UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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Judge

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May 31, 2019

(all via email)

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Re: *Imerys Talc America, Inc., et. al.*, Case No. 19-10289
Motion to Appoint James L. Patton, Jr. as the Legal Representative for Future Talc Personal Injury Claimants [D.I. 100]

Dear Counsel:

This is a further ruling on the Debtors' motion ("Debtors' Motion") for the appointment of James L. Patton, Jr. as legal representative for future talc personal injury claimants [D.I. 100]. It comes after Mr. Patton filed two supplemental declarations [D.I. 527, 554] ("Supplemental Declarations") containing disclosures responsive to my May 7, 2019 Bench Ruling [D.I. 503]. After the Supplemental Declarations were filed, the Certain

Excess Insurers, now including National Union Fire Insurance Company of Pittsburg, PA ("National Union"), and calling themselves the "Cyprus Historical Excess Insurers," filed two documents: (i) what they termed a supplemental objection ("Supplemental Objection") [D.I. 571] to the form of order submitted on the Debtors' Motion and (ii) the Declaration of Mark Muth ("Muth Declaration") in support thereof [D.I. 599]. I note, as did Mr. Patton in his responsive filing ("Response") [D.I. 588], that I did not request additional filings. And, in particular, I did not re-open the evidentiary hearing held on the Debtors' Motion at which Mr. Muth could have testified, but did not. Nonetheless, because the Supplemental Declarations contain further disclosures on the Debtors' Motion, which I previously suggested is *sui generis*, I will address the new filings. In explaining my further ruling now, I assume familiarity with the Debtors' Motion, my Bench Ruling and the subsequent filings.

The Supplemental Objection is both confusing[1] and largely irrelevant[2] to the issues actually presented by the Supplemental Declarations, and for that matter, Mr. Patton's original declaration. The Supplemental Objection focuses on National Union's assertion that Young Conaway Stargatt & Taylor, LLP ("YCST") has a conflict of interest that precludes Mr. Patton from being appointed as the legal representative and precludes the retention of YCST as his counsel.[3] The alleged conflict of interest is YCST's concurrent representation of National Union in the *Warren Pumps* lawsuit pending in the Superior Court of the State of Delaware and YCST's request to represent Mr. Patton (if he is appointed) in this bankruptcy case. This conflict is also the subject of the Muth Declaration. YCST responds (consistent with Mr. Patton's testimony) that it has no conflict because it received a prospective waiver from the insurance companies it represents in the *Warren Pumps* lawsuit which permits the firm to be adverse to those insurance companies in the *Imerys* bankruptcy proceeding. There are other lesser objections as well. I will address the objections in order.

1. The Cyprus Historical Excess Insurers state (in multiple ways and in multiple places) that by the terms of Mr. Patton's September 25, 2018 engagement letter, he could not disclose his prepetition work on behalf of future claimants to National Union because the engagement letter required Mr. Patton and YCST to keep the engagement confidential. They argue, therefore, that YCST could not have obtained a knowing and intentional waiver from the insurers.

Mr. Patton did not testify that he or YCST approached National Union to obtain a waiver at the time of his September 25, 2018 engagement. Rather, he has consistently testified that

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[1] For example, the Supplemental Objection toggles among positions taken by National Union, individually, the Cyprus Historical Excess Insurers and other insurers, generally.

[2] See paragraph 1.

[3] In this sense, the Supplemental Objection is "plain vanilla" in that it is unrelated to the proper standard for the appointment of a legal representative which was the main question addressed in the Bench Ruling. And, the asserted conflict is not dependent on the relevant standard.

YCST obtained a prospective waiver. The prohibition of disclosure contained in the September 25, 2018 engagement, therefore, is not relevant. The real issue (addressed below) is whether the prospective waiver, which Mr. Patton testified YCST obtained from National Union (and other insurance companies), is effective.

2. As part of the Supplemental Objection, National Union, as did the Certain Excess Insurance Companies before it, seeks access to documents about its insurance coverage that YCST received and shared with tort claimants.

There is no evidence that YCST shared any documents with tort claimants. And, in any event, this is a discovery issue which has, at least in part, been raised in the Adversary Proceeding. Nothing further on this point in the Supplemental Objection causes me to reconsider the Bench Ruling.

3. The Cyprus Historical Excess Insurers argue that Mr. Patton has not adequately disclosed his firm's representation of any talc claimants. In particular, the Cyprus Historical Excess Insurers state that there is no disclosure of the identity of any personal injury claimants YCST has represented.

Rule 2014 requires disclosures of connections, not disclosures of non-connections. In his first Supplemental Declaration, signed under penalty of perjury, Mr. Patton stated "[n]either Young Conaway nor I represent any clients who are asserting claims based on exposure to talc." This statement is definitive. If YCST or Mr. Patton had previously represented any talc claimants, it would have been incumbent on Mr. Patton to disclose those facts. There are no such disclosures.

4. The Cyprus Historical Excess Insurers assert that Mr. Patton did not disclose whether YCST has co-counsel and referral relationships with plaintiffs' lawyers who serve the Tort Claimants Committee in this case.

When Mr. Patton filed his original declaration in support of the Debtors' Motion, the Tort Claimants' Committee had not yet been formed. Nonetheless, Mr. Patton disclosed in his original declaration that "Young Conaway serves as counsel to the future claimants' representative in other pending bankruptcy cases and settlement trusts for asbestos and other mass torts (as disclosed herein) where members of a committee may also be appointed to a committee representing current holders of talc claims against the Debtors." As with all other professionals, if Mr. Patton or YCST needs to supplement their disclosures, they should. But, the failure to disclose any co-counsel and referral relationships does not mean any exist, and a professional does not have an affirmative duty to disclose the types of relationships that do not exist. I also note that this area of inquiry is new and could have been raised at or before the evidentiary hearing on the Debtors' Motion.

5. YCST's inconsistent Rule 2014 disclosure in the *Diesel USA* bankruptcy case has now been corrected by a supplemental disclosure in that case. The disclosure in this case was correct.

6. The indemnity requested by Mr. Patton in the Debtors' Motion has been struck from the proposed form of order.

7. The ethical wall was a suggestion made in my Bench Ruling, which YCST decided to implement. Whether or not an ethical wall is erected, a law firm may not use the confidences of a client against it in a subsequent matter. There is no evidence that such has been or will be the case here. The real issue remains whether the prospective waiver is effective.

8. YCST's representation of certain insurance companies in the *Warren Pumps* lawsuit provides the basis for the Muth Declaration. Mr. Muth states that he is Senior Vice President and Special Counsel for Resolute Management, Inc., the claims administrator charged by National Union Fire Insurance Company of Pittsburgh PA, Lexington Insurance Company and Continental Casualty Company and Continental Insurance Company with handling (x) coverage claims made by Imerys and (y) coverage claims made by Warren and Viking in the *Warren Pumps* lawsuit. Mr. Muth also states, among other things, that he cannot find a waiver letter for Continental (implying that he found one for National Union and Lexington), that Imerys' claims under the Cyprus Historical Insurance Policies are by definition extra-contractual as Imerys is not a named insured under those policies, and that he objects on behalf of the insurance companies to this concurrent representation.

I reviewed *in camera* the engagement letter supplied by YCST for the *Warren Pumps* lawsuit. The engagement letter is on YCST letterhead, is dated September 5, 2014 and is directed to, and counter signed by, Brian Bendig, Esquire, Vice President and General Counsel of Resolute Management, Inc. – New England Division as Claims Manager for certain carriers, which includes National Union, Lexington and Continental. It is copied to Bonnie J. McClements, Esquire.

The engagement letter contains the exemplar language found in Mr. Patton's first Supplemental Declaration. The following sentences of the waiver paragraph are germane to the question of whether the prospective waiver is effective:

> **A. It is possible that during the time that we are representing You, some of our present or future clients could have disputes with or matters adverse to You. As you are aware, the Firm has a substantial corporate workout, bankruptcy and insolvency practice.**
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> - These sentences provide important context because it is clear from Mr. Patton's original declaration that as of September 5, 2014—the date that Mr. Bendig signed the letter as the agent of the insurance companies—Mr. Patton and/or YCST had significant past and current engagements as either the legal representative for personal injury claimants and/or as counsel to the legal representative in numerous mass tort cases. These sentences also evidence a recognition that Mr. Bendig is aware, at least generally if not specifically, that YCST has a significant bankruptcy and insolvency practice.
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> **B. Accordingly, You agree that the Firm may represent other clients (i) in workout, bankruptcy and insolvency proceedings, and (ii) in connection with trusts established pursuant to section 524(g) of the Bankruptcy Code, collectively referred to as "Bankruptcy Related Matters."**
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> - This sentence immediately follows the two sentences in A above, and provides the conflict waiver upon which YCST relies. The waiver is premised on Mr. Bendig's recognition of YCST's significant bankruptcy and insolvency practice. And, the conflict waiver is limited and directed to that practice as opposed to the other areas of representation provided by YCST, a general service firm.
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> - This sentence also contains a specific reference to section 524(g), the provision of the Bankruptcy Code permitting channeling injunctions to trusts established pursuant to a plan of reorganization and requiring the appointment of a legal representative for demand parties. This is a precise reference to the very type of conflict that may arise in the future, and the one at issue here. It is not abstract or general, but is an exact reference to

the types of work that Mr. Patton and YCST were doing in 2014 when the engagement letter was signed—asbestos/mass tort cases—and the type of work they were likely to do in the future and for which they were seeking a waiver.

C. This is so provided that: (i) the Firm is not then representing and has not previously represented You in the same matter or a matter substantially related to the same matter . . . .

- Cyprus Historical Excess Insurers take the position that the *Imerys* bankruptcy case is "substantially related" to the *Warren Pumps* matter because the *Warren Pumps* lawsuit involves (i) more than one corporate entity asserting a claim to insurance policy proceeds, (ii) insurers are litigating contribution rights among insurers, and (iii) there are issues raised regarding whether excess policies owe defense obligations and to whom and under what limitations and conditions. YCST responds that the coverage issues were resolved by the Delaware Supreme Court several years ago and that in any event, the prospective waiver makes this a non-issue. Given the waiver discussion below, it is difficult to see how these issues are not encompassed in the waiver even if "substantially related" to the issues surrounding the Cyprus Historical Insurance Policies (which, at least before me deal with a specific business transaction). From their very nature, it appears these general issues could arise in every mass tort case and thus would eviscerate the very waiver given. I cannot conclude that this was intended by the parties to the engagement letter.

D. The Client agrees that it will not assert that this instant Engagement is a basis for disqualifying the Firm from representing others in future matters in which the Firm is retained to represent a party in Bankruptcy Related Matters.

- This agreement clearly covers Mr. Patton's appointment as a future claims representative and YCST's engagement as counsel to him as both of these engagements fall within the definition of "Bankruptcy Related Matters."[4] While Mr. Muth asserts that a post-

[4] I previously raised the issue of whether the conflicts of YCST could be imputed to Mr. Patton in his individual capacity as the insurers contend. Since none of the subsequent filings addressed this issue, I will continue to assume they do. Assuming they do, the waiver of the firm's conflict must also be imputed to Mr. Patton as the proposed legal representative.

confirmation role for Mr. Patton would not fall within this definition, no such engagement is before me and I do not decide that issue; but, this position seems doubtful.

E. The Parties agree, however, that the Firm will not represent plaintiffs in bankruptcy adversary proceedings involving claims for bad faith or extra-contractual coverage against You or Your affiliates.

- This sentence, which follows immediately after the sentence in D above, shows the contours of the nature of the waiver. This sentence contains a carve-out from (or exception to) YCST's ability to represent other clients in Bankruptcy Related Matters. Specifically, YCST cannot represent plaintiffs in adversary proceedings involving claims for bad faith or extra-contractual coverage. This language also suggests that conflicts with respect to YCST's representations of plaintiffs in other types of adversary proceedings related to coverage claims are waived (i.e. they are not within the carve-out). This language further reflects the sophistication of the parties who have negotiated language specific to both section 524(g) trusts (above) and types of insurance claims.

- Mr. Muth asserts that Imerys' claims against the Cyprus Historical Excess Insurers are "extra-contractual claim[s]" because Imerys is not a named insured under the policy. The Cyprus Excess Insurance Companies do not cite any cases for this proposition. As Mr. Patton points out in the Response (supported by citations), Imerys is asserting a right to coverage under the Cyprus Historical Insurance Policies; as such, these claims are not extra-contractual. This is borne out by cursory research which shows that bad faith claims and extra-contractual claims have a very specific meaning in the insurance context. These types of claims are not for coverage under a policy, but outside of a policy.[5] Further, the inability to bring such claims does not limit Mr. Patton's ability to be the legal representative. These claims are far too attenuated from his constituency. He does not represent current claimants or even individual future claimants, but rather persons who have not yet

[5] *See, e.g.*, 14 Steven Plitt et al., *Couch on Insurance* §§ 204:3, 204:4 (3d ed. 2018).

manifested a disease or illness. And, as Mr. Patton points out, such claims belong to Imerys.

- Mr. Patton also points out that the exception prevents YCST from representing *plaintiffs* (not any *party*) in bad faith and extra-contractual claims litigation. While the subtlety of that distinction might in other circumstances not weigh heavily in the conflict analysis, here, where there is reference in the letter to section 524(g) trusts, the distinction has significance.

The parties are not in disagreement about the standard. The effectiveness of a waiver is "generally determined by the extent to which the client reasonably understands the material risks that the waiver entails." Model Rules of Prof'l Conduct R. 1.7 cmt. 22. "If . . . consent [to a future conflict] is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved." *In re Meridian Auto. Sys.-Composite Operations*, 340 B.R. 740, 748 (Bankr. D. Del. 2006) (quoting Model Rules of Prof'l Conduct R. 1.7 cmt. 22). And, the party requesting the waiver must provide "information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 582 (D. Del. 2001).

Based on my review of the September 5, 2014 engagement letter, I find that National Union and the other insurance companies who are defendants in the *Warren Pumps* lawsuit had enough information to appreciate the waiver they were granting to YCST and the risk that YCST could represent an adverse party—and particularly a legal representative—in a representation such as the one in Imerys' bankruptcy case. The Cyprus Historical Excess Insurers are sophisticated parties, represented by an agent and the agent's in-house insurance counsel who signed the waiver letter on their behalf. While the waiver letter may be somewhat open-ended, it is not general. The waiver letter specifically references workout, bankruptcy and insolvency proceedings and, even more precisely, section 524(g) trusts, which occur in mass tort bankruptcy cases. Further, National Union carved out from its conflict waiver adversary proceedings asserting bad faith and extra-contractual claims. The very language of the waiver evidences an appreciation of both bankruptcy and insurance substantive and procedural law indicative of parties that bargained for their waivers in the context of the retention of YCST. This conclusion is also supported by a spot check of the dockets of only a few of the bankruptcy cases listed in Mr. Patton's original declaration which reveals (not surprisingly) that National Union, Continental and

Lexington have appeared in mass tort bankruptcy cases and thus should be familiar with the issues that arise in these types of cases.[6]

I also observe that while the *Warren Pumps* lawsuit pre-dates the *Imerys* bankruptcy, it does not pre-date the numerous mass tort bankruptcy cases listed in Mr. Patton's original declaration in which he either served as the legal representative or was counsel to the legal representative. It is understandable, therefore, that YCST sought the specific waiver it received in the September 5, 2014 engagement letter.

Given the above, any assertion that National Union (or any other insurance companies) could not or did not understand or appreciate the risks associated with retaining YCST to represent them in the *Warren Pumps* lawsuit simply rings untrue. I conclude the prospective waiver is effective.

An order appointing Mr. Patton as the legal representative in this case will be entered.

Very truly yours,

Laurie Selber Silverstein

LSS/cmb

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[6] Counsel for National Union entered appearances in the *Leslie Controls*, *Megex* and *Quigley* bankruptcy cases. Counsel for Continental entered appearances in the *Metex*, *Specialty Products*, and *Quigley* bankruptcy cases. Counsel for Lexington entered an appearance in the *Leslie Controls* bankruptcy case.