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9 **UNITED STATES BANKRUPTCY COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **LOS ANGELES DIVISION**

12 In re  
13 J.T. THORPE, INC., THORPE INSULATION  
14 COMPANY,  
15 Debtor.

Chapter 11  
Case No. LA 02-14216-BB  
Case No. LA 07-19271-BB

16 J.T. THORPE SETTLEMENT TRUST,  
17 THORPE INSULATION COMPANY  
18 ASBESTOS SETTLEMENT TRUST,  
19 Plaintiffs,

Adversary Case No. 12-02182-BB  
Adversary Case No. 12-02183-BB

20 MICHAEL J. MANDELBROT and THE  
21 MANDELBROT LAW FIRM,  
22 Defendants.

**OPPOSITION TO EMERGENCY  
MOTION FOR ORDER TO PERMIT  
COUNSEL FOR DECEASED  
FUTURES REPRESENTATIVE TO  
PARTICIPATE ON BEHALF OF THE  
OFFICE OF THE FUTURES  
REPRESENTATIVE IN PENDING  
BRIEFING AND HEARING BASED  
UPON EXISTING CLIENT  
INSTRUCTION**

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I.

INTRODUCTION

Appellants and Defendants Michael J. Mandelbrot and the Mandelbrot Law Firm (“Mandelbrot”) hereby submit this *Opposition to Motion for Order to Permit Counsel for Deceased Futures Representative to Participate on behalf of the office of the Futures Representative* (the “**Motion**”).

Mandelbrot appreciates the passing of the Hon. Charles Renfrew (Ret.). However, since the bankruptcy petition filings of J.T. Thorpe, Inc. (2002) and Thorpe Insulation (2002), and all Thorpe Trust matters before this Court, Renfrew has employed an individual *specifically prohibited* by the United States Department of Justice and the United States Bankruptcy Code since he is *not “disinterested”* – Gary Fergus. See 11 U.S.C. Section 101(14) and Bankruptcy Code Section 327. Gary Fergus is not “disinterested” by virtue of his 20+ year representation of Fibreboard Corporation, and his former partnership with J.T. Thorpe Trustee and Thorpe Insulation Trustee Stephen Snyder.<sup>1</sup>

Section 327 of the Code provides for the employment of professional persons in a bankruptcy case and prohibits a professional from being employed if they are not disinterested. The term “disinterested person” is defined in the Bankruptcy Code to include one who is not a creditor and “does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.” § 101(14) (A) and (C). **A person who is disinterested “is one that can make unbiased decisions, free from personal interest, in any matter pertaining to the debtor’s estate.”** (Emphasis added). *Shat v. Kistler (In re Shat)*, 2009 Bankr. LEXIS 4547 (9th Cir. BAP Nov. 25, 2009). The reason for the “disinterested” requirement is the need for professionals employed by a bankruptcy estate to make full and candid disclosure of all

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<sup>1</sup> Like Fergus, Snyder is also not “disinterested”. He was a 25-year asbestos defense attorney (and partner with Fergus) with interests materially adverse to the beneficiaries of the Thorpe Insulation and J.T. Thorpe Settlement Trusts as well as a bias against Trust Claimants. Unquestionably, both Snyder and Fergus deceived this Court when submitting their Declaration for Employment by the Trust. Both Fergus and Snyder submitted false and misleading Declarations which failed to disclose their close personal connections.

1 connections, both when applying for approval of their employment and during the pendency  
2 of the case. This duty to disclose must be taken seriously --if a professional fails to do so, he  
3 or she risks disallowance of all compensation. *In re Sundance Self Storage-El Dorado LP*,  
4 482 B.R. 613, 618 (Bankr. E.D. Cal. 2012).

5 The "adverse interest" language under § 327(a) and the "material adverse interest"  
6 prong of the "disinterested person" definition under § 101(14)(C) "telescope into what  
7 amounts to a single hallmark." *Martin*, 817 F.2d at 180. This unitary hallmark is designed to  
8 filter out conflicts that may jeopardize a fair and equitable administration of the bankruptcy  
9 estate.

10 It is equally important in terms of policy that these rules are also  
11 meant to preserve the integrity of the bankruptcy system. Therefore,  
12 in addition to avoiding conflicts detrimental to a particular case, the  
13 rules were drafted to avoid conflicts and questionable relationships  
14 that had historically cast the bankruptcy system itself in an  
15 unfavorable light. See, e.g., *In re Kendavis Indus. Int'l, Inc.*, 91 B.R.  
16 742, 747 n. 1 (Bankr.N.D.Tex.1988) (citing legislative history of  
17 disinterestedness requirement). 482 B.R. 613 (2012)

18 *In re Sundance Self Storage-El Dorado LP, Debtors*, 482 B.R. 613 (2012)

## 19 II 20 ARGUMENT

### 21 A. GARY FERGUS IS A NOT DISINTERESTED BECAUSE HE HELD AND 22 REPRESENTED INTERESTS ADVERSE TO THE ESTATE AS A 20+ YEAR 23 ASBESTOS DEFENSE LAWYER FOR FIBREBOARD CORPORATION

24 For at least 20 years, and until their Petition for Bankruptcy Protection in 2002, Fergus  
25 represented Fibreboard Corporation, an asbestos defendant and former asbestos insulation  
26 manufacturer, supplier, and distributor in San Francisco Bay Area. Fergus represented  
27 Fibreboard Corporation is *thousands* of individual cases, including the representation of  
28 Fibreboard *against* the *same Beneficiaries* (both Present and Future) of the Thorpe Insulation



1 and J.T. Thorpe Settlement Trust.<sup>2</sup> The Thorpe Beneficiaries had previously sued Fibreboard  
2 Corporation (represented by Fergus) for damages due to their asbestos disease and later filed  
3 claims with the Thorpe Trusts.

4 As an asbestos defense lawyer (leaving aside his lack of professionalism, morals and  
5 ethics), Fergus central argument in *every case* was that a) asbestos victims (later Thorpe Trust  
6 Beneficiaries) weren't sick; and/or b) asbestos victims weren't exposed to Fibreboard; and/or  
7 c) asbestos victims has alternate exposures (not Fibreboard) to asbestos from other asbestos  
8 products (like those of Thorpe Insulation and J.T. Thorpe Settlement Trust). Unquestionably,  
9 in every case (since it was his 'duty'), Fergus had a bias *against asbestos victims*. Moreover,  
10 many of the *very same* claimants with the J.T. Thorpe, Inc. and Thorpe Insulation Settlement  
11 Trusts are individuals who Fergus litigated *against* while representing Fibreboard Corporation  
12 (with Stephen Snyder). How can Fergus possible litigate against an individual and then  
13 purportedly be a representative of their future interest?

14 As a direct result of Fergus' former employment as an asbestos defense attorney for  
15 Fibreboard Corporation, including litigating against J.T. Thorpe and Thorpe Insulation  
16 claimants, Fergus has an "interest adverse to the Estate" -- Fergus has a bias against J.T.  
17 Thorpe and Thorpe Insulation Settlement Trust Beneficiaries/Victims/Creditors and is thus  
18 prohibited participating in *any* Thorpe Trust matters.

19 **B. GARY FERGUS IS HAS AN INTEREST MATERIALLY ADVERSE TO THE**  
20 **ESTATE'S INTEREST BY REASON OF HIS CONNECTION WITH**  
21 **MANAGING TRUSTEE STEPHEN SNYDER**

22 The Managing Trustee is of the Thorpe Insulation and J.T. Thorpe, Inc. Settlement  
23 Trusts is Gary Fergus' longtime partner at the law firm of Brobeck, Phleger & Harrison,  
24 Stephen Snyder. As a former 20-year partner of Stephen Snyder, Fergus is incapable of acting  
25 without bias and/or requisite impartiality, much less exercise objective and independent  
26 judgment in this matter. Fergus has and will always side with and act in accordance with the

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27 <sup>2</sup> Not coincidentally, many of these lawsuits filed against Fibreboard Corporation were filed by Thorpe  
28 Insulation and J.T. Thorpe Settlement Trust Fiduciaries Alan Brayton and David McClain. As such, Fergus has  
a long standing relationship and history of settling cases with Thorpe Fiduciaries Brayton and McClain which  
*also* creates a bias and favoritism.

1 wishes of his former partner, personal friend and co-consumer/recipient of millions of dollars  
2 of trust funds in compensation annually.

3 This patently offensive and unjust alliance and bad faith unity of interest pertains not  
4 only to the *Mandelbrot* cases, but all Trust matters, including the yearly misappropriation of  
5 millions in Trust funds to compensate other similarly “interested parties” (such as Counsel  
6 Chuck LaGrave of Morgan, Lewis, et al.....). *See all Thorpe Trust Annual Reports 2004-2016.*

7 As the attorney for the Futures Representative, Fergus’ fiduciary duty is to “Future  
8 Claimants” of the Thorpe Trusts.

9 Fergus’ former law partner Stephen Snyder’s duty as the Managing Trustee is to  
10 “Present Claimants” of the Thorpe Trusts.

11 As a result of Fergus’ longstanding and irrefutable business/personal relationship with  
12 Snyder and by any objective standard, Fergus has not been, will not now and can never be  
13 “disinterested” when it comes to this sort of proceeding.

14 **C. FERGUS FILED MISLEADING AND FALSE DISCLOSURES BEFORE THIS**  
15 **COURT IN ORDER TO GAIN EMPLOYMENT**

16 Separate and apart from the above, there is compelling evidence that from and after  
17 assuming his present “employment” with the J.T. Thorpe Settlement Trust and the Thorpe  
18 Insulation Settlement Trusts, Fergus submitted false and misleading Disclosures before *this*  
19 *very Court* relating to his relationship with Snyder.

20 The overarching responsibility and duty of those such as Fergus who are appointed by the  
21 Court to safeguard and promote the interests of claimants/creditors is to truthfully and  
22 comprehensively disclose any and all actual or perceived conflicts of interest whether those be  
23 actual, apparent or perceived insofar as the debtor, debtor-in-possession, insiders, creditors and any  
24 and all parties in interest. This responsibility and affirmative duty to disclose is not subject to  
25 whim or fancy. It cannot be unilaterally exercised on the basis of that which said individuals  
26 believe is relevant vs. trivial/irrelevant. No matter how tenuous the connection, no matter how  
27 trivial/irrelevant it may appear, these professionals are duty bound to fully disclose the same  
28 before assuming the position. *Park-Helena Corp.*, 63 F.3d at 882 (quoting another source).

1 "The duty to disclose is a continuing obligation as to which the risk of defective  
2 disclosure always lies with the discloser. Disclosure that later turns out to be  
3 incomplete can be remedied by denial of fees." *In re Kobra Props.*, 406 B.R. at 402  
4 (citations omitted).

5 "Even a negligent or inadvertent failure to disclose fully relevant information may  
6 result in a denial of all requested fees." *Park-Helena Corp.*, 63 F.3d at 882.

7 Thus, if the bankruptcy court discovers that a professional holds an undisclosed  
8 adverse interest, the court has the power to deny all compensation and reimbursement of  
9 expenses. Section 328(c); *Woodcraft*, 464 B.R. at 8; *Kobra Props.*, 406 B.R. at 402 ("[T]his  
10 Sword of Damocles should be omnipresent in the mind of counsel.").

11 Unquestionably Fergus has shirked this responsibility/duty by abjectly and  
12 intentionally failing to disclose "all connections" to the debtor and insiders (such as Stephen  
13 Snyder).

14 Fergus's failure to affirmatively and comprehensively disclose the above referenced  
15 connections "insiders" was not the product of innocent oversight or inadvertence. It was  
16 intentional. Despite having many opportunities to cure this blatant defect through such  
17 disclosure over the years, Fergus has refused to do so.

18 The longer this Court permits Fergus to perpetrate this unconscionable charade the  
19 greater the opportunity for irreparable harm/damage to the rights and interests of all interested  
20 parties and most importantly to the Trust Beneficiaries.

21 **D. FERGUS HAD AN ADVERSE RELATIONSHIP WITH BENEFICIARY COUNSEL**  
22 **MANDELBROT, YET ENGAGED IN FAVORITISM TOWARDS BENEFICIARY**  
23 **COUNSEL ALAN BRAYTON AND DAVID MCCLAIN**

24 For decades (1980-2000) while representing Fibreboard Corporation, Fergus litigated  
25 hundreds of cases against Thorpe Trust Beneficiaries (3<sup>rd</sup> party plaintiffs) represented by such  
26 asbestos plaintiffs' attorneys as Alan Brayton, David McClain, Jack Clapper, Steven  
27 Tigerman, Harry Wartnick and Mandelbrot.

28 Fergus settled hundreds (if not thousands) of cases with Brayton and McClain alone,



1 thus irrefutably establishing a close and personal relationship with these fellow trust  
2 employees and advisers.

3 Fergus did not settle cases with Mandelbrot and indeed through Brayton and McClain  
4 evinced a strong bias and antipathy towards Mandelbrot that has carried over into this arena.

5 In addressing the standards for removing a trustee due to a conflict of interest, under  
6 Bankruptcy Code § 324(a), the Ninth Circuit has recognized that even "a **potential** for a  
7 materially adverse effect on the estate" or the "appearance of impropriety" is sufficient to  
8 disqualify that individual/professional. Under Bankruptcy Code §101(14)(C) the definition of  
9 a disinterested person "is broad enough to include a [person] with **some** interest or  
10 relationship that would **even faintly** color the independence and impartial attitude required by  
11 the Code." See *Dye v. Brown* 530 F.3d 832, 838 (9th Cir. 2008) citing *In Re AFI Holding,*  
12 *Inc.*, 525 F.3d 700 (9th Cir. 2008) (internal quotations omitted).<sup>3</sup>

### 13 CONCLUSION

14 In light of the foregoing, Mandelbrot objects to participation of Gary Fergus as counsel  
15 in these remand proceedings or any further Trust matters. An independent, unbiased, and  
16 disinterested Futures Representative, free of influence from the biased Fergus, is necessary in  
17 these proceedings. Gary Fergus shall not be permitted to participate in any of these  
18 proceedings or any future J.T. Thorpe, Inc. or Thorpe Insulation Settlement Trust matters.  
19 Michael Mandelbrot and the Mandelbrot Law Firm reserve all rights, including the right to  
20 seek disgorgement of Trust monies from Fergus, with respect to any such request.

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24 Dated: 1/11/2018

Respectfully Submitted:

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27 Michael J. Mandelbrot  
28 Mandelbrot Law Firm

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<sup>3</sup> Emphasis added