CR-2023-001772

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF WEALTHTEK LLP (IN SPECIAL ADMINISTRATION)

AND IN THE MATTER OF THE INVESTMENT BANK SPECIAL ADMINISTRATION REGULATIONS 2011

WRITTEN SUBMISSIONS OF THE APPLICANTS

(Filed pursuant to paragraph 4 of the Order of Rajah J dated 23 July 2024)

A. INTRODUCTION

1. These written submissions are filed on behalf of the administrators of WealthTek LLP (in special administration) (respectively, the "**Administrators**" and "**WealthTek**") pursuant to paragraph 4 of the Order of Rajah J dated 23 July 2024 to address what is defined in the order as the "**Costs Reserve Issue**", namely: whether the Administrators can, as a matter of jurisdiction, calculate the costs contribution of a client to include a sum representing the estimated costs of litigation (the "**Potential Litigation**") they are considering causing WealthTek to bring in the interests of its clients (the "**Potential Litigation Reserve**").

2. Defined terms from the previous skeletons filed by the Administrators are adopted for convenience.

B. BACKGROUND TO CLIENTS' COST CONTRIBUTIONS

3. The Distribution Plan provides for a costs reserve of £18.4m to be retained by the Administrators: Crooks2, ¶124 [A/3/61]. This amounts to £6.5m of incurred costs (as at 5 April 2024) and estimated future costs of £11.9m: Crooks2, ¶126 [A/3/62]. Approximately 40% of the costs reserve the Administrators propose to maintain relates to the Potential Litigation i.e. £7,168,218: Crooks2, ¶129 [A/3/62].

4. Provision is made in clauses 13.2 and 14.2 of the Distribution Plan for the Administrators to calculate whether the costs reserve should be reduced at 3-month intervals. In the event the

costs reserve is reduced, provision is made in clause 14 of the Distribution Plan for the Administrators to pay a rebate to the relevant clients or the FSCS (as appropriate).

5. The Administrators have not yet determined whether they will pursue the Potential Litigation and, if so, what form or forms it will take: Crooks2, ¶129 [A/3/62]. The Administrators are continuing to progress their own specific enquiries and investigations and continue to liaise with the Committee in this regard: Crooks8, ¶62 [B/6/161]. The Administrators have incurred certain costs and expenses to date in relation to those enquiries, which has been done with the knowledge and support of the Committee.

6. The Committee has been briefed on the costs reserve which the Administrators intend to keep and has confirmed its support for the proposed approach: Crooks2, ¶127 [A/3/62]. The Committee was nominated and selected at the initial meeting of creditors and clients to represent the interests of all of WealthTek's creditors and clients. It comprises four client members and the FSCS: Crooks2, ¶93 [A/3/44].

7. The vast majority of clients will have their costs contribution paid by the FSCS (alongside any shortfalls they suffer up to the limit of £85,000) (clause 17.1(c) of the Distribution Plan [A/4/110]). Only 365 clients (out of 1,323) have not yet been approved for FSCS compensation (these cases being more complex for the FSCS to consider) and the FSCS and the FSCS expects the vast majority of the 365 clients to be eligible to receive FSCS compensation: Enright1, ¶23-24 [B/2/62].

8. In respect of FSCS compensation, the Administrators will draw down as required on a funding arrangement agreed with the FSCS. The Administrators would not therefore draw down amounts corresponding to the Potential Litigation Reserve unless and until it was necessary to do so.

9. For clients who are eligible to receive FSCS compensation they are able to indicate that they wish to receive such compensation in their "Client Assets Claim Form".[1] If they have so indicated, then the FSCS will meet their costs contribution together with their shortfall (up to £85,000) and will be subrogated to each client's rights vis-à-vis WealthTek. The vast majority

[1] The Client Assets Claim Form is a pro forma claims submission form made available privately to each client of WealthTek on their claim portal along with their Client Assets Statement, in order that they can agree or identify any points of disagreement with the JSAs' computation of their claims to client assets and client money.

of clients who are eligible for FSCS compensation are expected by the Administrators to opt in to receive it.

10. For those clients there will be no impact on the Client Assets (or Client Money) returned to them as a result of the Potential Litigation Reserve. The Potential Litigation Reserve may, however, reduce the amount of FSCS compensation to be paid to those clients:[2]

    (1) Lower client claim values: 84% of clients, will be unaffected, i.e. they will be fully compensated for their shortfall and costs contributions even with the inclusion of the Potential Litigation Reserve. Removing that reserve, therefore, will have no impact on the compensation they receive and would instead reduce the amount the FSCS is required to pay out. The FSCS is a member of the Committee and has not taken issue with the proposed approach;.

    (2) Intermediate client claim values: In the case of approximately 1% of clients (approximately 17 in number), they would be compensated in full for their shortfall and costs contribution if no Potential Litigation Reserve is created, but not be compensated in full if the Potential Litigation Reserve is created; and

    (3) Higher client claim values: In the case of approximately 15% of clients (approximately 193 in number) they will not be compensated in full even if no Potential Litigation Reserve is created – as such they will see the amount of FSCS compensation they receive increase by £9,500 per client if the Potential Litigation Reserve is not created, but will still suffer a loss.

11. For other clients (i.e. those not eligible for FSCS compensation or who have chosen not to take such compensation) whose number is expected by the Administrators to be very low:

    (1) There are three options open to them to pay their costs contribution (clause 17.1(d)-(f) [A/4/110]): (a) a "Cash Option" (in which the client pays their costs contribution in cash); (b) a "Client Money Option" (in which the client directs the Administrators to use part or all of the client's distribution of client money they would otherwise receive to meet their costs contribution); and (c) a "Liquidation Option" (in which the Administrators are directed to liquidate some or all of the client's assets to meet their costs contribution).

    (2) Clients who will not be receiving FSCS compensation will need to utilise the "Payment Options Form" (set out in Schedule 4 to the Distribution Plan) to select which payment

[2] The figures below are provisional and based on the Administrators' current best understanding.

option they wish to use; the completion of the form and the payment of the costs contribution are conditions of an entitlement to a distribution or transfer of client assets (clauses 15.3-15.4 [A/4/108]).

(3) If by the "Long-Stop Date" a client has not completed the "Payment Options Form", the Administrators may liquidate some of that client's Client Assets and return the proceeds to the client after deducting the client's costs contribution (clause 15.5 [A/4/108]). Moreover, prior to the "Long-Stop Date", the Administrators may deem a client to have selected the "Liquidation Option" if they consider it appropriate and consistent with Objective 1 to do so and they have given the client at least three weeks' written notice that they intend to do so (and the client has not selected a different option) (clause 15.6 [A/4/109]).

12. The payment of a client's costs contribution therefore only impacts the Client Assets which are actually returned to a client if: (a) they are not eligible for, or elect not to take, FSCS compensation; and (b) they elect for the "Liquidation Option" (or the Administrators deem them to have done so). In all other cases, a client's costs contribution will be met by FSCS compensation or in cash.

13. In all cases, the Potential Litigation Reserve is **not** formed of Client Assets which are being retained by the Administrators during the period of the special administration. It is formed from cash paid by the FSCS (in the vast majority of cases) or the client, or from the liquidation of Client Assets in accordance with the Distribution Plan and consistently with the Regulations and Rules (as discussed below).

C. NEED FOR A COSTS RESERVE IN RESPECT OF OBJECTIVE 1

14. Regulation 15(4)(a) amends paragraph 99(3) of Schedule B1 to the Insolvency Act 1986, as it applies to an investment bank in special administration, such that "*remuneration and expenses incurred in respect of the pursuit of Objective 1 will be charged on and payable out of the client assets*". Therefore, the costs in respect of the pursuit of Objective 1 are payable out of the Client Assets. On the cessation of a special administration, the client assets are subject to a statutory charge to secure the payment of the administrator's remuneration and expenses: see Walker v National Westminster Bank plc [2016] BCC 355, per HHJ David Cooke; and Re MK Airlines Ltd (in liquidation) [2013] Bus LR 169 per Sir Andrew Morritt C.

15. The Rules recognise that the payment of the costs in respect of Objective 1 out of client assets may result in a shortfall in the amount of assets to be returned to a client (in other words, that the administrator may liquidate client assets to meet a costs contribution). Rule 137(2) provides that if the allocation of costs to be paid out of client assets results in a shortfall in the amount of assets to be returned to a client, then the shortfall is to be treated as an unsecured claim in the general estate.

16. However, the liquidation of client assets is usually unnecessary where FSCS compensation is available. This is because, in cases where compensation from the FSCS is available for a client (as Mr Enright explains at Enright1, ¶10 [B/2/59]), the FSCS will meet the shortfalls and costs contributions of eligible clients up to the compensation limit of £85,000 by making payments directly to the administrators for that purpose.

17. In practical terms, no administrator would distribute client assets to clients in a special administration before making adequate provision for the costs and expenses in respect of Objective 1. As some of these costs will not yet have been incurred, and the remuneration will not have been approved in whole or in part (see rule 196 of the Rules) and would remain open to challenge (see rules 201-202 of the Rules), the practice has developed in previous cases of setting a costs reserve in respect of anticipated costs together with a rebate mechanism. This enables an administrator to distribute client assets in compliance with Objective 1 (i.e. as soon as reasonably practicable) whilst also ensuring that the administrator's costs and expenses are paid. It is a practical solution to what would otherwise be a 'chicken and egg' problem.

18. The principle of setting a costs reserve is one which has been considered and approved in previous distribution plans approved by the Court. For example, in Re Beaufort Asset Clearing Services Limited [2018] EWHC 2287 (Ch) at [13] Arnold J noted that "*a prudent estimated costs reserve of £55 million in respect of costs which have been incurred, or are anticipated to be incurred, in the pursuit of Objective 1*". Likewise, in Re Blankstone Sington Limited [2024] EWHC 1111 (Ch) at [25] a costs reserve of £17m was noted to be present in the distribution plan.

D. WHY THE COSTS RESERVE SHOULD INCLUDE THE POTENTIAL LITIGATION RESERVE

19. The Administrators do not understand the Court to be concerned that the costs reserve provided for in the Distribution Plan includes sums for future or contingent expenses. That is consistent with previous authority and practical reality. To take an obvious example, the

Administrators will inevitably incur costs and expenses in implementing the Distribution Plan. Those costs cannot be known with certainty at this stage, so the costs reserve has to include a sum (calculated on a conservative, estimated basis) to satisfy those costs.

20. The Costs Reserve Issue which the Court has raised is whether the Administrators can include the Potential Litigation Reserve within the costs reserve.

21. As recognised in the description of the Costs Reserve Issue, the Potential Litigation Reserve is confined to litigation which: (i) WealthTek or the Administrators, in their capacity as such, have standing to bring, and (ii) is in the interests of WealthTek's clients (or some of them) to bring.

22. In summary, the Administrators submit that they are permitted to seek to include the Potential Litigation Reserve pursuant to: (i) the Rules, in particular in order to pursue Objective 1, and/or (ii) the Berkeley Applegate jurisdiction at common law, independent of what is provided in the Rules.

23. The Administrators acknowledge that the Potential Litigation would be (or would at least include) litigation to recover Client Assets (or their proceeds) which WealthTek held on trust for one or more clients. The Distribution Plan also provides (at clause 21.1 [A/4/115]) that any recoveries will be held on trust for the relevant client(s) or FSCS (by reason of its subrogation rights). In framing the Administrators' submissions, therefore, it is helpful first to consider both: (i) the trustee's powers and duties when pursuing litigation for the benefit of beneficiaries, including the ability to retain assets for that purpose, and (ii) how these trustee duties interact with the duties of an insolvency office holder.

(1) Ability of a trustee to bring litigation for the benefit of those interested under the trust

24. Where loss or damage has been suffered to the trust assets, the trustee is normally the proper claimant to any proceedings seeking to recover that loss or to seek damages.[3] The question whether proceedings should be brought is a matter for the trustee to determine having regard to its fiduciary duties. That determination involves an assessment of what is in the interests of the trust (or rather its beneficiaries) in the circumstances, taking into account the merits of any proceedings and the proportionality of pursuing them. This assessment forms part of the

[3] The exception being where a beneficiary is given permission to pursue a derivative claim on behalf of the trust against the relevant third party. This will only be the case where there are exceptional circumstances, such as where the trustee is unable to bring the claim due to a conflict of interest: see e.g., Lewin on Trusts (20th ed), 47-008. That exception is not relevant here.

trustee's general duty to get in, preserve and manage the trust assets for the benefit of the beneficiaries: see Lewin, 34-022, 34-050.

25. The trustee, however, enjoys no special position as a litigant. The trustee is potentially subject to adverse costs orders and personal liability in respect of any such orders. The trustee may seek to satisfy such orders out of the trust assets pursuant to their right of indemnity. However, that right may be challenged by one or more beneficiaries on the ground that the liability was not properly incurred.

26. The trustee can circumvent such issues by bringing proceedings with the benefit of a Beddoe order, the result of which is to pre-judge the issue of the trustee's right to an indemnity out of the assets in respect of the costs of the proceedings (subject to the terms of the order): Lewin, 48-132. An application of this character is made for directions whether or not the trustee should bring specific proceedings or continue to pursue or defend ongoing proceedings. It does not extend to costs which the trustee wishes to incur in exploring the possibility of claims being brought generally. Those costs are nonetheless still payable out of the trust assets pursuant to the trustee's right of indemnity (if properly incurred).

27. The trustee's right of indemnity extends to both future and contingent liabilities: see e.g., X. v A [2000] 1 All ER 490 at 493. It is, therefore, a feature of that right of indemnity that the trustee may retain trust assets to meet such liabilities, at least to the extent required to meet the worst case on the basis of reasonable but not fanciful assumptions: Lewin, 19-044(3). That right exists even in the face of objections from a beneficiary, as the trustee's right of indemnity takes priority over the rights of beneficiaries.

28. Those future and contingent liabilities which are the subject of a retention may include legal costs. The retention may also be made in circumstances where the remaining assets are distributed to the beneficiaries on the basis that the retained fund will, in turn, be distributed if and when it is no longer required: Lewin, 24-039. Such retentions are commonly made where there is potential for a claim to be made against the trustee, but there is no reason in principle why a retention cannot be made where there is a potential for a claim to be made **by** the trustee and costs may be incurred both in exploring and bringing such a claim. In both cases, the retention is made because further steps may need to be taken in the administration of the trust, so the trustee should be kept in funds to take those steps. To the extent there is any distinction, it may only be in accurately estimating the size of the retention when exploring (and pursuing) a claim, but that difficulty is a matter for the trustee.

(2) Duties of a liquidator or administrator in relation to property held on trust

29. If a trustee goes into liquidation or administration, the question becomes to what extent the interposition of the liquidator or administrator alters the analysis above. This can be answered through four points.

30. ***First***, unless the trust instrument provides otherwise, the trustee's entry into liquidation or administration does not mean that the trustee ceases to be the trustee: Lewin, 27-016. The assets held on trust remain vested in the trustee and the trustee remains subject to the same fiduciary duties.

31. ***Second***, absent a change of trustee, the powers formerly exercisable by the trustee in respect of the trust assets are exercisable by the liquidator or administrator as agents of the trustee:[4] Lewin, 27-018, 27-020.

32. What should be done in relation to the trust assets is a separate issue. For that reason, it is open to the liquidator or administrator to seek directions from the court relating to any such exercise in much the same way as the trustee could previously, including whether a new trustee should be appointed.

33. The administrator in an investment bank special administration has a statutory power to seek directions from the Court "*in connection with his functions*" (see paragraph 63 of Schedule B1 to the IA as applied by Regulation 15(4)(a)).

34. ***Third***, the liquidator or administrator or the special administrator cannot (safely) stand idle with respect to the administration of the trust assets. In Australia, it is well established that a liquidator has a duty to act in a responsible way as regards the trust assets, and may be liable for any breach of that duty: Lewin, 27-018 (and the authorities cited in fns 109-110). In the case of an investment bank special administration, the administrator is obliged to seek to achieve Objective 1 ("*to ensure the return of client assets as soon as is reasonably practicable*").

35. ***Fourth***, outside the context of a special administration, if a liquidator or administrator does elect to take steps in administering the trust assets and seeks to recover their costs and expenses (including their own remuneration) out of those assets, they may seek a court order in exercise of the Berkeley Applegate jurisdiction: Lewin, 27-023. The court nonetheless acts in protection of the beneficiaries' interests in only making such an order if satisfied that: (i) the liquidator or

[4] IA, Sch B1, para 69 (as applied by Regulation 15).

administrator should provide the services at all, rather than appointing a new trustee; (ii) the services are in the interests of the beneficiary/ies; and (iii) the amount to be charged is appropriate: Lewin, 27-024.

36. Viewed in light of these points, the interposition of a liquidator or administrator or special administrator does not necessarily alter what could in principle be done in relation to the trust assets. The liquidator or administrator or special administrator has the ability to stand in the shoes of the trustee in general terms. In fact, in exercising his or her functions, the administrator in a normal or special administration acts as the agent of the company in respect of which he or she is appointed (see paragraph 69 of Schedule B1 to the IA which is applied by Regulation 15(4)(a)). In a special administration, where Objective 1 must be pursued, those functions extend to bringing proceedings in the name of the trustee in its capacity as such. The fact of the insolvency procedure is only relevant to the extent of informing what **should** be done in respect of the costs and expenses (including the liquidator's or administrator's remuneration) which will be incurred in exercising those functions in relation to trust assets, more specifically whether to seek an order under the Berkeley Applegate jurisdiction.

(3) Inclusion of the Potential Litigation Reserve pursuant to the Rules

37. The first ground on which the Administrators submit, as a matter of jurisdiction, they are entitled (if not required) to include the Potential Litigation Reserve as part of the costs reserve is that this forms a necessary part of achieving Objective 1 under the Regulations and this is anticipated in the provisions on costs in the Rules. This can be broken down into two points.

38. ***First***, Objective 1, as defined in Regulation 10(1)(a), is "*to ensure the return of client assets as soon as is reasonably practicable*". To understand what Objective 1 means in practice an understanding of what is meant by "*client assets*" and "*return*" respectively is required. Taking each in turn:

    (1) "*Client assets*" are defined in Regulation 10B(13) (by reference to section 232(4) of the Banking Act 2009) as (i) "*assets which an institution* ***has undertaken*** *to hold for a client* ***(whether or not on trust and whether or not the undertaking has been complied with)***"; and (ii) "*assets equivalent to those which the investment bank* ***undertook to hold for clients***" (emphasis added). The use of the past tense in the emphasised passages acknowledges that the focus is not just on those assets which are actually held by the company at the point at which it enters special administration, but also those assets which

should have been held by the investment bank at that point (including where they are no longer held).

(2) "*Return*" has a broad meaning under Regulation 10(5): "*the investment bank relinquishes full control over the assets for the benefit of the client to the extent of… the client's beneficial entitlement to those assets (where the assets in question* ***have been held on trust by the investment bank****)… having taken into account any entitlement the investment bank may have, or a third party might have, in respect of those assets*" (emphasis added).

(3) In addition, section 233(4) of the Banking Act 2009 makes clear that a reference to returning client assets includes a reference to "*(a) transferring assets to another institution, and (b)* ***returning or transferring assets equivalent to those which an institution undertook to hold for clients***" (emphasis added). Again, the use of the past tense means the special administrator's focus cannot be solely on those assets available for return to clients on commencement of the special administration.

39. It is therefore clear from Objective 1 that the legislative scheme is not limited simply to returning the Client Assets which WealthTek actually holds when it entered special administration – the focus is on those Client Assets which WealthTek undertook to hold. Accordingly, for the Administrators properly to comply with Objective 1, they are required by its wording to consider what client assets **ought** to be available for return, not only what client assets are available now.

40. ***Secondly***, the provisions in the Rules sanction the payment of expenses incurred by the Administrators in the pursuit of Objective 1. Rule 135(1) separately provides that the expenses of the special administration to be paid out of the client assets held by the investment bank are (at least as a starting position) payable in the following order of priority:

(1) "*subject to rule 136, expenses properly incurred by the administrator in pursuing Objective 1*";

(2) "*any necessary disbursements by the administrator in the course of the special administration specific to the achievement of Objective 1…*";

(3) "*the remuneration or emoluments of any person who has been employed by the administrator to perform any services for the investment bank specific to the achievement of Objective 1…*"; and

(4) "*the administrator's remuneration… in respect of the work done in pursuance of Objective 1*".

41. If one accepts (per the first submission above) that Objective 1 extends to taking steps to recover client assets, the legislative sanction must extend to incurring legal costs for that purpose. Rule 135(1) in that way operates as a form of statutory Berkeley Applegate order. The Administrators recognise that Rule 135(1) on its own does not authorise the commencement of any proceedings without further approval for such a step from the Court such as through an application pursuant to paragraph 63 of Schedule B1 to the IA as applied by Regulation 15(4)(a), particularly if the interests of the Committee, the FSCS and/or the clients themselves are not aligned. The general wording used is plainly broad enough, however, to permit the Administrators to incur legal costs investigating whether there are any claims which could be pursued, and if so whether they should be pursued, in achieving Objective 1. As those costs will necessarily be incurred in the future, it must follow that the Administrators can make a retention for that purpose as part of the costs reserve through the Potential Litigation Reserve.

(4) Inclusion of the Potential Litigation Reserve pursuant to the *Berkeley Applegate* jurisdiction

42. If, contrary to the submissions above, the Court concludes that the Potential Litigation Reserve cannot be included in reliance on the terms of the Regulations and Rules, and the pursuit of Objective 1, the question then arises whether the Court should permit its inclusion pursuant to the Berkeley Applegate jurisdiction. As to this:

43. ***First***, there can be no doubt that the purpose of the Potential Litigation Reserve is to give effect to the interests of the beneficiaries by taking steps to identify and (potentially) recover trust assets in the hands of others: see e.g., Re Berkeley Applegate (Investment Consultants) Ltd (No.1) [1989] Ch 32 at 50H-51B and In re Sports Betting Media Ltd [2008] BCC 177 at [10]-[11] (in the context of administrators). In this case, the beneficiaries are the clients and/or the FSCS (to the extent subrogated to the rights of clients).

44. ***Secondly***, whether such an order should be made is not affected by the Potential Litigation Reserve being in respect of legal costs to be incurred in the future. It is not possible for the Administrators to provide precise figures for what work must be done in respect of what claims because their initial work is necessarily investigatory in nature. What the Administrators have done is to formulate the Potential Litigation Reserve based on a series of high-level assumptions about what funds will be required to investigate and potentially pursue any such claims. The actions which the Administrators will take, including the possibility of obtaining litigation funding, remain undetermined and the Administrators intend to explore all the options available to them in relation to the Potential Litigation. The approach is effectively no

different to that adopted by a trustee when making retentions, as to which see paragraph 27 above.

45. ***Thirdly***, there are practical and policy reasons why it would be undesirable for the Potential Litigation Reserve not to be included, in that:

(1) The Administrators will be unable to take any steps to investigate and (subject to obtaining funding from litigation funders, perhaps) pursue any claims for the benefit of clients. This does provide clarity to the Administrators, as they cannot be subject to any duty to expend their personal resources to investigate and pursue any claims for the benefit of others: Lewin, 34-022. It has the effect, however, of placing the burden on individual clients to investigate and pursue any such claims at their own cost. It is relevant in this regard that one of the factors in favour of a Berkeley Applegate order being made is that "*if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done… by the person entitled to the equitable interest*": Re Berkeley Applegate at 51A. That is a particularly powerful factor in this context, where the overwhelming majority of WealthTek's clients (c. 98% of them) are individuals who were classified as retail clients with an average age of 68: Crooks2, ¶23.a [A/3/18]. The Administrators do not consider that large parts of WealthTek's client base would be in a position in terms of understanding, experience, resources and time to be able to bring proceedings themselves.

(2) If such investigations are not carried out, and there is reason to believe they may not be carried out if the burden is placed on individual clients, there is a risk this discourages proper scrutiny of the conduct of officers and members of body corporates, as well as other potential wrongdoers, in a case such as the present one.

(3) The Administrators have seen the correspondence which the Court has received from certain individual clients which, while supportive of action being taken in the form of the Potential Litigation, expresses the view that this should not be paid for out of Client Assets (or out of the compensation received by clients from the FSCS) and should instead be paid for by alternative funders such as the FCA or the Treasury. The Administrators do not have any power over the actions which the FCA may (or may not) take and, as matters stand, do not have any ability to fund the Potential Litigation other than as an expense of achieving Objective 1 i.e. out of Client Assets/FSCS compensation. The Court and the Administrators do not have the ability to require the FCA or any other body to fund the Potential Litigation.

46. For all these reasons, it is submitted that the Potential Litigation Reserve should be included within the costs reserve. Again, the Administrators acknowledge that further issues may (and likely will) arise with respect to what steps should be taken to bring Potential Litigation, which may mean further approval from the Court (in addition to discussions with, and the approval of the Committee, in the ordinary course) is required before any of those steps can be taken. As mentioned above, the Administrators have a statutory right to seek directions from the Court in relation to their functions.

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