Nos. 22-2003, 22-2004, 22-2005, 22-2006, 22-2007, 22-2008, 22-2009, 22-2010, 22-2011 (Consolidated)

United States Court of Appeals for the Third Circuit

IN RE LTL MANAGEMENT, LLC,

Debtor.

OFFICIAL COMMITTEE OF TALC CLAIMANTS, *et al.*,

Petitioners-Appellants,

v.

LTL MANAGEMENT, LLC,

Debtor-Appellee.

Direct Appeal from the United States Bankruptcy Court for the District of New Jersey in Ch. 11 No. 21-30589 and Adv. Pro. No. 21-03032

BRIEF FOR APPELLANT OFFICIAL COMMITTEE OF TALC CLAIMANTS AND JOINT APPENDIX VOLUME 1 OF 20 (Pages A1 to A272)

MOLOLAMKEN LLP
Jeffrey A. Lamken
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 556-2010

GENOVA BURNS LLC
Angelo J. Genova
Daniel M. Stolz
110 Allen Road, Suite 304
Basking Ridge, NJ 07920
(973) 533-0777

Counsel for Appellant Official Committee of Talc Claimants
(Additional Counsel Listed on Inside Cover)

BROWN RUDNICK LLP
David J. Molton
Michael S. Winograd
Robert J. Stark
7 Times Square
New York, NY 10036
(212) 209-4800

OTTERBOURG P.C.
Melanie L. Cyganowski
Adam C. Silverstein
230 Park Avenue
New York, NY 10169
(212) 661-9100

MASSEY & GAIL LLP
Jonathan S. Massey
1000 Maine Ave. S.W., Suite 450
Washington, DC 20024
(202) 652-4511

BAILEY & GLASSER LLP
Brian A. Glasser
1055 Thomas Jefferson St., N.W.
Washington, DC 20007
(202) 463-2101

PARKINS LEE & RUBIO LLP
Lenard M. Parkins
700 Milam St., Suite 1300
Houston, TX 77002
(713) 715-1666

Counsel for Appellant Official Committee of Talc Claimants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 of the Federal Rules of Appellate Procedure and 26.1 of the Third Circuit Local Appellate Rules, counsel for Appellant hereby state that the Official Committee of Talc Claimants is not a corporate entity. The Committee consists of ten natural persons and Blue Cross and Blue Shield of Massachusetts ("BCBSMA"). BCBSMA is composed of Blue Cross and Blue Shield of Massachusetts, Inc. ("BCBS Inc.") and Blue Cross and Blue Shield of Massachusetts HMO Blue, Inc. ("HMO Inc."). BCBS Inc. and HMO Inc. are not-for-profit medical services corporations organized as charitable organizations. BCBS Inc. is organized under M.G.L. cc.176A and 176B, and HMO Inc. is organized under M.G.L. c.180. BCBS Inc. is the parent of HMO Inc.

Counsel for Appellant further state that Johnson & Johnson is the parent company of Debtor-Appellee, LTL Management LLC. Johnson & Johnson is a publicly owned corporation with a financial interest in this litigation. Among other things, Johnson & Johnson asserts that it has indemnification rights against the Debtor and has obligations to the Debtor under a Funding Agreement. This appeal also involves an order entered by the bankruptcy court halting talc-related litigation against Johnson & Johnson and other entities.

June 30, 2022

<u>/s/ Angelo J. Genova</u>
Angelo J. Genova

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

JURISDICTION 4

STATEMENT OF ISSUES PRESENTED 4

STATEMENT OF RELATED CASES 5

STATEMENT OF THE CASE 5

I. Background of Talc Litigation 5

A. J&J's Tortious Conduct 5

B. J&J and Old JJCI Satisfy Talc Liabilities in the Ordinary Course 7

II. J&J Orchestrates LTL's Creation and Immediate Bankruptcy 8

A. J&J Assigns Operating Assets to New JJCI and Talc Liabilities to LTL 9

B. LTL Files for Bankruptcy 12

III. Proceedings Below 13

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. The Bankruptcy Court's Decision Denying the Motion To Dismiss Was Legal Error 20

A. The Bankruptcy Court Erred in Holding LTL's Petition Had a Valid Bankruptcy Purpose 21

1. Bankruptcy's Supposed Litigation Advantages Cannot Justify a Good-Faith Filing 22

2. The Bankruptcy Court Exceeded Its Proper Role by Making Ad Hoc Policy Judgments About Bankruptcy's Supposed Advantages over the Ordinary Civil Justice System 26

3. The Bankruptcy Court's Assessment Rests on Flawed Assumptions 29

B. The Scheme Defies the Code's Structure and Principles 31

1. LTL's Structure Evades Traditional Bankruptcy Protections 31

2. The Scheme Threatens the Public Interest and Raises Serious Constitutional Questions 38

C. The Bankruptcy Court's Finding of "Financial Distress" Was Reversible Error 39

1. Old JJCI's Financial Situation Was Irrelevant 39

2. The Bankruptcy Court Applied the Wrong Legal Standard 40

3. No Finding of Financial Distress Is Sustainable as to LTL 42

D. The Court's "Unusual Circumstances" Holding Was Erroneous 43

II. The Bankruptcy Court Committed Legal Error in Freezing Tens of Thousands of Suits Against Hundreds of Non-Debtors 44

A. The Bankruptcy Court Lacked "Core" Jurisdiction To Enjoin Tens of Thousands of Suits Against Non-Debtors 45

B. The Bankruptcy Court Lacked "Related-To" Jurisdiction To Enjoin Cases Against Non-Debtors 49

1. Manufactured Grounds for "Related-To" Jurisdiction Cannot Support Jurisdiction 50

2. Putative Effects of Suits Against Non-Debtors Fall Short 52

3. Claims Against Non-Debtors Would Not Liquidate Claims Against LTL 54

4. Allegations of Shared Insurance Cannot Establish "Related-To" Jurisdiction 56

C. The Bankruptcy Court Failed To Apply the Correct Legal Standard..57

CONCLUSION 62

TABLE OF AUTHORITIES

Page(s)

CASES

A.H. Robins Co. v. Piccinin,
788 F.2d 994 (4th Cir. 1986) 58

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 27

Armstrong v. Exceptional Child Ctr., Inc.,
575 U.S. 320 (2015) 37

CAE Indus. LTD v. Aerospace Holdings Co.,
116 B.R. 31 (S.D.N.Y. 1990) 58

Carl v. Johnson & Johnson,
237 A.3d 308 (N.J. App. Div. 2020), *cert. denied*,
244 A.3d 270 (N.J. 2021) 7

Carolin Corp. v. Miller,
886 F.2d 693 (4th Cir. 1989) 19

Case v. L.A. Lumber Prods. Co.,
308 U.S. 106 (1939) 35

Chesapeake Crossing Assocs. v. TJX Cos.,
Civ. A. 2:92CV631, 1992 WL 469801 (E.D. Va. 1992).....................................58

Czyzewski v. Jevic Holding Corp.,
137 S. Ct. 9739 (2017)... 32, 37, 38

Dunphy v. Ryan,
116 U.S. 491 (1886) 62

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,
561 U.S. 477 (2010) 27

Georgine v. Amchem Prods., Inc.,
83 F.3d 610 (3d Cir. 1996) 27

Georgine v. Amchem Prods., Inc.,
878 F. Supp. 716 (E.D. Pa. 1994)...27

Gold v. Johns-Manville Sales Corp.,
723 F.2d 1068 (3d Cir. 1983) 56, 60

In re 15375 Mem'l Corp. v. BEPCO, L.P.,
589 F.3d 605 (3d Cir. 2009) .... *passim*

In re 15375 Mem'l Corp. v. BEPCO, L.P.,
382 B.R. 652 (Bankr. D. Del. 2008)...23

In re A.H. Robins Co.,
89 B.R. 555 (Bankr. E.D. Va. 1988) 41

In re Combustion Engineering, Inc.,
391 F.3d 190 (3d Cir. 2004) .... *passim*

In re Cont'l Airlines,
203 F.3d 203 (3d Cir. 2000) 45

In re Dow Corning Corp.,
244 B.R. 673 (Bankr. E.D. Mich. 1999) 36

In re Federal-Mogul Glob. Inc.,
300 F.3d 368 (3d Cir. 2002) 49, 54

In re Federal-Mogul Glob. Inc.,
684 F.3d 355 (3d Cir. 2012) 30

In re Integrated Telecom Express, Inc.,
384 F.3d 108 (3d Cir. 2004) .... *passim*

In re Ira Haupt & Co.,
361 F.2d 164 (2d Cir. 1966) 18

In re Johns-Manville,
36 B.R. 727 (Bankr. S.D.N.Y. 1984) 36, 41

In re Johnson & Johnson Talcum Powder Prods. Mktg.,
Sales Pracs. & Prods. Litig., 509 F. Supp. 3d 116 (D.N.J. 2020) 7

In re Maislin Indus., U.S., Inc.,
66 B.R. 614 (E.D. Mich. 1986) 50

In re Mallinckrodt PLC,
— B.R. —, No. 20-12522, 2022 WL 404323
(Bankr. D. Del. Feb. 8, 2022)...36

In re Primestone Inv. Partners L.P.,
272 B.R. 554 (D. Del. 2002) 37

In re Resorts Int'l, Inc.,
372 F.3d 154 (3d Cir. 2004) 48

In re SGL Carbon Corp.,
200 F.3d 154 (3d Cir. 1999) ....*passim*

In re SGL Carbon Corp.,
233 B.R. 285 (D. Del. 1999) 23, 41

In re Venoco LLC,
998 F.3d 949 (3d Cir. 2021) 32

In re W.R. Grace & Co.,
13 F.4th 279 (3d Cir. 2021) 61

In re W.R. Grace & Co.,
591 F.3d 164 (3d Cir. 2009) 47, 48, 49, 54

Ingham v. Johnson & Johnson,
608 S.W.3d 663 (Mo. Ct. App. 2020), *cert. denied*,
141 S. Ct. 2716 (2021)..*passim*

Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 50

Johnson & Johnson Talcum Powder Cases,
249 Cal. Rptr. 3d 642 (Cal. Ct. App. 2019) 7

Kieffer v. Best Buy,
14 A.3d 737 (N.J. 2011) 54

Kimbrough v. United States,
552 U.S. 85 (2007) 27

Local Loan Co. v. Hunt,
292 U.S. 234 (1934) 1

Maritime Elec. Co. v. United Jersey Bank,
959 F.2d 1194 (3d Cir. 1991) 48, 57

Mazurek v. Armstrong,
520 U.S. 968 (1997) 58

McCartney v. Integra Nat'l Bank N.,
106 F.3d 506 (3d Cir. 1997) 48, 51

Norwest Bank Worthington v. Ahlers,
485 U.S. 197 (1988) 61

Olson v. Brenntag N. Am., Inc.,
No. 190328/2017, 2020 WL 6603580 (N.Y. Sup. Ct. Nov. 11, 2020) 55

Pacor, Inc. v. Higgins,
743 F.2d 984 (3d Cir. 1984) 49, 54, 56

Patton v. Bearden,
8 F.3d 343 (6th Cir. 1993) 49

Pepper v. Litton,
308 U.S. 295 (1939) 38

Prudencio v. Johnson & Johnson,
No. RG20061303 (Cal. Super. Ct. Aug. 27, 2021) 55

Stanford v. Foamex L.P.,
Civ. A. 07-4225, 2009 WL 1033607 (E.D. Pa. Apr. 15, 2009) 48

Stern v. Marshall,
564 U.S. 462 (2011) 22, 39

Stoe v. Flaherty,
436 F.3d 209 (3d Cir. 2006) 46, 48

Temple Univ. Hosp., Inc. v. Sec'y U.S. Dep't of Health & Hum. Servs.,
2 F.4th 121 (3d Cir. 2021) 45, 46

Wellness Int'l Network, Ltd. v. Sharif,
575 U.S. 665 (2015) 39

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 58

Zadvydas v. Davis,
533 U.S. 678 (2001) 39

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., amend. VII .... *passim*

11 U.S.C. § 105 .... *passim*

11 U.S.C. § 105(a) 31, 47, 48, 49

11 U.S.C. § 301(b) 30

11 U.S.C. § 362 .... *passim*

11 U.S.C. § 362(a) 45, 48, 57

11 U.S.C. § 363 .... 32, 33

11 U.S.C. § 521 32

11 U.S.C. § 524(g) 29, 30, 31, 61

11 U.S.C. § 524(g)(2)(B)(i)(I) 30

11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) 30

11 U.S.C. § 726(a)(6) 32

11 U.S.C. § 1104(a) 32

11 U.S.C. § 1112(b) 3, 14, 18

11 U.S.C. § 1112(b)(2) 43

11 U.S.C. § 1112(b)(2)(A) 43

11 U.S.C. § 1112(b)(2)(B)(i) 44

11 U.S.C. § 1112(b)(2)(B)(ii) 44

11 U.S.C. § 1129(a)(7) 32

11 U.S.C. § 1129(b)(2) 32

11 U.S.C. § 1129(b)(2)(A)(iii) 35

28 U.S.C. § 157(a) 4

28 U.S.C. § 158(d)(2)(A)(i) 4

28 U.S.C. § 158(d)(2)(A)(iii) 4

28 U.S.C. § 1334(a) 4

28 U.S.C. § 1334(b) 46, 49

28 U.S.C. § 1359 50

28 U.S.C. § 1452 46

T.B.O.C. §§ 10.0001 *et seq.* 9

OTHER AUTHORITIES

2022 First Quarterly Dividend Announcement, Johnson & Johnson (Jan. 4, 2022) 34

Individual Characteristics of Mass Torts Case Congregations, A Report to the Mass Torts Working Group, Fed. Jud. Ctr. (Jan. 1999) 29

Ovarian Cancer: Stage 4, Minnesota Ovarian Cancer Alliance (last visited June 28, 2022) 60

Thomas E. Plank, *The Constitutional Limits of Bankruptcy,* 63 Tenn. L. Rev. 487 (1996) 32

Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97 (2013)..29

Summary Statistics, United States District Court Judicial Panel on Multidistrict Litigation (June 30, 2019) 29

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PRELIMINARY STATEMENT

The courts have "again and again emphasized" bankruptcy law's fundamental "purpose": To give a fresh start to "the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934). Companies facing financial distress from mass-tort liabilities, like Johns-Manville, thus have placed themselves in bankruptcy while accepting bankruptcy law's concomitant requirements: They subjected their operations, assets, and transactions to court supervision, accepted the bankruptcy system's priority scheme for distributions, and complied with disclosure requirements. This appeal concerns an effort to do the opposite—to obtain the benefits of bankruptcy while evading the corresponding obligations, and to convert bankruptcy into a claims-resolution mechanism for the benefit of non-debtors.

Johnson & Johnson ("J&J") is one of the world's largest and most financially stable corporations, with a better credit rating than the United States. J&J—together with its subsidiary Johnson & Johnson Consumer Inc. ("Old JJCI")—confronted adverse court judgments for ovarian cancer and mesothelioma caused by their JOHNSON's Baby Powder and talc-related products. Rather than declare bankruptcy themselves, they engaged in a maneuver termed the "Texas Two-Step." First, at J&J's instruction, Old JJCI transferred its talc-related tort ***liabilities*** to a newly created shell entity, "LTL Management LLC," but its ***operating assets*** to another

new company, "New JJCI." Second, within 48 hours of its creation, LTL alone declared bankruptcy, leaving Old JJCI's productive operations and trade creditors outside bankruptcy.

That scheme contravenes the Bankruptcy Code's structure. Far from being an "honest but unfortunate" debtor with a pre-existing business, LTL is a contrived entity selectively assigned specific liabilities to help affiliates evade bankruptcy requirements. For example, under the Two-Step, the talc-claimant creditors J&J and Old JJCI targeted are relegated to bankruptcy, where their claims can be reduced. But Old JJCI's former shareholders and other creditors sit outside the bankruptcy, able to enjoy payments New JJCI generates from the operating assets it received from Old JJCI. That circumvents bankruptcy's priority system, including the requirement that creditors be paid ahead of shareholders. The Bankruptcy Code also requires that debtors "surrender" their assets, placing their management under the bankruptcy court's power. The Two-Step evades that requirement. Despite having received Old JJCI's operating businesses, New JJCI—along with J&J and its affiliates—stands outside bankruptcy. The bankruptcy court is thus left to process mass-tort claims, but without control over the assets and management of the business whose conduct precipitated those claims.

That effort to seek bankruptcy's benefits, while evading its obligations, cannot satisfy 11 U.S.C. § 1112(b)'s requirement that bankruptcy be filed in objective good faith. LTL's bankruptcy lacks any valid bankruptcy purpose. With no employees or pre-existing business, LTL has nothing to "reorganize." An abbreviation for "Legacy Talc Litigation," LTL was created solely to resolve talc claims in bankruptcy, away from juries. The resulting bankruptcy operates for the benefit of non-debtors, who sit outside the bankruptcy in control of the business—while suits by rapidly dying victims are halted.

Separately, the bankruptcy court granted further relief to complete the Two-Step scheme: It halted litigation against some 670 ***non-debtors,*** including J&J, New JJCI, insurers, and retailers, freezing (sometimes mid-trial) more than 38,000 talc-related tort actions by ill claimants, hundreds of whom have died during the bankruptcy already. Those actions seek to hold J&J directly liable for its independent wrongdoing, as confirmed by courts. The bankruptcy court had neither jurisdiction, nor legal or factual bases, for so broad an injunction. If J&J or Old JJCI needed bankruptcy protection—and were in financial distress—either was free to file. Mass tortfeasors, however, should not so easily make a sham of the Bankruptcy Code's calibrated architecture to circumvent the civil tort system and the claimants' right to jury trials otherwise guaranteed by the Seventh Amendment.

JURISDICTION

On April 4, 2022, the bankruptcy court certified for direct appeal its orders denying motions to dismiss LTL's petition ("MTD Order"), App. 57-58, and freezing actions against non-debtors ("PI Order"), App. 194-201, under 28 U.S.C. § 158(d)(2)(A)(i), (iii). On May 11, 2022, this Court accepted the case. App. 268-72 (No. 22-8015, Dkt. 12).

The bankruptcy court had jurisdiction over the bankruptcy under 28 U.S.C. §§ 1334(a) and 157(a), but as explained below, lacked jurisdiction to issue the PI Order.

STATEMENT OF ISSUES PRESENTED

1. Whether LTL's bankruptcy petition must be dismissed because (a) the petition lacks a valid bankruptcy purpose; (b) the petition contravenes the Bankruptcy Code's structure and foundational principles; and/or (c) LTL did not face the requisite financial distress. App. 15, 40 (Opinion Denying Motions To Dismiss ("MTD Op.")).

2. Whether LTL's bankruptcy petition, even if not filed in good faith, can be sustained because of "unusual circumstances." App. 13 n.8 (MTD Op.).

3. Whether the bankruptcy court's PI Order, halting litigation against more than 670 non-debtors, was void for lack of subject-matter jurisdiction or

otherwise inconsistent with the Code. App. 193 (Opinion Granting Preliminary Injunction ("PI Op.")).

STATEMENT OF RELATED CASES

This case has not previously been before this Court. Related appeals of the bankruptcy court's MTD Order and PI Order are stayed before the district court (D.N.J. Nos. 22-1280, 22-1289, 22-1292, 22-1296, 22-1303, 22-1339, 22-1350, 22-1387, 22-1620). In February 2019, Old JJCI's talc supplier, Imerys Talc America, Inc. and affiliates Imerys Talc Vermont, Inc. and Imerys Talc Canada, Inc., filed Chapter 11 petitions. *In re Imerys Talc Am., Inc.*, D. Del. Bankr. 19-10289-LSS. In February 2021, talc miner Cyprus Mines Corporation also filed for Chapter 11. *In re Cyprus Mines Corp.*, D. Del. Bankr. 21-10398-LSS.

STATEMENT OF THE CASE

I. BACKGROUND OF TALC LITIGATION

A. J&J's Tortious Conduct

J&J manufactured talc-based JOHNSON'S Baby Powder until 1979. Since then, various J&J subsidiaries and ultimately Old JJCI produced it. App. 2-3 (MTD Op.). J&J retained responsibility for health-and-safety policy decisions for Baby Powder: It had the power to require product warnings or stop selling talc products, but failed to do so. App. 6058-59 (52:22-53:10), 6061 (55:1-12), 6907-08 (7751:23-7752:15), 6912 (7833:12-18) (Hopkins Testimony). Instead, in 2018 and 2019, J&J,

including its CEO Alex Gorsky, issued public statements assuring consumers that its talc products were safe. App. 6913-23 (Trial Exhs.).

In December 2018, Health Canada identified a causal connection between genital exposure to talc and ovarian cancer. App. 7061 (2018 Assessment); App. 7077 (2021 Assessment). In October 2019, the FDA detected asbestos, the only known cause of mesothelioma, in J&J's Baby Powder. App. 2643 (53:11-19) (Kim Testimony). From November 2019 to October 13, 2021 (one day before LTL's bankruptcy), seven mesothelioma plaintiffs won trials against J&J and Old JJCI. *Id.* at 2644-45 (54:14-55:9); *see* App. 364 (Debtor Info Brief 49). Juries also found J&J and Old JJCI liable for ovarian cancer caused by their talc products. App. 457-58 (Kim Decl. ¶¶36-39); *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 724-25 (Mo. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2716 (2021).

Although J&J had long known talc could cause cancer, App. 6893-94 (45:20-46:13) (Hopkins Testimony), it did not stop selling talc-based Baby Powder in the U.S. and Canada until May 2020, App. 456-57 (Kim Decl. ¶33). Today, J&J sells only baby powder made of cornstarch in the U.S. and Canada, a product it has sold for decades. App. 6896 (37:1-22) (Hopkins Testimony).

By the time LTL (or "Debtor") filed its bankruptcy petition, J&J and Old JJCI faced more than 38,000 ovarian cancer claims—about 35,000 in a Multi-District

Litigation proceeding ("MDL") in the District of New Jersey, roughly 2,200 claims consolidated in California and New Jersey state courts, and another 1,100 claims in other state courts. App. 439 (Debtor Info Brief 124). J&J and Old JJCI also faced more than 400 mesothelioma cases, with more than 250 in one New Jersey state court. *Id.* at 440.

J&J disputes the causal link between its talc-related products and cancer. After hearing extensive evidence, however, the MDL court admitted (with limited exceptions) expert testimony establishing a causal relationship between talc products and ovarian cancer. *See In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Prods. Litig.*, 509 F. Supp. 3d 116, 198 (D.N.J. 2020). Trial and appellate courts have repeatedly rejected J&J's position on talc's safety. *See, e.g.*, *Ingham*, 608 S.W.3d at 718; *Carl v. Johnson & Johnson*, 237 A.3d 308, 311 (N.J. App. Div. 2020), *cert. denied*, 244 A.3d 270 (N.J. 2021); *Johnson & Johnson Talcum Powder Cases*, 249 Cal. Rptr. 3d 642, 676 (Cal. Ct. App. 2019).

B. J&J and Old JJCI Satisfy Talc Liabilities in the Ordinary Course

Until this bankruptcy, J&J and Old JJCI satisfied talc and other liabilities in the ordinary course. In May 2020, J&J told a bankruptcy court in a different talc-liability case that it was "absurd" to suggest that "J&J may lack the financial wherewithal to meet its obligations." App. 4700 (Diaz Report 7). J&J boasted being "one

of the top 10 companies in the United States by market value," which "can provide the claimants far greater protection than . . . the bankruptcy claims trust ever could." *Id.*

J&J is one of the world's most liquid companies: As of October 2021, it had roughly $30 billion in annual earnings before interest, taxes, and amortization, App. 3424 (36:13-14) (Kaplan Dep.); over $41 billion in cash, marketable securities, and credit lines; and, despite talc liabilities, a credit rating better than the United States, App. 4699 (Diaz Report 6); App. 4662-75 (Burian Report 25-38).

II. J&J ORCHESTRATES LTL'S CREATION AND IMMEDIATE BANKRUPTCY

On July 19, 2021, J&J's corporate treasurer told Standard & Poor's that J&J "feel[s] failed by courts," and might "seek to cap [talc] liability"—through a scheme involving a "re-org," a "split," and a "Texas corp." App. 7115 (Kaplan Notes 1). She told Moody's: "We are looking at a number of ways of capping our talc liability, especially" in light of the denial of certiorari in *Ingham*, 141 S. Ct. 2716 (2021). App. 4469 (email). "One scenario being considered," she elaborated, "would be to capture the liability in one subsidiary, and fund that subsidiary for current and future losses, and then basically bankrupt that subsidiary." *Id.* She never suggested J&J or any existing affiliate confronted financial distress.

In October 2021, J&J executed on that plan through the "Texas Two-Step" at issue here. Step one was a corporate restructuring under the Texas divisive merger statute, T.B.O.C §§ 10.0001 *et seq*. *See* App. 448, 450-53 (Kim Decl. ¶¶ 16, 22-23). Through "labyrinthine" transactions the bankruptcy court found "somewhat overwhelming," App. 5 (MTD Op.), J&J effectively extinguished Old JJCI and divided it into two new companies—"New JJCI" to hold Old JJCI's productive assets, and "LTL" to receive talc-related liabilities. *See* App. 477 (Kim Decl.) (org chart); *see also* App. 4712-22 (Diaz Report 19-29) (diagrams). Step two, effectuated two days later, was to place LTL, but not New JJCI and thus no operating business, into bankruptcy. As LTL chief legal officer John Kim—who previously managed talc litigation for J&J—testified, "the whole purpose of the restructuring was to enable LTL, the company, ***to file for bankruptcy without subjecting the rest of the assets of JJCI to the bankruptcy procedure***." App. 2481 (201:12-15) (emphasis added); *see* App. 445 (Kim Decl. ¶ 2).

A. J&J Assigns Operating Assets to New JJCI and Talc Liabilities to LTL

In the restructuring, Old JJCI's business assets, including a range of well-known brands (such as Tylenol, Band-Aid, and Neutrogena), together with non-talc liabilities (*e.g.*, trade claims), were assigned to New JJCI. App. 448-49, 451-53 (Kim Decl. ¶¶ 16, 19, 23-24); App. 2321 (41:7-22) (Mongon Testimony). As LTL's chief

legal officer explained, "the entity that was formerly JJCI and the entity that is the new JJCI were . . . virtually identical except for it no longer had the talc liabilities." App. 2481 (201:16-19) (Kim Testimony).

The talc liabilities went to LTL ("Legacy Talc Litigation"). App. 3417 (13:18-23) (Kaplan Dep.). LTL was given no operating business. App. 4737-38 (Diaz Report 44-45). LTL has no employees of its own. Its board, management, and professionals are paid by J&J and work (or worked) for J&J. *Id.* at 4731-33, 4737-38. LTL's office is "hoteling" space in a J&J building. App. 2116 (125:8-23) (Wuesthoff Testimony). As of its bankruptcy petition, LTL's bank account was not in its own name. *See* Bankr. Dkt. 548 (Debtor's Chapter 11 Monthly Operating Report 14, ¶8). LTL has no bonds, trade creditors, or pension liabilities. App. 2117-18 (126:23-127:13) (Wuesthoff Testimony); App. 3479 (36:23-24, 37:5-13, 45:15-18, 45:21-23) (Kim Dep.). Its sole purpose is resolving talc liabilities.

LTL was funded with a $6 million bank account and the rights to royalty streams valued at $367.1 million as of the petition date. App. 7 (MTD Op.). J&J and New JJCI jointly and severally committed, under a Funding Agreement, to fund LTL's expenses (*i.e.*, to resolve talc liabilities assigned to LTL) outside of bankruptcy, up to the value of New JJCI. *Id.* at 44 n.27. The bankruptcy court accepted

LTL's assertions that the Funding Agreement provided $61 billion in potential liquidity. *Id.* at 35; App. 2641 (51:13-24) (Kim Testimony).

If LTL filed for bankruptcy, the Funding Agreement provided that J&J and New JJCI would fund a trust under a confirmed plan to resolve talc liabilities. App. 44 n.27 (MTD Op.). Thus, before bankruptcy, LTL faced no restrictions on paying talc liabilities on a current basis up to the Funding Agreement cap. App. 4725 (Diaz Report 32). After bankruptcy, LTL would receive nothing under the Funding Agreement to satisfy a single talc claim until entry of a final non-appealable order confirming a reorganization plan with a trust for victims. *Id.*; App. 4234 (Funding Agreement 6).

J&J drove and controlled those transactions. An October 11, 2021 memorandum outlining the restructuring sought approval only from J&J officials. App. 4444-55; *see* App. 2296-97 (16:19-22, 17:2-7) (Mongon Testimony). Old JJCI's president did not see it before approving the restructuring. App. 2273-75 (282:24-283:4, 284:1-19) (Goodridge Testimony). Advised by a J&J attorney, she signed the restructuring documents without changing a word. App. 3388-89 (34:14-36:4) (Goodridge Dep.); App. 2194 (203:7-17) (Goodridge Testimony). The record does not show negotiations regarding any material term of the transaction between LTL

and J&J, much less arms-length negotiations. App. 4651 (Burian Report 14); App. 2135 (144:6-16) (Wuesthoff Testimony); App. 4733-37 (Diaz Report 40-44).

B. LTL Files for Bankruptcy

On October 14, 2021, two days after LTL's creation, LTL's board met and authorized LTL to file for bankruptcy. App. 2 (MTD Op.); App. 4456 (Board Minutes). Only lawyers—no businesspeople—presented. App. 4456-62. When LTL filed for bankruptcy that same day, it had paid no bills and had never encountered difficulty satisfying any obligations. App. 3495 (195:10-196:4) (Kim Dep.).

There is no evidence LTL's board understood that the bankruptcy petition eliminated LTL's ongoing access to billions in liquidity under the Funding Agreement. App. 4725 (Diaz Report 32). Nor is there evidence the board had sufficient information to understand LTL's assets and liabilities. *Id.* LTL's president (Robert Wuesthoff) and chief financial officer (Richard Dickinson)—both recruited by J&J—had no experience with bankruptcy or talc litigation. App. 2094-95 (103:9-104:4), 2101-02 (110:24-111:1), 2118 (127:14-16) (Wuesthoff Testimony); App. 3357 (88:12-19), 3348 (25:19-26:4), 3372-73 (230:6-19) (Dickinson Dep.). Before the LTL board meeting, no written analysis was provided to the board regarding a bankruptcy filing. App. 2120 (129:13-16) (Wuesthoff Testimony). The board had

no projection of future talc expenses, verdicts, or settlements. App. 2139 (148:21-23) (Wuesthoff Testimony); App. 3358 (92:15-20) (Dickinson Dep.). It did not discuss whether insurance coverage was available. App. 2141-42 (150:24-151:10) (Wuesthoff Testimony). It did not know the value of the Funding Agreement: J&J never told the board; the board never asked. *Id.* at 2133-35 (142:10-144:5); App. 3355 (75:10-76:18) (Dickinson Dep.); App. 2599-2606 (9:14-16:13) (Kim Testimony).

A critical goal of the bankruptcy was to freeze pending actions against J&J and other non-debtors, putting an end to jury trials. J&J announced that "all pending cosmetic talc cases will be stayed," and that J&J and its affiliates "will continue to operate their business as usual," before such relief had even been sought in the bankruptcy case. App. 6925 (J&J Oct. 19, 2021 8-K). According to LTL, absent an injunction halting talc litigation against J&J and other non-debtors, "[t]he entire purpose of this" bankruptcy "would be thwarted." App. 4219 (Omnibus Reply in Support of PI 51).

III. PROCEEDINGS BELOW

LTL filed its Chapter 11 petition in the Western District of North Carolina, a forum perceived as having a more lenient good-faith standard for bankruptcy filings. The court transferred the case to New Jersey, where J&J is headquartered. LTL's

assets, it found, "were all set up primarily for the purpose of filing bankruptcy in this district," and none were "involved in any further business in North Carolina." App. 1511 (Transfer Order 6). LTL was "trying to manufacture venue and . . . outsmart the purpose of the statute." *Id.* at 1515.

The Motions To Dismiss. On December 1, 2021, the Official Committee of Talc Claimants ("TCC" or "Committee")—Appellant here—and others moved to dismiss the bankruptcy proceeding under § 1112(b) of the Code for (among other reasons) lack of a valid bankruptcy purpose. App.1730-31 (TCC MTD); App. 1 n.2 (MTD Op.). The U.S. Trustee supported dismissal, or appointment of a Chapter 11 trustee. App. 3012 (96:1-4) (hearing transcript).

The U.S. Trustee emphasized that LTL's officers had performed no "independent functions" and merely "capitulated and signed off on the decisions and strategy of J&J." App. 3013 (97:11-13). The "desire to exploit bankruptcy powers for non-debtor affiliates" like J&J "is decidedly not a legitimate bankruptcy purpose." *Id.* at 3016 (100:20-22). J&J, moreover, had shifted "adjudication of its tort litigation . . . away from the solvent business of J&J" to a shell company in bankruptcy, while keeping "extraordinary and extensive resources"—all productive business assets—outside bankruptcy, free from "the burdens of bankruptcy" and beyond "the Code's commands." *Id.* at 3016-17 (100:19-101:13).

The bankruptcy court denied the motions. The court did not find bankruptcy was necessary to preserve LTL as a "going concern." App. 15 (MTD Op.). And it nowhere found that J&J or Old JJCI had difficulty paying tort claims in the ordinary course before LTL's bankruptcy. But it ruled that LTL's petition would "maximize the property available to satisfy creditors," because "the court-administered claims assessment process" "will dramatically reduce costs" compared to the civil justice system. *Id.* It asserted that "[t]he tort system has struggled to meet the needs of present claimants in a timely and fair manner [and] is ill-equipped to provide for future claimants." *Id.* at 24. It emphasized its "strong conviction that the bankruptcy court is the optimal venue" for talc liability disputes. *Id.* at 19.

Recognizing that a good-faith filing requires "some" showing of "financial distress," *id.* at 37, the court found that requirement met because "J&J and Old JJCI were . . . facing a torrent of significant talc-related liabilities for years to come," *id.* at 40. The court rejected the argument that, if Old JJCI or J&J needed relief in bankruptcy, they—not an artificial construct like LTL—should petition for bankruptcy. Those entities, the court stated, had "too much value to be wasted," *id.* at 47, if subjected to the Code's requirement for "full transparency of all assets, liabilities and financial conduct," as well as "judicial oversight," *id.* at 48.

Stay/Preliminary Injunction. The same day, the bankruptcy court granted LTL's motion for a sweeping order that halted litigation against some 670 non-debtors, including J&J, hundreds of its affiliates, around 145 retailers (groceries, drugstores, sporting-goods stores, etc.), and 105 insurance companies that deny liability. App. 196 (PI Order 3); App. 3842-60 (PI Motion, App. B). The court noted an "unsettled" issue of subject-matter jurisdiction, App. 150 (PI Op. 11), but ruled that it could extend stay relief to non-debtors because "a lawsuit asserting talc-related claims against" those non-debtors "is essentially a suit against Debtor," *id.* at 158, and because such suits would have an "undeniable impact on Debtor's estate," *id.* at 160.

SUMMARY OF ARGUMENT

I. The bankruptcy court's refusal to dismiss LTL's bankruptcy petition was error.

A. LTL's bankruptcy petition lacks a valid bankruptcy purpose. LTL is not a going concern and the bankruptcy will not maximize value for creditors. The heart of the bankruptcy court's decision—a policy-driven argument for the superiority of bankruptcy over tort—contravenes this Court's precedents. It invades Congress's role and ignores critical values like the Seventh Amendment and the role of state courts. A desire to resolve claims in bankruptcy court cannot establish good

faith. It seeks litigation advantage. The court also ignored that the bankruptcy was designed to benefit non-debtors. And it erroneously considered the desire for bankruptcy remedies as evidence of good faith.

B. The scheme here defies the Bankruptcy Code's structure. The Code imposes important obligations on debtors, empowering the bankruptcy court to oversee assets, operations, and non-ordinary-course sales. It establishes priority among claimants. Far from effectuating those purposes, the Two-Step scheme is designed to defeat them. By placing talc liabilities in LTL and operating assets in another company just before LTL's bankruptcy, the scheme circumvents those critical protections: It leaves only talc creditors encumbered in bankruptcy, but all productive operations outside it. It affords non-debtors J&J and New JJCI the benefits of bankruptcy while evading its obligations. By converting bankruptcy courts' limited jurisdiction into a mass-tort processing machinery for entities not in financial distress, the scheme raises significant constitutional questions.

C. The bankruptcy court erroneously looked to the financial situation of an extinct non-debtor, Old JJCI, to justify LTL's bankruptcy. The bankruptcy court's outlandish estimate of defense costs was unsupported and contradicted J&J's own statements.

II. Separately, the bankruptcy court's unprecedented decision to stay or enjoin actions against some 670 non-debtors—freezing more than 38,000 talc-victim lawsuits asserting direct liability against J&J and hundreds of other non-debtors—cannot be sustained. The court lacked subject-matter jurisdiction to halt cases against non-debtors; eve-of-bankruptcy transactions cannot manufacture jurisdiction. J&J's own representations regarding the Funding Agreement preclude any finding that talc litigation against non-debtors would impede LTL's reorganization. Even if jurisdiction exists, the bankruptcy court applied an incorrect legal standard and exceeded its powers. As Judge Friendly observed, "[t]he conduct of bankruptcy proceedings not only should be right but must seem right." *In re Ira Haupt & Co.*, 361 F.2d 164, 168 (2d Cir. 1966). Shutting down the claims of more than 38,000 ill and dying talc claimants for the benefit of non-debtors—based on 11th-hour asset shifting—contravenes that principle.

ARGUMENT

Time and again, this Court has enforced the rule that "a Chapter 11 petition is subject to dismissal for 'cause' under 11 U.S.C. § 1112(b) unless it is filed in good faith." *In re SGL Carbon Corp.*, 200 F.3d 154, 162 (3d Cir. 1999); *see In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119-20 (3d Cir. 2004). This Court does not require "subjective bad faith . . . to warrant dismissals for want of good

faith." *In re 15375 Mem'l Corp. v. BEPCO, L.P.*, 589 F.3d 605, 618 n.7 & n.8 (3d Cir. 2009) (quoting *Carolin Corp. v. Miller*, 886 F.2d 693, 700-01 (4th Cir. 1989)). The good-faith inquiry focuses "more on objective analysis"; good faith is absent where, in view of "totality of facts and circumstances," the petition does not serve "a valid bankruptcy purpose" or seeks "a tactical litigation advantage." *Id.* at 618 & n.8; *see SGL*, 200 F.3d at 162.

LTL failed to meet its burden of proving good faith. *See Integrated Telecom*, 384 F.3d at 118. As the U.S. Trustee explained, LTL is a shell staffed by officers "enmeshed in the J&J family" who perform no function except to "capitulate[] and sign[] off on" J&J's strategy. App. 3013 (97:9-12) (hearing transcript). LTL functions to "exploit bankruptcy powers for non-debtor affiliates," which is "decidedly not a legitimate bankruptcy purpose." *Id.* at 3016 (100:21-22). The bankruptcy court found a valid bankruptcy purpose based on its policy judgment that bankruptcy processes are more efficient than traditional tort suits. But the desire to shift claims against the debtor and others from traditional fora—circumventing the jury trials the Seventh Amendment guarantees and the traditional role of non-bankruptcy courts—is not a valid bankruptcy purpose.

Rooted in equity, the good-faith requirement demands that debtors conform "with the Code's underlying principles." *SGL*, 200 F.3d at 161. Created just 48

hours before the bankruptcy filing, LTL evades those principles by design. By isolating talc liabilities in the made-for-bankruptcy LTL, but placing productive assets elsewhere, J&J and its affiliates seek the benefits of bankruptcy while circumventing its protections and requirements. As the U.S. Trustee put it, J&J and its affiliates demand that courts freeze and then absolve them of "tens of thousands of claims" while they "remain on the sidelines" "without placing [their] assets subject to the Code's commands." App. 3017 (101:10-14) (hearing transcript). The bankruptcy court's injunction against ***non-debtors***—enjoining suits filed by dying claimants—to implement that scheme exceeded its jurisdiction and defies Code principles.

I. THE BANKRUPTCY COURT'S DECISION DENYING THE MOTION TO DISMISS WAS LEGAL ERROR

This Court has vigorously, strictly, and repeatedly enforced the Bankruptcy Code's equitable command of objective good faith. In *SGL*, the Court reversed a good-faith determination and overturned lower-court findings. 200 F.3d at 159, 162-63. In *Integrated Telecom*, it overturned good-faith findings by the district and bankruptcy courts. 384 F.3d at 118, 129-30. And in *BEPCO*, the Court affirmed a district court's dismissal, even though the bankruptcy court had denied the motion. 589 F.3d at 616-18. The Court should enforce that command once again.

Standard of review. This Court reviews denials of motions to dismiss Chapter 11 petitions for an abuse of discretion and fact-findings for clear error. *SGL*, 200 F.3d at 159. However, "whether the . . . facts of a case support the conclusion of good faith . . ., *i.e.*, whether the application of law to fact was proper . . . is subject to plenary review because it is, essentially, a conclusion of law." *BEPCO*, 589 F.3d at 616.

A. The Bankruptcy Court Erred in Holding LTL's Petition Had a Valid Bankruptcy Purpose

A petition serves a "valid bankruptcy purpose" where bankruptcy will (i) "preserv[e] a going concern" or (ii) "maximiz[e] the value of [its] estate." *BEP-CO*, 589 F.3d at 619. Here, the court did not identify any interest in preserving LTL, the made-for-bankruptcy debtor, as a "going concern." App. 15 (MTD Op.). LTL is the opposite of a "going concern"—a shell formed only to resolve talc claims. It has "no going concerns to preserve—no employees, offices, or business other than the handling of litigation." *BEPCO*, 589 F.3d at 619.

The bankruptcy court found a valid bankruptcy purpose because bankruptcy supposedly "serve[d] to maximize the property available to satisfy creditors." App. 15 (MTD Op.). None of LTL's assets, however, were "maximized" by bank-ruptcy: Its $6 million bank account and royalty rights remain the same. And its rights under the Funding Agreement were ***diminished*** by bankruptcy: LTL lost its

right to draw on that agreement to pay talc claims on a current basis; as a result of bankruptcy, the agreement's funding is largely unavailable until there is a confirmed plan after appeals are exhausted, perhaps years down the line. *See* p. 11, *supra*.

The bankruptcy court's holding to the contrary was based on its "strong conviction that the bankruptcy court is the optimal venue" to fairly and efficiently resolve mass-tort litigation. App. 19 (MTD Op.). "In the [court's] eyes . . . the tort system produces an uneven, slow-paced race to the courthouse . . . . Present and future talc claimants should not have to bear the sluggish pace and substantial risk . . . ." *Id.* at 27. The court opined that "which judicial system" is "best" for resolving the claims—tort or bankruptcy—was a "far more significant issue" than the "valid reorganizational purpose" inquiry this Court's precedents require. *Id.* at 12-13. This Court's cases foreclose that rationale.

1. Bankruptcy's Supposed Litigation Advantages Cannot Justify a Good-Faith Filing

The Bankruptcy Code is properly invoked to effect reorganizations or dissolutions of distressed debtors. It is not an alternative dispute resolution system for debtors who—otherwise lacking a valid bankruptcy purpose—deem litigation too expansive or expensive. "[T]he fact that a given law or procedure is efficient, convenient, and useful" cannot justify the claims being adjudicated in bankruptcy. *Stern v. Marshall*, 564 U.S. 462, 501 (2011).

This Court has repeatedly made that clear. In *SGL*, the debtor confronted antitrust lawsuits, including a class action. 200 F.3d at 156-57. The district court allowed the bankruptcy to proceed because "the Debtor ha[d] expressed its hope that its Chapter 11 filing will facilitate a speedy and efficient resolution to the pending litigation." 233 B.R. 285, 290-91 (D. Del. 1999). This Court reversed, explaining that the "[b]ankruptcy provisions are . . . not intended to be used as a mechanism to orchestrate pending litigation." 200 F.3d at 165.

In *Integrated Telecom,* the debtor argued that its bankruptcy would avoid "the costs and delay inherent in litigation." Appellee's Br., No. 04-2411, 2004 WL 5020971 (3d Cir. July 7, 2004). This Court rejected that argument and explained that it could "identify no value . . . that was threatened outside of bankruptcy . . . but that could be preserved or maximized" under Chapter 11. 384 F.3d at 122.

In *BEPCO*, the debtor likewise argued that its "valid bankruptcy purpose[ ]" was "to efficiently and cost effectively resolve and liquidate . . . pending and future claims" and to distribute "assets on a fair and equitable basis." Appellants' Br., Nos. 09-1391, 09-1432, 09-1608, 2009 WL 5635433 (3d Cir. May 6, 2009). Agreeing, the bankruptcy court held that "[l]itigating these, and other claims, in Bankruptcy Court is the most efficient way to resolve them." 382 B.R. 652, 686 (Bankr. D. Del. 2008). This Court again rejected that theory: The "creation of a central forum to

adjudicate claims against the Debtors is not enough to satisfy the good faith inquiry." 589 F.3d at 622.

As in those cases, the bankruptcy court here invoked the putative superiority of bankruptcy as a means of resolving litigation claims. App. 23-27 (MTD Op.). In its view, "which judicial system—the state/federal court trial system, or . . . chapter 11 reorganization"—"best" serves "the interests of this bankruptcy estate" was a "far more significant issue" than the considerations this Court has identified. *Id.* at 12-13. Once again, this Court should reject that rationale. Congress has not authorized bankruptcy courts to extend their authority based on distaste for traditional judicial mechanisms or preference for alternatives. The bankruptcy court's contrary decision elevated its policy preferences over the will of Congress.

While the absence of a bankruptcy purpose alone dooms the petition, the effort to move cases to bankruptcy court to avoid ordinary tort procedures is at the extreme end of the "spectrum," *SGL*, 200 F.3d at 162—an impermissible effort to achieve a "litigation advantage," *Integrated Telecom*, 384 F.3d at 120. In *SGL*, this Court held that unequal treatment of litigation creditors (compared to other creditors) shows the petition was "filed ***solely*** to gain tactical litigation advantages." 200 F.3d at 167. Here, J&J's scheme leaves only talc creditors encumbered by the bankruptcy; all

other creditors are preferred and can pursue payment outside bankruptcy from New JJCI. More blatant inequality is hard to imagine.

In *SGL*, the Court explained that a "petition may be dismissed" if "the timing of the filing" leaves "no doubt that the primary, if not sole, purpose of the filing was a litigation tactic." 200 F.3d at 165; *see BEPCO*, 589 F.3d at 625. Here, J&J's Two-Step scheme was a direct response to litigation setbacks, "especially" the Supreme Court's denial of certiorari in *Ingham*. App.4469 (J&J Treasurer email); pp. 8-9, *supra*. And LTL filed for bankruptcy 48 hours after its creation, without any consideration for whether bankruptcy made sense. As the U.S. Trustee has explained, LTL's officers simply did as J&J directed. App.3013 (97:8-16) (hearing transcript); pp. 12-13, *supra*.

This case is thus like *BEPCO*, where "the Debtors' representative was primarily concerned with protecting the [non-debtor parents], ***not the Debtors***." 589 F.3d at 624. There, the debtors' decisionmakers were "employed by" the non-debtor parent; "the Debtors' decision to file for bankruptcy was not their own"; and the non-debtor parent "was ultimately in control of whether the Debtors filed." *Id.* at 624-25. The same is true here.

J&J has made clear that the goal is to protect J&J, not creditors. Unless the preliminary injunction against further litigation covers J&J and its affiliates, it urged,

"[t]he entire purpose of this case" "would be thwarted." App. 4219 (Debtors' Omnibus Reply in Support of PI 51). J&J's control dwarfs the non-debtor's role in *BEPCO*:

- J&J orchestrated the restructuring and bankruptcy, without meaningful participation by Old JJCI. *See* pp. 11-12, *supra.*
- The bankruptcy was to "cap[]" J&J's "talc liability" while avoiding "impact on [its] credit rating." App. 4469 (J&J Treasurer email).
- LTL's board and management were all former and current J&J employees who, in the U.S. Trustee's words, were "enmeshed" in J&J's operations. App. 3013 (97:9-11) (hearing transcript).
- LTL's board did not receive basic information about LTL's liquidity, such as the scope of talc liabilities or the value of the Funding Agreement. *See* p. 13, *supra*.
- The LTL board voted to file for bankruptcy, even though that denied it access to billions of dollars in liquidity until a bankruptcy plan is confirmed. *See* p. 11, *supra.*

BEPCO makes this an *a fortiori* case. The bankruptcy here operates to benefit non-debtors by design.

2. The Bankruptcy Court Exceeded Its Proper Role by Making Ad Hoc Policy Judgments About Bankruptcy's Supposed Advantages over the Ordinary Civil Justice System

By invoking the supposed superiority of bankruptcy processes over traditional litigation, the bankruptcy court exceeded its institutional role. Such policy decisions are for Congress. Courts lack "professional staff with appropriate expertise" in

gathering and analyzing "empirical data and national experience." *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). There are critical institutional values beyond efficiency, including the centrality of the Seventh Amendment jury-trial right and the importance of state-court trials in our federal system. "[C]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). The bankruptcy court overlooked those other values entirely.

This Court has recognized that Congress must make the policy choices about how to resolve mass-tort claims. In *Georgine v. Amchem Prods., Inc.*, 878 F. Supp. 716 (E.D. Pa. 1994), the district court approved an asbestos class-action settlement because claims resolution under that court-approved compensation scheme would "lower costs, shorten delays, produce consistent results, and provide assurance that compensation will be available." *Id.* at 723-24. This Court reversed, holding such considerations irrelevant:

> The desirability of innovation in the management of mass tort litigation does not escape the collective judicial experience of the panel. But reform must come from the policy-makers, not the courts.

Georgine v. Amchem Prods., Inc., 83 F.3d 610, 634 (3d Cir. 1996). The Supreme Court agreed. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997). This case calls for the same conclusion.

The bankruptcy court admitted that the relative merits of bankruptcy and traditional tort systems have been "the subject of academic, judicial, and policy debates for years." App. 13 (MTD Op.). ***J&J itself*** has switched its views. In Imerys's talc-related bankruptcy in 2019, J&J touted "the process of efficient adjudication by the MDL court" in handling talc litigation. App. 7094 (J&J Brief 3). It rejected any suggestion that litigation would require "individual trials *ad infinitum*," dismissing that "parade of horribles" as "ill-conceived and disproven by the fact that thousands of state-law claims are currently centralized in the MDL court." App. 7114 (J&J Reply Brief 38). Only after J&J lost its motion to exclude talc claimants' scientific testimony in the MDL in April 2020, and the Supreme Court declined review of *Ingham* in June 2021, did J&J's opposition to the civil justice system materialize. *See* pp. 7-8, *supra*.

The Article I bankruptcy court's denigration of the congressionally established Article III MDL process, *see* App. 23-24, 55 (MTD Op.), illustrates the dangers of ad hoc judicial assessments. MDL proceedings have successfully resolved mass torts, centralizing nearly 1 million lawsuits without depriving claimants of traditional rights. *See* App. 1938 (Law Professors' Amicus Br. 7). Ninety percent involved product-liability mass-tort claims. *Id.* at 1939. MDLs resolved nearly 14,000 cases in 2019 alone. *Id.* at 1942. Bellwether cases can establish facts

regarding liability, causation, and damages, making settlement parameters clear. MDL-875 has resolved over 186,000 asbestos cases since 2006 ***without*** a global settlement.[1] As the Federal Judicial Center noted, even though asbestos involves "latent claims," "[a]s symptoms of those injuries become manifest, the cases are routinely filed and, apparently, settled."[2] *See* Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 100 (2013). While the debate has two sides, the propriety of a bankruptcy petition cannot depend on a bankruptcy court's ad hoc policy views about the benefits of claims processing in bankruptcy.

3. The Bankruptcy Court's Assessment Rests on Flawed Assumptions

The bankruptcy court's assessment of the virtues of the bankruptcy system suffered from other fatal flaws. For example, the court invoked the availability of a settlement trust and channeling injunction for present and future asbestos claimants under 11 U.S.C. § 524(g). App. 28-29 (MTD Op.). But the "desire to take advantage

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[1] Summary Statistics, United States District Court Judicial Panel on Multidistrict Litigation (June 30, 2019), https://www.paed.uscourts.gov/documents/MDL/MDL875/MDL-875.jun30.2019.pdf.

[2] Individual Characteristics of Mass Torts Case Congregations, A Report to the Mass Torts Working Group at 12, Fed. Jud. Ctr. (Jan. 1999), https://www.uscourts.gov/sites/default/files/masstapd_1.pdf.

of" any "particular provision in the Bankruptcy Code, standing alone," does not establish good faith. *Integrated Telecom*, 384 F.3d at 127. Section 524(g) is a ***remedy*** in connection with a confirmed plan. *See In re Federal-Mogul Glob. Inc.*, 684 F.3d 355, 359-62 (3d Cir. 2012). The "question of good faith is . . . antecedent to the operation" of any bankruptcy remedy. *Integrated Telecom*, 384 F.3d at 128.

Moreover, the bankruptcy court did not establish that § 524(g) would be available. A § 524(g) trust and injunction require a plan approved by 75% of the debtor's asbestos claimants. *See In re Combustion Engineering, Inc.*, 391 F.3d 190, 201 n.4 (3d Cir. 2004) (citing § 524(g)(2)(B)(ii)(IV)(bb)). The bankruptcy court cannot predict such support. And § 524(g) relief is limited to debtors who, "at the time of entry of the order for relief"—*i.e.*, as of the petition date[3]—were "named as . . . defendant[s]" in an asbestos lawsuit. *See* § 524(g)(2)(B)(i)(I); *Combustion Engineering*, 391 F.3d at 234 n.45. For the unusual debtor here—LTL—that was not the case. When it filed for bankruptcy, it had existed for 48 hours; it was named in no asbestos suits. App. 1020-21 (244:24-245:1) (Kim Testimony). Suits against Old JJCI, a distinct entity with different assets, do not qualify.

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[3] 11 U.S.C. § 301(b) ("The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.").

The bankruptcy court opined that, if § 524(g) did not apply, it could enter a channeling injunction under § 105. App. 9, 18, 29 (MTD Op.). But this Court has already held that § 105(a) cannot sustain "a channeling injunction to non-debtors in an asbestos case where the requirements of § 524(g) are not otherwise met." *Combustion Engineering*, 391 F.3d at 233-34.

B. The Scheme Defies the Code's Structure and Principles

To meet the good-faith requirement, "[a] debtor who attempts to garner shelter under the Bankruptcy Code . . . must act in conformity with the Code's underlying principles." *SGL*, 200 F.3d at 161. A petition that "objective[ly]" seeks "to step outside the 'equitable limitations' of Chapter 11," *BEPCO*, 589 F.3d at 618 n.8, is not a good-faith petition.

That describes LTL's petition precisely. Far from effectuating the Code's requirements, it evades them by design. As the U.S. Trustee pointed out, the Two-Step scheme—by which J&J put Old JJCI's talc ***liabilities*** but ***not*** Old JJCI's ***operations*** into bankruptcy—eviscerates the Code's protections. It gives New JJCI and its owners the benefits of bankruptcy without the corresponding obligations.

1. LTL's Structure Evades Traditional Bankruptcy Protections

The Bankruptcy Code reflects a "careful balancing of interests." *Integrated Telecom,* 384 F.3d at 119. "Chapter 11 vests petitioners with considerable powers—

the automatic stay, . . . the discharge of debts, etc.—that can impose significant hardship on particular creditors." *SGL*, 200 F.3d at 165. Concomitantly, the Code imposes important obligations on debtors. As the bankruptcy court explained, the Code "requires full transparency of all assets, liabilities and financial conduct through scheduling and reporting." App. 48 (MTD Op.); *see* 11 U.S.C. § 521. The Code provides "judicial oversight over all non-ordinary course of business conduct," such as asset sales and distributions. App. 48 (MTD Op.); *see* § 363. It imposes an "absolute priority rule" under which equity holders can "receive nothing until all previously listed creditors have been paid in full." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017) (citing §§ 726(a)(6), 1129(a)(7), 1129(b)(2)). And it vests courts with power to control ***all*** the debtor's non-exempt property and ongoing operations. *See In re Venoco LLC*, 998 F.3d 94, 99 (3d Cir. 2021); § 1104(a) (power to appoint trustee); Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 Tenn. L. Rev. 487, 526 (1996).

The Two-Step scheme here end-runs those protections. J&J and its affiliates faced mass-tort liability for their misconduct. But they now seek "to cleanse" themselves of that "liability without enduring the rigors of bankruptcy." *Combustion Engineering*, 391 F.3d at 237. They created LTL, assigned LTL talc liabilities, and promptly placed LTL alone in bankruptcy—while keeping Old JJCI's valuable

operating assets outside bankruptcy in New JJCI. By doing so, they defeated any transparency into virtually all of Old JJCI's "assets, liabilities and financial conduct through scheduling and reporting." App. 48 (MTD Op.).

The Two-Step scheme likewise frustrates bankruptcy-court supervision over assets, including non-ordinary-course sales under § 363. That bankruptcy encumbrance now applies only to LTL, which received no operating assets. By contrast, "[t]he funding agreement [was] structured in a way that [New] JJCI can 'spin out' the [consumer-health] assets up the chain or to a new [legal entity] and be unencumbered going forward." App. 4634 (J&J email); *see* App. 4463 (J&J press release). By allocating talc liability to LTL but operational assets to New JJCI, the Two-Step puts operating assets—the ones responsible for liability here—beyond bankruptcy court supervision.

The scheme also upends the "absolute priority" rule, which gives creditors priority over equity. Under the Two-Step, New JJCI—holding Old JJCI's assets—remains outside bankruptcy-court control and can freely distribute its substantial earnings to parent companies and shareholders (principally J&J). J&J, in turn, has paid on average $10-11 billion in shareholder dividends in the six years before LTL's bankruptcy, and continues to pay hefty dividends. App. 3570 (11:9-16) (Ryan

Dep.).[4] By contrast, talc claimants are mired in LTL's bankruptcy. The good-faith inquiry "is particularly sensitive where, as here, the petition seeks to distribute value directly from a creditor to a company's shareholders." *Integrated Telecom*, 384 F.3d at 128-29. Even same-level creditors are treated unequally. Talc claimants are frozen in bankruptcy, while Old JJCI's trade creditors and non-talc unsecured creditors remain outside bankruptcy.

LTL's scheme removes judicial control over going-concern management. New JJCI—holding Old JJCI's businesses—remains outside bankruptcy, making management decisions free from bankruptcy-court supervision. That destroys a critical incentive for debtors to emerge from bankruptcy proceedings promptly: avoiding the constraints of operating in bankruptcy. App. 4678 (Burian Report 41). Operating Old JJCI's business units outside bankruptcy, New JJCI is indifferent to the bankruptcy's duration; LTL has no business and no purpose outside bankruptcy. They lack any incentive to negotiate or press forward. Indeed, other Two-Step debtors have yet to emerge from bankruptcy. *See In re Bestwall LLC*, No. 17-31795

[4] 2022 First Quarterly Dividend Announcement, Johnson & Johnson (Jan. 4, 2022), https://www.jnj.com/johnson-johnson-announces-quarterly-dividend-for-first-quar ter-2022.

(Bankr. W.D.N.C.) (petition filed 11/2/2017); *In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C.) (petition filed 1/23/2020).

The bankruptcy court's invocation of the Funding Agreement as a substitute for placing Old JJCI's business assets into bankruptcy, *see* App. 31-32, 43-45 (MTD Op.), compounds the error. It does not cure the evasion of the protections discussed above. And the Code expects debtors to surrender control of their assets to the court. It does not license them to evade that requirement, and move all productive assets beyond bankruptcy, by offering an unsecured funding promise in their stead. *Contrast* 11 U.S.C. §1129(b)(2)(A)(iii) (plan can provide for "indubitable equivalent" of secured claims). The Funding Agreement, a contractual obligation of New JJCI and J&J, App. 44 n.27 (MTD Op.), is no substitute regardless. Before the Two-Step scheme, talc claimants had property rights in Old JJCI, enforceable by judgment lien. The Two-Step leaves them with a right against a different party, LTL, that holds an unsecured promise it would have to enforce against the original tortfeasors (which control LTL).

"A debtor . . . who invokes the aid of the federal courts in reorganization or rehabilitation . . . assumes all of the consequences which flow from that jurisdiction." *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 125 (1939). Where the debtor was created to evade bankruptcy's statutory scheme—to circumvent rather than "con-

form[ ] with the Code's underlying principles"—the equitable requirement of good faith is absent. *SGL*, 200 F.3d at 161.

This case is fundamentally different from other mass-tort bankruptcies where debtors, facing liability for their own conduct, themselves filed for bankruptcy. *See, e.g.*, *In re Johns-Manville*, 36 B.R. 727, 738 (Bankr. S.D.N.Y. 1984) ("a real business with real creditors in pressing need of economic reorganization"); *In re Dow Corning Corp*., 244 B.R. 673, 677 (Bankr. E.D. Mich. 1999) ("'a real company with real debt, real creditors and a compelling need to reorganize'"); *In re Mallinckrodt PLC*, — B.R. —, No. 20-12522, 2022 WL 404323, at *1 (Bankr. D. Del. Feb. 8, 2022). LTL is a shell created by wealthy tortfeasors to move talc liabilities into bankruptcy, while keeping themselves, their productive assets, and other liabilities outside bankruptcy.

Former bankruptcy judge Judith Fitzgerald, who presided over more asbestos bankruptcies during her tenure than any other bankruptcy judge, made precisely that point:

> If the pre-merger company is so inundated with claims from victims of the company's wrongdoing that it faces economic ruin, it should use the statute that Congress has passed and file its own bankruptcy—put its assets and its liabilities up for public scrutiny and court supervision . . . . The bankruptcy system should not be used by a non-debtor as an artifice or stratagem to escape the requirements

> Congress has instituted to relieve the honest but unfortunate debtor from true financial woes.

Written Testimony of Hon. Judith Fitzgerald at 9, Sheldon Whitehouse U.S. Senator for Rhode Island (Feb. 8, 2022), https://www.whitehouse.senate.gov/imo/media/doc/Fitzgerald%20Testimony.pdf.

The bankruptcy court acknowledged the Code's requirements, from the listing of assets to court supervision of non-ordinary-course conduct. App. 48-49 (MTD Op.). It nowhere denied that the Two-Step scheme sidestepped those requirements. *Id.* But the court questioned their value given "the attention this case is receiving" from media and counsel. *Id.* The court assailed the consequences of placing the actual tortfeasors into bankruptcy as administratively costly and risking "too much value." *Id.* at 47. But "courts cannot deviate from the procedures 'specified by the Code,' even when they sincerely 'believ[e] that . . . creditors would be better off.'" *Jevic*, 137 S. Ct. at 987. Nor can they license circumvention of legislative choices. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015). Supposed compliance with the Texas merger statute cannot answer the "good faith" question either. App. 42, 51 (MTD Op.). ***How*** Old JJCI accomplished its line-item bankruptcy cannot license efforts to "step outside" Chapter 11's "equitable limitations." *BEPCO*, 589 F.3d at 618 n.8; *see In re Primestone Inv. Partners L.P.*, 272 B.R. 554, 558 (D. Del. 2002) (affirming dismissal where there was "nothing inherently

improper" about debtor's form). In bankruptcy, "substance will not give way to form." *Pepper v. Litton*, 308 U.S. 295, 305 (1939).

2. The Scheme Threatens the Public Interest and Raises Serious Constitutional Questions

As the bankruptcy court acknowledged, its decision has implications for "restructurings beyond" this case. App. 3764-65 (74:21-75:8) (hearing transcript). Under the Two-Step blueprint, any company could shed tort or other liabilities in bankruptcy while avoiding Bankruptcy Code requirements.

Addressing concerns about " 'open[ing] the floodgates' to similar machinations," the bankruptcy court suggested that "maybe the gates indeed should be opened." App. 52. Alternatively, it speculated that only sophisticated corporations could engineer Two-Step transactions. *Id.* But Congress did not create a two-tier Bankruptcy Code, with one set of rules for well-heeled companies able to afford evasive maneuvers, and another for everyone else. Besides, "[o]nce the floodgates are opened" and the model is established, "debtors . . . can be expected to make every case that 'rare case.' " *Jevic*, 137 S. Ct. at 986.

The scheme raises serious constitutional questions. Because "bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts," "their ability to resolve such matters is limited to a narrow class of common law claims as an incident to [their] primary . . . adjudicative function" of

handling bankruptcies. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679-80 (2015); *see Stern*, 564 U.S. at 494-95. The Two-Step scheme tests those constitutional limits: It transfers traditional state-law claims to bankruptcy court using a shell entity manufactured for bankruptcy. Talc claimants are deprived of their "Seventh Amendment right to try [their] . . . claims before a jury" without a corresponding bankruptcy justification. *SGL*, 200 F.3d at 169 n.23. The canon of constitutional avoidance requires courts to avoid so testing constitutional limits. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

C. The Bankruptcy Court's Finding of "Financial Distress" Was Reversible Error

A valid bankruptcy purpose exists, moreover, only if ***the debtor*** is experiencing "serious financial and/or managerial difficulties at the time of filing." *SGL*, 200 F.3d at 164.

1. Old JJCI's Financial Situation Was Irrelevant

The bankruptcy court found financial distress because ***non-debtors*** "J&J and Old JJCI were . . . facing a torrent of significant talc-related liabilities . . . ." App. 40; *id.* at 14, 33-40 (MTD Op.). But any financial distress of non-debtors is irrelevant. What matters is the debtor's situation. In *SGL*, for example, this Court repeatedly referred to the bankruptcy "petitioner" (11 times) and "debtor" (29 times); "if a ***petitioner*** has no need to rehabilitate or reorganize," the Court emphasized, "its

petition cannot serve [Chapter 11's] rehabilitative purpose." 200 F.3d at 166 (emphasis added). Likewise, *BEPCO* found that running a bankruptcy to protect non-debtors supports dismissal. 589 F.3d at 609, 620-24.

Here, the bankruptcy court found that talc litigation could have "threaten[ed] ***Old JJCI's*** ability to sustain the marketing, distribution, and R&D expenditures needed to compete in the U.S. market." App. 33 (MTD Op.) (emphasis added). But ***Old JJCI*** no longer exists. App. 448 (Kim Decl. ¶ 16). The debtor here, LTL, faces ***none*** of those risks. It engages in no marketing, distribution, R&D, or manufacturing. Either LTL's financial circumstances should be judged independently or Old JJCI should have filed for bankruptcy itself. Old JJCI's situation cannot justify putting a different debtor into bankruptcy while keeping Old JJCI's productive assets—held by New JJCI—beyond bankruptcy control. Characterizing the restructuring and the bankruptcy as "a single, pre-planned, integrated transaction," App. 14 (MTD Op.), does not convert an effort to evade bankruptcy requirements into a good-faith filing.

2. The Bankruptcy Court Applied the Wrong Legal Standard

Invoking out-of-circuit precedent, the bankruptcy court stated that the "Code does not 'require any ***particular degree*** of financial distress . . . .'" App. 38. But this Court has emphasized that there must be "immediate" and "serious financial . . .

difficulties at the time of filing." *SGL*, 200 F.3d at 164. In *Johns-Manville*, the debtor faced the prospect of "book[ing] a $1.9 billion reserve thereby triggering potential default on a $450 million debt." 200 F.3d at 164. In *A.H. Robins*, "Robins' financial picture had become so bleak that financial institutions were unwilling to lend it money." *In re A.H. Robins Co.*, 89 B.R. 555, 558 (Bankr. E.D. Va. 1988); *see SGL*, 200 F.3d at 164 n.15.

SGL reversed a finding of financial distress, even though antitrust plaintiffs there sought "hundreds of millions of dollars in damages, before trebling, an amount well in excess of the Debtor's ability to pay." 233 B.R. at 287. That "potential liability," the district court had found, "could very well force [the debtor] out of business." *Id.* at 291. While acknowledging "that a debtor need not be insolvent," this Court reversed. *SGL*, 200 F.3d at 163. "Whether or not [debtor] faces a potentially crippling antitrust judgment, it is incorrect to conclude it had to file when it did. As noted, [debtor] faces no ***immediate*** financial difficulty." *Id.* (emphasis added).

The requirement of "serious" and "immediate" financial distress confines federal bankruptcy jurisdiction to its constitutionally circumscribed role—adjusting rights and liabilities for genuinely distressed debtors. It prevents wealthy companies facing only speculative risks from converting bankruptcy into an alternative claims-

processing regime at the cost of Seventh Amendment rights and federalism principles.

3. No Finding of Financial Distress Is Sustainable as to LTL

The bankruptcy court made no finding of "immediate" and "serious" financial distress for LTL. When LTL filed for bankruptcy, it had not been presented with a single talc judgment to pay. The Funding Agreement recited that LTL had "financial capacity sufficient to satisfy its obligations as they become due in the ordinary course of business, including any Talc Related Liabilities." App. 4229-30 (Funding Agreement 1-2). LTL told the bankruptcy court that the Funding Agreement provides $61 billion in liquidity and that there is no "imminent or even likely need of the Debtor to invoke the Funding Agreement to its maximum amount or anything close to it." App. 3747 (Debtor's Obj. to Mots. for Certification 22); *see* p. 11, *supra*. Those representations, if assumed correct, require dismissal.

LTL's board, moreover, lacked sufficient information to make a judgment of "financial distress" when it filed for bankruptcy. For example, the board was never provided with estimates of talc liabilities or analyses of the Funding Agreement's value. *See* pp. 12-13, *supra*. The assertion of financial distress was manufactured during bankruptcy. It rested on speculation that "[d]efending just the over 38,000 pending ovarian cancer claims through trial would cost up to $190 billion," assuming

costs between $2 million and $5 million to try each case. App. 37 (MTD Op.). But J&J never tried every case; there is no evidence LTL would. J&J's treasurer told Standard & Poor's in October 2020 that the "worst case" talc liability was between $7 billion and $7.5 billion. App. 3423 (35:10-36:19) (Kaplan Dep.); *see* App. 4766-67 (S&P Oct. 13, 2020 Notes).

D. The Court's "Unusual Circumstances" Holding Was Erroneous

The bankruptcy court asserted that "unusual circumstances" preclude dismissal under § 1112(b)(2), invoking "the interests of current tort creditors and the absence of viable protections for future tort claimants outside of bankruptcy." App. 13 n.8 (MTD Op.). Whether dismissal is in ***creditors'*** best interests, however, is best answered by ***creditors***—virtually all of whom sought dismissal. *See* App. 1726-1804, 1864-71 (Claimants' Motions to Dismiss).[5] When this Court finds good faith absent, it orders dismissal. *SGL*, 200 F.3d at 159 n.8.

The bankruptcy court also failed to address § 1112(b)(2)'s other requirements. Neither LTL nor any other party established "a reasonable likelihood that a plan will be confirmed" within the statutory period. § 1112(b)(2)(A). Even the bankruptcy court found the "success of Debtor's reorganization [was] speculative." App. 186 (PI

[5] An opposition, App. 1968-69, was filed on behalf of the proposed representative of an uncertified Canadian class-action.

Op. 47). There is no "reasonable justification" for the LTL act supporting dismissal—filing a petition without a valid bankruptcy purpose while seeking to evade the Code's requirements. § 1112(b)(2)(B)(i). And those circumstances cannot be "cured within a reasonable period of time." § 1112(b)(2)(B)(ii).

Regardless, the bankruptcy court's preference for bankruptcy over traditional handling of mass torts, App. 13 n.8 (MTD Op.), is not the type of "objective analysis" courts can consider. *Cf. BEPCO*, 589 F.3d at 618 n.8; *see* p. 19, *supra*. If that sufficed, "unusual circumstances" would encompass any policy preferences for dispute resolution in bankruptcy.

II. THE BANKRUPTCY COURT COMMITTED LEGAL ERROR IN FREEZING TENS OF THOUSANDS OF SUITS AGAINST HUNDREDS OF NON-DEBTORS

After structuring their eve-of-bankruptcy transactions to put ***only LTL*** into bankruptcy—and to exclude J&J and New JJCI—J&J and New JJCI asked the bankruptcy court to stay actions against J&J, New JJCI, and some 670 other non-debtors in view of LTL's bankruptcy. Even though the automatic stay under § 362 extends only to actions against ***the debtor***, the bankruptcy court granted the request, halting more than 38,000 talc lawsuits asserting direct liability claims against hundreds of ***non-debtors*** (where the debtor was not a named defendant). It froze cases in a federal MDL and state courts across the country, even during trial, shutting

down relief for rapidly failing and now-deceased plaintiffs. *See, e.g.*, App. 597-99 (Vanklive Objection). Over 300 talc claimants represented by TCC firms have died since that order issued, never having had their day in court. App. 3775 (TCC Statement 9).

No court of appeals has ever approved such a sweeping extension of relief. The bankruptcy court here found it had jurisdiction under bankruptcy provisions governing "core" and "related-to" proceedings but overlooked precedent foreclosing those theories. And the court lacked a factual or legal basis for an injunction of that magnitude.

Standard of review. This Court exercises plenary review over subject-matter jurisdiction. *Combustion Engineering*, 391 F.3d at 224 n.34. The Court reviews "legal determinations de novo, . . . factual findings for clear error, and . . . exercise of discretion for abuse thereof." *In re Cont'l Airlines*, 203 F.3d 203, 208, 213 (3d Cir. 2000).

A. The Bankruptcy Court Lacked "Core" Jurisdiction To Enjoin Tens of Thousands of Suits Against Non-Debtors

The *sine qua non* for federal court action is subject-matter jurisdiction. *Temple Univ. Hosp., Inc. v. Sec'y U.S. Dep't of Health & Hum. Servs.*, 2 F.4th 121, 130 (3d Cir. 2021). Here, the bankruptcy court asserted authority to freeze actions against non-debtors under § 362(a)—which authorizes stays of actions ***against the***

debtor—together with its authority under § 105 to enter "necessary or appropriate" relief. *See* App. 147-52 (PI Op. 8-13). The court recognized that this Court had "not addressed" how the Code's jurisdictional provision, 28 U.S.C. § 1334(b), would cover such relief. App. 152 (PI Op. 13).

1. The bankruptcy court first held that § 1334(b)'s provisions relating to "'core' proceedings" gave it jurisdiction over actions against non-debtors. App.151 (PI Op. 12). Those provisions provide jurisdiction over "(1) cases 'under' title 11; (2) proceedings 'arising under' title 11; [and] (3) proceedings 'arising in' a case under title 11." *Id.* (quoting *Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir. 2006)). Efforts "to extend an automatic stay and injunction to non-debtor third parties pursuant to sections 362 and 105," the court ruled, "qualify as 'core' proceedings" over which it "can exercise jurisdiction." *Id.* at 152-53 (PI Op. 13-14).

That was error. "Whether a proceeding is a 'core' proceeding that 'arises under' title 11 depends upon whether the Bankruptcy Code creates the cause of action or provides the substantive right invoked." *Stoe*, 436 F.3d at 217. In *Stoe*, this Court held there was no "core" jurisdiction over state-law claims removed to federal court under 28 U.S.C. § 1452, because the underlying claims arose under state law, "not under the Bankruptcy Code." *Id.* "The Bankruptcy Code did not create [plaintiff] Stoe's cause of action." *Id.* That reasoning applies here. Talc

litigation against non-debtors arises under state law, App. 5242-5284 (MDL Second Amended Complaint), not the Bankruptcy Code.

The bankruptcy court erroneously looked to the statutory provision LTL invoked to support its ***claim for stay relief***—the fact that §§ 362 and 105 are bankruptcy provisions—while ignoring the basis for the state-court and federal MDL talc ***cases LTL sought to enjoin***. This Court rejected that approach in *In re W.R. Grace & Co.*, 591 F.3d 164 (3d Cir. 2009). There, the debtor argued that "the Bankruptcy Court does not need related-to jurisdiction over the [state-court] Actions in order to enjoin them, because the Court's jurisdiction over the adversary proceeding in [debtor's] Chapter 11 case is sufficient to provide it with a basis for expanding the § 105(a) injunction" to non-debtors. *Id.* at 174. This Court rejected that argument because it would give "a bankruptcy court . . . power to enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as the injunction motion was filed in the adversary proceeding." *Id.*

The bankruptcy court made the same mistake here. The question is not the statutory basis for requested ***bankruptcy relief***. It is the court's subject-matter jurisdiction over ***the cases LTL seeks to enjoin***. The court invoked the facts that the relief was sought "under the Bankruptcy Code" and that bankruptcy stay proceedings "arise only in the context of a bankruptcy case." App. 152-53 (PI Op. 13-

14). If that sufficed, bankruptcy courts would have jurisdiction to stay ***any case, with or without any relation to bankruptcy***. *See W.R. Grace*, 591 F.3d at 174. "Neither the Bankruptcy Code nor . . . the [bankruptcy] Plan" is the "source of the bankruptcy court's subject matter jurisdiction." *In re Resorts Int'l, Inc.*, 372 F.3d 154, 161 (3d Cir. 2004). Determining jurisdiction based on the relief sought would impermissibly allow LTL to write its "own jurisdictional ticket." *Id.* *Stoe* and *W.R. Grace* foreclose that extravagant extension of "core" bankruptcy jurisdiction.

2. Nor can expansive relief for non-debtors be characterized as an application of § 362's automatic stay. "[T]he clear language of section 362(a) indicates that it stays only proceedings ***against*** a 'debtor'—the term used by the statute itself." *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991); *see McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 509 (3d Cir. 1997) (similar). Insofar as the question is "unsettled," App. 150 (PI Op. 11), that statutory text should control. To stay tens of thousands of cases against ***non-debtors***, the bankruptcy court had to invoke § 105 authority for "necessary or appropriate" orders.

Indeed, the "courts cited by *McCartney* . . . relied on 11 U.S.C. § 105(a), not § 362(a), to enjoin the actions against the non-bankrupt parties." *Stanford v. Foamex L.P.*, Civ. A. 07-4225, 2009 WL 1033607, at *1 n.7 (E.D. Pa. Apr. 15, 2009). Such orders, "although referred to as extensions of the automatic stay, were in fact

injunctions issued by the bankruptcy court" under § 105. *Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993). Section 105(a), however, is not about "core" proceedings and "does not provide an independent source of federal subject matter jurisdiction"; that jurisdiction must be established separately. *Combustion Engineering*, 391 F.3d at 225. Enjoining state-law actions against non-debtors is not a "core proceeding" under the Code.

B. The Bankruptcy Court Lacked "Related-To" Jurisdiction To Enjoin Cases Against Non-Debtors

The bankruptcy court alternatively invoked "related-to" jurisdiction under § 1334(b). App. 153-54 (PI Op. 14-15). Four times—in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 986 (3d Cir. 1984), *In re Federal-Mogul Glob. Inc.*, 300 F.3d 382 (3d Cir. 2002), *Combustion Engineering*, and *W.R. Grace*—this Court has enforced strict limits on "related-to" bankruptcy jurisdiction. Four times, this Court has rejected efforts to enjoin asbestos suits against non-debtors under "related-to" jurisdiction, even where the suits might trigger indemnification claims against the debtor. *Id.*

"Related-to" jurisdiction depends on "whether the allegedly related lawsuit would affect the bankruptcy ***without*** the intervention of yet ***another lawsuit***." *Federal-Mogul*, 300 F.3d at 382 (emphasis added). In *Combustion Engineering*, the Court rejected the argument that the debtor and non-debtors had a "unity of interest" based on "joint operations at single sites leading to the asbestos personal injury

claims at issue" and "extensive financial inter-dependence." 391 F.3d at 213, 230. Any "potential indemnification and contribution claims by non-debtors" are insufficient for "related-to" jurisdiction because they "would require another lawsuit before they could affect" the debtor's estate. *Id.* at 227. Shared insurance cannot provide a basis for "related-to" jurisdiction absent "findings regarding the terms and operation of the subject policies." *Id.* at 232-33. And made-for-bankruptcy agreements between the parties, like those here, are insufficient. Subject-matter jurisdiction "cannot be conferred by consent of the parties" or "agreement even in a plan of reorganization." *Id.* at 228. The bankruptcy court's finding of "related-to" jurisdiction here defies *Combustion Engineering*.

1. Manufactured Grounds for "Related-To" Jurisdiction Cannot Support Jurisdiction

"[N]o action of the parties can confer subject-matter jurisdiction upon a federal court." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *see* 28 U.S.C. § 1359; *In re Maislin Indus., U.S., Inc.*, 66 B.R. 614, 617 (E.D. Mich. 1986). Here, the bankruptcy court found "related-to" jurisdiction because LTL "is liable for the talc claims as the result of pre-petition corporate transactions, including the 2021 Corporate Restructuring, and various contractual indemnification obligations." App. 153 (PI Op. 14). But the bankruptcy court accepted the premise that LTL's indemnity obligations were "'based ***solely*** on the

allocation of agreements to the debtor on the ***eve of the bankruptcy*** filing ***for the very purpose of extending the stay***.'" *Id.* at 159 (emphasis added). LTL's assets "were all created to effectuate a bankruptcy filing and have no other business purpose." App. 1514 (Transfer Order 9).

Such efforts to fabricate subject-matter jurisdiction—through related-party transactions on the bankruptcy courthouse steps—cannot suffice. In *Combustion Engineering*, the parties sought to support a channeling injunction by invoking the non-debtors' agreement to provide financial support to the debtor. This Court rejected the effort. 391 F.3d at 228. If such made-for-bankruptcy agreements were sufficient, "a debtor could create subject matter jurisdiction over any non-debtor third party" by agreement. *Id.*; *contrast McCartney*, 106 F.3d at 509 (considering pre-existing, longstanding business connections). The court below accepted such made-for-bankruptcy allocations as creating jurisdiction nonetheless.

That defect cuts across the bankruptcy court's opinion. The court invoked indemnification agreements, shared insurance coverage, and related connections between LTL and non-debtors. App. 153 (PI Op. 14). But LTL never signed any indemnification agreements, insurance policies, or other agreements. It never manufactured or sold baby powder. J&J unilaterally allocated all that to LTL via deal documents when LTL was created on the eve of bankruptcy for bankruptcy

purposes. Precedent and equity forbid such efforts to manipulate the scope of federal jurisdiction (or manufacture an identity of interest) on the courthouse steps.

2. Putative Effects of Suits Against Non-Debtors Fall Short

Any LTL indemnification obligations do not create the required effect on the reorganization regardless. App. 153, 159-60 (PI Op. 14, 20-21). *First*, when non-debtors (or carriers using shared insurance) pay talc claimants, that at worst reduces, dollar-for-dollar, claims against LTL. Liquidating claims against non-debtor joint-tortfeasors merely replaces the personal-injury claims of talc claimants with indemnity claims by affiliates and commercial partners.

Second, the Funding Agreement prevents any impact on reorganization (even assuming indemnification occurs). Under the Funding Agreement, LTL has the "contractual right to look to J&J and New JJCI as primary obligors"—"without having to establish independent liability"—to fund claims against LTL, ***including talc-related indemnification claims***. App. 44 (MTD Op.). As a result, if J&J or New JJCI were to tender an adverse talc judgment to LTL, LTL would simply tender that liability back under the Funding Agreement—a circular flow that avoids any impact on reorganization (and shows how contrived the indemnity is).

The bankruptcy court opined that LTL's estate could be affected because, under "the Funding Agreement, Debtor must first use its own assets to fund the

trust." App. 160 (PI Op. 21). However, when LTL filed for bankruptcy, all its assets other than the Funding Agreement (*i.e.*, rights to royalty streams valued at $367.1 million and a $6 million bank account, App. 7 (MTD Op.)), were spoken for; they represented a fraction of the talc liabilities assigned to LTL, *id.* at 36. Any indemnification claims against LTL based on ***continued*** litigation cannot affect already-spoken-for LTL assets.

The indemnity theory fails for yet another reason. J&J had no right to indemnity from LTL's predecessor, Old JJCI; as a result, LTL could not have inherited such an obligation. The bankruptcy court interpreted a 1979 agreement as having transferred J&J's talc-related liabilities to Old JJCI. App. 164 (PI Op. 25). But the 1979 Agreement stated that Baby Products Company (Old JJCI's predecessor) would assume "all the indebtedness, liabilities and obligations of every kind and description ***which are allocated on the books or records*** of J&J as pertaining to its BABY Division." *Id.* (emphasis added). The record is devoid of evidence that any talc claims were "allocated on the books or records of J&J" in 1979. The first talc-related tort case was not filed against J&J until 1982. App. 360 (Debtor Info Brief 45). The bankruptcy court found the indemnity provision "ambiguous," App. 167 (PI Op. 28), but failed to construe that ambiguity against the indemnitee

(here J&J), as New Jersey law requires. *See Kieffer v. Best Buy*, 14 A.3d 737, 743 (N.J. 2011).

3. Claims Against Non-Debtors Would Not Liquidate Claims Against LTL

The bankruptcy court held that claims against non-debtors would "liquidate" claims against LTL, as LTL owes them "contractual, common law, and statutory indemnification obligations." App. 153, 169 (PI Op. 14, 30). This Court has rejected such theories. Because LTL would not be a party to talc lawsuits against non-debtors, it could litigate its own liability later. *See, e.g.*, *W.R. Grace*, 591 F.3d at 172 (debtor "will not be bound by any judgment against the third party in question"). That LTL's liability could not be established without a separate proceeding against LTL negates "related-to" jurisdiction. *Federal-Mogul*, 300 F.3d at 382. If such a later proceeding ***were*** brought ***against LTL***, the bankruptcy court could stay ***that*** action. But enjoining tens of thousands of suits against non-debtors in advance goes too far.

For the same reason, "principles of res judicata, collateral estoppel, and record taint" cannot support such relief. App. 173-180 (PI Op. 34-41); *Pacor*, 743 F.2d at 995 ("Since Manville is not a party . . . , it could not be bound by res judicata or collateral estoppel."). The bankruptcy court, moreover, nowhere determined that collateral estoppel, res judicata, or record taint would result. App. 176 (PI Op. 37)

("collateral estoppel ***may not*** adversely impact Debtor in subsequent litigation") (emphasis added); *id.* at 179 ("there ***exists a risk*** that . . . res judicata could adversely impact Debtor"); *id.* at 180 (record taint "***could*** prejudice Debtor") (emphasis added). Speculation is not enough.

The bankruptcy court insisted that talc claims against J&J would "involve the same products, same time periods, same alleged injuries, and same evidence as claims against the Debtor." App. 158 (PI Op. 19). But talc claims against J&J rest on J&J's ***own*** tortious conduct and culpability. Courts and juries have held J&J and Old JJCI independently liable. App. 4706-07 (Diaz Report 13-14); App. 4952 (Summary of Talc Verdicts). Courts have instructed juries to consider the liability of J&J and Old JJCI separately and to differentiate between them for each claim. App. 4549-4629 (Verdict Forms and Transcripts). Numerous courts have affirmed J&J's independent talc liability. *E.g.*, *Ingham*, 608 S.W.3d at 714-19, 723 (J&J "engaged in reprehensible conduct of its own").[6]

[6] *See Olson v. Brenntag N. Am., Inc.*, No. 190328/2017, 2020 WL 6603580, at *49 (N.Y. Sup. Ct. Nov. 11, 2020) (punitive liability 2/3 to J&J, 1/3 to Old JJCI, compensatory damages joint) (appeal pending); App. 4623-29 (Verdict Forms), *Prudencio v. Johnson & Johnson*, No. RG20061303 (Cal. Super. Ct. Aug. 27, 2021) (punitive and non-economic damages 85% to J&J, 15% to Old JJCI, remainder joint).

Evidence, claims, time periods, and products overlap in every case involving joint tortfeasors. The bankruptcy court's reasoning would allow joint tortfeasors to benefit from bankruptcy stays as a matter of course, contradicting *Pacor* and its progeny. *See Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1076 (3d Cir. 1983).[7]

4. Allegations of Shared Insurance Cannot Establish "Related-To" Jurisdiction

The bankruptcy court's invocation of shared insurance, App. 153 (PI Op. 14), was less persuasive still. The court acknowledged "the message from *In re Combustion*"—"that a court must make adequate factual findings before staying proceedings against nondebtor co-insureds on the theory that asbestos-related personal injury claims against the nondebtors will automatically deplete the insurance proceeds available to the debtor." *Id.* at 183. But the bankruptcy court nowhere made the "record findings regarding the terms and operation of the [insurance policies]" that *Combustion Engineering* requires. 391 F.3d at 232-33.

Disputing coverage, J&J's insurers have never paid a penny to any J&J entity for talc-liability defense costs, settlement, or judgment. App. 462 (Kim Decl. ¶53).

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[7] Because the actions against non-debtors do not sufficiently affect LTL's estate, there is also no "identity of interest" to justify stay relief under §§ 362 and 105. *See* pp. 57-58, *infra*.

Moreover, if coverage exists, LTL failed to show that the $2 billion policy limit, App. 182 (PI Op. 43), was not already overtopped by the $3.5 billion in talc judgments and settlements J&J paid in the five years ***before*** LTL filed for bankruptcy, App. 34 n.22 (MTD Op.). The bankruptcy court admitted that "certain coverage is disputed, and no definitive determination has been made as to exhaustion." App. 182 (PI Op. 43). The court nowhere explained how it could find that pending lawsuits threatened to draw down insurance available to LTL, as *Combustion Engineering* requires, without addressing whether such insurance exists or is already spoken for.

C. The Bankruptcy Court Failed To Apply the Correct Legal Standard

Jurisdiction aside, the bankruptcy court failed to apply the proper legal standard when enjoining tens of thousands of cases against non-debtors.

1. The bankruptcy court erred insofar as it purported to extend relief to non-debtors under § 362. Section 362(a) stays actions "against the debtor," not non-debtors. *See* pp. 48-49, *supra*. "[T]he automatic stay is not available to non-bankrupt co-defendants . . . even if they are in a similar legal or factual nexus with the debtor." *Maritime Electric*, 959 F.2d at 1205. Efforts to extend relief to suits against non-debtors must invoke §105. Any supposed "identity of interest," App. 158 (PI Op. 19), should bear on whether an injunction can be granted under

§ 105. *See* pp. 49-50, *supra*. And such an "identity" of interest cannot be manufactured artificially on the eve of bankruptcy. *See* pp. 51-52, *supra*.

Extension of the stay to a non-debtor, moreover, is typically inappropriate where it is "independently liable," as in the case of "joint tortfeasors or where the nondebtor's liability rests upon his own breach of a duty." *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986); *see CAE Indus. LTD v. Aerospace Holdings Co*., 116 B.R. 31, 33 (S.D.N.Y. 1990); *Chesapeake Crossing Assocs. v. TJX Cos.*, Civ. A. 2:92CV631, 1992 WL 469801, *4 (E.D. Va. 1992). For J&J, that is the situation here. *See* p. 55, *supra*.

2. The bankruptcy court's invocation of § 105 was error as well. To obtain a preliminary injunction, plaintiffs must show threatened harm that is concrete and imminent, not remote or speculative. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Under § 105, the debtor must also satisfy the traditional 4-factor test, demonstrating: (i) a reasonable likelihood of a successful reorganization plan; (ii) irreparable harm to the debtor's ability to reorganize absent the requested relief; (iii) a balance-of-harms weighing in favor of relief; and (iv) that the requested relief would serve the public interest. App. 185 (PI Op. 46). Injunctive relief "should not be granted unless the movant, ***by a clear showing***, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

The bankruptcy court never required that "clear showing," much less concrete and imminent harm. Instead, it invoked conjecture and inverted the burden of proof:

- For likelihood of a successful reorganization plan, the court admitted "the success of Debtor's reorganization is speculative." App. 186 (PI Op. 47). Ignoring Debtor's burden to show likelihood of success, the court substituted a finding that "nothing in the record . . . suggest[s] that Debtor does ***not*** have a reasonable likelihood of reorganization." *Id.*

- For irreparable harm to LTL, the court again indulged speculation, saying LTL "could" face "risks" of preclusion and record taint, *id.* at 173, 179, 180, without finding ***any*** J&J entity, in ***any*** talc case, has ***ever*** been subject to preclusion or "record taint" based on a judgment against a different entity.

- For indemnification, the court declined to require a "clear showing" and instead reversed the burden, finding "nothing in the record" proved that LTL would ***not*** face automatic indemnification obligations. *Id.* at 172.

- For shared insurance, the court failed to require a "clear showing" that lawsuits against non-debtors risked insurance proceeds, ignoring disputes about availability and evidence that any coverage is spoken-for already. *See* pp. 56-57, *supra.*

- The court enjoined cases against nearly 150 third-party retailers despite LTL's failure to show an actual indemnification obligation for each. App. 173 (PI Op. 34) (quoting LTL's assertion it had "provided a summary" and "exemplars" of J&J tender agreements). Nor did Debtor ***certify*** indemnification rights for each. The court instead put the burden on claimants to disprove such agreements later: "[T]his Court would be willing at a later date to review continuance of the stay if a ***record exists establishing the lack*** of a Tender Agreement or other contractual obligation." *Id.* (emphasis added).

The harm to claimants and the public interest is plain. "[T]he clear damage to the plaintiffs is the hardship of being forced to wait for an indefinite and, if recent

experience is any guide, a lengthy time before their causes are heard . . . . [P]laintiffs and crucial witnesses are dying, often from the very diseases that have led to these actions." *Johns-Manville*, 723 F.2d at 1076. In the *Bestwall* talc bankruptcy, for example, ***all*** the original creditors' committee representatives have died without having their day in court. *See* Appellants' Br. at 8, *In re Bestwall LLC*, 22-1127, Dkt. 30 (4th Cir. May 18, 2022). Here, over 300 plaintiffs have died while their cases were frozen by the bankruptcy court. *See* p. 45, *supra*.

The bankruptcy court's view, App. 187-89 (PI Op. 48-50), that talc claimants will benefit from having their cases frozen for years—as they decline and die—is absurd. No witness, not even Debtor's experts, denied that claimants suffer irreparable harm. Many have Stage 4 ovarian cancer, with a 5-year survival rate of 17%.[8] Others have mesothelioma, a fatal cancer with a 5-year relative survival rate of 12%.[9]

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[8] Ovarian Cancer: Stage 4, Minnesota Ovarian Cancer Alliance (last visited June 28, 2022), https://www.mnovarian.org/stage-4/#:~:text=In%20Stage%204%2C%20cancer%20has,considered%20Stage%204%20ovarian%20cancer.&text=Most%20women%20diagnosed%20with%20Stage,survival%20rate%20of%20approximately%2017%25.

[9] Survival Rates for Mesothelioma, American Cancer Society (Mar. 2, 2022), https://www.cancer.org/cancer/malignant-mesothelioma/detection-diagnosis-staging/survival-statistics.html.

The extraordinary nature of the injunction also militates against it. The bankruptcy court effectively awarded some 670 non-debtors the kind of channeling injunction available for confirmed plans under § 524(g). For non-debtors to be protected under § 524(g), however, the plan must be approved by more than 75% of asbestos claimants and, even then, relief is limited to "derivative liability" where "statutory relationship" requirements are met. *See In re W.R. Grace & Co.*, 13 F.4th 279, 283-84 (3d Cir. 2021). The bankruptcy court here awarded such far-reaching relief at the outset without regard to § 524(g)'s prerequisites. It froze non-derivative direct-liability claims against non-debtor J&J and claims against non-debtor retailers not eligible for relief under § 524(g). Injunctive relief "can only be exercised within the confines of the Bankruptcy Code"—not to circumvent its requirements. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

* * * * *

If J&J or Old JJCI had chosen to declare bankruptcy in good faith, it would have been entitled to the benefit of an automatic stay and other bankruptcy relief. But they structured LTL and its bankruptcy to make ***LTL*** the debtor and to keep themselves and their operations outside bankruptcy. They cannot demand that equity save them from the consequences of that choice by granting them statutory relief from which they deliberately excluded themselves. Equity will not "relieve

parties from the consequences of their own negligence or folly," much less strategic choices. *Dunphy v. Ryan*, 116 U.S. 491, 498 (1886).

CONCLUSION

For the foregoing reasons, the Committee respectfully requests that the Court (i) reverse the MTD Order and dismiss the case, or alternatively, (ii) reverse the PI Order and vacate the stay and injunctive relief granted therein.

June 30, 2022

Respectfully submitted,

/s/ Angelo J. Genova

MOLOLAMKEN LLP
Jeffrey A. Lamken
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 556-2010

GENOVA BURNS LLC
Angelo J. Genova
Daniel M. Stolz
110 Allen Road, Suite 304
Basking Ridge, NJ 07920
(973) 533-0777

BROWN RUDNICK LLP
David J. Molton
Michael S. Winograd
Robert J. Stark
7 Times Square
New York, NY 10036
(212) 209-4800

OTTERBOURG P.C.
Melanie L. Cyganowski
Adam C. Silverstein
230 Park Avenue
New York, NY 10169
(212) 661-9100

MASSEY & GAIL LLP
Jonathan S. Massey
1000 Maine Ave., S.W., Suite 450
Washington, DC 20024
(202) 652-4511

BAILEY & GLASSER LLP
Brian A. Glasser
1055 Thomas Jefferson St., N.W.
Washington, DC 20007
(202) 463-2101

PARKINS LEE & RUBIO LLP
Lenard M. Parkins
700 Milam St., Suite 1300
Houston, TX 77002
(713) 715-1666

Counsel for Appellant Official Committee of Talc Claimants

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Rule 28.3(d), I certify that I am a member of the Bar of this Court.

June 30, 2022

/s/ Angelo J. Genova
Angelo J. Genova

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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June 30, 2022

/s/ Angelo J. Genova
Angelo J. Genova

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I certify that today, June 30, 2022, I electronically filed the foregoing Brief and Appendix Volume 1 with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

June 30, 2022

/s/ Angelo J. Genova
Angelo J. Genova