

UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Re:

EAGLE-PICHER INDUSTRIES, INC., et al.,

Debtors.

Consolidated Case No. 1-91-10100

Chapter 11

Hon. Jeffery Hopkins, U.S.B.J.

Trustees' Motion to Amend Trust
Agreement

**MOTION OF THE TRUSTEES PURSUANT TO SECTIONS 105 AND 524(g) OF
THE BANKRUPTCY CODE AND SECTION 5804.12 OF THE OHIO TRUST
CODE FOR AN ORDER AMENDING THE TRUST AGREEMENT**

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James J. McMonagle, chairperson, Stephen A. Madva, and Laura R. Walker (the "Trustees"), as trustees of the Eagle-Picher Industries, Inc. Personal Injury Settlement Trust (the "Trust"), upon the accompanying Declaration of Melanie K. Impastato, and with the full support of the Trustees' Advisory Committee (the "TAC"), hereby move this Court, pursuant to the Third Amended Consolidated Plan of Reorganization (the "Plan") of Eagle-Picher Industries, Inc. and affiliated debtors ("Eagle-Picher"), Sections 105 and 524(g) of title 11 of the United States Code (the "Bankruptcy Code"), and Section 5804.12 of the Ohio Revised Code (the "Ohio Trust Code"), to modify certain administrative provisions of the Eagle-Picher Industries, Inc. Personal Injury Settlement Trust Agreement (the "Trust Agreement," attached as **Exhibit A**) governing Trustee retirement and compensation as described herein and as reflected in **Exhibit B** (proposed modifications reflected in blackline against current Trust Agreement (excerpted)) and **Exhibit C** (clean copy of Trust Agreement incorporating proposed modifications (excerpted)).

PRELIMINARY STATEMENT

More than 25 years ago this Court oversaw one of the first proceedings under Section 524(g) of the Bankruptcy Code. The Eagle-Picher asbestos reorganization was, in some ways, a test of a new statute, and an opportunity to create a framework for other, similar reorganizations in the future.

By any measure, Eagle-Picher has passed this test:

- the Trust has processed over 636,000 claims;
- it has distributed more than \$763.5 million to victims of asbestos disease or their survivors;
- it maintains over \$369 million for future beneficiaries; and
- it has never returned a single claim to the tort system.

These results are even more remarkable considering that in nearly twenty years of operation the Trust Agreement has not once been amended. It is no coincidence that the Eagle-Picher valuation case law and the documents governing its trust have informed dozens of asbestos bankruptcy proceedings that have followed over these many years.

Much of this success is driven by Bankruptcy Code Section 524(g)'s statutory mandate—as incorporated into the Trust's governing documents—that an underlying fiduciary duty of a 524(g) trustee is to continually evaluate how best to treat past, present, and future claimants and beneficiaries fairly and in as similar a fashion as possible.

It is in keeping with this duty that the Trustees, for the first time, bring this Motion to effect two administrative amendments to the Trust Agreement to help them better meet their mission. First, the Trustees seek to increase the mandatory retirement age from 72 to 77, subject to an annual re-election beginning at age 72. Second, the Trustees seek to

restructure—*but not to increase*—trustee compensation, such that trustee honorariums are further equalized to better reflect current duties.

The Trustees believe that the historical knowledge and added experience of an additional five years of service will enhance their ability to preserve similar treatment for claimants, and is clearly in the interest of Trust beneficiaries. Moreover, the Trustees are not eliminating a mandatory retirement, only changing the age, and in an abundance of caution are proposing that any Trustee beyond the age of 72 be subject to an annual reelection. By decreasing the trustee chairperson's compensation and increasing non-chairperson trustee compensation, the Trustees' proposal will better align their total remuneration with their overall, current duties to beneficiaries. The proposed changes in Trustee compensation have no direct impact on beneficiaries because total Trustee compensation will remain exactly the same.

The Trust Agreement generally may be amended without a motion. However, the Trust Agreement deems provisions related to trustee tenure and compensation not subject to amendment. Therefore, in keeping with the Trust Agreement and Ohio law, and as a matter of sound governance and to provide notice and an opportunity for all beneficiaries to be heard, the Trustees have determined to seek Bankruptcy Court approval of the proposed amendments.

Governing Ohio law is clear that trustees are empowered with the flexibility and discretion to amend any provision of a trust agreement by application to a governing court when the amendment would enhance efficient estate administration in the interest of beneficiaries, notwithstanding any provision to the contrary. In that connection, not only do the Trustees and Trust management believe that the proposed amendments are in the best interests of claimants, the Trustees' Advisory Committee—a body of three claimants lawyers appointed under the Trust

Agreement with the fiduciary duty to represent the interests of all beneficiaries—unanimously supports the proposed amendments and the relief sought in this Motion.

Moreover, Ohio law allows for any provision of a trust agreement to be amended where, as here, there has been a change in circumstance impacting beneficiaries. In this case, claims filings have, and continue to, exceed projections from the Trust’s inception (in fact, a single batch of over 5,000 claims was filed this April) and, thanks to the Trustees’ sound management of the corpus, the Trust’s current assets far exceed any reasonable expectation of value at the outset of this proceeding. Additionally, while the role of chairperson in the earlier days of the Trust required, in relative terms, more time and effort to oversee daily operations, at this point in the life cycle of the Trust the Trustees’ roles are more equalized.

Finally, this Court, which retains exclusive jurisdiction over all matters related to the Trust, has the power to amend the Trust Agreement under Sections 105 and 524(g) of the Bankruptcy Code in the interest of beneficiaries because the Trust Agreement is a Plan document approved as part of Eagle-Picher’s Chapter 11 reorganization.

Accordingly, the proposed amendments should be approved.

JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to Article 9.1 of the Plan, which was approved in the Order of Confirmation of Plan entered jointly by this Court and the United States District Court for the Southern District of Ohio. *See In re Eagle-Picher Indus., Inc.*, 203 B.R. 256 (Bankr. S.D. Ohio 1996) (the “Confirmation Order”). The Plan specifically provides that this Court has jurisdiction to “[t]o interpret, enforce, and administer the terms of the . . . Trust Agreement.” (Plan, Art. 9.1.) The Trust Agreement, a form of which was attached as an exhibit to the Plan (Ex. 1.1.13), similarly recognizes “the Bankruptcy Court’s continuing

exclusive jurisdiction to interpret and enforce the terms of this Trust Agreement” (Trust Agr., Art. 7.15; *see* Plan, Art. 9.1.)

This Court also has jurisdiction pursuant to 28 U.S.C. Sections 1334(b) and 157(b) because this Motion requests interpretation and modification of the Trust Agreement, a Plan document approved as part of Eagle-Picher’s Chapter 11 confirmation. (*See* Plan, Ex. 1.1.13.) *See also* *Thickstun Bros. Equip. Co. v. Encompass Servs. Corp. (In re Thickstun Bros. Equip. Co.)*, 344 B.R. 515, 521-22 (6th Cir. B.A.P. 2006) (bankruptcy courts have post-confirmation jurisdiction when there is a “close nexus” to the bankruptcy plan or proceeding).

Venue is proper in this Court pursuant to 28 U.S.C. Section 1409(a) because this Motion concerns a matter that is related to Eagle-Picher’s Chapter 11 case.

STANDING

The Trustees have standing to seek to seek modification of the Trust Agreement under the Ohio Trust Code. *See* Ohio Revised Code (“R.C.”) § 5804.10(B) (“A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under Sections 5804.11 to 5804.16 of the Revised Code”); *see also* *Kryder v. Kryder*, No. 25665, 2012 WL 1866376, at *4-5 (Ohio Ct. App. May 23, 2012) (only trustees and beneficiaries having standing to seek court approval for proposed trust modifications).

NOTICE

The Trustees believe any change to the Trust Agreement is worthy of providing all claimants with full notice and an opportunity to be heard. In that connection, this Motion and all accompanying documents have been posted on the Trust’s website (www.cpf-inc.com); they have been served on those persons on the Service List attached to this Motion in accordance with Article 7.6 of the Trust Agreement; and, so as to effect the broadest notice possible, a Notice of

Filing attached hereto as **Exhibit D** has be mailed to all counsel for holders of Asbestos Personal Injury Claims, Lead Personal Injury Claims, and Asbestos or Lead Contribution Claims, who have filed claims with the Trust, and all *pro se* holders of Toxic Personal Injury claims who have active claims with the Trust.¹

STATEMENT OF FACTS

Eagle-Picher's Bankruptcy and Resulting Trust

Asbestos litigation began in the 1960s and by the late 1980s and early 1990s had become a significant, precipitating cause of Chapter 11 filings. (Declaration of Melanie K. Impastato (“Impastato Decl.”) ¶ 2.) On January 7, 1991, Eagle-Picher filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, primarily due to the large volume of asbestos personal injury lawsuits against the company. (*Id.*) On November 18, 1996, this Court and the District Court jointly entered the Confirmation Order approving Eagle-Picher’s Third Amended Consolidated Plan of Reorganization. *See* Confirmation Order, 203 B.R. 256.

Pursuant to the Confirmation Order, the Eagle-Picher Industries, Inc. Personal Injury Settlement Trust was established under Section 524(g) of the Bankruptcy Code. *See id.* at 279-81. The Trust is governed by the Eagle-Picher Industries, Inc. Personal Injury Settlement Trust Agreement, effective November 29, 1996. The Trust Agreement is governed by, and construed in accordance with, the laws of the State of Ohio. (Trust Agr., Art. 7.12; Plan, Art. 12.12.) The Trust was one of the first trusts established under Bankruptcy Code Section 524(g). (Impastato Decl. ¶ 4.)

1. This is in keeping with the notice procedures established by this Court’s Order Regarding Accountings of the Eagle-Picher Industries, Inc. Personal Injury Settlement Trust dated March 14, 1997 utilized by the Trust to file its annual reports, and the notice period complies with the 21 days required for motions under the Southern District of Ohio’s Local Bankruptcy Rule 9013-1.

On the effective date, the Trust assumed the liabilities of reorganized Eagle-Picher with respect to asbestos personal injury claims. Confirmation Order, 203 B.R. at 280. The Bankruptcy Code requires that a trust established pursuant to Section 524(g) must operate to “provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.” 11 U.S.C. § 524(g)(2)(B)(ii)(V). This requirement is echoed in the Court’s Confirmation Order (203 B.R. at 280), the Plan (Art. 7.8.0.1.13), and the Trust Agreement (Art. 2.2).

The Trust was initially funded with \$730.2 million, principally comprised of its ownership in reorganized Eagle-Picher. (*See* Impastato Decl. ¶ 5.) At the time of the earliest actuarial forecasts of asbestos-related personal injury claims in the early 1980s experts forecast asbestos claims until approximately 2027. (*Id.* ¶ 6.) By the time of the hearing on the confirmation of Eagle-Picher’s bankruptcy plan, it was expected that the Trust would receive claims for about forty years (that is, until approximately 2036) and would exhaust its assets during that timeframe. (*Id.*) *See* Confirmation Order, 203 B.R. at 266 (“[T]he Plan Proponents point out that the . . . Trust has been carefully structured with periodic adjustments in the distribution formula so that there is no reasonable expectation that at the end of the trust, some 40 years in the future, any assets will remain in the trust.”)

As of May 31, 2016, the Trust had processed 636,713 claims and paid over \$763.5 million to victims of asbestos disease or their survivors. (Impastato Decl. ¶ 7.) The Trust remains very active, with 8,258 new asbestos disease claims filed in 2015. (*Id.*) Additionally, more than 8,000 claims have already been filed in 2016, including more than 5,000 in the month of April alone. (*Id.*) Despite facing a greater volume of claims than originally anticipated, sound management has enabled the Trust to significantly grow its assets, and a sizeable fund remains

available to pay claims. (*Id.* ¶ 8.) As of May 31, 2016, the Trust maintained gross assets valued at approximately \$369.5 million. (*Id.*) Current actuarial forecasts predict claims filings until the year 2049. (*Id.*)

Trustee Appointment and Duties

The Trust Agreement appoints three trustees to transact the business and affairs of the Trust in furtherance of the Trust's purpose. (Trust Agr., Arts. 2.1, 5.1(a).) One trustee is appointed as a chairperson who "shall act as the Trustees' liaison, he or she shall coordinate and schedule meetings of the Trustees, and he or she shall handle all administrative matters that come before the Trustees." (*Id.*, Art. 5.1(b).) At inception, a fourth trustee was also appointed to serve a single five-year term. (*Id.*, Art. 5.1(a).)

To meet the requirements set forth under Bankruptcy Code Section 524(g)(2)(B)(ii)(V), when administering claims, the trustees are required to rely on mechanisms that "provide reasonable assurance the PI Trust will value, and be in a financial position to pay, similar present asbestos personal injury Claims and future asbestos personal injury demands in substantially the same manner." (Trust Agr., Art. 3.3(b)(i); *see also* Art. 4.2 (referring to "duties of the Trustees to pay similar present and future Toxic Personal Injury Claims in substantially the same manner".))

Trustees' Advisory Committee Appointment and Duties

The Court's Confirmation Order appointed a Trustees' Advisory Committee in accordance with the Terms of the Trust Agreement. *See* Confirmation Order, 203 B.R. at 267. The TAC is a committee of three members who serve as advisors to the trustees and are charged with acting in the best interest of Trust claimants. (Trust Agr., Art. 6.1 ("The TAC shall endeavor to act in the best interests of the holders of all Toxic Personal Injury Claims.")) In doing so, the TAC effectively acts as the voice of the beneficiaries as contemplated by the Plan.

The Trustees may consult with the TAC on any issue and must consult the TAC on certain issues. (*Id.*, Art. 6.1 (“The Trustees may consult with the TAC on any matter affecting the PI Trust”).) In particular, the trustees must consult with the TAC regarding the appointment of successor trustees and claim resolution procedures. (*Id.*, Art. 3.2(e).) In a few circumstances, such as when deciding to terminate the Trust, the Trustees must obtain consent from the majority of the TAC in order to act. (*Id.*)

All past and present TAC members are prominent lawyers for claimants, and each TAC member was involved in Eagle-Picher’s bankruptcy. (Impastato Decl. ¶ 14.) The Confirmation Order and Trust Agreement appointed Gene Locks, Robert E. Sweeney, and Robert B. Steinberg to serve as the TAC for the duration of the Trust (or until his death, resignation, or removal). Confirmation Order, 203 B.R. at 279-80. (Trust Agr., Arts. 6.2(a), 6.3(a).) Mr. Sweeney resigned from the TAC for personal reasons in 2001 and was ultimately succeeded by Michael P. Thornton. (Impastato Decl. ¶ 14.) As required by the Trust Agreement, in reflection of their role as claimant representatives, the TAC endeavors to act in the best interests of claim holders. (*See* Trust Agr., Art. 6.1.)

Trust Agreement Provisions for Trustee Terms of Service

The Trust Agreement sets out procedures governing trustee succession. (Trust Agr., Art. 5.1-5.3.) Namely, it provides that each trustee shall serve until the earlier of (i) the termination of the Trust, (ii) his or her death, (iii) his or her resignation, (iv) his or her removal, or (v) his or her retirement. (*Id.*, Art. 5.2(a).) The conditions governing trustee retirement are found in Article 5.2(d), which states that “[e]ach Trustee must retire upon attaining the age of seventy-two (72), by written notice to each of the remaining Trustees and the TAC.” A trustee must inform his or her fellow trustees 90 days prior to attaining the mandatory retirement age of 72. (*Id.*)

The Trust Agreement provided for three trustees to serve for the life of the Trust (or until resignation, removal, or retirement) and for a fourth trustee to only serve a five-year term. (Trust Agr., Art. 5.1(a).) The Confirmation Order and Trust Agreement designated James J. McMonagle, Ruth McMullin (chairperson trustee), Daniel M. Phillips (five-year trustee), and W. Thomas Stephens as initial trustees of the Trust. (*See id.*) *See* Confirmation Order, 203 B.R. at 279.)

Mr. Stephens resigned effective February 27, 1998 to accept a CEO position, and the remaining trustees voted to transfer Mr. Phillips from the five-year trustee position to the regular trustee position vacated by Mr. Stephens. (Impastato Decl. ¶ 10.) Mr. Phillips died on August 22, 2000, and the remaining trustees appointed David L. McLean to serve as the third trustee beginning July 1, 2001. (*Id.*) Ms. McMullin, Mr. McMonagle, and Mr. McLean continued to serve together as trustees for the next twelve years. (*Id.*)

Upon attaining the mandatory retirement age of 72, Mr. McLean retired on April 30, 2013 and was succeeded by Stephen A. Madva. (*Id.* ¶ 11.) Ms. McMullin, who was about to attain age 72, retired on December 31, 2013. (*Id.*) Laura R. Walker succeeded her as a trustee, and Mr. McMonagle, the sole initial trustee still serving, was elected as chairperson by a unanimous vote. (*Id.*)

Upon receiving notification from Mr. McMonagle that he will attain the current mandatory retirement age of 72 on October 1, 2016, the remaining Trustees (Mr. Madva and Ms. Walker) initiated the search for a successor trustee, in coordination with Trust counsel. (*Id.* ¶ 15.) After beginning to undertake a search, and in coordination with Trust counsel, it was the judgment of these remaining Trustees that it would instead be in the beneficiaries' best interest for Mr. McMonagle—the only fiduciary to serve for the entire life of the Trust since its inception

in 1996—to continue to serve as a trustee. (*Id.*) Indeed, without Mr. McMonagle, no Trustee will have served prior to 2013.

Mr. McMonagle’s impending retirement demonstrated to the Trustees the value of extending trustee tenure under the Trust Agreement, and the Trustees determined that extending the mandatory retirement age for an additional five years would improve administration of the Trust in the interest of the Trust’s beneficiaries. (*Id.* ¶ 16.) Specifically, the Trustees judged that longer trustee tenure through age 77 will helpfully provide more time for newer trustees to accrue historical knowledge passed on from longer-serving trustees, thereby assisting trustees in trying to achieve Section 524(g)’s goal of treating past, current, and future Trust claimants in as substantially the same manner as possible. (*Id.*) The Trustees further determined that annual elections for trustees past the age of 72 would be prudent and in keeping with the mandatory retirement provision. (*Id.*)

The Trustees then consulted with the TAC regarding their recommendation to amend Article 5.2(d) of the Trust Agreement. (*Id.* ¶ 18.) The TAC, which is charged with representing the interests of all Trust beneficiaries, unanimously supported the Trustees’ recommendation to amend the Trust Agreement as to trustee tenure. (*Id.*) These proposed changes are reflected in **Exhibit B**.

Trust Agreement Provisions for Trustee Compensation

The Trust Agreement Article 5.5(a) separately provides for \$50,000 in annual compensation for each trustee, as well as an additional \$50,000 in annual compensation for the chairperson, for \$200,000 in total annual trustee remuneration. (Trust Agr., Art. 5.5(a).) Thereafter, compensation is to be increased annually at a rate tied to inflation. (*Id.* (“[P]er annum compensation payable to the Trustees hereunder shall be increased annually proportionately with any increase in the Consumer Price Index—All Cities (or any successor index) for the

corresponding annual period.”.) As a result, compensation for 2016 under the present terms of the Trust Agreement results in \$74,844 in annual compensation for each trustee, as well as an additional \$74,844 in annual compensation for the chairperson, for total annual compensation of \$299,376. (Impastato Decl. ¶ 12.)

After the Trustees agreed that they would petition the Court to modify the Trust Agreement’s provisions on trustee terms of service, they unanimously concluded that it would be beneficial to modify the provisions on trustee compensation at the same time. (*Id.* ¶ 17.) The Trustees concluded that it would be more equitable to adjust compensation in light of the apportionment of trustee responsibilities during the present stage of the Trust. (*Id.*) Accordingly, the trustees agreed that the annual compensation for the chairperson should be reduced by 22%, with such amount reallocated to the non-chairperson trustees and split equally. (*Id.*) Under this formula, 2016 annual compensation for each trustee would be \$91,310 per annum, as well as an additional \$25,446 in annual compensation for the chairperson.² (*Id.*) These proposed changes are reflected in **Exhibit B**. Following the recommended change, total annual compensation would remain unchanged at \$299,376 and therefore have zero impact on the Trust’s beneficiaries. The TAC also unanimously supports these proposed amendments. (*Id.* ¶ 18)

Trust Agreement Provisions on Amending the Trust Agreement

The Trust Agreement is irrevocable by its terms, but subject to amendment as otherwise provided therein. (Trust Agr., Art. 7.1 (“The . . . Trust is irrevocable, but is subject to

2. There are also rarely used provisions detailing per diem rates. For consistency, the proposed modification updates the \$2,000 per diem rate in the original Trust Agreement to account for inflation, using the Consumer Price Index, to reflect that the \$2,000 is now equivalent to \$2,992.

amendment as provided in Article 7.3.”.) Article 7.3 of the Trust Agreement provides trustees with broad power to amend the Trust Agreement, following consultation with the TAC, and only with TAC approval in some circumstances. (*Id.*, Art. 7.3 (“The Trustees, after consultation with the TAC, and subject to the TAC’s consent when so provided herein, may modify or amend this Trust Agreement”). However, the trustees’ amendment powers do not extend to certain specified provisions, including the provisions governing trustee terms of service and trustee compensation. (*Id.* (referencing trustees’ amendment powers “except that Articles . . . 5.2 (Term of Service) . . . [and] 5.5 (Compensation and Expenses of Trustees) . . . shall not be modified or amended in any respect.”).) Therefore, the Trustees cannot amend the Trust Agreement’s provisions governing trustee terms of service and compensation without Court approval. (*See id.*, Art. 3.1(b) (“Except as otherwise specified herein, the Trustees need not obtain the order or approval of any court in the exercise of any power or discretion conferred hereunder.”); *see also id.*, Art. 5.5(a) (Amendments increasing trustee compensation “may be made only with the approval of the Bankruptcy Court.”).)

Trusts Established After Eagle-Picher

Today there are more than forty Section 524(g) trusts established and governed by bankruptcy courts across the country. Many, if not all, have trust agreements and claims procedures that largely mirror Eagle-Picher’s governing documents in nearly all material respects. However, at least one area where they deviate—notable for this Motion—is that they generally do *not* have provisions regarding mandatory retirement age.³

3. (*See, e.g.*, Ninth Amendment to and Complete Restatement of the Western Asbestos Settlement Trust Agreement; Eighth Amendment to and Complete Restatement of J.T. Thorpe Settlement Trust Agreement; Third Amended ARTRA 524(g) Asbestos Trust Agreement; Armstrong World Industries, Inc. Asbestos

(Footnote continued on next page)

ARGUMENT

I. THE COURT SHOULD APPROVE THE PROPOSED AMENDMENTS TO THE TRUST AGREEMENT.

In order to better comply with Section 524(g) and to promote effective trust administration, the Trustees move this Court to order certain administrative changes to the Trust Agreement's provisions governing trustee tenure and compensation. (*See* Trust Agr., Arts. 5.2(d), 5.5(a).) While the Trust Agreement deems such provisions not subject to amendment, governing Ohio law is clear that a trust agreement provision may be amended, notwithstanding any provision to the contrary, where the amendment would promote better trust administration or when changed circumstances mean the amendment would assist beneficiaries.⁴ Both of these factors are present here, the TAC unanimously supports the relief requested in this Motion, and the amendments should be approved. In addition, this Court retains exclusive jurisdiction over the Trust and therefore has the power to amend the Trust Agreement as a Plan document.

A. The Court Should Approve the Trustees' Proposed Amendments to the Trust Agreement Under Ohio Law.

The Ohio General Assembly enacted the Ohio Trust Code, Sections 5801–5811, a modified version of the Uniform Trust Code, effective January 1, 2007. *See* H.B. 416, 126th Gen. Assem., Reg. Sess. (Ohio 2006); R.C. § 5801.011 (R.C. §§ 5800–5811 may be cited as the

(Footnote continued from previous page)

Personal Injury Settlement Trust Agreement; DII Industries, LLC Asbestos PI Trust Agreement; Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust Agreement; Owens Corning/Fibreboard Asbestos Personal Injury Trust Agreement; W.R. Grace Asbestos PI Trust Agreement.)

4. In fact, with respect to compensation, The Trust Agreement itself specifically contemplates that the Trustees should seek this Court's authorization for compensation changes that they are prohibited from making unilaterally, stating that any increases in trustee compensation greater than the rate of inflation (as determined by the Consumer Price Index), "may be made only with the approval of the Bankruptcy Court." (Trust Agr., Art. 5.5(a).)

“Ohio Trust Code”). Although the Trust was established prior to the effective date of the statute, the Trust Agreement nonetheless must be interpreted with regard to the Ohio Trust Code. The Ohio Trust Code explicitly states that it “appl[ies] to all trusts created before, on or after [its] effective date.”⁵ R.C. § 5811.03(A)(1).

The Ohio Trust Code largely codified existing case law, but it also changed trust law in certain areas and included a set of mandatory rules considered so fundamental that they cannot be overridden by the terms of a trust agreement. *See* Alan Newman, *The Uniform Trust Code: An Analysis of Ohio’s Version*, 34 Ohio N.U. L. Rev. 135, 136, 142 (2007). The Ohio Trust Code’s provisions permitting modification of the trust instrument are among those that cannot be overridden agreement. As the Ohio Court of Appeals explained, the Uniform Trust Code as enacted by Ohio “provide[s] a series of interrelated rules on when a trust may be terminated or modified *other than by its express terms*. The overall objective of these sections is to *enhance flexibility . . .*” *In re Frank*, 910 N.E.2d 523, 525 (Ohio App. Ct. 2009) (emphasis added). Moreover, the Ohio Trust Code provides a grant of power to the Court in the interest of equity, regardless of the terms of a trust agreement. *See* R.C. § 5801.04(B)(13) (stating that “[t]he power of the court to take any action and exercise any jurisdiction that may be necessary in the interests of justice” cannot be overridden by the terms of the trust).

By its terms, the Trust Agreement prohibits the Trustees from amending its provisions regarding trustee terms of service and compensation. (Trust Agr., Art. 7.3.)

5. Courts have accordingly applied the Ohio Trust Code’s provisions to analyze trusts established prior to the effective date of the statute. *See, e.g., Cartwright v. Batner*, 15 N.E.3d 401, 408 (Ohio Ct. App. 2014) (“The law as amended and enacted was specifically intended to apply retroactively to trusts created prior to 2007.”), *appeal dismissed*, 17 N.E.3d 594 (Ohio 2014); *Cundall v. U.S. Bank*, 882 N.E.2d 481, 495-96 (Ohio Ct. App. 2007) (retroactively applying Ohio Trust Code to pre-2007 trust), *aff’d in part, rev’d in part on other grounds*, 909 N.E.2d 1244 (Ohio 2009).

However, the Ohio Trust Code is clear that this Court retains the ability to modify the Trust Agreement even if the instrument itself says that certain provisions should not be amended. The statute specifically states that “[t]he terms of a trust prevail over any provision of Chapters 5801. to 5811. of the Revised Code *except . . . [t]he power of the court to modify or terminate a trust under sections 5804.10 to 5804.16 of the Revised Code.*” R.C. § 5801.04(B)(4) (emphasis added). *See also Zimmerman v. Zirpolo Trust*, No. 2011CA00142, 2012 WL 346657, at *2-3 (Ohio Ct. App. Jan. 31, 2012) (Ohio Trust Code provision overrides conflicting terms in trust agreement). The Trustees therefore rely on Ohio Trust Code Section 5804.12 as the first statutory basis for the Court’s amendment to the administrative provisions of the Trust Agreement as set forth below.

1. The Court Should Approve the Proposed Amendments to Improve Trust Administration Under Ohio Trust Code Section 5804.12(B).

The Trustees move to modify the trustee terms of service and compensation provisions in the Trust Agreement (as reflected in **Exhibit B**) under the authority of Ohio Trust Code Section 5804.12(B) which states that “[t]he court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or *impair the trust’s administration*” (emphasis added). These provisions effectively distill the statutory and common law requirement that a Trust exist for the benefit of its beneficiaries. *See* R.C. § 5804.04 (“A trust exists, and its assets shall be held, for the benefit of its beneficiaries in accordance with the interests of the beneficiaries in the trust.”). The comment to the analogous provision in the Uniform Trust Code explains that this section is “an application of the requirement . . . that a trust and its terms must be for the benefit of its beneficiaries.” 7C U.L.A. 77 (2010), § 412 cmt., available at http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf.

The Trustees and the TAC believe the proposed amendments—which are administrative (i.e. not dispositive or distributive) provisions of the Trust Agreement—are absolutely beneficial to the Trust’s beneficiaries. Extending trustee tenure by five years will help the trustees to effectively execute their duty to treat similar past and future Trust claims in substantially the same manner, as mandated by Bankruptcy Code Section 524(g)(2)(B)(ii)(V) and further required by this Court’s Confirmation Order, the Plan, and the Trust Agreement. (*See Impastato Decl.* ¶ 16.)

The importance of this proposed amendment is illustrated by Mr. McMonagle’s otherwise impending retirement later this year. When Mr. McMonagle reaches age 72, the Trust will be faced with a situation where no initial Trustees remain. (*See id.* ¶ 10-11.) The oldest trustee will have served for less than three years, and no single fiduciary will have the historical knowledge to ensure that similar past and future Trust claims are treated in substantially the same manner, thereby impairing Trust administration. Retention of Mr. McMonagle, and generally extended trustee tenure to allow for longer overlap and education of new trustees, will ultimately aid in informed trustee decision-making and help the trustees to achieve their fiduciary duty to treat past, current, and future beneficiaries in the same manner. (*See id.* ¶ 16.)

Similarly, the Trustees’ proposed reallocation of trustee compensation between the three individual trustees will better align their compensation with current duties, and therefore better reflect proper and efficient administration of the trust. The reallocation results in *no* net change to the compensation paid to the trustees as a group. (*Id.* ¶ 17.)

In sum, the modifications proposed in this Motion are precisely intended to benefit the beneficiaries by improving trust administration in accordance with their interests. Perhaps most importantly, the Trustees’ Advisory Committee—the voice of the victims of

asbestos disease and their survivors, who are the beneficiaries of the Trust—unanimously supports the relief requested in this Motion. (*Id.* ¶ 18.) The amendments should be approved.

2. The Court Should Approve the Proposed Amendments in Light of Unanticipated Circumstances Under Ohio Trust Code Section 5804.12(B).

The Trustees additionally move to modify the trustee terms of service and compensation provisions in the Trust Agreement (as reflected in **Exhibit B**) under the authority of Ohio Trust Code Section 5804.12(A).⁶ That section allows a court to modify the terms of a trust if, due to unanticipated circumstances, the proposed modification will further the purposes of the trust:

The court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settlor modification or termination will further the purposes of the trust. To the extent practicable, the court shall make the modification in accordance with the settlor’s probable intention.

5804.12(A).

It was anticipated at inception that the Trust would receive new claims filings for approximately forty years (i.e., 2036) and would exhaust its assets during that timeframe; the current actuarial forecast predicts claims filings through 2049, more than a decade beyond what was originally anticipated, and due to sound management of the Trust corpus assets are expected to remain at least that long. (Impastato Decl. ¶ 8.) *See* Confirmation Order, 203 B.R. at 266.

These changed circumstances mean claimants will benefit from additional historical knowledge and experience of trustees with an additional five years of service. As a commentator has noted,

6. The comment accompanying the comparable section of the Uniform Trust Code explains that “Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b).” Uniform Trust Code § 412 cmt.

“[g]enerally, the [Ohio Trust Code’s] rules on modification and termination are intended to provide more flexibility than the common law rules. Greater flexibility is desired because trusts last for longer periods of time than in the past” *See* Alan Newman, *Ohio Adopts New Trust Code: An Overview of Ohio Trust Code and House Bill 416*, 20 Ohio Law. 9, 11 (2006). Indeed, this amendment will bring the Trust closer in line with the many other asbestos trusts that have emerged over the past twenty years that largely do not have any provision for mandatory retirement age. *See* page 13, *supra*. Similarly, over time the Trustees’ duties have further equalized, with the chairperson and fellow Trustees shouldering more similar duties than at the Trust’s inception, when the chairperson had more extensive duties in connection with the formation of the claims process and monetization of the Trust corpus. (Impastato Decl. ¶ 17.) In sum, because of these changed circumstances, the proposed amendments should be approved.

B. The Court Should Approve the Proposed Amendments Pursuant the Equitable Powers Conferred by the Bankruptcy Code.

In addition to the modification powers specifically granted by the Ohio Trust Code, this Court also has the power to grant relief pursuant to Section 105 of the Bankruptcy Code. *See* 11 U.S.C. § 105(a) (“The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”). *See also Young v. United States*, 535 U.S. 43, 50 (2002) (“[B]ankruptcy courts . . . are courts of equity and ‘apply the principles and rules of equity jurisprudence.’” (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939))); *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) (“[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.”); *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 242 (6th Cir. 2009) (“The Supreme Court has long recognized that bankruptcy courts are courts of equity with the power to apply flexible equitable remedies in bankruptcy proceedings.”)

(citation omitted). The Court similarly has the power to issue equitable orders deviating from a trust's terms under Ohio common law. *See Craft v. Shroyer*, 74 N.E.2d 589, 598 (Ohio Ct. App. 1947) ("In ordering a deviation a court of equity is merely exercise[ing] its general power over the administration of trusts; it is an essential element of equity jurisdiction.")

As the Trustees' proposed modification to the trustee terms of service would be in the best interest of the Trust's beneficiaries, and the proposed modification to trustee compensation more fairly reflects the division of labor among trustees with zero impact on Trust beneficiaries, approving these modifications is an appropriate use of this Court's equity jurisdiction under the Bankruptcy Code. An exercise of this Court's equitable powers would not contravene any specific statutory provisions and would afford an equitable remedy designed to protect the interests of former creditors of the estate by positively impacting Trust administration in a manner mandated under the Bankruptcy Code.

RELIEF REQUESTED

The Trustees respectfully request that, in order to facilitate the operation of the Trust, this Court enter an order amending the administrative provisions of the Trust Agreement, Articles 5.2(d) and 5.5(a), substantially in the form of the proposed order attached as **Exhibit E** to this Motion, and granting such other relief as is just and proper.

Dated: New York, New York
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