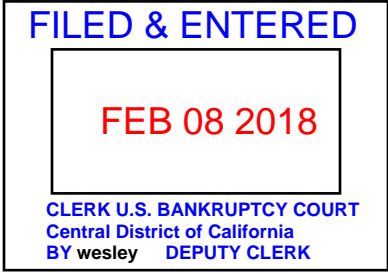


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CHANGES MADE BY COURT

11 *Attorneys for the J.T. Thorpe Settlement Trust and*
Thorpe Insulation Company Asbestos Settlement Trust

12 UNITED STATES BANKRUPTCY COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 LOS ANGELES DIVISION

15 In re
16 J.T. THORPE, INC.
17 and
18 THORPE INSULATION COMPANY,
19 Debtors.

Chapter 11
Case Nos. 2:02-bk-14216-BB and 2:07-bk-19271-BB
Adv. Case Nos. 2:12-ap-02182-BB and 2:12-ap-02183-BB
On Remand

20 J.T. THORPE SETTLEMENT TRUST and
21 THORPE INSULATION COMPANY
22 ASBESTOS SETTLEMENT TRUST,

**SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW
FOLLOWING REMAND**

23 Plaintiffs,
24 v.
25 MICHAEL J. MANDELBROT and
THE MANDELBROT LAW FIRM,
26 Defendants.
27
28

Date: February 1, 2018
Time: 10:00 a.m. PT
Place: Courtroom 1539
255 E. Temple St.
Los Angeles, CA 90012
Judge: Honorable Sheri Bluebond

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1 **I. PROCEDURAL POSTURE**

2 The above-captioned adversary proceedings came before this Court on remand from the
3 District Court’s *Order Remanding Matter to the Bankruptcy Court* [Dkt. No. 299] (the “**Remand**
4 **Order**”) following remand to the District Court from the Ninth Circuit’s decision in *Mandelbrot v.*
5 *J.T. Thorpe Settlement Trust*, 870 F.3d 1121 (9th Cir. 2017) [Dkt. No. 297] (“*Mandelbrot I*”).
6 The purpose of this remand is for this Court to decide “whether federal or state law governs
7 (including whether the federal law argument has been waived), and what impact, if any, *Golden v.*
8 *Cal. Emer. Phys. Med. Group*, 782 F.3d 1083 (9th Cir. 2015) has on this case” and whether in
9 light of those proceedings, to amend, modify, vacate, or supplement the Bankruptcy Court Orders¹
10 that are the subject of this appeal. Remand Order (quoting *Mandelbrot I*, 870 F.3d at 1125).

11 The Bankruptcy Court Orders approved and enforced the settlement agreement, entered
12 into on the record in open court between Plaintiffs J.T. Thorpe Settlement Trust (the “**JTT**
13 **Trust**”) and Thorpe Insulation Company Asbestos Settlement Trust (the “**Thorpe Trust**,” and
14 with the JTT Trust, the “**Plaintiff Trusts**”), two other § 524(g)² trusts administered by common
15 fiduciaries and claim-handling staff, the Western Asbestos Settlement Trust (the “**Western**
16 **Trust**”) and the Plant Insulation Company Asbestos Settlement Trust (the “**Plant Trust**” and with
17 the Western Trust and the Plaintiff Trusts, the “**Trusts**”), on the one hand, and Michael
18 Mandelbrot and the Mandelbrot Law Firm (together, “**Mandelbrot**”) on the other.

19 Following entry of the Remand Order, this Court held a status conference on December 12,
20 2017 and requested that the parties submit briefs and supporting declarations addressing the issues
21 this Court has been instructed to consider on remand. The Plaintiff Trusts submitted the *Plaintiffs*
22 *J.T. Thorpe Settlement Trust and Thorpe Insulation Company Asbestos Settlement Trust’s*
23 *Opening Brief on Remand* [Dkt. No. 312], the *Declaration of Stephen M. Snyder* [Dkt. No. 313],
24

25 ¹ The Bankruptcy Court Orders consist of the *Order Granting Motion to Enforce January 23,*
26 *2014 Stipulated Agreement* [Dkt No. 232], the *Order Following Trial on Adversary Complaints*
27 *and Motion for Instructions* [Dkt No. 233], the *Judgment in Adversary Proceedings* [Dkt No.
28 234], and the *Findings of Fact and Conclusions of Law* [Dkt No. 235].

² References to “§ 524(g)” are to 11 U.S.C. § 524(g).

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1 the *Plaintiffs J.T. Thorpe Settlement Trust and Thorpe Insulation Company Asbestos Settlement*
2 *Trust’s Reply Brief on Remand* [Dkt. No. 320], the *Declaration of Laura Paul* [Dkt. No. 321], and
3 the *Declaration of Sasha M. Gurvitz* [Dkt. No. 322]. Mandelbrot submitted the *Brief of*
4 *Defendants Michael J. Mandelbrot and the Mandelbrot Law Firm Regarding Issues on Remand*
5 [Dkt. No. 315], the *Declaration of Defendant Michael J. Mandelbrot Regarding Issues on Remand*
6 [Dkt. No. 316], the *Responding Brief of Defendants Michael J. Mandelbrot and the Mandelbrot*
7 *Law Firm Regarding Issues on Remand* [Dkt. No. 324], the *Request for Judicial Notice re Issues*
8 *on Remand by Defendants Michael J. Mandelbrot and the Mandelbrot Law Firm* [Dkt. No. 325],
9 and the *Declaration of Defendant Michael J. Mandelbrot Regarding Issues on Remand* [Dkt. No.
10 326]. The Plaintiff Trusts also submitted the *Plaintiffs J.T. Thorpe Settlement Trust and Thorpe*
11 *Insulation Company Asbestos Settlement Trust’s Evidentiary Objections to the Declarations of*
12 *Defendant Michael J. Mandelbrot* [Dkt. No. 327] (“**Plaintiff Trusts’ Evidentiary Objections**”).

13 The Court conducted a hearing on February 1, 2018. The Plaintiff Trusts appeared
14 through counsel, Klee, Tuchin, Bogdanoff & Stern LLP. Mandelbrot appeared in person and
15 through counsel. The Office of the Futures Claims Representative (the “FCR”) appeared through
16 counsel, Gary Fergus of Fergus, a Law Office.³ Other appearances are as reflected in the record of
17 the hearing. The Court heard argument from counsel for the Plaintiff Trusts and Mandelbrot, and
18 the parties’ declarations were admitted into evidence, except to the extent excluded as set forth in
19 the Court’s *Judgment Following Remand*, entered substantially concurrently herewith.

20 Upon consideration of the admissible evidence and pleadings submitted by the parties, the
21 arguments of counsel, **the *Objections by Defendants Michael J. Mandelbrot and the Mandelbrot***
22 ***Law Firm to Plaintiffs’ “[Proposed] Supplemental Findings of Fact and Conclusions of Law***
23 ***Following Remand” [Dkt. No. 334] (the “Findings Objections”)*** and the entire record of these

24 _____
25 ³ The Honorable Charles B. Renfrew (Ret.), who had been the FCR for the Trusts, passed away
26 in December 2017. Upon the motion of counsel for the deceased FCR [Dkt. No. 303], this Court
27 entered an order [Dkt. No. 308] permitting counsel to participate in these remand proceedings on
28 behalf of the Office of the FCR based upon existing instructions from the deceased FCR, with the
proviso that counsel would inform the parties and this Court if issues arose in the briefing or at the
hearing that exceeded the scope of counsel’s instructions from the deceased FCR.

1 adversary proceedings, and good and sufficient cause appearing therefor, the Court hereby makes,
2 pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, incorporating by referenced
3 Rule 52 of the Federal Rules of Civil Procedure, the following Supplemental Findings of Fact and
4 Conclusions of Law Following Remand.

5 II. JURISDICTION

6 1. This Court has jurisdiction over the above-captioned adversary proceedings and
7 the related above-captioned chapter 11 cases under 28 U.S.C. §§ 157 and 1334. This matter
8 constitutes a core proceeding under 28 U.S.C. § 157(b)(2). Venue of these adversary proceedings
9 and the related chapter 11 cases is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This Court
10 may enter a final judgment consistent with Article III of the United States Constitution. All
11 parties consented to this Court's entry of final orders and judgments enforcing the Mandelbrot
12 settlement by so stipulating on the record in open court on January 23, 2014. *See, e.g., Wellness*
13 *Int'l Network, Ltd. v. Sharif*, 2015 U.S. LEXIS 3405, at *28 (May 26, 2015).

14 III. SUPPLEMENTAL FINDINGS OF FACT

15 2. The Court incorporates by this reference its prior findings of facts contained in the
16 Bankruptcy Court Orders⁴ and makes the additional supplemental findings of fact. To the extent
17 any of the supplemental conclusions of law set forth below constitute findings of fact, they are
18 also incorporated by this reference.

19 3. Based on the record of the above-captioned adversary proceedings, including the
20 submissions of the parties on remand, no genuine issue of material fact exists with regard to the
21 facts found herein.

22 4. The governance structure of each Trust is set forth in documents approved by the
23 Trusts' respective supervising bankruptcy courts, including, as relevant here, a trust agreement
24 ("**Trust Agreement**") and trust distribution procedures ("**TDPs**"). Each Trust is managed by the
25

26 ⁴ The Bankruptcy Court Orders consist of the *Order Granting Motion to Enforce January 23,*
27 *2014 Stipulated Agreement* [Dkt No. 232], the *Order Following Trial on Adversary Complaints*
28 *and Motion for Instructions* [Dkt No. 233], the *Judgment in Adversary Proceedings* [Dkt No.
234], and the *Findings of Fact and Conclusions of Law* [Dkt No. 235].

1 same three Trustees: the Managing Trustee, Stephen M. Snyder, an attorney, Sandra R.
2 Hernández, M.D., a public health expert, and John F. Luikart, an investment and finance
3 professional (the “**Trustees**”). The Trustees administer the Trusts in accordance with the Trusts’
4 underlying purpose, which (as expressed in the Thorpe Trust’s Trust Agreement) is “to assume the
5 liabilities of [the debtor], arising from or relating to Asbestos Related Claims and to use the
6 Trust’s assets and income to pay holders of Asbestos Related Claims in accordance with the Trust
7 Agreement and in such a way that all holders of similar Asbestos Related Claims are treated in a
8 substantially equivalent manner and to otherwise comply in all respects with the requirements set
9 forth in section 524(g)(2)(B)(i) of the Bankruptcy Code.” Trust Agreement, § 1.2.⁵

10 5. In addition to the Trustees, the Trust Agreements also specify the powers and
11 duties of two other trust fiduciaries, the FCR and the Trust Advisory Committee (“**TAC**”). The
12 TAC is comprised of plaintiffs lawyers who represent current asbestos claimants with claims
13 against the Trust they advise. The TAC “serve[s] in a fiduciary capacity representing holders of
14 [asbestos claims].” Trust Agreement, § 6.2. The FCR “serve[s] in a fiduciary capacity
15 representing the interests of the future asbestos claimants for the purpose of protecting the rights
16 of persons who might subsequently assert [asbestos claims].” Trust Agreement, § 5.1.

17 6. The TAC and FCR each have rights of approval with respect to certain actions
18 under the Trust Agreements and TDPs, and, even when not required, the Trustees may consult
19 with them with respect to other matters. Trust Agreement, §§ 5.1 & 6.2. Where the Trust
20 Agreements or other documents require TAC or FCR consent for certain actions or decisions, the
21 Trustees may, in lieu of obtaining that consent, “apply to the Bankruptcy Court on an expedited
22 basis for approval of such action or decision.” Trust Agreement, §§ 5.7 & 6.9.

25 ⁵ Unless otherwise noted, for ease of reference, all citations to the Trust Agreement and TDPs
26 are to the Thorpe Trust’s Trust Agreement and TDPs. The Trust Agreements and TDPs for the
27 JTT Trust, the Plant Trust, and the Western Trust are to the same effect in all material respects
28 relevant to this proceeding. Properly authenticated copies of the Trust Agreements and TDPs are
found in the record of these proceedings on remand. Snyder Decl. [Dkt. No. 313], ¶¶ 4 & 12; *id.*,
Exs. 1–4 & 6–9.

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1 7. The TDPs specify the procedures for claimants to file and for the Trusts to process
2 claims. The TDPs contemplate streamlined procedures to efficiently and promptly resolve claims.
3 Adjusting claims economically is critical to the goal of distributing the greatest amount of
4 compensation feasible to claimants equitably and promptly. The streamlined procedures that
5 govern the filing of claims against the Trusts pursuant to the TDPs might expose the Trusts to
6 unscrupulous parties asserting unfounded claims. Accordingly, the TDPs provide:

7 In the event that the Trust reasonably determines that any unreliable individual or
8 entity has engaged in a pattern or practice of providing unreliable medical or other
9 evidence to the Trust, it may decline to accept additional evidence from such
10 provider in the future. Further, in the event that an audit reveals that fraudulent
11 information has been provided to the Trust, the Trust may penalize any responsible
12 claimant or claimant’s attorney by disallowing the related Trust Claims or by other
13 means including, but not limited to, requiring the claimant or attorney submitting
14 the fraudulent information to pay the costs associated with the audit and any future
15 related audit or audits, ... refusing to accept additional evidence from the same,
16 seeking the prosecution of the claimant or the claimant’s attorney for presenting a
17 fraudulent claim in violation of 18 U.S.C. § 152, and seeking Rule 11 sanctions.

18 TDPs, § 5.7(a).⁶

19 8. Each Trust also establishes a claims valuation matrix, which sets forth factors and
20 values that will be considered and the manner in which they will be applied in determining the
21 values of asbestos claims. Since the Trusts expect to have insufficient assets to pay the full value
22 of claims using the claim valuation matrix, the TDPs authorize the Trusts to establish a “payment
23 percentage”—a percentage, based on the Trusts’ estimates of their assets and the projected total of
24 all present and future claims, that will be applied to the liquidated value of claims as determined
25 by the claims valuation matrix. TDPs at § 4.2. Together, the claims matrix and TDPs are
26 designed to enable the Trusts to pay present and future claimants equivalent percentages of the
27 former debtor’s several share of liability based on settlements, judgments, and verdicts historically
28 obtained for substantially similar claims under state law.

 9. The detailed history of the Mandelbrot claims issues is recounted in the
Declaration of Laura Paul [Dkt. No. 152-1]. After a review of Mandelbrot-filed claims revealed

⁶ TDP § 5.7(a) is substantially identical for the Thorpe Trust, the JTT Trust, and the Western Trust. The Plant Trust TDP contains substantially similar language at § 5.8(a).

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1 disturbing patterns, the matter was raised at a meeting of the Trustees in September 2011 and the
2 Trustees voted, with the consent of the TACs and FCR, to audit Mandelbrot claims filed with the
3 Western Trust, the JTT Trust, and the Thorpe Trust (the Plant Trust had yet to receive claims).
4 Even in the absence of TAC or FCR consent, the Trustees could have sought bankruptcy court
5 approval to initiate the audit. Based on the audit, the Plaintiff Trusts and the Western Trust
6 determined Mandelbrot was unreliable and the Plaintiff Trusts determined Mandelbrot had
7 engaged in a pattern or practice of submitting unreliable evidence to the Plaintiff Trusts pursuant
8 to the TDPs. By letter dated May 24, 2013 (the “**Snyder Letter**”), the Plaintiff Trusts and the
9 Western Trust notified Mandelbrot of the results of the audit determination and proposed to place
10 conditions on his claim-filing privileges to reflect the unreliability in the evidence that Mandelbrot
11 adduced. Mandelbrot rejected the conditions. After advising Mandelbrot that the Plaintiff Trusts
12 had determined that he was unreliable and that he had engaged in a pattern or practice of filing
13 unreliable evidence in support of claims, the Plaintiff Trusts moved this Court for instructions
14 based on the audit and its findings.

15 10. The case was tried before the Court and the Trusts’ audit findings were reinforced
16 by the extensive evidence of Mandelbrot’s misconduct revealed at trial. The Plaintiff Trusts
17 supplied this Court with numerous examples of audited Mandelbrot claims (i) verified by
18 individuals lacking personal knowledge, (ii) not supported by deposition evidence,
19 (iii) contradicted by prior litigation testimony by the claimant or by government records,
20 (iv) supported by serially inconsistent interrogatory responses, and (v) suffering from a host of
21 other forms of unreliability, some supporting strong inferences of outright fraud. The audit
22 findings amply demonstrated substantial misconduct posing a significant threat to the legitimate
23 interests of the Trusts in protecting Trust assets for the benefit of present and future claimants.

24 11. Further trial proceedings were scheduled when a settlement resolving the litigation
25 was reached between the parties on the morning of January 23, 2014 and read into the record. The
26 key elements of the settlement agreement include:

27 Mandelbrot agreed that the [JTT Trust’s, the Thorpe Trust’s,] and the Western
28 Trust’s determinations stated in the [Snyder Letter], including the determination by
all three trusts that Mandelbrot, the person and the firm, are unreliable and with
respect to the [JTT Trust and the Thorpe Trust] specifically, have engaged in a

1 pattern and practice of filing unreliable evidence and support claims filed with
2 those two trusts, are reasonable in light of the evidence assessed in connection with
the audit.

3 Mandelbrot agreed that the remedy imposed by the [JTT Trust and the Thorpe
4 Trust] in the [Snyder Letter] disallowing all further evidentiary submissions by
Mandelbrot is authorized under the [TDPs] of each trust, and is reasonable in light
5 of the Trusts' audit and investigative findings.

6 Mandelbrot agreed that the investigation of Mandelbrot – by the [JTT Trust, the
7 Thorpe Trust,] and the Western Trust – and the determinations and the remedy
8 imposed were reasonable, not based upon improper interpretations of the terms of
the three trusts, were and are consistent with the trusts' fiduciary duties, were
conducted pursuant to a valid trust purpose, were not done in bad faith and were
not an abuse of discretion.

9 12. In reliance on the stipulation, this Court terminated the trial. The matters to which
10 Mandelbrot stipulated were consistent with the evidence presented and were factual findings that
11 this Court would have made on its own. This Court found that the JTT Trust, the Thorpe Trust,
12 and the Western Trust had reasonably determined that Mandelbrot was unreliable and had engaged
13 in a pattern and practice of filing unreliable evidence in support of claims filed with the Plaintiff
14 Trusts. This Court further determined that the Plaintiff Trusts' decision to bar Mandelbrot from
15 filing claims against the Plaintiff Trusts was reasonable, authorized, and appropriate in light of the
16 evidence.

17 13. Mandelbrot subsequently tried to renege on the stipulation, declining to execute a
18 written agreement memorializing its terms and refusing to perform. The Trusts accordingly
19 sought to enforce the stipulation. After considering Mandelbrot's arguments, this Court found the
20 stipulation made in its presence, and upon which it relied in terminating the trial, to be valid and
21 binding and entered the Bankruptcy Court Orders that are the subject of this appeal.

22 14. Mandelbrot appealed to the District Court, which affirmed the Bankruptcy Court
23 Orders. Mandelbrot appealed to the Ninth Circuit. A divided Ninth Circuit remanded the matter
24 to the District Court for consideration of two issues: "whether federal or state law governs [the
25 enforceability of the Mandelbrot settlement] (including whether the federal law argument has been
26 waived), and what impact, if any, *Golden* has on this case." 870 F.3d at 1125. The majority noted
27 that in *Golden*, the Ninth Circuit had, in articulating a new standard that "the district court ... did
28 not have the benefit of," remanded that case "so the district court could order additional briefing or

1 conduct further fact-finding.” *Id.* at 1124–25 (citing *Golden*, 792 F.3d at 1093). The Ninth
2 Circuit majority decided “the same approach is appropriate here.” 870 F.3d at 1125. Observing
3 that “it may be, as the dissent suggests, that *Golden* has no application here because (1) federal
4 law governs, or (2) the facts in this case differ materially from those in *Golden*,” the Ninth Circuit
5 concluded “these calls are best for the district court to make in the first instance.” *Id.* at 1125.

6 15. The District Court in turn remanded this matter to this Court for its determination
7 in the first instance “whether federal or state law governs [the enforceability of the Mandelbrot
8 settlement] (including whether the federal law argument has been waived), and what impact, if
9 any, [*Golden*] has on this case.” Dkt. No. 299 (quoting *Mandelbrot I*, 870 F.3d at 1125).

10 16. In connection with the issues this Court has been instructed to consider on remand,
11 the Court finds that as a factual matter the California pro-competition and employee mobility
12 public policies that prompted the remand in *Golden* are not implicated by the facts and
13 circumstances of the settlement entered into between Mandelbrot and the Trusts.

14 17. The Trusts do not compete with Mandelbrot. The Trusts do not engage in business
15 and their only interest is in protecting present and future Trust beneficiaries. Other than with
16 respect to issues of reliability, the Trusts do not favor claims filed by any one firm over any other
17 firm and have no reason to do so.

18 18. The Trustees likewise do not compete with Mandelbrot. Mr. Snyder is an attorney,
19 but he does not represent asbestos claimants, and the other two Trustees are an investment and
20 finance professional and a physician and public health expert. The Trustees have no economic or
21 other stake in the success or failure of Mandelbrot’s law practice, nor do they have any reason to
22 bar Mandelbrot from the Trusts other than to protect the Trusts from Mandelbrot’s documented
23 practice of filing unreliable evidence.

24 19. The FCR also does not compete with Mandelbrot, nor does the FCR have any
25 economic or other interest in the success or failure of Mandelbrot’s law practice.

26 20. As lawyers representing asbestos claimants, TAC members do potentially compete
27 with Mandelbrot. However, once the TAC (and the FCR) consented to the audit of Mandelbrot’s
28 claims, the TAC played, with one exception noted in the Snyder Declaration, no role in the audit,

1 the decision of the Trusts to file these adversary proceedings in 2012, the Snyder Letter, the
2 decision to seek specific remedies pursuant to the Trusts' 2013 filings in these adversary
3 proceedings, or the settlement itself. The Trusts' decision to bar Mandelbrot was not affected by
4 any member of the TAC and was instead entirely motivated by the results of the audit and the
5 documented record of Mandelbrot's misconduct. The Trusts could have and would have acted in
6 the same manner irrespective of the TAC's position.

7 21. The Trusts also do not employ Mandelbrot. The settlement does not prohibit
8 Mandelbrot from working for any employer or carrying on his own practice, whether in the area of
9 asbestos trust litigation or any other area of law practice. The settlement does not contemplate
10 terminating or precluding Mandelbrot from any employment now or in the future. The settlement
11 does not bar Mandelbrot from filing claims with other § 524(g) trusts currently managed by
12 different fiduciaries, or from other trusts that the Western Trust's claims handling facility might
13 contract with in the future or that the current Trust fiduciaries might be involved with in the future.

14 22. All four Trusts are parties to the settlement. The settlement is designed to protect
15 the Trusts and their present and future beneficiaries from Mandelbrot's documented misconduct
16 and unreliability. The Trusts have reasonably limited the claim-filing prohibition to protect their
17 present and future beneficiaries from an established pattern and practice of abuse and have a
18 legitimate interest in doing so. Mandelbrot attempted to frustrate the Trusts' efforts to examine
19 his claims at every turn. Mandelbrot has never adequately explained how the pattern and practice
20 of unreliable evidence came about, nor has he ever indicated in any satisfactory way what steps
21 could be taken to ensure that pattern and practice does not persist. The four Trusts, their shared
22 claim-handling staff and facility, and their common fiduciaries were all at risk of abuse as a result
23 of Mandelbrot's misconduct. Accordingly it was reasonable for the Trustees to require that any
24 settlement with Mandelbrot include a claim-filing bar in favor of all four Trusts.

25 23. The claim-filing prohibition in the Mandelbrot settlement does not operate as a
26 substantial restraint on the exercise of Mandelbrot's business or profession within the meaning of
27 *Golden* and the California case law it relies upon.

28

1 24. The asbestos litigation market is a national market. The Trusts represent only a
2 small fraction of the overall asbestos litigation market.

3 25. Mandelbrot previously testified in the course of these adversary proceedings that he
4 has “filed claims with asbestos trusts throughout the United States” and that he has “submitted
5 over 13,000 claims to more than 50 trusts nationwide.” Dkt. No. 171 (Mandelbrot Trial Decl.), at
6 ¶¶ 15 & 19. Comparing these figures to the 4,500 claims Mandelbrot contends he has filed with
7 the Plaintiff Trusts and the Western Trust, Dkt. No. 316 (Mandelbrot Decl.), ¶ 7, reveals that the
8 filing of claims against these Trusts represented only approximately 35% of Mandelbrot’s overall
9 claim submissions over the broad period during which Mandelbrot has historically filed claims.
10 Mandelbrot also previously testified in his March 11, 2013 deposition in connection with these
11 adversary proceedings that (i) the submission of claims to asbestos trusts constitutes just one
12 portion of Mandelbrot’s business as an attorney, which also includes consulting work and “lots of
13 stuff ... besides just the filing of bankruptcy claims,” Mandelbrot Depo. Tr., at 19:20-20:10, and
14 (ii) Mandelbrot has filed claims with many asbestos trusts other than the four settling Trusts,
15 including the Kaiser Asbestos Trust, TH Agriculture & Nutrition, L.L.C. Asbestos Personal Injury
16 Trust (THAN Trust), ACandS Asbestos Settlement Trust, Owens Corning Fibreboard Asbestos
17 Personal Injury Trust, Armstrong World Industries Asbestos Trust, Babcock & Wilcox Asbestos
18 Trust, DII Industries, LLC Asbestos PI Trust (Harbison-Walker Trust), Celotex Asbestos
19 Settlement Trust, Shook & Fletcher Asbestos Settlement Trust, and Manville Personal Injury
20 Settlement Trust (Johns-Manville Trust), *see* Mandelbrot Depo. Tr., at 47:18-48:10; *see also* Trial
21 Ex. 160 (identifying over two dozen § 524(g) trusts Mandelbrot files claims against).⁷ Mandelbrot
22 also testified that he currently “represent[s] thousands of individuals who file claims with other
23 524 (g) Asbestos Trusts.” Dkt. No. 326 (Mandelbrot Decl.), ¶ 75.

24 26. Certain of Mandelbrot’s claims of economic harm attributable to the settlement
25 were properly excluded from the record based on the evidentiary rulings set forth in the Court’s
26

27 ⁷ Relevant excerpts of Mandelbrot’s March 11, 2013 deposition transcript and a copy of Trial
28 Exhibit 160 are found in the record of these proceedings on remand. Gurvitz Decl., Ex. 1 & Ex. 2.

1 *Judgment Following Remand*, entered substantially concurrently herewith, but in any event did not
2 meet his burden of establishing that his agreement to cease filing claims against the four Trusts
3 constituted a substantial restraint on his ability to practice his profession.

4 27. **Except as expressly adopted by and incorporated into paragraphs 9 and 12**
5 **hereof, none of the objections contained in the Findings Objections are well-founded, as they**
6 **seek to include inaccurate statements that are inconsistent with the factual findings actually**
7 **made by the Court in connection with this proceeding.**

8 **IV. SUPPLEMENTAL CONCLUSIONS OF LAW**

9 28. The Court incorporates by this reference its prior conclusions of law contained in
10 the Bankruptcy Court Orders, and makes these additional supplemental conclusions of law. To
11 the extent any of the supplemental findings of fact set forth above constitute conclusions of law,
12 they are also incorporated by this reference.

13 29. *Golden v. Cal. Emer. Phys. Med. Group*, 782 F.3d 1083 (9th Cir. 2015), properly
14 construed, does not apply to this case because the California policies (employee mobility and free
15 competition) supporting *Golden's* limited extension of the *Edwards v. Arthur Andersen LLP*, 44
16 Cal. 4th 937 (2008) categorical rule against non-competition covenants are not implicated by the
17 claim-filing prohibition Mandelbrot agreed to in this case.⁸ Rather, the settlement is designed only
18 to protect the respective parties in dealing with each other.

19 a. The Trusts do not compete with Mandelbrot. The Trusts do not engage in business
20 and their only interest is in protecting present and future Trust beneficiaries. The Trusts have no
21 economic or other interest in the success or failure of Mandelbrot's law practice. Neither the
22 Trustees, nor the FCR compete with Mandelbrot, and although TAC members do potentially
23 compete with Mandelbrot, the Trusts' decision to bar Mandelbrot was not affected by any member

24 _____
25 ⁸ To the extent California public policy is implicated by the circumstances presented here, that
26 policy weighs in favor of construing § 16600 to permit enforcement of the settlement. *See, e.g.,*
27 *Coleman v. Gulf Ins. Grp.*, 41 Cal. 3d 782, 793 (1986) (citing the "strong state interest in
28 encouraging the settlement of litigation"); *see also* Cal. Probate Code § 16006 ("The trustee has a
duty to take reasonable steps under the circumstances to take and keep control of and to preserve
the trust property").

1 of the TAC and was instead entirely motivated by the results of the audit and the documented
2 record of Mandelbrot’s misconduct. Moreover, even if the Trusts had sought the consent of the
3 TAC (they did not), the Trusts could have and would have acted in the same manner irrespective
4 of the TAC’s position. Unlike the no-rehire covenant in *Golden*, Mandelbrot’s agreement not to
5 file claims against the Trusts does not contractually bar him from working for a present or future
6 competitor of the Trusts. As such, the settlement does not implicate public policy concerns for
7 open competition and was not entered into for the purpose of restraining competition.

8 b. The Trusts also do not employ Mandelbrot. The settlement does not prohibit
9 Mandelbrot from working for any employer or carrying on his own practice, whether in the area of
10 asbestos trust litigation or any other area of law practice. In contrast to the challenged provision in
11 *Golden*, the Bankruptcy Court Orders and the settlement do not contemplate terminating or
12 precluding Mandelbrot from any employment now or in the future. Moreover, the stipulated
13 settlement has a defined and limited scope—it does not bar Mandelbrot from filing claims with
14 other § 524(g) trusts currently managed by different fiduciaries, nor does it bar Mandelbrot from
15 filing claims with other trusts that the Western Trust’s claims handling facility might contract with
16 in the future or that the current Trust fiduciaries might be involved with in the future.
17 Accordingly, the settlement does not implicate public policy concerns for employee mobility.

18 30. Since neither *Golden*, nor any other public policy recognized by the California
19 courts applies here, the “rule of reason” governs application of § 16600 to the settlement under a
20 long line of California authorities rooted in common law. *See Great Western Distillery Prods.,*
21 *Inc. v. John A. Wathen Distillery Co.*, 10 Cal. 2d 442 (1937). The rule of reason has not been
22 supplanted by the *Edwards-Golden* line of cases and still applies in cases, such as this one, where
23 the public policy concerns that animate § 16600 are not implicated. *See, e.g., USS-Posco Indus. v.*
24 *Case*, 244 Cal. App. 4th 197 (Cal. Ct. App. 2016).

25 31. The burden of proof to demonstrate that the claim-filing prohibition, or the
26 settlement as a whole, contravenes California public policy and is therefore void is on Mandelbrot.
27 *See, e.g., Bovard v. Am. Horse Enters.*, 201 Cal. App. 3d 832, 839 (Cal. Ct. App. 1988).

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1 32. The rule of reason requires a balancing of any competitive concerns against the
2 legitimate interests of the protected party. Under the rule of reason, the settlement was reasonable
3 in light of the lack of material competitive concerns, the narrowly tailored effect on Mandelbrot's
4 ability to continue to practice his profession, the legitimate need to protect the Trusts from
5 Mandelbrot's amply established misconduct, and the reasonableness and measured nature of the
6 Trusts' actions in response thereto. The reasonableness of the settlement is further established by
7 Mandelbrot's own admission to his misconduct and lack of reliability, as well as his express
8 agreement that the remedy sought by the Plaintiff Trusts was reasonable. Mandelbrot was not the
9 only party to make concessions in the settlement. The Trusts also made important concessions to
10 Mandelbrot in exchange for his agreement not to file claims against them. Specifically, the
11 Plaintiff Trusts agreed to end the trial and to waive the equitable relief sought in these adversary
12 proceedings, as well as their right under the TDPs to impose the costs of the audit on Mandelbrot.
13 As such, the Mandelbrot settlement is not void under § 16600.

14 33. Even if the *Golden* rule were extended to cover the Mandelbrot claim-filing
15 prohibition, Mandelbrot has failed to meet his burden to establish that the claim-filing prohibition
16 operates as a restraint of a substantial character within the meaning of *Golden*. Mandelbrot
17 concedes that the settlement is enforceable to the extent it bars him from filing claims with the
18 Plaintiff Trusts. The claim-filing prohibition as applied to the Western Trust and the Plant Trust is
19 not a restraint under *Golden* because the Western Trust and the Plant Trust are parties to the
20 settlement. In addition, Mandelbrot has failed to introduce sufficient admissible evidence upon
21 which this Court could find that the claim-filing prohibition as applied to the Western Trust and
22 the Plant Trust (or even as applied to all four Trusts) constitutes a restraint of a substantial
23 character. Even had the Court admitted all his evidence, it does not meet Mandelbrot's burden
24 because Mandelbrot failed to address other opportunities to practice in the asbestos area. These
25 trusts occupy only a very small percentage of a national practice, a practice in which Mandelbrot
26 has testified he is active. Accordingly, Mandelbrot has failed to introduce evidence showing that
27 the loss of the ability to file claims against these trusts in particular operates as a substantial
28 restraint on his practice.

1 34. With respect to federal preemption, at each stage of these proceedings, the Plaintiff
2 Trusts have raised and developed, and thereby properly preserved, their argument that the
3 settlement is enforceable under federal law, notwithstanding otherwise applicable contrary
4 California state law. There has been no “intentional relinquishment or abandonment of a known
5 right or privilege,” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and the Plaintiff Trusts have not
6 waived the argument on appeal. *See, e.g., Field v. Mans*, 157 F.3d 35, 41–42 (1st Cir. 1998).

7 35. Although the preemption issue has been properly preserved by the Plaintiff Trusts
8 throughout these proceedings, California law, properly construed, does not conflict with § 524(g)
9 and the court approved TDPs implementing the statutory requirements of § 524(g)(2)(B)(i) and
10 § 524(g)(2)(B)(ii)(V). If the Court were to construe § 16600 to preclude the Trusts, acting in full
11 compliance with their court-approved TDPs, from prohibiting a professional the Trustees have
12 reasonably determined to be unreliable from agreeing to file no further claims against the Trusts,
13 then the California statute as so construed would conflict with federal policies governing the
14 administration of asbestos trusts created under § 524(g) and would be preempted. *Mandelbrot I*,
15 870 F.3d at 1131–35 (Korman, S.D.J., dissenting). The settlement would thus still be enforceable
16 under federal law.

17 36. **Except as expressly adopted by and incorporated into paragraphs 9 and 12**
18 **hereof, none of the objections contained in the Findings Objections are well-founded and**
19 **they are hereby overruled.**

20 37. **Plaintiffs’ lodging and service upon the opposing parties of a proposed form of**
21 **order and findings in advance of the February 1, 2018 hearing in this matter does not**
22 **constitute an ethical violation or an ex parte communication.**

23 38. The Court reaffirms its prior findings and conclusions regarding the application of
24 Rule 1-500 to this case. Because these findings and conclusions were expressly affirmed by the
25 District Court, *see* Dist. Ct. Dkt. No. 35, and because nothing in *Mandelbrot I* suggests this Court
26 or the District Court erred in analyzing Rule 1-500, this Court’s prior rejection of Mandelbrot’s
27 challenge to the settlement under Rule 1-500, as subsequently affirmed by the District Court, is
28 “law of the case.” *See* 18B Wright, Miller & Cooper, Fed. Prac. & Proc.: Jurisdiction 2d at § 4478

1 (2d ed. 2002). Nothing in *Golden* constitutes a basis for revisiting that determination given that
2 the employee in that case was not a lawyer regulated by the State Bar of California or subject to
3 Rule 1-500. Nevertheless, the purposes of Rule 1-500 are not implicated by the facts of this case
4 and California's established rule of reason approach to the application of Rule 1-500, *see Howard*
5 *v. Babcock*, 6 Cal. 4th 409 (1993), requires no modification of the Bankruptcy Court Orders or the
6 settlement for the reasons set forth in the discussion of the § 16600 rule of reason analysis above.

7 39. For the reasons set forth herein and those stated on the record at the hearing, the
8 Court concludes that there is no need to amend, modify, or vacate the Bankruptcy Court Orders or
9 alter the claim-filing prohibition to which Mandelbrot agreed. The settlement and the claim-filing
10 prohibition are valid and enforceable as to all four Trusts under California law, including
11 specifically § 16600 and, to the extent at all applicable, Rule 1-500, because the settlement is
12 reasonable and does not operate as a restraint of a substantial character on Mandelbrot's practice.
13 Likewise the unmodified Bankruptcy Court Orders remain in force in accordance with their terms.

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24 Date: February 8, 2018



25 Sheri Bluebond
26 United States Bankruptcy Judge
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