in "mass tort bankruptcy liquidation" and a "claims estimation expert" – both testified about, factually what the creditors might recover under the proposed plan versus a liquidation.[35]

- At the confirmation hearing in the *Quigley* asbestos bankruptcy case, Quigley presented fact and expert testimony in support of its liquidation analysis, including expert testimony regarding "the tort-system value of the outstanding [current] claims. . . applying historic qualification rates."[36]

20. Significantly, after the *Johns-Manville* and *W.R. Grace* cases were appealed, in part based on questions concerning the plan's compliance with § 1129(a)(7), the appellate courts in each case rejected the appeals because the objecting parties did not offer their own expert

[33] *Westberry*, 178 F.3d at 260.

[34] *Johns-Manville Corp.*, 843 F.2d at 649.

[35] *In re W.R. Grace & Co.*, 2012 U.S. Dist. LEXIS 80461, at *258 – 259.

[36] *In re Quigley Co., Inc.*, 437 B.R. 102, 112 (Bankr. S.D.N.Y. 2010).

testimony and evidence regarding the liquidation analysis.[37] Implicit in those decisions is that expert evidence on claims estimation and asbestos creditor recoveries is appropriate, relevant, and ***necessary*** in the context of the bankruptcy court's consideration of whether an asbestos-related Chapter 11 plan complies with § 1129(a)(7). The Court should not foreclose the Chubb Insurers' ability to present such evidence here.

21. The Chubb Insurers have disputed that the Plan complies with § 1129(a)(7). The Plan Proponents obviously disagree. The Court must make its independent finding based on all of the evidence adduced that the hearing, which for due process and fundamental fairness reasons should include the evidence that the Chubb Insurers will submit. Mr. Scarcella's report and testimony will be, at a minimum, "relevant" to that question and helpful to the Court in determining factually whether the Plan does or does not satisfy the Best Interest of Creditors test.

22. Significantly, while the Chubb Insurers are confident that Mr. Scarcella is correct that asbestos claimant creditors would be better off under a Chapter 7 liquidation than under the Plan, the Court "need not determine" that question at this point.[38] Instead, "the proper way to test the correctness and thoroughness of an expert's opinions is through cross-examination and rebuttal evidence" at the Hearing.[39]

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[37] *See Johns-Manville Corp.*, 843 F.2d at 649 (noting Kane "submitted no evidence" about the liquidation analysis); *In re W.R. Grace & Co.*, 2012 U.S. Dist. LEXIS 80461, at *259 ("The Libby Claimants did not rebut this evidence with their own contrary expert testimony.").

[38] *See Westberry*, 178 F.3d at 261 (in ruling on the admissibility of expert testimony, the court does not need to decide whether the opinion is "irrefutable or certainly correct."); *see also Maryland Cas. Co.*, 137 F.3d at 783 (explaining that parties proffering expert evidence "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*….") (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3rd Cir. 1994) (italics in the original).

[39] *Trauernicht v. Genworth Fin., Inc.*, No. 3:22-cv-532, 2024 U.S. Dist. LEXIS 95739, at *25 (E.D. Va. May 29, 2024). *See also Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 195 (4th Cir. 2017) ("'questions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility' of the witness' assessment, 'not its admissibility.'"); *Paul L. Kennedy Enters., Inc. v. Manganaro Se., LLC*, No. 21cv01223, 2023 WL 2542110, at *1 (D.S.C. Jan. 31, 2023) (refusing to exclude expert testimony on the

23. Because that factual determination is the Court's to make, however, the "gatekeeping" function relied upon by Debtor is far less critical than would be in a case where a jury acts as the trier of fact.[40] "In the absence of a jury, there is little to no concern about [the expert's] testimony being overly misleading or influential to warrant exclusion."[41] That is because, in a bench trial, the judge "can, after hearing the expert's testimony or opinion, determine what, if any, weight it deserves."[42] Indeed, even in cases where the factfinder is a jury, the court's "gatekeeping" role "is not intended to serve as a replacement for the adversary system, and consequently, the rejection of expert testimony is ***the exception*** rather than the rule."[43]

24. Mr. Scarcella's expert testimony is designed to help the Court make its "independent" factual determination regarding whether the Plan complies with § 1129(a)(7), or whether it fails to do so, precluding confirmation. That is a classic basis for expert testimony at a confirmation hearing.[44] Even beyond the fact that Debtor's basis for moving to exclude it seeks a premature and improper ruling on a legal confirmation issue regarding § 1129(a)(7), Mr.

basis of the expert's methodology because such arguments were "merely fodder for cross examination, not a basis to exclude [the expert's] opinion" and "go to the weight of [the expert's] opinion, not the admissibility").

[40] *See, e.g.*, *Trauernicht*, 2024 U.S. Dist. LEXIS 95739, at *10; *U.S. v. Wood*, 741 F.3d 417, 425 (4th Cir. 2013) ("because the district court was also the trier of facts, the district court's evidentiary gatekeeping function was relaxed").

[41] *Trauernicht*, 2024 U.S. Dist. LEXIS 95739, at *21.

[42] *Id*. at *10 (quoting *Fed. Trade Comm'n v. DIRECTV, Inc.*, 2017 U.S. Dist. LEXIS 13480, 2017 WL412263, at *2 (N.D. Cal. Jan 31, 2017)); *see also U.S. v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.").

[43] *In re Lipitor (Atorvastatin Calcium) Mktg., Sale Pracs. & Prod. Liab. Litig. (No 11)*, 892 F.3d 624, 631 (4th Cir. 2018) (quoting *U.S. v. Stanley*, 533 F. App'x 325, 327 (4th Cir. 2013) (*per curiam*)) (emphasis added).

[44] *See, e.g.*, *Johns-Manville Corp.*, 843 F.2d at 649.

Scarcella's testimony is a proper and relevant topic for expert testimony. The Court should deny the Motion and permit Mr. Scarcella to testify.

C. Debtor Is Wrong About the Requisite Analysis Under § 1129(a)(7)

25. Although the Court should not at this point resolve the confirmation issue of the proper legal standard to apply with respect to §1129(a)(7), the Debtor is wrong about the scope of, and analysis required by, §1129(a)(7). Relying on the general definition of "claim" in the Bankruptcy Code and caselaw discussing when a "claim" arises for purposes of determining which asbestos claims are subject to the automatic stay provision of § 362(a)(1), Debtor claims that "even those individuals who have not yet manifested an injury as a result of exposure to asbestos attributable to the Debtor have 'claims,' and, as a result, such claims ***must*** be considered for purposes of the Best Interest Test."[45] This is not accurate. A plain reading of § 1129(a)(7), § 524(g), the Plan, and caselaw stemming back to the original *Johns-Manville* case demonstrates that the proper analysis under § 1129(a)(7) is comparing what ***asbestos claimants who are creditors (and voters) in the bankruptcy*** action would receive under the proposed Chapter 11 plan and a Chapter 7 liquidation, and without accounting for potential future claimant demand-holders, who are separately protected under the "fair and equitable" test of § 524(g) and feasibility analysis under § 1129(a)(11).

26. First, § 1129(a)(7) specifically applies to "each holder of a claim or interest" in an "impaired class of claims."[46] Under Supreme Court precedent, this means "individual creditors holding impaired claims."[47] A "creditor" is an "entity that has a claim against the debtor that arose

[45] Motion at 12 – 13 (emphasis in the original).

[46] 11 U.S.C. § 1129(a)(7)(a)(i)-(ii).

[47] *Bank of America Nat'l Trust and Sav. Ass'n*, 526 U.S. at 441 n.13 (emphasis added).

at the time of or before the order for relief concerning the debtor."[48] By definition, unknown "individuals who have not yet manifested an injury as a result of exposure to asbestos" ***are not*** "creditors" of Debtor. Those individuals may become creditors of Debtor in the future, but right now they are merely demand-holders – hence, the reason that the Plan Proponents sought the appointment of a Future Claimants' Representative and the Court has appointed one.

27. Second, § 1129(a)(7) refers only to known individual creditors with the current power to vote on the Plan itself. That is why § 1129(a)(7)(a)(i) acknowledges that if each claim holder "has accepted the plan," then that is sufficient to satisfy the Best Interest of Creditors test.[49] The Supreme Court has confirmed as much, holding that the protection extends to "individual creditors…even if the class as a whole votes to accept the plan."[50] Indeed, the Liquidation Analysis itself states that it was "prepared so that the Bankruptcy Court may determine that the Plan is in ***the best interest of creditors who reject the Plan*** and equity holders."[51]

28. This is only sensible – the Liquidation Analysis is part of the Disclosure Statement, which must be "designed to provide information to creditors to permit them to determine whether to vote for or against the plan."[52] Unknown potential future claimants do not get a Disclosure

[48] 11 U.S.C. § 101(10).

[49] 11 U.S.C. § 1129(a)(7)(a)(i).

[50] *Bank of America Nat'l Trust and Sav. Ass'n*, 526 U.S. at 441 n.13.

[51] Liquidation Analysis, Dkt. 767, at p. 213 (emphasis added).

[52] *In re A.H. Robins Co., Inc.*, 216 B.R. 175, 180 (E.D. Va. 1997) ("Creditors form their ideas about what they will receive out of the debtor's estate from that disclosure statement. It plays a pivotal role in the give and take among creditors and between creditors and the debtor that leads to a confirmed negotiated plan of reorganization by requiring adequate disclosure to the parties so they can make their own decisions on the plan's acceptability."); *see also In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990) ("At the 'heart' of the chapter 11 process is the requirement that holders of claims in impaired classes be furnished a proper disclosure statement 'that would enable a hypothetical reasonable investor typical of claims or interests of the relevant class to make an informed judgment about the plan.'") (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 408 (1977), U.S. Code Cong. & Admin. News 1978 pp. 5787, 6364).

Statement.[53] Likewise, holders of future demands are not creditors who are "voting on" and/or "objecting to" a plan. Rather, voting is reserved to known asbestos creditors whose claims against Debtor were pending as of the petition date and who are eligible to vote on and/or object to the Plan.

29. All of this is further clarified by virtue of the definitions in § 524(g) itself, which specifically distinguishes a pre-confirmation bankruptcy "claim" like that of the asbestos creditors voting on the plan from a "demand" of the kind held by potential future asbestos claimants, stating:

> ***In this subsection, the term "demand" means a demand for payment, present or future, that (A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization; (B) arises out of the same or similar conduct or events that gave rise to claims addressed by the injunction issued under paragraph (1); and (C) pursuant to this plan is to be paid by a trust described in paragraph 2(B)(i).***[54]

Note that § 524(g)(5) uses the "arises out of the same or similar conduct" test relied upon by the Motion in support of Debtor's argument that "individuals who have not yet manifested an injury as a result of exposure to asbestos attributable to the Debtor" must have "claims" for purposes of § 1129(a)(7).[55] Nevertheless, § 524(g)(5) specifically defines and refers to such individuals as having a "demand" and explicitly differentiates them from "a claim during the proceedings leading to the confirmation of a plan of reorganization."[56] Based on the definition in § 524(g)(5) alone, a

[53] *See In re Crowthers*, 120 B.R. at 300 – 301 ("Disclosure statements are required to contain liquidation analyses that enable creditors to make their own judgment as to whether a plan is in their best interests and ***to vote and object to a plan if they so desire***.") (emphasis added).

[54] 11 U.S.C. § 524(g)(5) (emphasis added).

[55] *See* Motion at 12 – 13.

[56] Not surprisingly, Debtor's own Plan makes this distinction by defining the Class 4 "Channeled Asbestos Claims" to mean both "the Asbestos Claims and Demands," with the term "Demand" being itself defined as "a 'demand,' as defined in section 524(g)(5) of the Bankruptcy Code, against Hopeman." Plan, Dkt. 766, at p. 14 (Definition 1.49).

future asbestos claimant demand-holder is not a "holder of a claim" within an impaired class under the Plan within the meaning of § 1129(a)(7).

30. But that is not all. Caselaw stretching back to the original *Johns-Mansville* case that served as a precursor to § 524(g) has specifically determined that the analysis under § 1129(a)(7) is limited to ***present*** asbestos claimants and does not include future claimants. As the *Johns-Manville* court explained:

> Subsection 1129(a)(7) incorporates the former 'best interest of creditors' test and requires a finding that each holder of a claim or interest either has accepted the plan or has received no less under the plan than what he would have received in a Chapter 7 liquidation. At the confirmation hearing, Manville presented an extensive liquidation analysis based on documentary evidence and expert testimony. Kane submitted no evidence. The Bankruptcy Judge accepted Manville's proof that all creditors and equity holders would receive substantially more under the Plan than they would have received if Manville were liquidated. In particular, the Bankruptcy Court found that Class–4 ***present asbestos health claimants*** would receive 100% on their claims under the Plan but would have received only 56%–81% in a liquidation.[57]

31. In fact, while fashioning the seminal trust-channeling injunction mechanism for future asbestos claimants that now is embodied in § 524(g), the *Johns-Manville* bankruptcy court's liquidation analysis under § 1129(a)(7) examined only "present", not future, claimants: "Class 4, ***the present Asbestos Health claimants*** have between $1.3 and $1.5 billion dollars in allowed claims. Upon liquidation, these claimants would again receive between 56% and 81% of their allowed claims. The Plan provides for 100% of their claims. Tr. p. 110."[58]

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[57] *Johns-Manville Corp.*, 843 F.2d at 649 (emphasis added).

[58] *In re Johns-Manville Corp.*, 68 B.R. 618, 633 – 34 (Bankr. S.D.N.Y. 1986), *aff'd sub nom. In re Johns-Manville Corp.*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988) (emphasis added). In this regard, the courts in *In re Eagle-Picher Indus., Inc.* and *In re W.R. Grace & Co.* were simply mistaken when they considered the value of future claims in their § 1129(a)(7) analyses.

32. The *Johns-Manville* court considered future claims ***only with respect to the feasibility analysis under § 1129(a)(11)***: "The Armstrong and Kane Objectors have challenged the feasibility of the Plan on the ground that the AH Trust will be unable to satisfy present and future AH claims. The evidence submitted by the Debtor as previously noted, provides a reasonable estimation, based upon known present claimants and reasonable extrapolations from past experience and epidemiological data, of the number and amount of asbestos-related claims that the AH Trust will be required to satisfy. The Debtor has also established that the Trust will, in fact, meet this burden."[59]

33. Non-voting demand holders/potential future asbestos claimants are also protected by the "fair and equitable" test under § 524(g), which assures that a plan may only be adopted if it deals equitably with both claims and future demands.[60] The U.S. Bankruptcy Court for the Southern District of New York articulated the distinction between § 1129(a)(7) and § 524(g)(2)(B)(ii)(III): "[w]hile ***the 'fair and equitable' test under § 524(g) protects the Futures***, ***§ 1129(a)(7) is designed to protect individual dissenting members*** of an impaired, accepting class, establishing the minimum that they must receive or retain under the plan."[61]

34. This, of course, harkens back to the Supreme Court's statement that § 1129(a)(7) "applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."[62] Obviously, potential future claimant demand holders could never be "individual

[59] *Id.* at 635.

[60] 11 U.S.C. § 524(g)(2)(B)(ii)(III).

[61] *In re Quigley Co.*, 437 B.R. at 144 (emphasis added).

[62] *Bank of America Nat'l Trust and Sav. Ass'n*, 526 U.S. at 441 n.13

creditors holding impaired claims" or "individual dissenting members" in the bankruptcy because ***they are not creditors and do not vote on the plan***.[63]

35. The Motion also claims that Mr. Scarcella's report "effectively rewrites the Plan by adding a bar date that does not exist."[64] That is false. Mr. Scarcella's analysis applies the terms of the Plan when conducting his analysis specific to the asbestos creditors' recovery under Chapter 11. Consistent with § 1129(a)(7), however, Mr. Scarcella's analysis focuses on the value to be received by those "individual creditors holding impaired claims" who were entitled to vote on the Plan, which he defined as the "Pending Claims" in his report.[65] Taking into account, however, that any liquidation might adopt a bar date (as Debtor's original plan did) and viewing the analysis through a conservative lens, Mr. Scarcella also developed an estimated value of the asbestos claims that would be filed within three years, which he defined as the "Bankruptcy Claims" in his report.[66] Based on the estimated combined value of both the Pending Claims and the Bankruptcy Claims, Mr. Scarcella then analyzed whether those creditors recoveries' under the Plan were at least equivalent to what they would recover in a Chapter 7 liquidation.[67]

36. Mr. Scarcella's analysis did not change the terms of the Plan, or impose non-existent terms under a chapter 7 liquidation. He only made sure to conduct the analysis on an

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[63] Debtor's mistake about the proper scope of § 1129(a)(7) renders its argument regarding "the chapter 7 comparison" adopted by Mr. Scarcella entirely off-base. *See* Mot. at 11 – 12. Regardless, to the extent Debtor chooses to pursue this argument, "the proper way to test the correctness and thoroughness of an expert's opinions is through cross-examination and rebuttal evidence" at the Hearing. *Trauernicht*, 2024 U.S. Dist. LEXIS 95739, at *25. It is not a basis on which to find Mr. Scarcella's testimony inadmissible. *See Bresler*, 855 F.3d at 195 ("questions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility of the witness' assessment, 'not its admissibility.") (internal quotation marks and citation omitted).

[64] Motion at 10.

[65] Scarcella Report at 4.

[66] *Id*.

[67] *Id*. at 4 – 27.

apples-to-apples basis, with the same underlying claim population. Significantly, if Mr. Scarcella had limited his analysis only to the "Pending Claims," the asbestos creditors would fare even better under a Chapter 7 liquidation than under the Plan.

D. Mr. Scarcella Is Eminently Qualified To Serve As An Expert Here

37. "Under Rule 702, an expert must have either knowledge, skill, experience, training, or education. These are disjunctive; an expert can qualify to testify on any one of the grounds."[68] Mr. Scarcella qualifies as an expert based on all five elements. As his report details, he has "worked on behalf of debtors, claimant representatives, creditor classes, insurers, and trustee boards in some of the largest asbestos-related bankruptcy cases and resulting settlement trusts of the past two decades" including "working extensively in Chapter 11 bankruptcy proceedings involving the establishment of trusts pursuant to Section 524(g) of the United States Bankruptcy Code, 11 U.S.C. § 524(g)."[69] His knowledge, skill, experience and training go all the way back to the *Johns-Manville* Personal Injury Trust, which presaged the enactment of § 524(g) itself, and include working for Future Claims Representatives, debtors, and boards of asbestos bankruptcy trusts.[70] In addition to testifying at numerous state and federal legislative hearings on asbestos bankruptcy matters, Mr. Scarcella has testified as an expert (either at a hearing or deposition) more than forty (40) times, including hearing testimony before the U.S. Bankruptcy Courts for the District of New Jersey (multiple times), the Southern District of Texas, and the District of Delaware, the U.S. District Court for the Southern District of New York, and state courts in Ohio,

[68] *Cooper v. Lab. Corp. of America Holdings, Inc.*, 150 F.3d 376, 380 (4th Cir. 1998).

[69] Scarcella Report at 6.

[70] *Id.* at 6 – 7.

Missouri, and Tennessee, with the vast majority of those in the context of asbestos and other mass tort and insurance matters.[71]

38. Debtor's primary challenge to Mr. Scarcella's qualifications is that "he has no prior experience testifying on liquidation analyses or the Best Interest [of Creditors] Test."[72] That is irrelevant. Mr. Scarcella is not testifying on legal issues, including the scope of the Best Interest of Creditors Test. Instead, as his report states, he is offering expert evidence on the facts pertinent to § 1129(a)(7) and the Liquidation Analysis. Given the Debtor's liabilities and assets, that means (1) an estimated value of asbestos claims and (2) the asbestos creditors' projected recoveries from the available pool of insurance assets under the Plan versus a hypothetical Chapter 7 liquidation.[73] Those two topics are well within the scope of Mr. Scarcella's expertise, much more so than the Plan Proponents' witness Mr. Tully. Even if it is Mr. Scarcella's first time testifying specifically in the context of a liquidation analysis, that is of no moment in light of his significant experience and involvement in mass tort, asbestos, and insurance cases, including a long history with § 524(g) trusts and testimony before numerous courts. Just as Debtor's counsel previously stated with respect to the Future Claims Representative, Ms. Eskin,"[e]veryone has a first case," and the fact that it may be the first case "doesn't mean [ ]he's not qualified.".[74] Given the narrow issues relevant to this Liquidation Analysis – which may be distilled down to asbestos claims liabilities and insurance assets – Mr. Scarcella is amply qualified to provide expert testimony.

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[71] *Id*. at 7, 28 – 36 (Appendix and CV).

[72] Motion at 14.

[73] *See* Scarcella Report at 4. Notably, this is not a debtor with a wide-ranging set of assets to value or a varied set of creditors. The only significant assets of Debtor are its insurance policies and the primary creditors are the asbestos claimants.

[74] *See* Ex. 1, Transcript from May 13, 2025 Hearing, at 25:13 – 20 ("Ms. Eskin has not been appointed FCR in another case to date. That doesn't mean she's not qualified. It means this is the first case. Everyone has a first case.).

39. Even if Debtor had a legitimate argument about Mr. Scarcella's qualifications (it does not) the Motion should still not be granted. Debtor admits that Mr. Scarcella "may be qualified to offer expert opinions regarding claim valuation in asbestos and other mass-tort cases," and that is precisely the subject of his testimony.[75] There will be no jury at the Confirmation Hearing, reducing any chance of confusion. Notably, Debtor does not argue that Mr. Scarcella's opinion and analysis are premised on "junk science," which is what Rule 702 is meant to exclude.[76] If the Court permits Mr. Scarcella to testify, then Debtor and the other Plan Proponents can cross-examine him on his qualifications and experience dealing with asbestos claims estimations, insurance recoveries, and § 524(g) plans, and the Court can consider his answers along with the rest of his expert evidence.[77] But he should not be prematurely precluded from testifying in the first place.[78]

CONCLUSION

For all these reasons, the Motion should be denied, and Mr. Scarcella should be permitted to testify at the Hearing.

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[75] Motion at 14. *See Trauernicht*, 2024 U.S. Dist. LEXIS 95739, at *12 ("In most cases, however, a witness with general expertise is qualified to testify, and the lack of specialized knowledge will go to the weight of the testimony.")

[76] *See Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017) ("Where, as here, the experts' opinions are not the junk science Rule 702 was meant to exclude, the interests of justice favor leaving the difficult issues in the hands of the jury and relying on the safeguards of the adversary system—vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" (cleaned up)).

[77] *Trauernicht*, 2024 U.S. Dist. LEXIS 95739, at *13 (the specific relevancy of an expert's experience "goes to the weight, not the admissibility of his testimony.").

[78] *See Assey v. Am. Honda Motor Co.*, No. 3:22-cv-02647-JDA, 2025 WL 1148512, at *3 (D.S.C. Apr. 18, 2025) ("the issues Defendant raises regarding Mr. Markushewski's methodology are fodder for cross examination and do not render Mr. Markushewski's opinions unreliable," and "Mr. Markushewski's testimony should 'be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion'") (quoting *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)).

Dated: August 18, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 18, 2025, a true and correct copy of the foregoing Chubb Insurers' Opposition to Debtor's Motion In Limine to Exclude the Expert Testimony of Marc C. Scarcella was served upon all parties receiving electronic notice through the Court's ECF notification system.

/s/ Dabney J. Carr
Dabney J. Carr

EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA (RICHMOND)

In Re:	)	Case No. 24-32428-KLP
	)	Richmond, Virginia
HOPEMAN BROTHERS, INC.,	)	
	)	
Debtor.	)	May 13, 2025
	)	11:01 a.m.
----------	)	

TRANSCRIPT OF HEARING ON
MOTION TO APPROVE STIPULATED ORDER APPROVING SETTLEMENT OF APPEAL OF INSURANCE SETTLEMENT ORDER AND GRANTING LIMITED RELIEF FROM THIRD INTERIM STAY ORDER
JOINT APPLICATION OF THE DEBTOR AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER APPOINTING MARLA ROSOFF ESKIN, ESQ. AS FUTURE CLAIMANTS' REPRESENTATIVE
BEFORE THE HONORABLE KEITH L. PHILLIPS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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testimony in this case for her.

And, your Honor, I think what you'll find is she's got substantial experience, over thirty years. And that resume is not inclusive of every one of her representation. It's emblematic of some of the bigger cases. And admittedly, she was co-counsel with Caplin and a lot of those. But she's got many representations where she wasn't with Caplin.

I've come to learn through this case that it's a bit smaller space than -- I was surprised to learn it's a bit smaller space than I thought. There are law firms who specialize in asbestos bankruptcy pieces. And Ms. Eskin is one of them. And so is Caplin & Drysdale, obviously.

Ms. Eskin has not been appointed FCR in another case to date. That doesn't mean she's not qualified. It means this is the first case. Everyone has a first case. Well, we're satisfied. She's been on the claimant's side. She's been on the trust side. She's been counsel to various committees. She's been involved in these processes. And her law firm -- it's not just her. Her entire law firm, who will likely represent her, has substantial experience in this space.

So Your Honor, I think with respect to the first question, is she qualified, I don't think there's really any issue there. The question then is, should we move forward with a 524(g) plan? It's the effort like last week of Chubb trying to derail us from even taking the first step toward the plan.

C E R T I F I C A T I O N

I, Michael Drake, the court-approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

May 14, 2025

MICHAEL DRAKE DATE

AAERT Certified Electronic Transcriber CER-513, CET-513