SHIPMAN & GOODWIN LLP
Stephen M. Forte, Esq.
400 Park Avenue, Fifth Floor
New York, NY 10022-4406
Tel: (212) 376-3015
Fax: (212) 376-3024
Email: sforte@goodwin.com

James P. Ruggeri (*pro hac vice* pending)
Joshua D. Weinberg (*pro hac vice* pending)
Abigail W. Williams (*pro hac vice* pending)
SHIPMAN & GOODWIN LLP
1875 K Street, NW, Suite 600
Washington, DC 20006-1251
Tel: (202) 469-7750
Fax: (202) 469-7751
Email: jruggeri@goodwin.com
jweinberg@goodwin.com
awilliams@goodwin.com

Attorneys for Hartford Accident and Indemnity Company

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In Re:	Chapter 11
DURO DYNE NATIONAL CORP., *et al.*,[1]	Case No. 18-27963 MBK
Debtors.	(Jointly Administered)
	Hearing Date: October 15, 2018, 2:00 p.m.

JOINT OBJECTIONS OF CERTAIN INSURERS AS CREDITORS AND PARTIES IN INTEREST TO DEBTORS' DISCLOSURE STATEMENT

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, are: Duro Dyne National Corp. (4664); Duro Dyne Machinery Corp. (9699); Duro Dyne Corporation (3616); Duro Dyne West Corp. (5943); and Duro Dyne Midwest Corp. (4662).

TABLE OF CONTENTS

Hartford Accident and Indemnity Company ("Hartford"), The North River Insurance Company ("North River"), and Federal Insurance Company ("Federal"), each a creditor and party-in-interest in these related Chapter 11 cases (collectively, the "Insurers"), respectfully submit these joint objections to Debtors' Disclosure Statement for Prenegotiated Plan of Reorganization for Duro Dyne National Corp, et al., (Sept. 7, 2018) [Dkt. No. 20] (the "Disclosure Statement"). Insurers reserve the right to assert modified, supplemental, or additional objections to the extent Debtors modify their proposed plan, the Disclosure Statement, or any related documents. In addition, Insurers reserve the right to raise any or all objections identified by any other party-in-interest, including other insurers.

PRELIMINARY STATEMENT

This Court has a critical gatekeeping function before debtors are permitted to solicit approval for a proposed plan. The Court must ensure that the plan is transparent -- accurately described for creditors -- and that it is not a vehicle for fraud, waste or mismanagement.

Ensuring full disclosure -- of the provisions of the plan, the risks it entails and the persons who will be charged with decisions regarding the allowance of claims -- is of utmost importance at this stage of the case so that creditors and any other parties in interest will have a complete understanding of how the plan, particularly the proposed trust, will operate. *See, e.g., In re Global Indus. Tech. Inc.*, 645 F.3d 201, 215 (3d Cir. 2011) (en banc) (holding that standing of parties in interest is particularly strong in matters that "implicate the integrity of the bankruptcy process"); 11 U.S.C. § 1129(a)(5)(A) (requiring disclosure of officers and trustees proposed to serve as such in joint plan). The current Disclosure Statement, however, fails to meet that task. It does not provide for transparency regarding who will be responsible for the trust or how it will be operated. It does not provide full information regarding critical funding mechanisms. It does

not provide transparency to ensure that illegitimate claims do not dilute valid ones. It does not provide information sufficient to describe the proposed classification and treatment of all creditor claims, particularly those of Insurers. And, to the extent it does provide detail, it describes a plan that conflicts with the goals of the Bankruptcy Code. For all the reasons that follow, the Court should deny approval of the Disclosure Statement and require Debtors to submit a new Disclosure Statement (and, likely, plan as well) that comports with the need for transparency and efficient management of the ongoing trust obligations that are -- or at least should be -- a hallmark of asbestos bankruptcy cases such as this one.

INSURERS' OBJECTIONS

I. THE DISCLOSURE STATEMENT CONTAINS INADEQUATE AND MISLEADING INFORMATION.

Section 1125 of the Bankruptcy Code requires the Disclosure Statement to provide "adequate information" that "would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1). Further, the Disclosure Statement must contain all relevant information relating to the risks that the plan poses to holders of claims or interests. *See In re Unichem Corp.,* 72 B.R. 95, 96-97 (Bankr. N.D. Ill. 1987). "Section 1125(b) of the Code gives the Court the authority to decline approval of a disclosure statement if it does not give 'adequate information' to the entities that will have to vote on the plan." *In re Pecht,* 57 B.R. 137, 139 (E.D. Va. 1986). Here, the Disclosure Statement provides inadequate and misleading information in at least the following ways.

A. The Disclosure Statement Fails to Provide Information Regarding the Material Risk that Insurance Proceeds May Not Be Available for Asbestos Claims, or May Be Limited.

The centerpiece of Debtors' proposed plan is a § 524(g) trust to which asbestos-related bodily injury claims will be channeled. *See* Prenegotiated Plan of Reorganization for Duro Dyne

National Corp., et al., Under Chapter 11 of the Bankruptcy Code § 4.06 (Sept. 7, 2018) [Dkt. No. 19] (the "plan"). In return for a $3,000,000 contribution to the trust, the Debtors' equity holders will retain all of their equity rights in what will emerge from bankruptcy as the reorganized debtor, freed of all pending and future asbestos liabilities. The holders of legitimate asbestos claims, in contrast, will be required to look primarily to the trust for payment.[2] Yet the Disclosure Statement provides no real explanation of the risk that the insurance proceeds which presumably are being counted on to provide the bulk of the trust's funding may not, in fact, be available or may be sharply limited.

While the Debtors' plan contemplates that Debtors (and their equity holders) will contribute cash and a promissory note to the trust, a substantial portion of funding for the trust will come from Debtors' purported assignment of potential rights to insurance proceeds. The Disclosure Statement asserts that Debtors have "nearly $57 million" in available insurance policy limits -- more than four times the combined cash contributions from Debtors and their equity holders. Disclosure Statement, Art. VI, § D. The Disclosure Statement, however, fails to acknowledge that the New York court that has been wrestling with coverage issues for the past five years has already ruled that the insurers' obligations are *pro rata*, not joint-and-several. *See North River Ins. Co. v. Duro Dyne Nat. Corp.*, 153 A.D.3d 844 (N.Y. App. Div. 2017). Each insurer is only responsible for injury during its policy period, and Debtors remain obligated for periods where no insurance is available (primarily due to insurer insolvencies, years in which Duro Dyne did not buy coverage, and years where all coverage Duro Dyne did purchase is

[2] To the extent there are insurers who do not settle with Debtors, the plan also allows claimants to pursue tort claims against the reorganized debtor, under the pseudonym "RDD Company," for the sole purpose of obtaining a judgment that can be enforced only against available insurance. The right to pursue unsettled insurance, however, may be theoretical only, given the limits on insurance coverage discussed below.

exhausted). Consequently, it would take several times that $57 million in actual liabilities -- which is unlikely based on the Debtors' history -- before Insurers could be required to pay their full limits.

Moreover, the Disclosure Statement fails to identify other risks that may further limit Debtors' rights to insurance recoveries, such that the insurance proceeds realizable by the trust are likely to be far lower than what the Disclosure Statement suggests. For example, if the New York court finds that Debtors have breached the conditions to coverage through the bankruptcy case and/or the proposed plan, the insurers' obligations to fund claims liquidated pursuant to the plan may be further limited or altogether eliminated.

1. The Disclosure Statement Should Identify the New York Rulings That Limit the Insurers' Coverage Obligations.

The Disclosure Statement acknowledges that, since 2013, Debtors have been in coverage litigation with certain insurers, including Insurers, in New York State Supreme Court. The Disclosure Statement is misleading because the description of the litigation suggests that the case is still in its preliminary stages when, in reality, the New York court has already issued several substantive rulings that bear on (and reduce) the insurers' obligations. For example, the New York court has already ruled that New York law applies to the parties' respective rights and obligations and that, under New York law, each insurer is only responsible for a *pro rata* time-on-the-risk share of the costs incurred in connection with an asbestos claim. *See* July 10, 2014 Order at 5, Supreme Court State of New York, Suffolk County, 2013/062947, *affirmed as North River Ins. Co.,* 153 A.D.3d 844. Under the New York court's rulings, the insurers cannot be held jointly and severally liable for asbestos claims that are covered only in part by their respective policies, and Debtors remain responsible for the uninsured shares.

In addition, the Disclosure Statement does not reflect that the New York court has already denied Debtors' summary judgment motions on other issues, including motions seeking rulings that the insurers had waived or were estopped from asserting contribution rights and that certain North River coverage does not have an asbestos exclusion. The Disclosure Statement should be revised to accurately reflect the status of the New York coverage litigation by including discussion of the New York court's substantive rulings, which materially impact the insurers' potential coverage obligations.

2. The Disclosure Statement Should Clearly Identify the Risk That Debtors Have Abrogated Their Rights to Coverage.

The Insurers' policies contain several conditions to coverage and other terms. Specifically, the policies, among other things, require Debtors to cooperate with their insurers in the defense and settlement of underlying claims, prohibit the assignment of rights under the policies without the respective insurer's consent, and provide that Debtors may not enter into settlements without the insurers' consent or voluntarily assume liability except at Debtors' own expense. The settlement and claims-liquidation procedures contemplated by the plan breach the policy conditions. If the court in the New York coverage action eventually agrees, Insurers – and many if not all of the other insurers – will be relieved of coverage obligations for underlying claims liquidated in connection with or pursuant to Debtors' prepackaged plan.

Moreover, because the plan seeks to override Insurers' rights under their policies, confirmation may relieve Insurers of any obligations to pay current or future asbestos claims submitted to the trust. Numerous plan provisions are inconsistent with, and may constitute a breach of, Insurers' policies. For example, the plan, among other things, seeks to assign to the trust rights under Insurers' policies without their consent, purports to deny Insurers their contractual rights to participate in the defense of the asbestos-related claims, and attempts to

relieve Debtors of any obligations to cooperate with Insurers in the defense and settlement of the asbestos claims against Debtors; to the contrary, the Disclosure Statement makes clear that Debtors may be required to cooperate with the trust, of which the asbestos claimants are the beneficial owners. *See* Disclosure Statement, Art. VIII, § H; Duro Dyne Asbestos Personal Injury Trust Agreement § 1.4(f) (Sept. 7, 2018) [Dkt. No. 19-1].

If Debtors' breaches of the insurance contracts eliminate Insurers' coverage obligations, creditors who vote to accept the proposed plan may have traded their claims against Debtors for a promise of payment that is worth far less than what the Disclosure Statement and plan promise. The Disclosure Statement brushes off these issues, mentioning none of them specifically and stating only that "the insurers have raised a host of other arguments that they contend limit or eliminate their coverage obligations." Disclosure Statement, Art. IV, § D(2)(e). Debtors' conclusory (and self-serving) statement that they believe the insurers' defenses "lack merit" is wholly insufficient to inform creditors of the risks that voting claimants are being asked to assume by accepting the plan. The Disclosure Statement should therefore be revised to add a full discussion of the coverage litigation and explain in detail why Insurers contend that no coverage will be available for asbestos claims liquidated under the plan.

B. The Disclosure Statement Should Disclose How the Debtors Propose to Classify and Treat All Pre- and Post-Petition Insurer Claims.

The plan classifies Insurers' "Prepetition Defense-Cost Contribution Claims" as Class 6 Claims and specifies that the class is impaired. Such claims are to be paid over time in full at a low interest rate. *See* Disclosure Statement, Art. VII, § B and C(f). The plan and Disclosure Statement are completely silent, however, with respect to the classification and treatment of Insurers' claims for pre-petition indemnity contribution claims and claims for reimbursement of amounts Insurers spend post-petition and post-confirmation.

Before the Petition Date, Debtors' liability insurers paid a substantially oversized share of the indemnity (settlement) costs arising from the asbestos lawsuits against Debtors. Before 2014, Debtors did not pay any portion of these indemnity costs. More recently, Debtors have paid a small percentage of these indemnity costs, but in an amount that does not account for periods where Debtors were not insured, as required under the recent *Keyspan* decision from the New York Court of Appeals. *See Keyspan Gas East Corporation v, Munich Reinsurance America, Inc.*, 31 N.Y.3d 51 (2018). Consequently, Insurers have substantial claims against Debtors for reimbursement of amounts Insurers paid in pre-petition indemnity to resolve claims against Debtors. Unlike pre-petition defense costs, however, there is no specific class designated for these Claims. It is unclear whether these Claims are intended to fall within Class 5 (General Unsecured Claims), Class 7 (Channeled Asbestos Claims) or some other class.

The problem arises because the two classes are defined, in part, by the exclusion of the other. Under the plan, General Unsecured Claims include "any Claim, regardless of whether such Claim is covered by insurance, to the extent that such Claim is neither secured nor entitled to a priority under applicable law. . . *provided however*, that unless otherwise specifically provided herein, the term 'General Unsecured Claim' shall not include or pertain to . . . an Asbestos Claim." *See* plan § 1.01(75). The insurers' pre-petition indemnity reimbursement claims fall within the general scope of this definition as Claims "neither secured nor entitled to a priority under applicable law." *Id.*

But they also potentially fall into the scope of a "Channeled Asbestos Claim." Channeled Asbestos Claims include "Indirect Trust Claims," defined, in pertinent part, as:

> any Claim, now existing or hereafter arising, that is (a) held by an Entity that has been, is, or may be a defendant in an action seeking damages for death, bodily injury, sickness, disease, or other personal injuries . . . to the extent based on, arising out of, or

> attributable to an Asbestos Personal Injury Claim, and (b) on account of alleged liability of a Debtor for reimbursement . . . of any portion of any damages such Entity has paid or may pay of account of physical, emotional, bodily, or other personal injury, death, or damages arising from personal injury or death . . . caused or allegedly caused, in whole or in part, directly or indirectly (i) by asbestos or asbestos-containing products manufactured, supplied, distributed, handled, fabricated, stored, sold, installed, or removed by a Debtor . . . . *provided, however,* that, for avoidance of doubt, the term "Indirect Trust Claim" shall not include or pertain to . . . a General Unsecured Claim.

Plan § 1.01(79). Because Insurers' indemnity claims potentially fall within the scope of an Indirect Trust Claim (and, therefore, a Channeled Asbestos Claim), it appears that such Claims are not General Unsecured Claims; however, the reverse appears to be equally true. Debtors must clarify the Disclosure Statement to make clear how these claims are to be treated, so that Insurers can intelligently vote on the plan and file appropriate plan objections. Insurers should not have to guess the class into which their pre-petition indemnity reimbursement claims fall.

The same lack of clarity applies to the classification and treatment (or lack thereof) of post-petition claims for indemnity and defense costs. As set forth in the proposed plan (*see* Disclosure Statement, Art. VIII, § O), following confirmation asbestos claimants will be permitted to pursue Insurers in the tort system notwithstanding the establishment of a trust. Because tort litigation will continue, Insurers will continue to incur defense and, possibly, indemnity costs for which the Debtors are responsible under New York law as set forth in *Keyspan*. While the plan does not specify how those claims are to be classified or treated, there are several possibilities. Such post-confirmation liabilities could be considered general unsecured claims, because although the claims relate to amounts paid post-petition, they relate to pre-petition insurance policies. Alternatively, the Debtors might intend to treat them as Class 6 Claims, although the definition of Pre-Petition Defense-Cost Contribution Claims would not encompass them because it refers only to defense costs that "were incurred prior to the Petition

Date." Because Debtors intend to assume insurance policies and related contracts (*see* plan at § 8.02; Disclosure Statement, Art. XII, § B), another possibility is that Debtors would view such post-confirmation claims as continuing obligations of the Debtors or cure costs. The Debtors also might consider post-confirmation reimbursement claims to be "Indirect Trust Claims," which include "any Claim … on account of alleged liability of a Debtor for reimbursement, indemnification, subrogation, or contribution …" If so, Insurers' post-petition or post-confirmation claims would constitute "Channeled Asbestos Claims" and would become the responsibility of the trust and be subject to a pro rata distribution based on a Payment Percentage determined by the trust. Upon review of Section 5.5 of the proposed Trust Distribution Procedures, however, it seems highly unlikely that this is the Debtors' intent as the proposed procedures appear not to contemplate insurer reimbursement claims at all.[3] *See* Duro Dyne Asbestos Personal Injury Trust Distribution Procedures § 2.3 (Sept. 7, 2018) [Dkt. No. 19-6] ("TDPs"). The treatment of the various classes of claims differs significantly. Insurers should not be required to guess how their claims will be treated.

The classification and treatment of *all* of Insurers' claims is critical to confirmation of a plan. According to the Disclosure Statement, "Debtors have been forced to bear an increasing share of settlements and defense costs due to the insolvency of one of the Debtors' insurance carriers, the exhaustion of the Debtors' primary insurance coverage, and disputes with insurance carriers providing excess level coverage." *See* Disclosure Statement, Art. IV, § C. But despite insurer reimbursement claims apparently being a significant driver behind the filing of this case, the Debtors have not specified how they intend to treat those obligations. Depending on the

[3] To the extent Insurers' claims are so classified as Channeled Asbestos Claims, that classification would be unlawful. 11 U.S.C. § 1122 ("a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class").

classification, the Debtors may be obligated to make full payment of those claims. And if they intend not to pay those claims in full, Debtors are likely to face an absolute priority issue, given that Debtors' equity holders are retaining their equity interests. In any case, the Disclosure Statement should:

(i) describe the nature of all existing and future insurer reimbursement claims,

(ii) state how Debtors propose to classify the claims,

(iii) state how Debtors propose to treat the claims, and

(iv) describe how Debtors propose to satisfy that proposed treatment.

Without that baseline information, Insurers cannot determine how their claims are to be treated and how they should respond to the proposed plan. As creditors entitled to vote on the plan, Insurers are entitled to such "adequate information."

Further, because the plan contemplates that it will be "crammed down" on Insurers' Class 6 Claims if the asbestos claimants in Class 7 vote in favor of the plan, the Disclosure Statement must also discuss the anticipated amount of all insurer reimbursement claims and how Debtors would propose to satisfy the "best interests" test with respect to all Class 6 Claims. Also, the Debtors should set forth a liquidation analysis stating how impaired Class 6 Claims would be treated in a Chapter 7 liquidation.

C. The Disclosure Statement Should Disclose that the Proposed Trust Distribution Procedures Are Likely To Pay Claimants Who Do Not Have Valid Claims Against Debtors.

Persons with claims classified as Channeled Asbestos Claims are impaired under the proposed plan. *See* Disclosure Statement, Art. VII, § B. These claimants' recoveries are governed by the trust distribution procedures ("TDPs") and limited by trust assets. As a consequence, the TDPs contemplate that holders of such Claims will receive only a percentage of the allowed amount of their claims. *See* TDPs § 2.3. Likewise, the time delay that claimants

may have to wait to receive payment will be determined, in part, by annual maximums that cap the amounts the trust is permitted to pay each year to holders of Channeled Asbestos Claims. *See id.* § 2.4. In both cases, the limits on spending will be determined, in part, by the total projected value of claims that the trust expects to pay over its lifetime. Yet, the Disclosure Statement does not adequately disclose to holders of *valid* Channeled Asbestos Claims that the plan and the TDPs will, in many cases, allow holders of *invalid* Channeled Asbestos Claims, who would not be entitled to payment in the tort system, to recover from the trust, diluting the recovery (and increasing the recovery time) of persons with *valid* claims.

The United States Department of Justice has recently expressed that these are legitimate concerns in the context of asbestos bankruptcies. In the *Kaiser Gypsum* bankruptcy currently pending in North Carolina, the United States recently filed its own statement of interest to identify its concerns regarding the lack of adequate disclosure concerning operation of the proposed plans. *See In re Kaiser Gypsum Co., Inc., et al.*, U.S. Bankruptcy Court for the Western District of North Carolina, No. 16-31602 (JCW), Statement of Interest on Behalf of the United States of America Regarding Plans of Reorganization for Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. (Sept. 13, 2018) [Dkt. No. 1150] (attached as Exhibit A) ("*Kaiser* Statement of Interest"). In *Kaiser*, the United States expressed its concern that "[a]bsent specific safeguards, the final plan may allow the trust to review, negotiate, and liquidate potentially millions of dollars of personal injury claims, with little continuing supervision by this Court and with little ability for interested parties to prevent -- or even detect -- fraud, abuse, or mismanagement." *Id.* at 2. Among other concerns, the United States noted that Trust Advisory Committees under many confirmed § 524(g) plans are composed of attorneys from the same plaintiffs' firms that represent individuals submitting claims to the trust.

See id. at ¶ 7. The trusts often do not coordinate among themselves to ensure that claimants' allegations of exposure are consistent as they submit claims to multiple trusts. As a result, when another recent bankruptcy case permitted an investigation of underlying claims, the court there concluded that there was widespread abuse, including multiple cases where claimants were permitted to file claims against asbestos trusts even after representing elsewhere that they had never been exposed to the product for which the trust is liable. *See id.* at ¶ 9; *In re Garlock Sealing Techs. LLC., et al*., 504 B.R. 71, 84-85 (Bankr. W.D.N.C. 2014). The same concerns exist here and, in particular, the TDPs on their face improperly allow payment of illegitimate claims in at least two ways:

a. The Trust will pay time-barred claims. Under the TDPs, persons who are first diagnosed with an asbestos-related disease after the trust becomes effective have three years from the date of diagnosis to file a claim against the trust, even if their claims would otherwise be barred by the relevant statutes of limitations or repose. *See* TDPs § 5.1(a)(2). This is likely to result in the trust paying numerous claims that would be time-barred under relevant state law, reducing the amounts available to pay timely-filed claims.

b. The Trust Can Disregard Medical Evidence Requirements. The Disclosure Statement suggests that the TDPs will be implemented in a manner that requires consistent application of medical and exposure evidence criteria so as to ensure that Channeled Asbestos Claims are treated "in substantially the same manner." Disclosure Statement, Art. VIII, § B. But the TDPs attached to the plan create the likelihood that claimants will *not* all be treated similarly. The TDPs, for example, allow the trust (with the permission of the Trust Advisory Committee (TAC) and the Future Claimants' Representative (FCR)) to accept disease level classifications from other trusts on a case-by-case basis, even though those other trusts may have

significantly lower evidentiary requirements. *See* TDP § 5.6(a)(3). And, for other claimants, the trust can ignore medical evidence requirements entirely. *See id.* § 5.6(a)(4) ("The Trustee, with the consent of the TAC and the FCR, may exempt claimants from the obligation to submit medical evidence or certain types of medical evidence"). This creates the likelihood that claimants -- particularly those represented by law firms on the TAC -- will be able to submit claims to the trust that are supported by little or no medical evidence at all.

These problems with the TDPs are not mere idle speculation. In its statement of interest in *Kaiser*, the United States noted that trust assets should be "preserved to the greatest extent possible to pay the claims of legitimate asbestos victims" and expressed concern that lax proof requirements will lead to the payment of illegitimate claims. *Kaiser* Statement of Interest at 2. Payment of claims with weak or no exposure evidence, or that are time-barred, unfairly puts claimants with strong claims against Duro Dyne on the same footing as those with weak or suspect claims. And, putting the members of the TAC, which represent some of the individuals with claims against the trust, in charge of consistent application of the TDPs risks creating conflicts of interest in favor of some claimants over others. At a minimum, the Disclosure Statement should be amended to provide creditors who may vote on the plan with complete information regarding the loopholes that other claimants may be able to exploit and which may dilute the value of legitimate claims.

D. The Disclosure Statement Should Disclose That the Plan Seeks Improper Declarations Concerning Coverage.

Debtor's proposed plan includes gratuitous, self-serving declarations concerning the effect of the trust's assumption of liability for Channeled Asbestos Claims. In particular, the plan contains a declaration that this assumption of liability does not affect Debtors' rights or the insurers' obligations under their respective insurance policies:

> Notwithstanding the Asbestos Trust's assumption of liability and responsibility for all Channeled Asbestos Claims, such assumption shall not itself operate or be construed as a release, accord, or novation of each Debtor's obligations on account of such Claims for purposes of any Asbestos Insurance Rights solely to the extent of suits against the Reorganized Debtor directly in accordance with Section 4.13 hereof.

Plan § 4.06. Similarly, the plan purports to eliminate insurers' rights to set off mutual claims against the Debtor. *See* plan § 9.05(a)(iv). These types of proposed findings and rulings regarding the insurers' potential coverage obligations are akin to seeking declaratory judgment on non-core, state law insurance coverage issues. Such rulings cannot properly be included in a plan or confirmation order under § 1123 of the Bankruptcy Code. *See* Fed. R. Bankr. P. 7001(9) (declaratory relief must be sought through an adversary proceeding). The Disclosure Statement should make clear that, if accepted by the Court, such purported conclusions and rulings concerning the scope of coverage will infringe Insurers' constitutional due process rights and their rights to trial by jury.

E. The Disclosure Statement Should Correctly Identify All Classes of Claims that are Unimpaired Under the Plan.

The Court may approve a plan only if it identifies all classes of Claims that are unimpaired. *See* 11 U.S.C. § 1123(a)(2). The plan provides that the holders of equity interests in debtor Duro Dyne National Corporation are "impaired." But that is not the case. The plan lets existing equity interest holders "retain their Equity Interests in Reorganized Duro Dyne National Corp. to the same extent held in the Debtor Duro Dyne National Corp. on the Petition Date." Plan § 3.03(k)(2). The only "limitation" on those equity interests is that the existing voting shares of Duro Dyne stock will be exchanged for new shares, without any dilution to the existing equity holders. *See id.* § 5.02(c). There is no impairment or diminution in value of any kind of the equity holders' interests, and the Disclosure Statement therefore should be revised to make

clear to creditors that, while their claims are being impaired under the plan, Duro Dyne National equity holders are retaining their complete interests.

F. The Disclosure Statement Fails to Disclose that Creditors May Be Entitled to 100% of Debtors' Equity Under the Absolute Priority Rule.

Duro Dyne is a profitable ongoing concern. Nonetheless, Creditors in Class 6 and Class 7 will have their claims impaired under the plan, and Channeled Asbestos Claims (Class 7) may only receive a portion of the value of their Claim. In contrast, under the plan, Duro Dyne's three voting shareholders -- members of the Hinden family -- will avoid all asbestos-related liabilities and keep their full equity interest in Duro Dyne National Corporation in return for a $3,000,000 cash contribution.

Creditors are entitled to be told in the Disclosure Statement that the bankruptcy code does not permit a class of equity holders to retain their interests (or any portion thereof) while cramming down a plan over an impaired class of creditors. *See* 11 U.S.C. § 1129(b)(2)(B). Rather, the impaired creditors are entitled to reject the plan and insist on receiving 100% of the equity in reorganized Duro Dyne under the absolute priority rule, unless the plan pays their claims in full. The Disclosure Statement is inadequate because it fails to disclose this important fact, especially under the circumstances of the plan, where the likelihood and amount of insurance recoveries that will be available for Channeled Asbestos Claims is sharply disputed.

G. The Disclosure Statement Fails To Provide Adequate Information About Debtors' Viable Alternatives to Bankruptcy in Dealing With Asbestos Claims.

The Disclosure Statement provides inadequate and misleading information regarding the "alternatives" to confirmation of a Chapter 11 plan. The Disclosure Statement describes only two such alternatives: liquidation under Chapter 7 of the Bankruptcy Code, or an alternative plan of reorganization. But these bankruptcy cases were not precipitated by the present financial

condition of the Debtors; Duro Dyne has a positive cash flow and is able to pay its debts as they come due. Rather, this bankruptcy case is an opportunistic attempt to cast off future asbestos liabilities while preserving existing equity's ownership of the company. *See* Declaration of Randall S. Hinden In Support of Chapter 11 Petitions and First Day Pleadings at ¶ 20 (Sept. 7, 2018) [Dkt. No. 3] ("Hinden Decl.") ("The primary reason for the filing of the Debtors' Chapter 11 Cases is the need to address the Company's asbestos liability."). Debtors indicate that they have settled approximately 650 cases since Duro Dyne was first named as a defendant in 1988, thirty years ago. *See id.* ¶¶ 21-22. That amounts to less than two dozen settlements per year, with insurance paying for a significant portion of those claims. Another obvious alternative to the proposed bankruptcy settlement is to resume litigation of the underlying claims and to continue with the coverage action. In such a situation, it is possible that there would not be *any* impairment of claims against Debtors. At a minimum, this alternative, which does not involve any immediate impairment of claims, and which would be the direct result of a dismissal of the case, should be discussed in the Disclosure Statement.

H. The Disclosure Statement and Plan Should Identify TAC Members and Other Fiduciaries.

The proposed plan contemplates that the TAC, along with the FCR, will be responsible for overseeing the trustee and ensuring that the TDPs are administered fairly and consistently so that all Channeled Asbestos Claims receive fair treatment. The Disclosure Statement identifies Lawrence Fitzpatrick as the person Debtors would like to have serve as FCR, but does not identify the members of the TAC (or even how many members it will have). *See* Disclosure Statement, Art. VIII, §§ E-F. Nor does the Disclosure Statement identify the individuals that will be selected to serve as trustee or Delaware trustee for the trust once it begins operation. *See id.* at Art. VIII, § D.

Creditors who may vote on the proposed plan are entitled to know who will be acting as fiduciaries for holders of Channeled Asbestos Claims (and who will be overseeing those fiduciaries). As the United States recognized in its recent filing in *Kaiser*, the individuals who serve in these fiduciary roles frequently serve on multiple trusts and frequently represent some of the Channeled Asbestos Claim holders that will be asserting claims against the trust. To the extent conflicts of interest arise, this can result in the dilution of funds flowing to legitimate claim holders. *See, e.g., Kaiser* Statement of Interest at ¶ 25. The Disclosure Statement should be revised to provide sufficient information regarding these fiduciaries so that persons who are entitled to vote on the plan can make a more informed decision about whether the trust will be operated in the creditors' best interests.

I. The Disclosure Statement Should Provide Clarity as to How Class 5 General Unsecured Claims Will be Paid.

The proposed plan states that Class 5, which consists of General Unsecured Claims, is unimpaired. *See* plan § 3.02. It is unclear, however, whether holders of General Unsecured Claims will be paid in full for those Claims. The description of Class 5 states that holders of General Unsecured Claims will be paid *either* the allowed amount of their Claim *or* "such other treatment that renders such holder Unimpaired." *Id.* § 3.03(e)(ii).

The Disclosure Statement and plan should provide creditors with sufficient information to determine what they will receive for their Claims.[4] Yet it is unclear what "other treatment" Debtors contemplate would be given to holders of Class 5 claims, since claimants are unimpaired only if their legal rights are unaltered by the plan. It is therefore impossible for claimants in Class 5 to determine what they will receive for their Claims and whether they agree with the

[4] Similarly, the Debtors should disclose whether they have the financial wherewithal to make all of the payments proposed by the plan, both as to Class 5 and Class 6 claimants.

plan's treatment of their Claims as unimpaired. The Disclosure Statement and the plan should be revised to inform Class 5 creditors exactly how their Claims will be treated, to the extent they do not receive the full value of their allowed Claims.

J. The Disclosure Statement Should Detail the Plan Negotiations.

The Disclosure Statement states that the Debtors determined to file bankruptcy, and then includes a one-sentence discussion of their "negotiations with the holders of asbestos-related personal injury and wrongful death Claims" without providing any details regarding those negotiations. *See* Disclosure Statement, Art. IV, § E. That discussion is inadequate, particularly in the context of a prepackaged plan that was negotiated without the bankruptcy court's supervision. A full and complete discussion of the plan negotiations, including the cash contributions to be made by the Debtors and the Hinden family members, the TDPs and the operation of the proposed trust, is required to enable creditors to make an informed judgment under 11 U.S.C. § 1125(a)(1) about whether the plan sufficiently protects their rights. This discussion should include, among other things, the parties involved, their relationship to each other and the interests they represented here, as well as a detailed narrative of the negotiations from the initial meetings or conversations in 2015 to the bankruptcy filing on September 7, 2018.

II. THE DISCLOSURE STATEMENT DESCRIBES AN UNCONFIRMABLE PLAN.

As currently drafted, Debtors' proposed plan cannot be confirmed as a matter of law. While Insurers reserve their rights to object on any valid grounds to plan confirmation, the Court should not approve a Disclosure Statement for a plan that is already unconfirmable on its face. *See In re American Capital Equip., LLC,* 688 F.3d 145, 154 (3d Cir. 2012). The Disclosure Statement therefore, should not be approved for at least the following reasons.

A. The Plan Improperly Characterizes Unimpaired Claims.

Section 1129(a) of the Code requires, as a condition to confirmation, that the proposed plan classify all Claims and Interests and identify whether such Claims or Interests are impaired or unimpaired under the plan. Debtors' proposed plan violates Section 1129(a) because it fails accurately to classify all classes of Interests that are unimpaired under the proposed plan.

The plan provides that Class 11 Claims, which are the equity interests in Duro Dyne National Corporation, are impaired. The plan, however, provides that the equity holders will retain their interests in Duro Dyne in full:

> Subject to the provisions of Section 5.02(c) of the Plan, holders of Equity Interests in Debtor Duro Dyne National Corp. shall receive and retain their Equity Interests in Reorganized Duro Dyne National Corp. to the same extent held in the Debtor Duro Dyne National Corp. on the Petition Date.

Plan § 3.03(k)(2). The only provision limiting the Class 11 interests holders' rights, Section 5.02(c), is not a limitation at all. It merely provides that each single share of voting Duro Dyne National Corp. stock will be exchanged for 1,000 shares of stock in the Reorganized Debtor. Because each share is being exchanged on an equivalent basis, there is no dilution, nor does the plan provide for any other reduction in the Class 11 equity holders' interests. Accordingly, Class 11 Interests should be identified as unimpaired.

Impaired creditors who are entitled to vote on the plan will, when reading the Disclosure Statement and plan, incorrectly be led to believe that equity interest holders that are junior to the unsecured creditors are impaired when, in reality, they are not. The plan therefore cannot be confirmed; it does not accurately classify Class 11 interests, as § 1129(a)(2) requires.

B. The Proposed Plan and its Cram Down Provision Would Violate the Absolute Priority Rule.

The proposed plan contemplates that Debtors will attempt to "cram down" the plan over the dissenting votes of creditors in Class 6 if that class votes to reject the plan. *See* plan § 6.05. The Bankruptcy Code, however, does not permit the Court to cram down over Class 6 in this circumstance.

Section 1129(b) sets forth the circumstances in which a bankruptcy court may cram down over a dissenting class: the plan must be "fair and equitable" with respect to any such dissenting class. *See* 11 U.S.C. § 1129(b)(1). With respect to an impaired class of unsecured creditors, the "absolute priority rule" is clear that the plan is "fair and equitable" only if either (i) the unsecured creditors receive the full allowed value of their claim or (ii) any junior class, *i.e.*, equity interests, retains none of its property interest. *See id.* § 1129(b)(2)(B); *In re Armstrong World Indus.*, 432 F.3d 507, 512 (3d Cir. 2005) (applying absolute priority rule and declining to find exceptions applicable in the context of an asbestos bankruptcy).

To the extent that Class 6 does not vote in favor of the plan, the provisions of the plan that provide for confirmation by cram down are inconsistent with the requirements of § 1129(b). The holders of Class 6 Claims are not receiving full value for their allowed claims; rather, they are forced to accept small interim payments at first and only receive the balance of their claims after eight years. *See* plan § 3.03(f)(ii). That restriction on payment clearly constitutes "impairment" for purposes of the plan. Moreover, Class 11 -- Duro Dyne National Corp. interests -- is a junior class of Interests which retains all of those Interests; indeed, as shown above, Class 11 is, in reality, unimpaired. As a matter of law, Debtors will not be able to show that the plan is "fair and equitable" with respect to a dissenting Class 6, and the plan cannot be confirmed with the cram down provisions in their current form.

C. The Proposed Findings That Attach to the Insurance Rights are Inconsistent With the Code.

Section 4.07 of the plan violates 11 U.S.C. § 1129(a)(3). That section of the plan provides that, after assignment of insurance policies to the trust, the trust shall have:

> the exclusive right to enforce any and all of the Asbestos Insurance Rights against any Entity, and the Proceeds of the recoveries of any such Asbestos Insurance Rights shall be the property of, and shall be deposited in, the Asbestos Trust. The Asbestos Insurance Rights shall be vested in the Asbestos Trust free and clear of all Liens, encumbrances, interests, claims and causes of action of any Entity.

Plan § 4.07. However, under applicable state law and the insurers' policies, coverage exists only to indemnify against judgments and reasonable settlements entered into with the insurers' consent, and then only after a final judgment finding that such coverage exists. By attempting to transfer the policy rights without the insurers' consent, Debtors are attempting to change the entity that the insurers are required to indemnify to one that has, as its beneficial owner, the very Channeled Asbestos Claimants that are adverse to Debtors, and thus to Debtors' insurers. To the extent that this provision purports to deprive Insurers of any interest, claims, and/or causes of action under the policies, it wrongly expands the rights to coverage under such insurance policies pursuant to the assignment.

Section 4.13 of the plan purports to abrogate the Debtors' obligation to cooperate in the defense of asbestos claims. It provides, in part:

> The Reorganized Debtor shall have no obligation to defend or otherwise appear or incur any costs or expenses in connection with any action brought under this Section 4.13, and any liability of the Reorganized Debtor to any Entity, including any Channeled Asbestos Claimant or Asbestos Insurer, that is based on, arises from, or is attributable to any action commenced pursuant to this Section 4.13 shall be enforceable only against the Asbestos Insurance Coverage provided by Non-Settling Asbestos Insurers.

Plan § 4.13. Pursuant to this language, Insurers' claims arising out of the Debtors' share of defense or indemnity costs would be borne by Insurers themselves. Nothing in the bankruptcy code authorizes this Court to rewrite Debtors' insurance contracts to eliminate Debtors' cooperation obligations. If Debtors choose not to participate in the defense of claims, the consequence under binding state law would be abrogation of coverage for any such claim.

Moreover, these provisions are tantamount to seeking a declaration concerning the rights and obligations of the parties with respect to insurance policies in the context of a confirmation hearing. Bankruptcy courts have consistently recognized that coverage disputes can be resolved only in state court coverage actions or adversary proceedings. *See, e.g., In re Congoleum Corp.*, Case No. 03-51524-KCF, Dkt. # 497 (Bankr. D.N.J. 2004); *In re Conxus Communs., Inc.*, 262 B.R. 893, 900 (D. Del. 2001) (bankruptcy court lacks authority to enjoin contract counterparty from exercising rights after post-confirmation breach); *In re Sunflower Racing*, 226 B.R. 673, 694 (D. Kan. 1998) (bankruptcy courts lack equitable power to determine contract rights in context of confirmation hearing). Nor can the bankruptcy court dictate the prospective and preclusive effect that its findings will have to bind future courts in ruling on coverage issues. *See, e.g., Covanta Onondaga Ltd. v. Onondaga County Resource*, 318 F.3d 392, 397-98 (2d Cir. 2003) ("the first court does not get to dictate to other courts the preclusion consequences of its own judgment") (citation omitted); *Blankenship v. Chamberlain*, 695 F. Supp.2d 966, 974 (E.D. Mo. 2010); *Midway Motor Lodge of Elk Grove v. Innkeepers' Telemanagement & Equip. Co.*, 54 F.3d 406, 409 (7th Cir. 1995). These principles apply in full to bankruptcy court rulings. The Court, therefore, should refuse to confirm a plan that purports to dictate the effect of confirmation on the rights of insurers to assert claims and/or defenses under their respective policies.

RESERVATION OF RIGHTS

Insurers expressly reserve, and do not waive, all of their rights and defenses in connection with their contractual rights and applicable law. Insurers further reserve all rights to assert any and all such rights and defenses and any conditions, limitations, and/or exclusions in their respective policies in any appropriate manner and forum whatsoever. Nothing contained in these objections shall be deemed to expand any coverage that may otherwise be available under any insurance policies issued by Insurers or any settlement agreement to which any Insurer is a party.

Insurers further reserve all of their rights to object to any claim for coverage under any policy or settlement, to seek declaratory relief and/or injunctive relief to the extent that treatment of their contractual rights and/or confirmation of the plan violates any terms or conditions of any policies or settlements to which any Insurer is a party, or that otherwise gives rise to any defenses on behalf of any Insurer.

Nothing in these objections shall be construed as an acknowledgement or admission that any Insurer's policy covers or otherwise applies to any claims, losses, or damages, or that any such claims, losses, or damages are eligible for payment.

Insurers reserve the right to adopt any other objection to the approval of the disclosure statement offered by any other party.

Insurers reserve their rights to amend, supplement, alter, or modify these preliminary objections in response to the filing of plan or Disclosure Statement supplements by Debtors, modification of the plan or Disclosure Statement by Debtors, any discovery being conducted in connection with the plan or Disclosure Statement, or any other submission in connection with the plan or Disclosure Statement.

CONCLUSION

For the foregoing reasons, the Court should deny approval of Debtors' Disclosure Statement.

Dated: October 4, 2018

Respectfully submitted,

/s/ *Stephen M. Forte*
Stephen M. Forte, Esq.
SHIPMAN & GOODWIN LLP
400 Park Avenue, Fifth Floor
New York, NY 10022-4406
Tel: (212) 376-3015
Fax: (212) 376-3024
Email: sforte@goodwin.com

-and-

James P. Ruggeri (*pro hac vice* pending)
Joshua D. Weinberg (*pro hac vice* pending)
Abigail W. Williams (*pro hac vice* pending)
SHIPMAN & GOODWIN LLP
1875 K Street, NW, Suite 600
Washington, DC 20006-1251
Tel: (202) 469-7750
Fax: (202) 469-7751
Email: jruggeri@goodwin.com
jweinberg@goodwin.com
awilliams@goodwin.com

Attorneys for Hartford Accident and Indemnity Company

KENNEDYS CMK LLP

/s/ Margaret F. Catalano
Margaret F. Catalano
Christina R. Salem
570 Lexington Avenue, 8th Floor
New York, N.Y. 10022
(212) 252-0004
Emails: meg.catalano@ kennedyscmk.com
christina.salem@kennedyscmk.com

-and-

IFRAH PLLC
George R. Calhoun, V (*pro hac vice*)
Ifrah PLLC
1717 Pennsylvania Ave., NW
Washington, D.C. 20006
202.525.4147
Email: george@ifrahlaw.com

Attorneys for The North River Insurance Company

/s/ Mark S. Lichtenstein
Mark S. Lichtenstein
CROWELL & MORING LLP
590 Madison Avenue, 20th Floor
New York, New York 10022
Telephone: (212) 223-4000
Facsimile: (212) 223-4001
Email: mlichtenstein@crowell.com

Mark D. Plevin (admitted *pro hac vice*)
Tacie H. Yoon (admitted *pro hac vice*)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
Telephone: (202) 624-2500
Facsimile: (202) 628-5116
Email: mplevin@crowell.com
tyoon@crowell.com

Attorneys for Federal Insurance Company