Court File No.: CV-21-00673856-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF LTL MANAGEMENT LLC

APPLICATION OF LTL MANAGEMENT LLC UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

AFFIDAVIT OF MONICA FAHEIM

I, Monica Faheim, of the City of Mississauga, in the Regional Municipality of Peel, MAKE OATH AND SAY:

1. I am an associate with the law firm of Miller Thomson LLP, Canadian Counsel for the Official Committee of Talc Claimants in the bankruptcy proceedings in the US Bankruptcy Court for the District of New Jersey commenced by LTL Management LLC under Chapter 11 of Title 11 of the United States Code (Case # 21-30589) (the "**Chapter 11 Case**"), and, as such, have knowledge of the matters contained in this Affidavit.

2. Attached to this Affidavit at **Exhibit "A"** is the *Initial Statement of the Official Committee of Talc Claimants Respecting the Chapter 11 Case* dated November 19, 2021, which was filed by the Official Committee in the Chapter 11 Case (Doc #495).

3. Attached to this Affidavit at **Exhibit "B"** is the *Motion of the Official Committee of Talc Claimants to Dismiss the Debtor's Chapter 11 Case* filed on December 1, 2021 in the Chapter 11 Case (Doc #632).

4. Attached to this Affidavit at **Exhibit "C"** is the *Order of the US Bankruptcy Court Western District of North Carolina Charlotte Division Transferring Case to the District of New Jersey* filed on November 16, 2021 in the Chapter 11 Case (Doc #416).

5. Attached to this Affidavit at **Exhibit "D"** is the *Order granting the Debtor's Request for Preliminary Injunctive Relief* granted by the North Carolina Bankruptcy Court on November 14, 2021 in the Chapter 11 Case (Doc #102).

SWORN by Monica Faheim of the City of Mississauga, in the Regional Municipality of Peel, before me at the Town of Milton, in the Province of Ontario, on December 16, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

DocuSigned by:
Asim Iqbal
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Commissioner for Taking Affidavits
(or as may be)

ASIM IQBAL

DocuSigned by:
Monica Faheim
A927328446B742A...

MONICA FAHEIM

This is Exhibit "A" referred to in the Affidavit of Monica Faheim sworn by Monica Faheim of the City of Mississauga, in the Regional Municipality of Peel, before me at the Town of Milton, in the Province of Ontario, on December 16, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits (or as may be)

ASIM IQBAL

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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In re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan

INITIAL STATEMENT OF OFFICIAL COMMITTEE
<u>OF TALC CLAIMANTS RESPECTING CHAPTER 11 CASE</u>

The Official Committee of Talc Claimants (the "<u>Official Committee</u>") respectfully submits this Initial Statement respecting the Debtor's bankruptcy. This filing is necessary because, with their Chapter 11 petition, the Debtor submitted an "informational brief" that is more in the nature of advocacy than factual recitation.[1] The LTL Information Brief also suggests a case trajectory that is unrealistic, at best. The Official Committee herein offers its initial case counterpoint, so that the Court can now assess the case landscape.

[1] *See Informational Brief of LTL Management LLC* [N.C. Dkt. No. 3] (the "<u>LTL Information Brief</u>"). Pleadings and submissions filed in the North Carolina bankruptcy case (Case No. 21-30589) on the main bankruptcy docket shall be referenced as "N.C. Dkt. No." Pleadings and submissions filed in the preliminary injunction adversary proceeding (Adv. P. No. 21-03032) shall be referenced as "N.C. Adv. P. Dkt. No." Unless otherwise indicated, capitalized terms used herein but not defined have the meaning ascribed to them in the LTL Information Brief.

This filing does not contain an explanation of ovarian cancer and mesothelioma, describing just how devastating those diseases are. It does not walk the Court through all the science proving that talcum powder causes these diseases. The filing does not explain to the Court how quickly the diseases progress and, in turn, how limited each plaintiff's time is to tell his or her story to a jury (even absent the delay imposed by bankruptcy). There are 38,000 stories, such as that of Ms. Nedelka Vanklive, a 50 year old, single mother raising a 14 year old daughter. Ms. Vanklive was a talcum powder user who was diagnosed with ovarian cancer in 2017 and mesothelioma in 2021, and has been told she now has 6 months to live. Her trial was scheduled for January 2021, continued three times at the behest of J&J, finally commenced and was midway through at the time of the Debtor's filing, and is, at present, enjoined. In very short order, the Court will come to know Ms. Vanklive and so many others so powerfully harmed by this bankruptcy case.

I. This Chapter 11 Case Is Untethered To Any Legitimate Chapter 11 Purpose.

1. The Debtor is a "special purpose vehicle" created by Johnson & Johnson ("J&J") and its consumer products affiliate ("Old JJCI") a mere two days before the bankruptcy filing. This was done by so-called "divisive merger" under Texas law to wall off talc-related tort liability from J&J and its non-debtor affiliates. The SPV's purpose was embedded in the corporate name: "LTL" is an acronym for "Legacy Talc Liabilities."

2. The Debtor's board, management, and professionals are all inexplicably entwined with J&J. LTL directors work for J&J (or affiliates) and draw J&J salaries.[2] The Debtor's "first-day" declarant is a "seconded" J&J Assistant General Counsel, who played a direct role in the

[2] *See* LTL 0019184-90.

divisive merger and managed all the talc powder claims against J&J.[3] The Debtor's primary bankruptcy counsel has long served J&J, and orchestrated the divisive merger for J&J.[4] LTL essentially concedes that it is here – not to serve tort claimant interests – but to serve J&J interests.

3. The Debtor does not have an operational presence. It does not make anything; it does not sell anything; it does not employ anyone.[5] It does not participate in the commercial world in any capacity. On its creation date (again, a few days before the bankruptcy filing), it was bestowed a few assets befitting a passive SPV: a royalty stream, a $6 million bank deposit, and a limited indemnity right from J&J and Old JJCI. LTL's assets "were all created to effectuate a bankruptcy filing and have no other business purpose."[6]

4. The Debtor does not have any funded or operational debt. There are no banks, bondholders, landlords, unions/pensions, vendors/suppliers, or taxing authorities. The Debtor's debt structure has only one line-item: the 38,000 pending tort claims arising from the use of J&J's talcum powder products.[7] There is, in turn, only one creditor class that could possibly support a plan, and that class most assuredly does not support this case.

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[3] *See Declaration of John K. Kim in Support of First Day Pleadings* [N.C. Dkt. No. 5] (the "Kim First Day Decl."), ¶ 2 ("I am employed by Johnson & Johnson Services, Inc. ('J&J Services'), a non-debtor affiliate of the Debtor and a subsidiary of the Debtor's ultimate non-debtor parent company, Johnson & Johnson ('J&J'). Just prior to my role as the Chief Legal Officer of the Debtor, I was J&J's Assistant General Counsel, Practice Group Lead for the Product Liability Litigation Group. In that role, I was responsible for product liability litigation globally. I began my employment with J&J and its affiliates in 2001 as a Senior Counsel in the Litigation Group. . . .").

[4] *Debtor's Ex Parte Application for an Order Authorizing It to Employ Jones Day as Counsel as of the Petition Date* [N.C. Dkt. No. 404], Exh. C, Gordon Decl. ¶ 16 ("Prior to the Petition Date, Jones Day represented J&J and Old JJCI in connection with the restructuring that led to the formation of the Debtor, as described below.")

[5] *See Order Transferring Case to the District of New Jersey* [N.C. Dkt. No. 416], at 2 ("The employees of the Debtor are all employees of Johnson & Johnson Services, Inc. ('JJS'), a New Jersey corporation, that have been seconded to the Debtor.").

[6] *Id.* at 9.

[7] *Id.* at 2 (describing only claims as "Old JJCI's liabilities arising from talc-related claims.").

5. In sum, the Debtor is an insignificant legal entity set up solely for bankruptcy, not because it has any need for bankruptcy, but instead to serve as a passive conduit through which J&J – a conglomerate of monumental size, power, and wealth *despite* its well-known current and future talc liability – can seize the injunctive benefits of Chapter 11 without having to file for Chapter 11. The injunctive benefits that J&J hopes to seize are, as the Debtor concedes, worth billions of dollars.

6. This is not what Chapter 11 is for. The bankruptcy process is intended to give "the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[8] The powers and benefits of Chapter 11 are only available "to further a valid reorganizational purpose."[9] As the Fifth Circuit (affirmed by the Supreme Court) noted in *Timbers of Inwood Forest*, "when there is no reasonable likelihood that the statutory objective of reorganization can be realized . . . then the automatic stay and other provisions designed to accomplish the reorganization objective become destructive of the legitimate rights and interests of creditors, the intended beneficiaries."[10]

7. There is no "reorganizational purpose" undergirding this case. This is about litigation advantage.[11] And, by litigation advantage, J&J is not seeking a leg up in some

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8 *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

9 *In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999); *see* Report of the Committee on the Judiciary, House of Representatives to Accompany H.R. 8200, H.R. Rep. No. 595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.").

10 *United Savs. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 808 F.2d 363, 373 (5th Cir. 1987) (en banc), *aff'd*, 484 U.S. 365 (1988); *see also SGL Carbon Corp.*, 200 F.3d at 167 (dismissing bankruptcy case as having been filed in bad faith where "the petition was not motivated by a desire to reorganize or rehabilitate SGL Carbon's business.").

11 *See SGL Carbon Corp.*, 200 F.3d at 165 (quoting *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994)); *Argus Grp. 1700 v. Steinman*, 206 B.R. 757, 765 (E.D. Pa. 1997) (finding that bankruptcy case was filed in bad faith where debtor sought to "fabricate federal court jurisdiction" for ongoing litigation); *Furness v. Lilienfield*,

commercial dispute with another corporate behemoth. This bankruptcy was structured deliberately to deprive people who are dying of cancer their rightful day in court. For bankruptcy, it simply does not get any uglier than this.[12]

II. The Debtor Characterizes J&J As The Innocent Victim Of A Tort System Run Amok; The Scientific Studies, The Government, The Judges, And The Juries All Say Differently.

8. The LTL Information Brief weaves a sort of conspiracy theory involving a large cabal of participants working together across State lines, in and out of court systems, to take down J&J. There is, says the Debtor, "no scientific or other proof that Johnson's Baby Powder either contained asbestos or was a cause of ovarian cancer or mesothelioma."[13] Indeed, the decision to "permanently discontinue its line of talc-based Johnson's Baby Powder in the U.S. and Canada" had nothing to do with talc-related disease, but rather "was based on business considerations, including lack of sales due to misinformation about the safety of Old JJCI's talc-based Johnson's Baby Powder."[14] To this day, "the Debtor stands behind the safety of Johnson's Baby Powder and asserts, based on decades of internal and third party studies and testing, that it is not a cause of either ovarian cancer or mesothelioma."[15] To this day, the Debtor denies the presence of asbestos in its talcum powder. Now come the facts.

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35 B.R. 1006, 1013 (D. Md. 1983) ("[Bankruptcy is] not intended to be used as a mechanism to orchestrate pending litigation."); *In re HBA East, Inc.*, 87 B.R. 248, 259-60 (Bankr. E.D.N.Y. 1988) (where "there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith.").

12 The Debtor's approach is reminiscent of Joseph Stalin's famous quip: "The death of one man is a tragedy, the death of millions is a statistic."

13 *Debtor's Emergency Motion to Enforce the Automatic Stay against Talc Claimants Who Seek to Pursue Claims against the Debtor and Its Non-Debtor Affiliates* [N.C. Dkt. No. 44], ¶ 23.

14 *Id.* ¶ 11.

15 *Id.* ¶ 12.

A. <u>The Scientific Studies Say Differently</u>.

9. In over 25 case-control studies and three prospective cohort studies since the 1980s investigating the link between talcum powder and ovarian cancer, all but two demonstrated an increased risk of ovarian cancer with the perineal or genital application of talcum powder. A 2018 meta-analysis that included 24 case-control (13,421 cases) and three cohort (890 cases) studies, found that "any" perineal talcum powder use was associated with an increased risk of ovarian cancer.[16] Two other recent meta-analyses and a pooled study in 2020 describe similar findings.[17]

10. A 2020 peer-reviewed article, titled "*Mesothelioma Associated with the Use of Cosmetic Talc*," concluded that exposure to asbestos-contaminated talcum powders can cause mesothelioma.[18] Another recently published peer-reviewed article, titled "*Malignant Mesothelioma Following Repeated Exposures to Cosmetic Talc*," likewise concluded that exposure to talc-based products caused mesothelioma in the study subjects.[19]

11. Using samples from the 1960s through the early 2000s, Drs. William Longo and Mark Rigler found that 68% of the samples of Johnson's Baby Powder and Shower to Shower were positive for amphibole asbestos and 98% of the samples contained fibrous talc.[20] It bears

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16 *See* Penninkilampi et al., *Perineal Talc Use and Ovarian Cancer: A Systematic Review and Meta-Analysis*, 29 Epidemiology 41 (2018).

17 *See* Berge, et al., *Genital Use of Talc and Risk of Ovarian Cancer: A Meta-Analysis*, 27 European J. Cancer Prev. 248 (2018); Taher et al., *Critical Review of the Association between Perineal Use of Talc Powder and Risk of Ovarian Cancer*, 90 Reproductive Toxicology 88 (2019); O'Brien et al., *Association of Powder Use in the Genital Area with Risk of Ovarian Cancer*, 323 JAMA 49 (2020); O'Brien et al., Supplementary Online Content (2020).

18 *See Journal of Occupational and Environmental Medicine*, Vol. 62, No. 1 (Jan. 2020).

19 Theresa S. Emory, MD, John C. Maddox, MD, and Richard L. Kradin, MD, Am. J. Ind. Med., 63:484-489 (2020).

20 *See In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Prod. Litig.*, 509 F. Supp. 3d 116, 147 (D.N.J. 2020); *See* Second Supplemental Rule 26 Expert Report of William E. Longo, PhD and Mark W. Rigler, PhD, pp. 7, 9 (Feb. 1, 2019).

observing that Chief District Court Judge Freda L. Wolfson has found "that the three-step TEM method applied by Dr. Longo, and his reliance on the AHERA counting rules, were reliable."[21]

B. <u>The Government (Canada and U.S.) Says Differently</u>.

12. In December 2018, Health Canada, the public department of the Government of Canada, preliminarily concluded that

> Available human studies . . . indicate a consistent and statistically significant positive association between perineal exposure to talc and ovarian cancer. Further, available data are ***indicative of a causal effect***.[22]

13. In response, J&J submitted a 255-page review of the data and several countervailing expert reports, and its scientists lobbied Health Canada on numerous occasions. In addition to submitting its 255-page review, J&J notably sent Heath Canada the expert reports that its lawyers submitted to Chief Judge Wolfson in the MDL. Not only did Health Canada reaffirm its preliminary conclusions, it specifically addressed – and rejected – the reasoning employed by J&J's litigation experts, noting areas of scientific disagreement with J&J's litigation experts. It found that:

> Overall there is a high degree of consistency in the epidemiological studies across several decades conducted in different parts of the world. Although there are uncertainties related to bias, there is confidence in the robustness of the available database for use in characterizing ovarian cancer risk attributed to talc exposure. Furthermore, the available data are indicative of a causal relationship.[23]

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[21] *See In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Prod. Litig.*, 509 F. Supp. 3d at 150.

[22] Draft Screening Assessment, Environment and Climate Change Canada, Health Canada, Dec. 2018, at 28 (emphasis added).

[23] Screening Assessment, Environmental and Climate Change Canada, Apr. 2021, at 36.

14. In 2019, the U.S. Food and Drug Administration tested two bottles of Johnson's Baby Powder.[24] It found one bottle to be contaminated with asbestos and talc fibers.[25] This led to J&J's recall of 33,000 bottles of its Baby Powder.[26] Today, J&J no longer sells talcum powder consumer products in the United States or Canada, as the Debtor concedes.[27]

C. The Judges Say Differently.

15. As this Court knows, Chief District Court Judge Freda L. Wolfson has overseen the talc MDL proceeding against non-debtor J&J affiliates for more than five years. On April 27, 2020, Chief Judge Wolfson issued a 141-page decision respecting dueling *Daubert* motions. If, as LTL says, there is "no scientific or other proof that Johnson's Baby Powder either contained asbestos or was a cause of ovarian cancer or mesothelioma," all plaintiff experts would have been excluded. That was not the Court's determination. The Court concluded: "what remains clear from the general causation evidence relied by the experts on both sides in this matter, is that there is scientific evidence supporting each side's opinion."[28]

16. Three months later, the Appellate Division of the Superior Court of New Jersey issued an opinion in another talc-injury case, *Carl v. Johnson & Johnson*,[29] where the trial judge excluded plaintiffs' expert causation testimony. In a unanimous 36-page opinion, the Appellate Division reversed the exclusion order, holding that "plaintiffs' experts adhered to methodologies

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[24] FDA News Release, *Baby Powder Manufacturer Voluntarily Recalls Products for Asbestos*, Oct. 18, 2019.

[25] *See* AMA Analytical Services, Inc., Certificate of Analysis, dated October 11, 2019.

[26] FDA News Release, *Baby Powder Manufacturer Voluntarily Recalls Products for Asbestos*, Oct. 18, 2019.

[27] On information and belief, J&J still sells its talcum powder worldwide. It is unclear where the constituent parts of that operation sit in J&J's new corporate structure.

[28] *See In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Prod. Litig.*, 509 F. Supp. 3d at 187.

[29] 237 A.3d 308, 311 (N.J. App. Div. 2020), *cert. denied*, 244 A.3d 270 (N.J. 2021).

generally followed by experts in the field, and relied upon studies and information generally considered an acceptable basis for inclusion in the formulation of expert opinions. Suppression of their testimony was an abuse of discretion."[30]

17. And, in June 2020, the Missouri Court of Appeals considered the sufficiency of expert opinion testimony linking talc-based products and ovarian cancer.[31] There, too, J&J argued that plaintiffs' general causation theory was "contrary to the overwhelming scientific consensus" that talcum powder products do not cause ovarian cancer.[32] The Missouri Court of Appeals unanimously rejected J&J's position.[33]

D. The Juries Say Differently.

18. It is true that, for decades, J&J was very successful defending talc-related personal injury lawsuits. In recent years, however, J&J was compelled – for the first time – to produce certain particularly sensitive documents in discovery.[34] These documents showed that, from at least 1971 to the early 2000s, J&J knew its talc-based products sometimes tested positive for carcinogens, that it was concerned with the issue, and that it intentionally failed to warn regulators or the public of the carcinogenic nature of it talcum powder products.[35] This proof of knowing concealment dramatically changed the complexion of personal injury litigation against J&J.

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[30] *Id.* at 344.

[31] *See Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 709-714 (Mo. App. 2020).

[32] *Id*. at 711.

[33] *Id*. at 714.

[34] *See* Girion, Lisa, *Johnson & Johnson Knew for Decades that Asbestos Lurked in Its Baby Powder*, Reuters, Dec. 14, 2018.

[35] *Id*.

19. Today, there are more than 38,000 cases currently pending alleging that J&J's talc-based products caused cancer.[36] Over 35,000 of those cases are part of the MDL pending before Chief Judge Wolfson.[37] Juries have awarded plaintiffs verdicts against J&J in the billions, inclusive of punitive damages.[38] J&J claims that it is facing a judicial system "run amok." Perhaps it is more apt to say that J&J is now facing juries that are enraged by the evidence long secreted in J&J files.

III. Liability Mapping: LTL vs. Old JJCI vs. J&J.

20. Some mass tort bankruptcies involve a debtor attached to successful non-debtor affiliates. In certain of those cases, the liability is "contained" in the debtor because only the debtor was involved in the production and selling of the harm-inducing product. But, that is not always the case.

21. *In re Quigley Company* is a case in point.[39] There, the debtor produced an insulation product that contained asbestos. In 1968, it was acquired by Pfizer, which started marketing Quigley's insulation product with Pfizer's name, logo, and trademark. Eventually, more than 160,000 plaintiffs filed asbestos-related suits against, not only Quigley, but Pfizer too. Pfizer had Quigley file for Chapter 11, not to rehabilitate Quigley's defunct business, but as a conduit for Pfizer to secure for itself a plan injunction. The strategy didn't work.

> [T]his is a Quigley bankruptcy in name only. Pfizer conceived and executed the global strategy, including the resuscitation of the moribund Quigley and the filing of the chapter 11 case contemplated

[36] Kim First Day Decl. ¶¶ 42-43.

[37] *Id.*

[38] *See Ingham*, 608 S.W.3d at 709-714.

[39] *In re Quigley Co., Inc.*, 437 B.R. 102, 126-27, 160 (Bankr. S.D.N.Y. 2010).

> in the Pfizer Settlement Agreements. Pfizer funded the chapter 11 . . . [and] is also providing the bulk of the plan funding. The Fourth Plan . . . is designed to free the Pfizer Protected Parties from derivative liability, and only incidentally, to reorganize Quigley to the extent necessary to confirm the plan. Pfizer, the parent of Quigley, the architect of the global strategy, the only source of chapter 11 and plan financing and the principal beneficiary of the channeling injunction, is the real proponent of this plan. . . . Quigley's motion to confirm the Fourth Plan is denied.

22. Confirmation was denied, in large part, because it was not proposed in "good faith". This Chapter 11 case has remarkable similarities. J&J (like Pfizer) had, for extensive periods of time, sole, and thereafter, direct involvement in the sale, marketing, and safety of all talc-related products, and this involvement renders J&J directly liable for talc-related personal injury claims.[40] This remains true today, despite the divisional merger.[41] Set forth below are certain salient datapoints:

- Dr. John Hopkins, who had responsibility for talc safety at the J&J group of companies in the 1970s, 1980s, and 1990s, was designated by J&J and Old JJCI as their corporate representative to testify at numerous trials and depositions. Dr. Hopkins repeatedly testified under oath that, even after 1979, J&J made health and

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[40] *See, e.g.*, *Arevalo v. Saginaw Machine Systems, Inc.*, 782 A.2d 931, 941 (N.J. Super. App. Div. 2001) (holding that predecessor company that manufactured defective products remained liable for products liability claims, even after manufacturer spun off division that had manufactured product in exchange for assumption of liabilities agreement, explaining that "the liability sought to be imposed in this case is direct – not vicarious" and that "the original manufacturer, albeit reconstituted, is in effect extant and viable," and therefore retained liability despite the assumption agreement).

[41] The Debtor wrongfully contends that, as a result of the "divisional merger," it alone bears the entirety of talc-related personal injury cases. *See, e.g.*, *Debtor's Motion for an Order (I) Declaring that the Automatic Stay Applies to Certain Actions Against Non-Debtors or (II) Preliminarily Enjoining Such Actions and (III) Granting a Temporary Restraining Order Pending a Final Hearing* [N.C. Adv. P. Dkt. No. 2], at 13, 14 (describing the "Debtor Talc Claims" by stating: "Old JJCI is responsible for all claims alleging that Johnson's Baby Powder and other talc-containing products cause cancer or other disease" and that the "Debtor Talc Claims are asserted in virtually every case against both the Debtor and J&J . . . [and] seek to hold the Debtor and J&J jointly and severally liable for the Debtor Talc Claims.").

safety policy decisions regarding talcum powder.[42] Dr. Hopkins also conceded that J&J had the authority to require warnings on Johnson's Baby Powder.[43]

- In 1982, the first epidemiologic study was performed on talcum powder use in the female genital area. This study was conducted by Dr. Daniel Cramer and others and found a 92% increased risk in ovarian cancer with women who reported genital talcum powder use. Shortly after this study was published, Dr. Bruce Semple of J&J visited Dr. Cramer about his study. Dr. Cramer advised Dr. Semple that J&J should place a warning on its talcum powder products about the ovarian cancer risks so that women could make an informed decision about their health.[44] J&J did not do so.

- A J&J Technology Forecast dated 1986 acknowledged that safety of cosmetic powders was a concern and that health professionals had decided that powders provide no health benefit. The document also acknowledged that "[r]etrospective studies have implicated talc use in the vaginal area with the incidence of ovarian cancer."[45] J&J did not warn or take other action.

- In 1994, the Cancer Prevention Coalition mailed a letter to then J&J CEO Ralph Larson, informing his company that studies "show[ ] conclusively that the frequent use of talcum powder in the genital area pose[ ] a serious health risk of ovarian cancer."[46] J&J again did not warn or take other action.

- In 1997, J&J's own toxicology consultant, Dr. Alfred Wehner, informed the company about false public statements being made by the company regarding talc safety.[47] No warning or other action.

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42 Nov. 4, 2021 Hr'g Tr. at 221:23-222:24; PI Exhibit List 1 (Meso Ex. 10) at 20:11-17 (Dr. Hopkins: "the parent company [J&J] for all the global companies made those decisions, yes."); PI Exhibit List 2 (Meso Ex. 10A) at 1993:6-12 (Dr. Hopkins: "Q. [A]ll talc in asbestos decision went through [New] Brunswick? A. Correct. Q. The headquarters for Johnson & Johnson, correct? A. Correct."); PI Exhibit List 3 (Meso Ex. 10B) at 17:24018:3 (Dr. Hopkins: "Q. Johnson & Johnson Corporate in New Brunswick, New Jersey made all health and safety policy decisions with regard to asbestos and talc issues, correct? A. Yes."); PI Exhibit List 4 (Meso Ex. 11) at 25:10-15 (same).

43 PI Exhibit List 6 (Meso Ex. 8) at 7752:11-15 (Dr. Hopkins: "Q. And you would agree that Johnson & Johnson has the authority to require warnings on Johnson's Baby Powder about cancer, correct? A. They have the authority to require warnings.").

44 PSC PI Exhibit List 42 (First Amended MDL Complaint) ¶ 30.

45 PSC PI Exhibit List 42 (First Amended MDL Complaint) ¶ 31.

46 PSC PI Exhibit List 42 (First Amended MDL Complaint) ¶ 41.

47 PSC PI Exhibit List 42 (First Amended MDL Complaint) ¶ 43.

- J&J instead required its branding on the front of each Baby Powder container to display its signature cursive "Johnson & Johnson" logo.[48] The J&J logo, of course, is owned by J&J, and not by any subsidiary.[49] Johnson's Baby Powder bottle specifically targeted women, stating: "For you, use every day to help feel soft, fresh, and comfortable."[50]

- In 2013, J&J established the Office of Chief Medical Officer, with responsibility for "labeling updates, warnings, and, when necessary, product withdrawals."[51] Yet, J&J never required warnings, even though it directly received information regarding health risks from talcum powder.

- In December 2018, J&J circulated a video of its CEO, Alex Gorsky, to millions of people around the world stating that "J&J's Baby Powder Has Never Contained Asbestos", "J&J's Baby Powder is Safe and Does Not Cause Cancer", and "We Know Our Talc Is Safe."[52]

23. J&J's direct tort exposure is more extensive than Pfizer's given that J&J (unlike Pfizer) did more than just marketing – it had direct involvement in production. From 1967 until 2003, the primary source of talc for J&J products were Vermont mines owned and operated by a J&J subsidiary until 1989. J&J exercised control over all key decisions concerning the mines until they were sold in 1989 to Cyprus Mines Corporation ("Cyprus"). Through 2003, the Vermont mines continued to be the company's primary talc source (whether owned by Cyprus or later, Rio Tinto Minerals or Imerys Talc America, Inc.), and J&J maintained control of all talc-related specifications and conducted occasional testing source ore mines and testing of finished Johnson's Baby Powder end-products.

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48 PI Exhibit List 4 (Meso Group Ex. 11) at 22:10-13.

49 *Id.*; *see* Oct. 22, 2021 Hr'g Tr. (John K. Kim Testimony) at 90:13-17.

50 PSC PI Exhibit List 42 (First Amended MDL Complaint) ¶ 25.

51 Nov. 5, 2021 Hr'g Tr. at 412:3-5. Dr. Joanne Waldstreicher, Chief Medical Officer of J&J, chairs the Safety Council overseeing the J&J corporate family. Nov. 4, 2021 Hr'g Tr. at 227:16-229:2. The Council could have overruled any health or safety decision by Old JJCI. Nov. 5, 2021 Hr'g Tr. at 408:6-8, 509:5-11.

52 Oct. 22, 2021 Hr'g Tr. (John K. Kim Testimony) at 98:8-100:23; *see also* Nov. 4, 2021 Hr'g Tr. at 229:3-20.

24. For these reasons, juries have repeatedly found J&J individually liable, separate and apart from Old JJCI.[53] That includes punitive damages.[54] *Ingham v. Johnson & Johnson*[55] is a case in point. There, the Missouri Court of Appeals affirmed a jury verdict finding: (i) Old JJCI liable for $500 million in actual damages; (ii) J&J liable for $125 million in actual damages;[56] and (iii) $1.6 billion in aggregate punitive damages, with a greater amount imposed on J&J in part because of its "reprehensible conduct" above and beyond that of Old JJCI.

> [B]ased on the evidence, we believe a larger amount of punitive damages is needed to deter J&J's conduct than JJCI's conduct. While both corporations are multi-billion dollar corporations, J&J's net worth is considerably larger than JJCI's net worth. At trial, Defendants stipulated JJCI's net worth is $13.3 billion and J&J's net worth is $63.2 billion. ***Furthermore, Defendants' decision to chart their course of reprehensible conduct began with J&J long before JJCI was spun off as a separate entity in 1979 and engaged in reprehensible conduct of its own. Given this evidence, the higher ratio of 5.72:1 for J&J is justified***.[57]

25. This bankruptcy is, in sum, based on a faulty legal premise: that all talc-related personal injury claims are, following the divisive merger, fully contained in the Debtor. That is

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[53] *See, e.g.*, PI Exhibit List 17 (Meso Group Ex. 21) at 9 (*Leavitt* verdict form); PI Exhibit List 18 (Meso Group Ex. 19) at 5 (*Prudencio* verdict form); PI Exhibit List 19 (Meso Group 20) (*Barden, Etheridge, McNeil, Ronning* verdict forms); PI Exhibit List 16 (Meso Ex. 17) at 9518:24-9520:16 (*Olson* verdict form); PI Exhibit List 125 (*Fox* verdict form); PI Exhibit List 126 (*Ristesund* verdict form); PI Exhibit List 127 (*Slemp* verdict form).

[54] *See, e.g.*, PI Exhibit List 20 (Meso Group Ex. 18) at 10139:13–20 (jury imposed $200MM punitive damages against J&J and $100MM against JJCI); PI Exhibit List 21 (Meso Group Ex. 21) ($70MM punitive damages against J&J and $35MM against JJCI). When J&J and JJCI are found liable for punitive damages, each company secures its separate payments with separate bonds. *See* PI Exhibit List 21 (Meso Group Ex. 21).

[55] 608 S.W.3d 663 (Mo. App. 2020), *cert. denied*, 141 S. Ct. 2716 (June 1, 2021).

[56] The Debtor has noted that the *Ingham* jury arbitrarily treated each plaintiff "the same" because it awarded $25 million in compensatory damages each. But the Debtor has failed to mention that none of the *Ingham* plaintiffs sought economic damages. All sought solely pain and suffering damages. It was entirely reasonable for the jury to believe it was acting fairly by treating all plaintiffs equally in that regard. Moreover, the defendants did not even address damages in closing or suggest to the jury what compensatory damages it should award.

[57] *Id*. at 724 (emphasis added).

simply not the case. Here, just as in *Quigley*, there are very serious questions and doubt as to the Debtor's (and J&J's) "good faith," which will be before the Court in short order.

IV. J&J Resorts To Structuring As "Liability Management".

26. It bears repeating that J&J's courtroom losses are a relatively recent phenomenon, following the revelation of sensitive documents through discovery. Just last year, in the Delaware Chapter 11 cases of *Imerys Talc America, Inc*. ("Imerys"), J&J moved for relief from the automatic stay to continue litigating in the tort system, stating "J&J, of course, has the financial wherewithal to defend these claims and satisfy any successful talc claim in full."[58] In a subsequent pleading, J&J reiterated its demand to defend at trial tort claims asserted against Imerys because J&J "prefers to defend the safety of its products (and the core causation issues) in open court."[59]

27. Then came the decision affirming the *Ingham* verdict, and the stakes went up considerably. Avoiding the courtroom became the preferred strategy. So commenced the "liability management" transactions.

28. The so-called "Texas two-step" is complex in implementation, but simple in result: Old JJCI is split into two companies, one taking the assets ("GoodCo"), the other taking the liabilities ("BadCo"). The end result is no different than if Old JJCI moved its assets to a new corporation, leaving the liabilities in the residual shell. A classic fraudulent transfer. At the closing, J&J caused BadCo (LTL) to reincorporate in North Carolina, giving it access to the North

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[58] *See In re Imerys Talc America, Inc., et al.*, Case No. 19-10289 (Bankr. D. Del. Mar. 20, 2020) (LSS), *Johnson & Johnson's Motion pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, and Local Bankruptcy Rule 4001-1 for Entry of Order Modifying Automatic Stay to Permit J&J to Send Notice Assuming Defense of Certain Talc Claims and Implement Talc Litigation Protocol* [Dkt. No. 1567], ¶¶ 4, 41, 45

[59] *See In re Imerys Talc America, Inc., et al.*, Case No. 19-10289 (Bankr. D. Del. May 19, 2020) (LSS), *Johnson & Johnson's Omnibus Reply in Support of J&J's Motion for Entry of Order Modifying Automatic Stay to Implement Talc Litigation Protocol* [Dkt. No. 1769], ¶¶ 3-4.

Carolina bankruptcy court and, more importantly, the Fourth Circuit's stringent standard for dismissal as a "bad faith" bankruptcy filing.[60]

29. This is not, by the way, how the transaction is supposed to work. Texas does not truly let GoodCo (JJCI) off the hook for liabilities vested in BadCo (LTL); GoodCo remains secondarily liable.[61] But, that would defeat the purpose, so J&J added a transaction step: It "killed" Old JJCI (literally terminated its corporate existence) and then incorporated a new entity that adopted the identical name, asset base, and profile as Old JJCI. New JJCI is, in every respect, GoodCo's doppelganger, but purportedly without the secondary liability. This is further proof of a fraudulent intent.

30. Five days after the bankruptcy filing, on October 19, 2021, before the "first-day" hearing before Judge Whitley, before the Debtor had applied for, let alone been granted, any injunctive relief, J&J filed a Form 8-K announcing that "*all* pending cosmetic talc cases will be stayed" as a result of the Debtor's bankruptcy filing.[62] Yet more evidence of fraudulent intent.

31. Anticipating the fraudulent transfer attack, J&J put in place the so-called "Funding Agreement." This document purports to "ensure that [LTL] has at least the same, if not greater,

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[60] *See Order Transferring Venue to the District of New Jersey* [N.C. Dkt. No. 416], at 9-10 ("Here, the Debtor is trying to manufacture venue and is attempting to outsmart the purpose of the statute. . . . [T]he Debtor's actions indicate a preference to file bankruptcy in this district, likely due to the Fourth Circuit's two-prong dismissal standard and Judge Hodges's estimation ruling in the Garlock case.").

[61] Tex. Bus. Org. Code § 10.008(a)(4) ("[E]ach surviving or new domestic organization to which a liability or obligation is allocated under the plan of merger is the ***primary*** obligor for the liability or obligation, and, except as otherwise provided by the plan of merger or by law or contract, no other party to the merger, ***other than a surviving domestic entity or non-code organization liable or otherwise obligated at the time of the merger***, and no other new domestic entity or non-code organization created under the plan of merger is liable for the debt or other obligation;") (emphasis added).

[62] Nov. 4, 2021 Hr'g Tr. at 269:6-270:9; Johnson & Johnson, Current Report on Form 8-K, filed on October 19, 2021.

ability to fund talc-related claims and other liabilities as Old JJCI had before the restructuring."[63] That is not accurate.

32. Under the Funding Agreement, J&J and Old JJCI are obligated to fund LTL to the "value" of New JJCI as of the date of the divisive merger (the "JJCI Value").[64] J&J and JJCI, thus, replace hard assets (that might increase in value) with an amorphous, artificially capped contract right that would take years to adjudicate to quantum meaning. And that litigation only ripens when J&J and New JJCI refuse to make payments under the Funding Agreement.[65] In other words, if a claimant secures a tort judgment against LTL, it cannot enforce that judgment on assets held by LTL; instead, it must request LTL (controlled by J&J) demand payment from J&J or New JJCI; if they refuse, the claimant then must wait on LTL (again, controlled by J&J) to litigate for that funding. Moreover, the Funding Agreement only pays to a plan trust, implying broad plan injunctions are conditions precedent to payment.[66]

33. Apparently, the divisive merger is not intended to be J&J's last "liability management" transaction. On November 12, 2021, J&J announced a plan to spin off its Consumer Health business (largely New JJCI) from J&J.[67] This would create further barriers between tort claimants and assets that should be available to satisfy their claims. Most significantly, it creates an additional potential issue under the Funding Agreement. New JJCI and J&J are jointly and

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63 Kim First Day Decl. ¶ 26.

64 *See* Funding Agreement § 1 (definition of "JJCI Value").

65 *See* Funding Agreement § 2(a) ("The JJCI Value shall be calculated at*, **and only at***, any date on which (x) the Payors refuse to make a requested Payment under this Agreement…") (emphasis added).

66 *See* Funding Agreement § 1 (definition of "Permitted Funding Use").

67 *See* Johnson & Johnson, Current Report on Form 8-K, filed on November 15, 2021.

severally liable for funding obligations thereunder.[68] While New JJCI remains a wholly-owned subsidiary of J&J, this merely expands the assets that the Funding Agreement purports to make available to tort claimants – the payment ultimately would come out of the pockets of J&J's owners and there would be little reason to debate which entity should make the payment. However, if New JJCI and J&J become separately-traded entities, this is no longer true: each entity may seek to litigate which entity should be the primary obligor under the Funding Agreement, creating a new reason to dispute or delay payment under the Funding Agreement.

34. The timing of the announcement (two days after the change in bankruptcy venue) does not appear coincidental. As one analyst covering J&J's stock observed: "the firm's timing [of 'the abrupt announcement of plans to divest its consumer healthcare division'] is surprising, as we don't see any major catalyst for the move. However, if the consumer division no longer holds the deep pockets of the combined company, the risk of future consumer product litigation – such as the large talc settlement – may decrease."[69]

V. **Where Do We Go From Here?**

35. **The Preliminary Injunction**. On October 21st (before appointment of the Official Committee), the Debtor sued more than 800 individual cancer plaintiffs (plus "John and Jane Does 1-1000") to enjoin them from prosecuting their tort claims against non-debtor J&J affiliates. Essentially, through the adversary proceeding, the Debtor asked the N.C. Bankruptcy Court (Judge Whitley) to enter an order enjoining Chief District Court Judge Wolfson from continuing the MDL proceeding she has overseen for more than five years.

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68 *See* Funding Agreement at 5 ("Payors" defined as J&J and JJCI); ss 16 (liabilities joint and several).

69 Damien Conover, CFA, *J&J Announces Divestment of Consumer Group*, Morningstar (November 12, 2021).

36. Immediately after initiating the adversary proceeding, the Debtor pressed Judge Whitley to issue a temporary restraining order, essentially targeting Chief Judge Wolfson. Unsurprisingly, Judge Whitley said no. In transferring the case to this Court, Judge Whitley granted a 60-day bridge injunction to prevent the Chapter 11 case from arriving "on fire."[70] That bridge injunction will expire on January 14, 2022, and the Debtor will assuredly seek an extension.

37. The Official Committee will undertake several measures in connection with the adversary proceeding and preliminary injunction. First, the Official Committee will intervene in the adversary proceeding, as a defendant. Second, the Official Committee will move, or will support the motion of other defendants, to withdraw the reference of the adversary proceeding (but only the adversary proceeding), so that Chief Judge Wolfson can decide whether the MDL and other lawsuits against non-debtor J&J affiliates should be stayed. Finally, the Official Committee will oppose the extension of the preliminary injunction, and will seek dismissal of the adversary proceeding.

38. **Motion to Dismiss the Bankruptcy Case as a "Bad Faith" Filing**. As noted above, this case has important similarities to the *Quigley* Chapter 11 case, where the Court found the debtor not to be acting in "good faith." The pathology of the Debtor's creation and exploitation for J&J's benefit quickly show this to be a "bad faith" bankruptcy filing. LTL was created solely as a litigation tactic designed to frustrate the prosecution of civil negligence and products liability talc claims pending against J&J and JJCI. The Debtor, obviously, does not have a valid "reorganizational purpose," given that it lacks a business to reorganize. The Debtor concedes – in

70 *See* Nov. 5, 2021 Hr'g Tr. at 143:12-18 ("But the point is that I think that, particularly given that I am moving the case, the last thing I want to do is send it with it on fire to the, to the recipient court. And so we need to, to slow down just for a little bit here and let a new judge take a look at this situation, read what we've written before, and then get the other constituencies on board before we go any further with that.").

page-after-page of the LTL Information Brief – that this case is a litigation tactic to shield non-debtor J&J affiliates from their tort exposure. The Official Committee will be moving to dismiss this Chapter 11 case as a "bad faith" filing.

39. **Derivative Standing Motion**. The Debtor clearly holds viable claims against non-debtor J&J affiliates, among others. The divisional merger is plainly a fraudulent transfer and, under New Jersey law, parties working with JJCI to achieve that result bear joint and several culpability for that outcome. That includes: (i) J&J and all other affiliated companies that assisted in the transaction; (ii) all directors, officers and employees that played a role; and (iii) all professionals that provided advice and assistance in documenting the transaction. Indeed, it bears observing that, in the *Banco Popular* case,[71] the New Jersey Supreme Court found the lawyer who counseled the debtor in connection with a fraudulent transfer bore equal liability for the transfer.

40. There are, of course, many other available theories of action including claims sounding in indemnity, contribution, unjust enrichment, veil piercing, substantive consolidation, and business tort. The Debtor is, almost admittedly, a shill for J&J and cannot retain possession of such assets. The Official Committee will be moving for derivative standing to initiate suit on behalf of the estate.

41. **Other Motion Practice**. The Official Committee will be objecting to the Debtor's professional retention applications, given that the proposed professionals are certainly not "disinterested." The Official Committee likewise will be objecting to the Debtor's "ordinary course professionals" motion, which is a particularly ironic motion given that nothing about this Debtor is "ordinary course" or concerns actual business operations. The Official Committee also will be objecting to the Debtor's motion to establish a so-called "qualified settlement fund," given

[71] *Banco Popular No. Am. v. Gandi*, 876 A.2d 253 (N.J. 2005).

that it is obviously a sub rosa plan and requests an improper advisory opinion (the sub rosa plan lacks any creditor support).

42. The Official Committee will continue to oppose any and all other motions seeking relief until this sham of a Chapter 11 case has ended, and J&J's victims can receive the fair day in court they are due as American citizens.

GENOVA BURNS LLC
Proposed Local Counsel to the Official Committee of Talc Claimants

By: */s/ Daniel M. Stolz* .
DANIEL M. STOLZ

By: */s/ Donald W. Clarke* .
DONALD W. CLARKE

Dated: November 19, 2021

This is Exhibit "B" referred to in the Affidavit of Monica Faheim sworn by Monica Faheim of the City of Mississauga, in the Regional Municipality of Peel, before me at the Town of Milton, in the Province of Ontario, on December 16, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

DocuSigned by:

Asim Iqbal

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Commissioner for Taking Affidavits (or as may be)

ASIM IQBAL

UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
Caption in Compliance with D.N.J. LBR 9004-1(b) **GENOVA BURNS LLC** Daniel M. Stolz, Esq. Donald W. Clarke, Esq. dstolz@genovaburns.com dclarke@genovaburns.com 110 Allen Road, Suite 304 Basking Ridge, NJ 07920 Tel: (973) 467-2700 Fax: (973) 467-8126 *Local Counsel to the Official Committee of Talc Claimants*	**BROWN RUDNICK LLP** David J. Molton, Esq. Robert J. Stark, Esq. Michael Winograd, Esq. dmolton@brownrudnick.com rstark@brownrudnick.com mwinograd@brownrudnick.com Seven Times Square New York, NY 10036 Tel: (212) 209-4800 Fax: (212) 209-4801 and Jeffrey L. Jonas, Esq. Sunni P. Beville, Esq. Sharon I. Dwoskin, Esq. jjonas@brownrudnick.com sbeville@brownrudnick.com sdwoskin@brownrudnick.com One Financial Center Boston, MA 02111 Tel: (617) 856-8200 Fax: (617) 856-8201 *Proposed Co-Counsel for the Official Committee of Talc Claimants*
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In Re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan Hearing: ***February 15, 2022, at 10:00 a.m,***

NOTICE OF MOTION OF THE OFFICIAL COMMITTEE OF TALC CLAIMANTS TO DISMISS DEBTOR'S CHAPTER 11 CASE

PLEASE TAKE NOTICE, that ***on February 15, 2022 at 10:00 a.m***, the undersigned, as local bankruptcy counsel for the Official Committee of Talc Claimants (the "Committee") of LTL Management LLC, ("LTL" or the "Debtor"), shall move before the Honorable Michael B. Kaplan, United States Bankruptcy Judge, at the United States Bankruptcy Court, for the District of New Jersey, Courthouse, 402 East State Street, Trenton, New Jersey 08608, seeking the entry of an order dismissing the Debtor's Chapter 11 case, and for such other relief that is just and proper.

PLEASE TAKE FURTHER NOTICE, that the undersigned shall rely upon the Motion filed herewith in support of the relief sought.

PLEASE TAKE FURTHER NOTICE, that oral argument is requested.

PLEASE TAKE FURTHER NOTICE, that no brief is being filed herewith since the legal basis upon which relief should be granted is set forth in the Motion.

PLEASE TAKE FURTHER NOTICE, that all objections must be in writing and filed no later than seven (7) days before the hearing with the Clerk of the United States Bankruptcy Court, for the District of New Jersey, Courthouse, 402 East State Street, Trenton, New Jersey 08608, and a copy thereof must simultaneously be served upon GENOVA BURNS, LLC., Attn: Daniel M. Stolz, Esq., 110 Allen Road, Suite 304, Basking Ridge, New Jersey 07920.

Respectfully submitted,

GENOVA BURNS, LLC

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Local Counsel to the Official Committee of Tort Claimants of LTL Management, LLC

UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
Caption in Compliance with D.N.J. LBR 9004-1(b) **GENOVA BURNS LLC** Daniel M. Stolz, Esq. Donald W. Clarke, Esq. dstolz@genovaburns.com dclarke@genovaburns.com 110 Allen Road, Suite 304 Basking Ridge, NJ 07920 Tel: (973) 467-2700 Fax: (973) 467-8126 *Local Counsel to the Official Committee of Talc Claimants*	**BROWN RUDNICK LLP** David J. Molton, Esq. Robert J. Stark, Esq. Michael Winograd, Esq. dmolton@brownrudnick.com rstark@brownrudnick.com mwinograd@brownrudnick.com Seven Times Square New York, NY 10036 Tel: (212) 209-4800 Fax: (212) 209-4801 and Jeffrey L. Jonas, Esq. Sunni P. Beville, Esq. Sharon I. Dwoskin, Esq. jjonas@brownrudnick.com sbeville@brownrudnick.com sdwoskin@brownrudnick.com One Financial Center Boston, MA 02111 Tel: (617) 856-8200 Fax: (617) 856-8201 *Proposed Co-Counsel for the Official Committee of Talc Claimants*
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In Re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan Hearing: ***February 15, 2022, at 10:00 a.m,***

MOTION OF THE OFFICIAL COMMITTEE OF TALC CLAIMANTS TO DISMISS DEBTOR'S CHAPTER 11 CASE

The Official Committee of Talc Claimants (the "Committee") of LTL Management LLC, ("LTL" or the "Debtor"), by and through its undersigned proposed counsel, respectfully moves to dismiss the Debtor's Chapter 11 case for cause, pursuant to Section 1112(b) of the Bankruptcy Code (the "Motion"). In support of this Motion, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. Johnson & Johnson[1] ("J&J") created this Debtor on the eve of its bankruptcy filing and initiated and prosecutes this Chapter 11 case for one purpose and one purpose alone—to manage the litigation associated with J&J's decades-long manufacture and sale of a carcinogenic

[1] Unless otherwise indicated, capitalized terms used herein but not defined shall have the meaning ascribed to them in the *Declaration of John K. Kim in Support of First Day Pleadings* [D.I. 5] (the "Kim Declaration") or in the Informational Brief of LTL Management LLC [D.I. 3] (the "Debtor's Information Brief").

product. J&J even went so far as to aptly identify this Debtor as a litigation management vehicle, naming it "LTL Management", an acronym for "Legacy Talc Litigation" management.

2. To accomplish this feat, J&J engineered a multi-step transactional scheme, reorganizing its consumer products subsidiary under Texas law in order to take advantage of a Texas statute designed to allow a company to divide itself into two (via a so-called divisive merger). But, in reality, J&J's divisive merger subverts the very Texas law upon which it relies. The sole purpose of the merger was to hinder and delay talc claimants in the pursuit of their claims by separating the liability for those claims from the assets backing such claims. This directly contravenes Section 10.901 of the Texas Business Organizations Code, which protects creditors from the abuse of divisive mergers to abridge their rights.

3. Make no mistake about it. The Debtor is a mere instrumentality of J&J. J&J created, owns, and controls the Debtor. The purpose of LTL and of this bankruptcy has been crystal clear from the outset: it is not to compensate creditors, but to protect J&J and its other valuable non-debtor affiliates. Specifically, this case was filed to shield J&J from liability for the production, marketing, and sale of carcinogenic products for decades, and to remove its valuable operating assets from the reach of a single group of creditors (the talc claimants). All of this, of course, without J&J and its operating entities having to subject themselves, and their assets, to the transparency and scrutiny of Chapter 11.

4. This is not what Chapter 11 is for. The purpose of Chapter 11, and of the powers and benefits granted by the statute, is "to further a valid reorganizational purpose." In re SGL Carbon Corp., 200 F.3d 154, 165 (3d Cir. 1999). This Debtor has no such purpose. It is a dummy entity with facially inadequate capitalization created only to purge all of J&J's and Old JJCI's massive talc-related tort liability, all in order to hinder and delay injured talc creditors, and indeed

injured talc creditors only, from accessing J&J's assets and providing J&J with a section 524(g) channeling injunction and a section 105 stay against present and future talc claims. Moreover, J&J incorporated this dummy entity in North Carolina, a state in which it had no contact and no business until a month ago, in order to game the bankruptcy system and take advantage of the Fourth Circuit's test for bad faith dismissal (which is one of the most stringent in the country).

5. Chapter 11 is intended to give reorganizing debtors a fresh start. But this Debtor has no need for a fresh start: it was barely two days old. It has no business, no operations, no employees, no funded debt, and no assets (except those set up for the purpose of manufacturing venue in North Carolina). LTL has, admittedly and from the start, no desire or intention to achieve a fresh start of its own. To the contrary, J&J caused LTL to file for bankruptcy solely in order to use the automatic stay and other provisions of Chapter 11 to summarily destroy the legitimate rights and interests of tort victims, many of whom are dying while J&J pursues this illicit bankruptcy filing.

6. Johnson & Johnson has a better credit rating than the United States of America. At the moment of the divisive merger in this case, it had approximately $31 billion in cash on its balance sheet, and it has a market cap of approximately a half-trillion dollars. Nevertheless, when it purported to push its many billions of dollars of talcum powder-related liabilities into LTL, its litigation management vehicle, it funded that anemic entity with a mere $6 million in cash[2] and an

[2] On November 24, 2021, the Debtor filed its Monthly Operating Report [D.I. 548]. That report includes a bank account statement showing that the $6 million is in a JJCI bank account. Nearly six weeks after the Petition Date, the Debtor claims that it is "in the process of updating the bank account information to reflect the Debtor's name." *Global Notes and Statements of Limitations and Disclaimers Regarding the Debtor's Monthly Operating Report* at ¶ 8.

unrelated royalty stream supposedly worth $375 million, and an illusory contract right under a funding agreement.

7. This bankruptcy case was not filed in good faith. It serves no legitimate purpose. It was designed to provide a litigation advantage for non-debtors. It serves only to deprive a single group of creditors of the full panoply of assets backing their claims, rather than making the full range of an entity's assets open and available for fair distribution to all creditors. It seeks to manipulate Texas law and the Bankruptcy Code for the sole purpose of discharging the Debtor's large and healthy non-debtor affiliates of direct and indirect tort liability, liability that J&J has admitted it was financially capable of paying. And, worse still, it makes dying cancer victims, even those with a judgment, scratch, claw, and fight, potentially for years, to be compensated from funds that would have been available to those creditors just two days before the filing.

8. Simply put, J&J, the Debtor, and its non-debtor affiliates seek to exploit Chapter 11 to deprive tens of thousands of individuals suffering from ovarian cancer and mesothelioma due to J&J's products their day in front of a jury.

9. As described in more detail below, despite J&J's scheme to have this case proceed under the Fourth Circuit's test for bad faith dismissal, this is a textbook case for bad faith dismissal under applicable law in the Third Circuit. LTL's bankruptcy should be dismissed in order to avoid further harm and delay to talc claimants, which they can ill afford, and to permit them to exercise their jury trial rights against J&J and the rest of the Debtor's non-debtor affiliates benefiting from this ploy.

10. The world is watching this case. In light of J&J's literal corporate shell game (including the Texas Two-Step and the state incorporation change) certain Members of Congress sent a letter to Alex Gorsky, J&J's Chairman and CEO objecting to "Johnson & Johnson's efforts

to manipulate bankruptcy laws to evade accountability for any harm caused by [its] products" and noting that "[e]xploitation of the bankruptcy system by large companies to avoid accountability is unsurprising, but it is also unacceptable."[3]

11. As these Members of Congress recognized, J&J's attempt to escape the scrutiny of American juries perverts the bankruptcy system. Indeed, if LTL's bankruptcy case is permitted to proceed, the floodgates would open for any company subject to mass tort litigation to slough off its responsibility via a Texas Two-Step and subsequent bankruptcy of the new subsidiary. Plaintiffs would no longer be able to rely on the tort litigation system, but would, even after having litigated for years, be subject to the shell game J&J is attempting here. This would abridge fundamental individual rights. The Debtor's bankruptcy case should therefore be dismissed.

JURISDICTION AND VENUE

12. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334 and 157(b)(2) and the *Amended Standing Order of Reference from the United States District Court for the District of New Jersey*, dated September 18, 2012. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. The statutory basis for the relief requested herein is section 1112(b) of title 11 of the United States Code (the "Bankruptcy Code").

3 Letter from Sen. Richard J. Durbin, Sen. Elizabeth Warren, Sen. Richard Blumenthal, Rep. Carolyn B. Maloney, and Rep. Raja Krishnamoorthi to Alex Gorsky (Nov. 10, 2021), available at https://www.durbin.senate.gov/imo/media/doc/2021-11-10%20Letter%20from%20Senators%20and%20Members%20of%20Congress%20to%20Mr.%20Gorsky.pdf.

RELEVANT FACTUAL BACKGROUND

13. The factual background for this Motion can be found in the *Initial Statement of Official Committee of Talc Claimants Respecting Chapter 11 Case* (the "Committee Initial Statement") [D.I. 495], which is incorporated herein. For the Court's convenience, the Committee summarizes particularly relevant facts here.

I. J&J Has Direct And Derivative Liability For Talc-Related Claims.

14. With no hint of the open and honest disclosures expected in a Chapter 11 case, the Debtor incorrectly proclaims that there is "no scientific or other proof that Johnson's Baby Powder either contained asbestos or was a cause of ovarian cancer or mesothelioma." *Debtor's Emergency Motion to Enforce the Automatic Stay Against Talc Claimants Who Seek to Pursue Claims Against the Debtor and its Non-Debtor Affiliates* [D.I. 44] at ¶ 23. Johnson & Johnson's own internal documents belie LTL's proclamation. In recent years, J&J has been compelled for the first time to produce particularly sensitive documents in discovery. These documents show that, for decades, J&J knew that its products sometimes tested positive for carcinogens, expressed concern with the issue, and intentionally failed to warn regulators and the public of the carcinogenic nature of its talcum powder products. See Girion, Lisa, Johnson & Johnson Knew for Decades that Asbestos Lurked in its Baby Powder, Reuters, Dec. 14, 2018.

15. Federal and State court judges across America that have permitted tort claims against Old JJCI and J&J to go to jury verdict obviously disagree with the Debtor's proclamation. These include both Chief Judge Freda Wolfson of the District of New Jersey, who presides over the Multi-District Litigation (the "MDL")[4] (see In re Johnson & Johnson, 509 F. Supp. 3d 116 (D.

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[4] In re Johnson & Johnson Talcum Powder Prods. Liability Litig., MDL 2738 (D. N.J.).

N.J. 2019)), and the Appellate Division of the State of New Jersey (see Carl v. Johnson & Johnson, 237 A.3d 308 (N.J. Super. Ct. 2020); Barden v. Brenntag North America, et al., No. MID-L-1809-17 (N.J. Super. Ct July 24, 2020). Other appellate courts that have passed on these cases likewise disagree. See, e.g., Ingham v. Johnson & Johnson, 608 S.W.3d 663, 724 (Mo. App. 2020), cert. denied, 141 S. Ct. 2716 (June 1, 2021) (affirming a jury verdict finding: (i) Old JJCI liable for $500 million in actual damages; (ii) J&J liable for $125 million in actual damages; and (iii) $1.6 billion in aggregate punitive damages, with a greater amount imposed on J&J in part because of its "reprehensible conduct of its own" above and beyond that of Old JJCI).

16. Multiple scientific studies, conducted over decades by dozens of independent researchers, have repeatedly found (i) that samples of Johnson's Baby Powder and Shower to Shower contained amphibole asbestos and fibrous talc; (ii) that perineal or genital application of talcum powder increases the risk of and can cause ovarian cancer; and (iii) that exposure to asbestos-contaminated talcum powders can cause mesothelioma. See Committee Initial Statement at ¶¶ 9-11.

17. J&J sought to have expert scientific testimony on these issues excluded in case after case, and court after court has agreed with plaintiffs that there is sufficient reliable evidence to submit the causation question to a jury. See, e.g., In re Johnson & Johnson, 509 F. Supp. 3d at 146 (Chief Judge Wolfson denying (in principal part) J&J's Daubert motions in the MDL and admitting plaintiffs' expert testimony); Leavitt v. Johnson & Johnson, Nos. A157572, A159021, 2021 WL 3418410, at *8 (Cal. Ct. App. Aug. 5, 2021) (affirming jury verdict against J&J and finding that the trial court did not abuse its discretion in admitting plaintiff's expert testimony).

18. As a result, the tide of litigation relating to J&J's talc liability has begun to shift. Juries across the country have held Old JJCI liable for tortious conduct relating to its manufacture

and sale of talcum-power products. Juries have found J&J itself directly liable for its own tortious conduct relating to the sale of talcum-powder products. And juries in many cases have assessed punitive damages against J&J and Old JJCI, respectively. Equally important, in this very District, after Chief Judge Wolfson denied J&J's Daubert motions, bellwether trials in the ovarian cancer MDL proceeding were scheduled to begin in April 2022.

19. Having been unable to persuade state and federal trial courts and the MDL to exclude plaintiffs' expert causation evidence, and having exhausted their appellate remedies, this contrived bankruptcy is J&J's last-ditch effort to escape from litigating its liability in the tort system.

20. This is a massive turn in decision-making at Johnson & Johnson. Just over a year ago in connection with the Chapter 11 cases of its talc supplier, Imerys Talc America, Inc. ("Imerys")[5], J&J moved for relief from the automatic stay to continue litigating in the tort system, stating unequivocally that "J&J, of course, has the financial wherewithal to defend these claims and satisfy any successful talc claim in full"[6] and, in a subsequent pleading, that it "prefers to defend the safety of its products (and the core causation issues) in open court."[7]

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5 Imerys, which is much smaller than J&J, did not perform a "Texas Two-Step" prior to its filing.

6 See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. Mar. 20, 2020) (LSS), *Johnson & Johnson's Motion Pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, and Local Bankruptcy Rule 4001-1 for Entry of Order Modifying the Automatic Stay to Permit J&J to Send Notice Assuming Defense of Certain Talc Claims and Implement Talc Litigation Protocol* [D.I. 1567] at ¶¶ 4, 41, 45.

7 See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. May 19, 2020) (LSS), *Johnson & Johnson's Omnibus Reply in Support of J&J's Motion for Entry of Order Modifying Automatic Stay to Implement Talc Litigation Protocol* [D.I. 1769] at ¶¶ 2-4.

21. J&J's sudden and recent flipflop away from the tort system and into the bankruptcy court is itself evidence of bad faith.

II. J&J Created LTL as a Special Purpose Vehicle to Shelter Itself From Derivative Talc Liability.

22. J&J formed LTL on October 12, 2021, approximately 48 hours before its Petition Date, by a divisive merger under Texas law. Kim Decl. at ¶ 16. The so-called "Texas Two-Step" by which J&J created the Debtor is summarized in the Kim Declaration (¶¶ 21-25): in brief, J&J terminated the corporate existence of Old JJCI, created six different corporate entities over a forty-eight-hour period to take advantage of the Texas divisive merger statute and wind up with a North Carolina-organized debtor. It was ultimately left with (i) LTL as the "BadCo," which succeeded to all of Old JJCI's talc-related liabilities, along with certain limited assets, including ownership of Royalty A&M (allegedly valued at $367.1 million), a bank account holding $6 million, and rights under the Funding Agreement; and (ii) New JJCI as the "GoodCo," which succeeded to Old JJCI's other, far more valuable assets and other liabilities, including those related to "a broad range of products used in the baby care, beauty, oral care, wound care and women's health care fields, as well as over-the-counter pharmaceutical products." Kim Decl. at ¶¶ 19, 23.

23. The Debtor falsely claims that the Funding Agreement "ensure[s] that [LTL] has at least the same, if not greater, ability to fund talc-related claims and other liabilities as Old JJCI had before the restructuring" (Kim Decl. at ¶ 26). Rather, the Funding Agreement obligates J&J and New JJCI to fund LTL up to the value of Old JJCI as of the date of the divisive merger. See Funding Agreement[8] at § 1 (definition of "JJCI Value"). J&J and JJCI thus replace operating

8 The Funding Agreement was filed at Annex 2 to the Kim Declaration.

businesses (which have historically increased in value) with an amorphous, artificially capped contract right, the value of which would take years to adjudicate. And that litigation only ripens when J&J and New JJCI refuse to make payments under the Funding Agreement. See id. at § 2(a) ("The JJCI Value shall be calculated at, ***and only at***, any date on which (x) the Payors refuse to make a requested Payment under this Agreement…" (emphasis added)). In other words, a tort claimant in possession of a judgment against LTL cannot enforce that judgment on assets held by LTL: instead, it must request that LTL (controlled by J&J) demand payment from J&J or New JJCI. If they refuse, the claimant must wait on LTL to litigate for that funding. Moreover, at present, J&J's and New JJCI's obligations to provide financing under the Funding Agreement are likely "financial accommodations," as such term is used in section 365(c) of the Bankruptcy Code, and are therefore unenforceable by the Debtor against J&J or New JJCI absent further order of the Court or a different agreement from J&J and New JJCI. Talc claimants have thus been intentionally rendered worse off than they were prior to the divisional merger, an outcome prohibited by the statute. See Aldrich Pump LLC v. Parties to Actions Listed on Appendix A to Complaint (In re Aldrich Pump LLC), Adv. No. 20-03041 (JCW), 2021 WL 3729335, at *27 & n.220 (Bankr. W.D.N.C. Aug. 23, 2021) (quoting Tex. Bus. Orgs. Code § 10.901 and noting that "[f]or while the TBOC permits a company to engage in a divisional merger, it does not permit that company to thereby prejudice its creditors.").

III. LTL Exploited The Bankruptcy Process To Shelter J&J.

24. The second step of J&J's Texas Two-Step strategy was to cause LTL to file for Chapter 11 protection in the Western District of North Carolina, in an attempt, specifically, to take advantage of the Fourth Circuit's stringent test for dismissal. See *Order Transferring Case to District of New Jersey* [D.I. 416] (the "Transfer Order") at 10 ("[T]he Debtor's actions indicate a

preference to file bankruptcy in this district, likely due to the Fourth Circuit's two-prong dismissal standard . . . .").

25. Immediately upon the commencement of its case, the Debtor began a campaign to halt all ongoing litigation against its non-debtor affiliates, including direct claims against J&J. On October 18, 2021, LTL filed the *Debtor's Emergency Motion to Enforce the Automatic Stay Against Talc Claimants Who Seek to Pursue Their Claims Against the Debtor and Non-Debtor Affiliates* [D.I. 44] (the "Emergency Stay Motion"), seeking entry of interim and final orders applying the Section 362(a) automatic stay to all talc-related claims asserted against J&J and New JJCI. The Emergency Stay Motion entirely ignores the direct liability of J&J and JJCI, and states incorrectly that "the commencement or continuation of the talc claims against Old JJCI or J&J is for the purpose of liquidating and recovering claims against the Debtor." Id. at 2. Just one day later, before its first-day hearing (and before the Debtor had been granted any injunctive relief), J&J filed a Form 8-K misrepresenting the automatic stay and preemptively announcing that "*all* pending cosmetic talc cases will be stayed" as a result of the Debtor's filing (emphasis added).[9] Even before the North Carolina Court entered any injunctive relief, J&J filed notices of the automatic stay in courts across the country. This callous disregard for dying victims who in their final days seek justice and help in taking care of their families they soon will leave behind is truly beyond the pale.

26. The United States Bankruptcy Court for the Western District of North Carolina (the "North Carolina Court") denied the Emergency Stay Motion and directed the Debtor to proceed

[9] Johnson & Johnson Current Report on Form 8-K, filed on October 19, 2021, available at https://www.sec.gov/ix?doc=/Archives/edgar/data/200406/000020040621000067/jnj-20211019.htm.

by adversary proceeding[10] and to file a complaint seeking the injunctive relief requested in the Emergency Stay Motion, and on October 21, LTL filed its complaint [Adv. D.I. 1] (the "Complaint"). The Complaint seeks to stay all talc-related claims against 490 non-debtor affiliates, including J&J and New JJCI (along with retailers and insurers), and seeks a preliminary injunction and a temporary restraining order against talc claimants.

27. On November 12, 2021 (just two days after the North Carolina Court transferred the Chapter 11 case to this Court), J&J announced[11] a plan to spin off its Consumer Health business (largely New JJCI) from J&J, creating additional barriers between tort claimants and the assets that should be available to satisfy their claims. This second spin-off also throws into question which of New JJCI and J&J should be the primary obligor under the Funding Agreement, which will likely lead to additional complications under the Funding Agreement.

RELIEF REQUESTED

28. The LTL Chapter 11 case is not a legitimate good faith filing. The Official Committee seeks an order of this Court dismissing the Debtor's Chapter 11 case, with prejudice, pursuant to Section 1112(b) of the Bankruptcy Code.

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10 Adv. Pro. No. 21-03032. Pleadings and submissions filed in the preliminary injunction adversary proceeding shall be referenced as "Adv. D.I." The Committee has asked the United States District Court for the District of New Jersey to withdraw the reference of the adversary proceeding.

11 Johnson & Johnson, Current Report on Form 8-K, filed on November 15, 2021, available at https://www.sec.gov/ix?doc=/Archives/edgar/data/200406/000020040621000072/jnj-20211115.htm.

ARGUMENT

I. The Chapter 11 Case Should Be Dismissed For Cause Because It Was Not Filed In Good Faith

29. Section 1112(b) of the Bankruptcy Code requires courts to convert or dismiss a Chapter 11 case, whichever is in the best interests of creditors and the estate, "for cause", unless the court determines that appointment of a trustee or examiner is in the best interests of creditors and the estate. See 11 U.S.C. § 1112(b)(1). Bankruptcy Courts "have wide latitude in determining whether cause exists to convert or dismiss" a Chapter 11 case. In re NuGelt, Inc.,142 B.R. 661, 665 (Bankr. D. Del. 1992).

30. The Third Circuit and other courts have overwhelmingly held 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 at 162; see also Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994); C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC Ave. P'ship), 113 F.3d 1304, 1311 (2d Cir. 1997); Carolin Corp. v. Miller, 886 F.2d 693, 698 (4th Cir. 1989). Once a party in interest has made allegations that a filing was not made in good faith, the burden shifts onto the debtor to establish that good faith exists. NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.), 384 F.3d 108, 118 (3d Cir. 2004), In re Cloudeeva, Inc., No. 14-24874, 2014 WL 6461514, at *4 (Bankr. D.N.J. Nov. 18, 2014).

31. Determining whether a petition for Chapter 11 was filed in good faith is a fact-specific undertaking and requires an examination of the totality of the facts and circumstances surrounding a debtor's filing. In re SGL Carbon, 200 F.3d at 162. The focus of the inquiry is whether the petitioner sought "to achieve objectives outside the legitimate scope of the bankruptcy laws" when filing for protection under Chapter 11. Id. at 165 (citing In re Marsch, 36 F.3d at

828). The Third Circuit has focused on two primary questions, namely, (i) whether the petition was filed to obtain a tactical litigation advantage; and (ii) whether the petition serves a valid bankruptcy purpose. See 15375 Mem'l Corp. v. Bepco, L.P., 589 F.3d 605, 618 (3d Cir. 2009) (citing SGL Carbon Corp, 200 F.3d at 165). Other factors courts consider include improper pre-petition conduct and whether the debtor was formed immediately prepetition. See Primestone Inv. Partners L.P. v. Vornado PS, L.L.C. (In re Primestone Inv. Partners L.P.), 272 B.R. 554, 557-58 (D. Del. 2002) (citing In re SGL Carbon, 200 F.3d at 165; In re Phoenix Piccadilly, Ltd., 849 F.2d 1393, 1394-95 (11th Cir. 1988); In re SB Props., 185 B.R. 198, 205 (E.D. Pa. 1995)). "[N]o single factor is determinative of a lack of good faith in filing a petition." In re Tiffany Square Assocs., Ltd., 104 B.R. 438, 441 (Bankr. M.D. Fla. 1989). In evaluating whether the Texas Two-Step and the subsequent bankruptcy filing were undertaken in good faith, this Court should apply equitable principles, considering the fiduciary obligations of J&J. See Pepper v. Litton, 308 U.S. 295, 306-07 (1939) ("The essence of the test [for good faith of an insider transaction] is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside."). Because each of the above factors exists and indisputably demonstrates that the case was not filed in good faith, it should be dismissed.

A. J&J Abused Texas Law When It Created LTL Two Days Prior To The Petition Date.

32. As described above and in the Kim Declaration (see ¶¶ 22-25), J&J used the Texas divisive merger statute to bring the Debtor into existence via a series of transactions on October 11 and October 12, 2021, mere days before the Petition Date. That statute does not permit J&J to use it, as it was used here, as a device to disadvantage creditors or to curtail rights bestowed by state or federal law, including the Bankruptcy Code. See Tex. Bus. Orgs. Code § 10.901 ("This code does not …

abridge any right or rights of any creditor under existing laws."); see also In re Aldrich Pump LLC, 2021 WL 3729335, at *27 & n.220 (Bankr. W.D.N.C. Aug. 23, 2021) ("[W]hile the TBOC permits a company to engage in a divisional merger, it does not permit that company to thereby prejudice its creditors."); DBMP LLC v. Those Parties Listed on Appendix A to Complaint and John and Jane Does 1-1000 (In re DBMP LLC), Adv. No. 20-03004, 2021 WL 3552350, at *24 & n.160 (Bankr. W.D.N.C. Aug. 11, 2021) (citing § 10.901 and noting that "[b]ut, while the TBOC permits a company to engage in a divisional merger, it does not permit that company to thereby prejudice its creditors.").

33. Indeed, prejudicing tort claimants *was the whole point* of the Texas Two-Step. Prior to the divisive merger, a claimant that secured a tort judgment against Old JJCI[12] could enforce that judgment on assets held by Old JJCI. Moreover, claims against J&J would be payable by J&J, which has a market cap of approximately half a trillion dollars. After the divisive merger, a claimant that secures a judgment against LTL (which is controlled by J&J) must first request that it demand payment from J&J or New JJCI. If they refuse, that claimant must wait on LTL to litigate for that funding. See Funding Agreement § 2(a) ("The JJCI Value shall be calculated at, ***and only at***, any date on which (x) the Payors refuse to make a requested Payment under this Agreement . . .") (emphasis added). And, under the Funding Agreement, claims against J&J are now capped at the value of New JJCI: J&J and Old JJCI are obligated to fund only up to the value of New JJCI as of the date of the divisive merger. See id. at § 1 (definition of "JJCI Value"). In other words, claimants are much worse off because they

12 As described herein, and in the Committee Initial Statement, tort victims also hold direct claims against J&J.

must rely on LTL (again, controlled by J&J) to litigate the valuation of New JJCI, and must await the outcome of that litigation, in order to be assured of payment.

34. The Texas statute does not truly let "GoodCo" (JJCI) off the hook for liabilities vested in "BadCo" (LTL): GoodCo, as surviving co-liable entity, remains secondarily liable.[13] In order to attempt to ensure that tort claimants would have *no* recourse to JJCI assets, J&J added a transactional step: it "killed" Old JJCI by terminating its corporate existence, and incorporated a new entity that adopted the identical name, asset base, and profile as Old JJCI. New JJCI is, in every respect, GoodCo's doppelganger, but purportedly without the secondary liability. J&J's prepetition conduct does not accord with the intent of the Texas statute, and its failure to comply with the statute demonstrates a lack of good faith.[14]

B. <u>The Debtor Filed Its Petition As A Litigation Tactic</u>.

35. Filing a Chapter 11 petition merely to obtain tactical litigation advantages is not within "the legitimate scope of the bankruptcy laws." <u>Marsch</u>, 36 F.3d at 828. As this Court has previously explained, "[g]enerally, where . . . the filing for relief under the Bankruptcy Code is intended to frustrate the legitimate efforts of creditors to enforce their rights against the debtor, dismissal for 'cause' is warranted." <u>In re Ravick Corp.</u>, 106 B.R. 834, 844 (Bankr. D.N.J. 1989).

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13 Tex. Bus. Org. Code § 10.008(a)(4) ("[E]ach surviving or new domestic organization to which a liability or obligation is allocated under the plan of merger is the ***primary*** obligor for the liability or obligation, and, except as otherwise provided by the plan of merger or by law or contract, no other party to the merger, ***other than a surviving domestic entity or non-code organization liable or otherwise obligated at the time of the merger***, and no other new domestic entity or non-code organization created under the plan of merger is liable for the debt or other obligation . . .") (emphasis added).

14 J&J's bad faith can be imputed to the Debtor because the Debtor has "acquiesced" to J&J's strategy. <u>In re Quigley Co., Inc.</u>, 437 B.R. 102, 127 n.32 (Bankr. S.D.N.Y. 2010).

Courts typically dismiss Chapter 11 petitions where such abuse of the bankruptcy system is evident. See Argus Grp. 1700, Inc. v. Steinman (In re Argus Grp. 1700, Inc.), 206 B.R. 757, 765-66 (E.D. Pa. 1997); Furness v. Lilienfield, 35 B.R. 1006, 1013 (D. Md. 1983) ("The Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation.").

36. In re SGL Carbon Corp. is a case in point. There, the debtor was sued by steel producers for price fixing in a class action and in separate antitrust lawsuits. 200 F.3d at 156-57. Shortly thereafter, the debtor filed a bankruptcy petition and a proposed plan, which provided that all creditors would be paid in full except the antitrust claimants, and which barred any claimant from bringing action against non-debtor affiliates arising out of or in any way connected with the antitrust claims against the debtor. Id. at 157. The debtor explained that it filed "to protect itself against excessive demands made by plaintiffs in civil antitrust litigation and in order to achieve an expeditious resolution of the claims against it." Id. The antitrust plaintiffs moved to dismiss the bankruptcy case as having been filed in bad faith, and the Delaware district court denied the motion. The Third Circuit reversed, remanding the case for dismissal as having been filed in bad faith and noting that the debtor's officers had acknowledged that the filing was due to "the excessive demands [of litigants]" and the difficulties in reaching settlements of the antitrust

litigation, and that there was no evidence of the debtor's need to reorganize or rehabilitate its business. Id. at 167.[15]

37. Here, as in In re SGL Corp., the Debtor admits that it "commenced this Chapter 11 case to equitably and permanently resolve all current and future talc-related claims against it . . . ." Complaint at ¶ 1. See also *Supplemental Declaration of John K. Kim in Support of Debtor's Complaint for Declaratory and Injunctive Relief and Related Motions* [Adv. D.I. 3] (the "Supplemental Kim Declaration") at ¶ 18 (goal of "reorganizing" is to address talc claims against "Protected Parties" (as listed on Appendix B of the Complaint, including Old JJCI, non-debtor affiliates, indemnified parties, insurers, and retailers)).

38. The scheme to create LTL and have it file for bankruptcy to insulate J&J from talc liability is a dramatic reversal of course for J&J. Prior to the Supreme Court's denial of *certiorari* with respect to the Ingham verdict, J&J assured the Imerys court that "J&J, of course, has the financial wherewithal to defend these claims and satisfy any successful talc claim in full."[16] Then, J&J demanded it be permitted to defend talc claims at trial because J&J "prefers to defend the safety of its

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15 The Third Circuit rejected the debtor's argument, also made by LTL, that the antitrust litigation would be a "harmful distraction of its management." 200 F.3d at 167; see Supplemental Kim Decl. at ¶ 18. There was no evidence that the purported "distraction" related to the antitrust litigation harmed the company in any way, as the company was (and remained) financially healthy. Here, LTL conducts no business, and exists only as a vehicle to resolve talc claims. The resolution of talc claims is not a "distraction" to the Debtor's management—rather, it is the only reason the Debtor exists at all.

16 See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. Mar. 20, 2020) (LSS), *Johnson & Johnson's Motion Pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, and Local Bankruptcy Rule 4001-1 for Entry of Order Modifying the Automatic Stay to Permit J&J to Send Notice Assuming Defense of Certain Talc Claims and Implement Talc Litigation Protocol* [Dkt. No. 1567], ¶¶ 4, 41, 45.

products (and the core causation issues) in open court."[17] Now, after it has exhausted its appellate remedies, the Debtor claims that "inconsistent and excessive awards"[18]in the MDL and by state courts and juries could exhaust "the assets available to pay current and future claimants." Debtor's Information Brief at 2. Now, the Debtor demands that the automatic stay apply not only to it, but to all the allegedly "Protected Parties." Complaint at ¶ 2. In other words, the Debtor no longer likes its chances with American juries, and instead asks this Court to sit in lieu of factfinders across the country. This is not an appropriate use of the Bankruptcy Code.

39. Moreover, by staying all litigation against Old JJCI and J&J, the Debtor and J&J are using this Court to divest plaintiffs of their Seventh Amendment right to a jury trial. There is at minimum a serious constitutional question whether, under the principles recognized by the Supreme Court in Stern v. Marshall, 564 U.S. 462, 484 (2011); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58-59 (1989); and Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 52 (1982), an Article I judge may properly preside over litigation transferred to the bankruptcy court by virtue of a chapter 11 filing that serves no reorganizational purpose. The Third Circuit has reserved the question whether such a bankruptcy filing may vitiate the Seventh Amendment right to a jury trial. See In re SGL Carbon Corp., 200 F.3d at 169 n.23 ("Because we conclude SGL Carbon's petition should be dismissed, we need not address the creditors' argument that the failure to dismiss would deprive it of its Seventh Amendment right to try its antitrust claims

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17 See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. May 19, 2020) (LSS), *Johnson & Johnson's Omnibus Reply in Support of J&J's Motion for Entry of Order Modifying Automatic Stay to Implement Talc Litigation Protocol* [Dkt. No. 1769], ¶¶ 2-4.

18 The Debtor, however, admits that "[a]pproximately 35,000 of [38,000 ovarian cancer claims] are pending in the MDL." Debtor's Information Brief at 124.

before a jury."). The constitutional concerns are magnified by Congress' express exclusion of "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11" from "core" claims. See 28 U.S.C. § 157(b)(2)(B).

C. There Is No Valid Reorganizational Purpose For This Bankruptcy.

i. LTL's Creation Had No Legitimate Business Purpose, And It Has No Business To Rehabilitate.

40. The purpose of bankruptcy is to give "to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); see Report of the Committee on the Judiciary, House of Representatives to Accompany H.R. 8200, H.R.Rep. No. 595 (1977), reprinted in 1978 U.S.C.C.A.N. 6179) ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."). As the Fifth Circuit (affirmed by the Supreme Court) noted in Timbers of Inwood Forest, "when there is no reasonable likelihood that the statutory objective of reorganization can be realized . . . then the automatic stay and other statutory provisions designed to accomplish the reorganization objective become destructive of the legitimate rights and interests of creditors, the intended beneficiaries." United Savs. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.), 808 F.2d 363, 373 (5th Cir. 1987) (en banc), aff'd, 484 U.S. 365 (1988). A petition lacks good faith when it is filed without a "valid reorganizational purpose":

> Chapter 11 vests petitioners with considerable powers - the automatic stay, the exclusive right to propose a reorganization plan, the discharge of debts, etc. - that can impose significant hardship on particular creditors. When financially troubled petitioners seek a chance to remain in business, the exercise of those powers is justified. But this is not so when a petitioner's aims lie outside those of the Bankruptcy Code…***if a petitioner has no need to rehabilitate or reorganize, its petition cannot serve the rehabilitative purpose for which Chapter 11 was designed***.

In re SGL Carbon Corp., 200 F.3d at 164-66 (emphasis added).

41. This Chapter 11 case is not designed to serve any "valid reorganizational purpose." As set forth in the Kim Declaration, the Debtor is a special-purpose bankruptcy vehicle with no business to reorganize. There are no jobs to save. There are no leases or contracts to reject. There is nothing to sell. There is no "creditor's bargain"[19] to preserve: there is no debt to restructure, no liens being primed, no cash collateral required, and no post-petition financing being granted. There is no rehabilitation to maximize value for creditors because there is no value to maximize. Furthermore, the divisive merger that created the Debtor had no legitimate business purpose, violated the creditor protection provisions of the Texas Business Organizations Code, and was intentionally done to, at a minimum, delay and hinder existing and future talc claimants. In sum, apart from enforcing the stay against itself, New JJCI, and J&J, there is nothing for the Debtor, or for this Court, to *do* in this case.

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[19] See Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 YALE L.J. 857, 859-60 (1982) (bankruptcy is "a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex ante position.").

ii. The Protection Of J&J and New JJCI Is Not A Valid Reorganizational Purpose For LTL.

42. As described above, LTL exists only as a litigation tool to wall off talc-related tort liability from its non-debtor affiliates. By engineering the Texas Two-Step and this bankruptcy case, J&J attempts to obtain the benefit of the automatic stay of talc claims against it, and a channeling injunction without having to subject itself to the scrutiny of the Chapter 11 process. Indeed, when questioned about why J&J did not file its own petition, in light of the litigation against it, Mr. Kim testified that "[w]e thought that this route was the preferable route" and that "we believe that according to the [Texas divisive merger statute] Johnson & Johnson would certainly be entitled to a stay, yes." Nov. 4, 2021 Hr'g Tr. at 262:2-7; see also Transfer Order at 2 ("The Debtor maintains this restructuring was undertaken to enable the Debtor to fully resolve talc-related claims through a chapter 11 reorganization without subjecting the entire J&J enterprise to a bankruptcy proceeding.").

43. When considering dismissal of a bankruptcy case, courts apply particular scrutiny to "***asset-culled entities where 'debtors have elected not to submit the actual entities in interest to the jurisdiction of the court, thereby isolating the entities in interest from the scrutiny and control of the court during proceedings***.'" In re Eden Assocs., 13 B.R. 578, 584 (Bankr. S.D.N.Y. 1981) (quoting In re Dutch Flat Inv., 6 B.R. 470, 471 (Bankr. N.D. Cal. 1980)) (emphasis added). In In re Quigley Co., 437 B.R. 102 (Bankr. S.D.N.Y 2010), the court found bad faith in such a circumstance. Quigley manufactured a product that contained asbestos. It was subsequently acquired by Pfizer, which started marketing Quigley's product. As of Quigley's petition date, hundreds of thousands of asbestos personal injury claims had been brought against Quigley and Pfizer (both derivative claims on account of Quigley products, and direct claims). Id. at 112. Pfizer caused Quigley to file for Chapter 11 in order to secure for itself a section 524(g) injunction. The

strategy didn't work: the ad hoc committee of tort claimants and the United States trustee objected to confirmation and moved to dismiss the case. The court denied confirmation, in large part, because Pfizer did not act in good faith in proposing it:

> [T]his is a Quigley bankruptcy in name only. Pfizer conceived and executed the global strategy, including the resuscitation of the moribund Quigley and the filing of the chapter 11 case . . . . Pfizer funded the chapter 11 . . . [and] is also providing the bulk of the plan funding. The Fourth Plan . . . is designed to free the Pfizer Protected Parties from derivative liability, and only incidentally, to reorganize Quigley to the extent necessary to confirm the Plan. Pfizer, the parent of Quigley, the architect of the global strategy, the only source of chapter 11 and plan financing and the principal beneficiary of the channeling injunction, is the real proponent of this plan.

Id. at 126-27. Moreover, because "Quigley acquiesced in if not actively embraced Pfizer's actions in connection with the prosecution of its chapter 11 case, . . . Pfizer's bad faith may be attributed to Quigley as well." Id. at 127 n.32.

44. As in Quigley, this is an LTL bankruptcy in name only. The true beneficiary of the case is J&J. As described in detail in the Committee Initial Statement, J&J (like Pfizer) had direct involvement in the sale, marketing, and safety of all talc-related products. In addition, J&J was directly involved in the production of talc, owned and operated (through a subsidiary) the mines that were the primary source of talc for J&J products for decades, and maintained control of all talc-related specifications. Additionally, J&J made all health and safety policy decisions with regard to asbestos and talc products. See Oct. 22, 2021 Hr'g Tr. at 88:4-9 (Q: "So, Mr. Kim, you assume that some decisions must be, must have been made elsewhere, but your corporate representative says all health and safety policy decisions with regard to asbestos and talc products were made by the parent company, Johnson & Johnson? Yes or no." A: "That's what he said, yes."). J&J is thus directly liable for talc-related personal injury claims. Ingham, 68 S.W.3d at 724 (affirming jury verdict finding J&J individually liable, separate and apart from Old JJCI, for actual

and punitive damages on account of its "reprehensible conduct."). Like Pfizer, J&J assigned its liabilities to LTL and then caused its bankruptcy to seize the injunctive benefits of Chapter 11 for itself (which, the Debtor admits, are worth billions of dollars) without having to file its own petition. This is not a valid reorganizational purpose.

45. The Debtor disagrees, claiming that it intends to seek a channeling injunction "that will permanently protect the Debtor, its affiliates and certain other parties from further talc-related claims arising from products manufactured and/or sold by Old JJCI, or for which Old JJCI may otherwise have had legal responsibility, pursuant to sections 105(a) and/or 524(g) of the Bankruptcy Code." Kim Decl. at ¶ 59 (emphasis added).[20] In its Informational Brief (filed prior to the transfer of this Chapter 11 case to New Jersey), the Debtor cited to In re Bestwall, LLC, 605 B.R. 43, 49 (Bankr. W.D.N.C. 2019) for the proposition that a channeling injunction resolving "all current and future cosmetic talc claims, while allowing New JJCI, J&J, and its affiliates to operate their businesses and continue to develop, manufacture, and distribute lifesaving therapies and devices . . . . is unquestionably a proper objective of a chapter 11 case." Debtor's Information Brief at 6.

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[20] On its face, the Funding Agreement does not require a section 105(a) injunction or a section 524(g) channeling injunction. See Funding Agreement at §§ 1 (definition of "Permitted Funding Use"), 2 ("Funding Obligations and Procedures"). In reality, however, J&J has ensured that its obligations under the Funding Agreement will depend upon a channeling injunction and a trust. First, J&J controls the Debtor, and only the Debtor can propose a plan during the exclusivity period: presumably, any plan proposed by the Debtor would contain an injunction protecting J&J. Second, the Funding Agreement pays only to a plan trust, implying that broad plan injunctions will be conditions precedent to payment. This is a clear bait and switch by the Debtor and J&J solely to pass muster before the North Carolina Court, which is further evidence of bad faith.

46. In Bestwall (where the debtor was represented by the same counsel that currently represents LTL, New JJCI, and J&J), the debtor was created through a Texas Two-Step, which vested the debtor with asbestos liability and certain assets, and the "NewCo" with all other assets and certain non-asbestos liabilities. 605 B.R. at 47. Pursuant to a funding agreement, the debtor could draw from NewCo the amount necessary to fund a section 524(g) trust. The official committee of asbestos claimants moved to dismiss the case as having been filed in bad faith. The court applied the Fourth Circuit's standard for dismissal: there, a court may dismiss a petition as a bad faith filing only when the reorganization is both (i) objectively futile and (ii) filed in subjective bad faith.[21] Id. at 48. The court held that the debtor's chapter 11 petition was not "objectively futile" because "Bestwall has the ability to reorganize and establish a trust that meets each of the statutory requirements of section 524(g) of the Bankruptcy Code." Id. at 49.

47. Now that the Debtor's attempt to "manufactur[e] forum and creat[e] venue" has failed (see Transfer Order at 10), however, the Debtor can no longer rely on the Fourth Circuit's standard for dismissal, which is "one of the most stringent articulated by the federal courts." Id. at 48, quoting In re Dunes Hotel Assocs., 188 B.R. 162, 168 (Bankr. D.S.C. 1995). Notably, the Fourth Circuit places the burden on the ***movant*** to demonstrate both objective futility and subjective bad faith by a preponderance of the evidence. 605 B.R. at 48 (citing In re SUD Props., 462 B.R. 547, 551 (Bankr. E.D.N.C. 2011)).

48. In the Third Circuit, however, the burden is on the ***debtor*** to establish that the filing was in good faith. In re Integrated Telecom Express, Inc., 384 F.3d at 118. Per the Kim Declaration,

[21] As the North Carolina Bankruptcy Court noted, "the Debtor's actions indicate a preference to file bankruptcy in this district, likely due to the Fourth Circuit's two-prong dismissal standard . . . ." Transfer Order at 10.

the Debtor filed this Chapter 11 case to take advantage of a particular provision in the Bankruptcy Code, that is, the section 524(g) channeling injunction. The desire to use a particular provision in the Bankruptcy Code is insufficient *by itself* to establish good faith to survive dismissal, as the Third Circuit has held:

> The Bankruptcy Court did not hold that Integrated's desire to take advantage of the § 502(b)(6) cap established ***good*** faith. Instead, the Bankruptcy Court held that "it does not establish ***bad*** faith for a debtor to file a chapter [11] case for the purpose of taking advantage of provisions which alter pre-petition rights, including altering the rights of a landlord under State law." We agree. Indeed, we believe it to be a truism that it is not bad faith to seek to avail oneself of a particular protection in the Bankruptcy Code–Congress enacted such protections with the expectation that they would be used. In re James Wilson Assocs., 965 F.2d 160, 170 (7th Cir.1992) ("It is not bad faith to seek to gain an advantage from declaring bankruptcy–why else would one declare it?") . . . ***The far more relevant question is whether a desire to take advantage of a particular provision in the Bankruptcy Code, standing alone, establishes good faith. We hold that it does not.***

Id. at 127 (emphasis added).

49. In other words, the desire to use Section 524(g) is not by itself a "valid bankruptcy purpose" sufficient to establish good faith. LTL bears the burden of establishing good faith, and gesturing toward a channeling injunction is not sufficient.

D. Debtor's And J&J's Actions And Admissions Demonstrate Subjective Bad Faith.

50. "While the good faith inquiry is more an objective analysis of whether the debtor has crossed the equitable limitations on bankruptcy filings, a debtor's subjective intent may also be relevant in considering the totality of the circumstances." In re Rent-A-Wreck of America, Inc., 580 B.R. 364, 382 (Bankr. D. Del. 2018). Although discovery is underway, the following actions and admissions demonstrate subjective bad faith:

- J&J improperly used the Texas Business Organizations Code's divisive merger provisions to establish LTL for the purpose of hindering and delaying a single group of creditors for its own benefit.

- Just last year, J&J moved for relief from the automatic stay in the Imerys cases in order to continue litigating in the tort system, stating "J&J, of course, has the financial wherewithal to defend these claims and satisfy any successful talc claim in full." See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. Mar. 20, 2020) (LSS), *Johnson & Johnson's Motion Pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, and Local Bankruptcy Rule 4001-1 for Entry of Order Modifying the Automatic Stay to Permit J&J to Send Notice Assuming Defense of Certain Talc Claims and Implement Talc Litigation Protocol* [D.I. 1567], ¶¶ 4, 41, 45. Subsequently, J&J reiterated its demand to defend talc claims against Imerys at trial because J&J "prefers to defend the safety of its products (and the core causation issues) in open court." See In re Imerys Talc America, Inc. et al., Case No. 19-10289 (Bankr. D. Del. May 19, 2020) (LSS), *Johnson & Johnson's Omnibus Reply in Support of J&J's Motion for Entry of Order Modifying Automatic Stay to Implement Talc Litigation Protocol* [D.I. 1769], ¶¶ 2-4. Now, after the Supreme Court refused to reconsider the Ingham verdict, the Debtor and J&J have changed their tune.

- J&J "killed" Old JJCI and "resurrected" an identical New JJCI to give the appearance that no surviving entity would remain to be secondarily liable on the liability assigned to LTL.

- The Debtor misrepresents that the Funding Agreement "ensure[s] that [LTL] has at least the same, if not greater, ability to fund talc-related claims and other liabilities as Old JJCI had before the restructuring." This is not accurate, as described above.

- The Debtor and J&J have repeatedly misrepresented the scope of the automatic stay, and the orders of the North Carolina Court in its securities filings and in the notices of automatic stay that the Debtor filed in courts around the country:

    - On October 19, 2021, before its first-day hearing and before the Debtor had applied for, let alone been granted, any injunctive relief, J&J filed a Form 8-K misrepresenting the automatic stay and preemptively announcing that "*all* pending cosmetic talc cases will be stayed" as a result of the Debtor's filing.[22]

    - As but one example of the Debtor's and J&J's misrepresentations, in Mississippi v. Johnson & Johnson[23], the Mississippi chancery court ordered briefing on the applicability of the Debtor's automatic stay to an action brought by the Mississippi Attorney General against J&J. The Debtors and J&J filed a *Supplement to Reply in Support of Defendant's Notice of Bankruptcy Filing*, in which they specifically represent that "the Bankruptcy court held the automatic stay applied to prohibit the commencement or continuation of any action seeking to hold LTL, Old JJCI, J&J and a number of other entities liable on account of the Enjoined Talc Claims." To the contrary, the North Carolina

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22 Nov. 4, 2021 Hr'g Tr. at 269:6-270:9; Johnson & Johnson Current Report on Form 8-K, filed on October 19, 2021.

23 Case No. 25CH1:14-cv-01207 [Docket No. 393] (Miss. Ch. Nov. 26, 2021).

Court's *Order Granting the Debtor's Request for Preliminary Injunctive Relief* [Adv. D.I. 102] (at ¶ 7) expressly ruled that "governmental units . . . are not Defendants in this proceeding. The relief granted herein . . . shall not apply to restrict or enlarge the rights of the Debtor or any governmental unit under applicable bankruptcy law and all such rights are hereby preserved."

- The Debtor wrongfully contends that, as a result of the divisive merger, it alone bears the entirety of the liability for talc-related personal injury cases. See, e.g., *Debtor's Motion for an Order (I) Declaring that the Automatic Stay Applies to Certain Actions Against Non-Debtors or (II) Preliminarily Enjoining Such Actions and (III) Granting a Temporary Restraining Order Pending a Final Hearing* [Adv. D.I. 2] at 13, 14 (describing the "Debtor Talc Claims" by stating: "Old JJCI is responsible for all claims alleging that Johnson's Baby Powder and other talc-containing products cause cancer or other disease" and that the "Debtor Talc Claims are asserted in virtually every case against both the Debtor and J&J . . . [and] seek to hold the Debtor and J&J jointly and severally liable for the Debtor Talc Claims."). In fact, and as described in the Committee Initial Statement, juries have repeatedly found that J&J has individual and direct tort liability, separate and apart from Old JJCI. See, e.g., Ingham, 68 S.W.3d 663.

- After this Chapter 11 case was transferred to less favorable (for J&J) venue, J&J announced a new plan to spin off its Consumer Health Business, creating additional delays and hurdles for tort claimants. See Johnson & Johnson, Current Report on Form 8-K, filed on November 15, 2021. This spin-off throws into question which of New

JJCI and J&J should be the primary obligor under the Funding Agreement, creating a new delay and hindrance to payments under the Funding Agreement.

E. <u>Equitable Principles Weigh In Favor Of Dismissal.</u>

51. In determining that this Chapter 11 case was not filed in good faith, this Court may also apply "the principles and rules of equity jurisprudence." <u>See</u> <u>Pepper v. Litton</u>, 308 U.S. at 304. A controlling stockholder, such as J&J, is a fiduciary:

> Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside.

<u>Id.</u> at 306-07 (citations omitted). In <u>Pepper</u>, the debtor's insider used technically legal maneuvers (including filing its own claim) to thwart the claim of a judgment creditor. The district court, exercising its equitable powers as a court of bankruptcy, disallowed the insider's claim on equitable grounds. The Supreme Court upheld that judgment, finding that "where on the facts the bankrupt has been used merely as a corporate pocket of the dominant stockholder", <u>id.</u> at 309, disallowance of a claim on equitable grounds is appropriate.

52. LTL is the "corporate pocket" into which J&J has purported to deposit all of its and Old JJCI's talc liability by means of the Texas Two-Step. J&J's corporate machinations involved no arm's-length negotiations or bargains, no independent directors or managers, and were done without consulting the talc claimants who are the only creditors being affected by these transactions. Thus, when evaluating with "rigorous scrutiny" the facts and circumstances

surrounding the Texas Two-Step and LTL's bankruptcy filing, the Court should apply equitable principles and conclude that this Chapter 11 case was not filed in good faith.

II. Dismissal Is In The Best Interests of Creditors.

53. Once cause is established, "a bankruptcy court *shall* convert a case to Chapter 7 or dismiss the case 'unless the court determines that the appointment under section 1104(a) of a trustee or examiner is in the best interests of the creditors and the estate.'" In re Dr. R.C. Samanta Roy Inst. of Sci. Tech. Inc., 465 F. App'x 93, 96-97 (3d Cir. 2011) (quoting 11 U.S.C. § 1112(b)(1)). Here, dismissal, rather than the appointment of a trustee or examiner, is in the best interest of the Debtor's creditors, some of whom are literally dying as they wait to have their day in court. The vast majority of claims against the Debtor, New JJCI, and J&J are being administered through the MDL, and Chief District Court Judge Freda L. Wolfson has overseen that proceeding for more than five years. Dismissal would ensure not only that creditors be able to see that proceeding (and other proceedings) through, but also that any tort claimant who secures a judgment against J&J or New JJCI can enforce that judgment on assets held by those companies without being subject to the roadblocks and limitations of the Funding Agreement.

54. Because LTL is merely a special purpose vehicle created days before the Chapter 11 case was filed, for the purpose of sheltering its non-debtor affiliates, there is no benefit to be obtained by the appointment of an examiner or a trustee that could not also be served by dismissing the case. Given the short period of time in which LTL has existed, there is unlikely to be any role for an examiner. A trustee in this case would pursue estate claims against J&J and JJCI for the benefit of LTL's creditors, but LTL's creditors could pursue such claims on their own behalf if the case were dismissed.

CONCLUSION

Based on the foregoing, the Committee respectfully requests that the Court dismiss the Debtor's Chapter 11 case with prejudice, and grant such other and further relief as appropriate.

Respectfully submitted,

GENOVA BURNS, LLC

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Local Counsel to the Official Committee of Tort Claimants of LTL Management, LLC

UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
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In Re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan

ORDER DISMISSING THE CHAPTER 11 CASE OF LTL MANAGEMENT, LLC

The relief set forth on the following page is hereby **ORDERED.**

Debtor: LTL Management, LLC

Case No.: 21-30589-MBK

Caption: Order Dismissing the Chapter 11 Case of LTL Management, LLC

This matter having come before the Court upon the Motion of the Official Committee of Talc Claimants of LTL Management LLC, seeking to dismiss the Chapter 11 case filed by LTL Management, LLC, and the Court having reviewed the Motion and any opposition thereto, and finding good cause for the entry of the within Order;

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Chapter 11 case filed by LTL Management, LLC, bearing case number 21-30589-MBK, is hereby **DISMISSED**.
2. The within Order shall be deemed served on all parties upon its ECF filing.

This is Exhibit “C” referred to in the Affidavit of Monica Faheim sworn by Monica Faheim of the City of Mississauga, in the Regional Municipality of Peel, before me at the Town of Milton, in the Province of Ontario, on December 16, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

DocuSigned by:

Asim Iqbal

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Commissioner for Taking Affidavits (or as may be)

ASIM IQBAL

FILED & JUDGMENT ENTERED
Steven T. Salata

November 16 2021

Clerk, U.S. Bankruptcy Court
Western District of North Carolina

J. Craig Whitley
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re:	)	
	)	
LTL Management LLC,	)	Case No. 21-30589
	)	Chapter 11
Debtor.	)	
	)	

ORDER TRANSFERRING CASE TO THE DISTRICT OF NEW JERSEY

THIS MATTER is before the Court on the Motion of the Bankruptcy Administrator to Transfer Venue of Bankruptcy Case Pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014(a)(1) in the Interest of Justice or for the Convenience of Parties (the "BA's Motion"), the Court's October 26, 2021, Order to Appear and Show Cause Why Venue Should Not Be Transferred to Another District (the "Show Cause Order"), and similar motions to transfer venue filed by certain law firms on behalf of ovarian and mesothelioma cancer claimants. For the reasons set forth below, the Court orders the transfer of venue to the District of New Jersey.

Background and Procedural History

The Debtor commenced this Chapter 11 case on October 14, 2020. Just two days before filing this case, the Debtor was first created through a corporate restructuring. As a result of this restructuring, the former Johnson & Johnson Consumer Inc. ("Old JJCI"), a subsidiary of Johnson & Johnson ("J&J"), ceased to exist and two new corporate entitles were created. The first is the Debtor, which initially was formed as a Texas limited liability company, and then converted into a North Carolina limited liability company. The second entity was also initially formed as a Texas limited liability company, but then it was merged into J&J and changed its name to Johnson & Johnson Consumer Inc. ("New JJCI"). The Debtor maintains this restructuring was undertaken to enable the Debtor to fully resolve talc-related claims through a chapter 11 reorganization without subjecting the entire J&J enterprise to a bankruptcy proceeding.

Through the restructuring, the Debtor received certain limited assets from Old JJCI, together with all of Old JJCI's liabilities arising from talc-related claims. Among the limited assets the Debtor owns are a bank account containing approximately $6 million in cash, Old JJCI's rights as payee under a funding agreement, and membership interests in Royalty A&M, a North Carolina limited liability company formed just prior to the Debtor. The Debtor also has access to various insurance receivables that potentially cover talc-related liabilities.

The Debtor operates out of New Jersey. In its voluntary petition, the Debtor lists its principal place of business and mailing address as 501 George St., New Brunswick, NJ 08933. The employees of the Debtor are all employees of Johnson & Johnson Services, Inc. ("JJS"), a New Jersey corporation, that have been seconded to the Debtor. These employees all continue to work in New Jersey. JJS further provides the Debtor with, among other things, accounting services, human resources, tax support, and most notably, office space and other facilities located in New Jersey. The Debtor's assets involve no operation of a business in North Carolina.

The Debtor's only liabilities are Old JJCI's liabilities arising from talc-related claims. As of the petition date, approximately 38,000 ovarian cancer cases were pending against the Debtor as well as J&J, including approximately 35,000 cases pending in a federal multi-district litigation (the "MDL") in front of the Honorable Freda L. Wolfson. <u>In re: Johnson & Johnson Talcum Power Products Marketing, Sales Practices and Products Liability Litigation</u>, Case MDL No. 2738, in the U.S. District Court for the District of New Jersey, Case No. 16-02738. In addition to the ovarian claims, more than 430 mesothelioma cases were pending against the Debtor as of the petition date across the U.S., with cases pending in New Jersey, California, Illinois, Missouri, New York, Ohio and others.

Other interested parties in this case are currently involved in pending proceedings with the Debtor's ultimate parent, J&J, and Old JJCI. Certain of the Debtor's third-party insurers filed a lawsuit against Old JJCI and J&J in the New Jersey Superior Court of Middlesex County in May 2019 (Docket No. MID-L-003563-19) (the "New Jersey Coverage Action"). The insurers seek declaratory judgment regarding their respective obligations under each of their insurance policies. Moreover, Imerys Talc America Inc., and its affiliates ("Imerys") and Cyprus Mines Corporation ("Cyprus") are in separate, factually intertwined bankruptcy cases currently pending in the District of Delaware. Imerys and Cyprus each filed adversary proceedings against Old JJCI and J&J in their respective bankruptcy cases seeking declaratory judgments related to indemnity.

The Bankruptcy Administrator ("BA") filed her Motion to transfer this case to the District of New Jersey on October 25, 2021. The Court, considering the apparent lack of a connection to this judicial district as well as its own judicial resources, entered the Show Cause Order on October 26, 2021, requiring the Debtor to appear on November 10, 2021, and show cause why this case should not be transferred to a different venue. The Show Cause Order permitted other parties to file their own motions and responses and set a hearing on November 10, 2021.

Other law firms and interested parties filed motions seeking to transfer venue to either the District of New Jersey or the District of Delaware. The Debtor filed an objection on November 5, 2021, seeking to keep venue in this district. On November 8, 2021, the BA docketed a letter from the Official Committee of the Talc Claimants (the "TCC"). The letter informed the Court that the committee unanimously supports the transfer of venue to the District of New Jersey.[1]

Attorneys for the Debtor and J&J; attorneys for the Plaintiffs' Steering Committee (the "PSC") in the MDL, certain talc claimants and their law firms, certain insurers of the Debtor, Imerys, and Cyprus; and the BA were among the parties who appeared at the November 10 hearing. At that hearing, the BA argued in favor of transferring the case to the District of New Jersey. The PSC, certain mesothelioma claimants, and certain ovarian cancer claimants joined in her argument. Two law firms on behalf of certain claimants argued in favor of transferring the case to the District of Delaware. Notably, the attorney for Imerys took no position as to whether the case should be

[1] The TCC could not retain counsel in time to respond to the Show Cause Order.

transferred but argued against transferring the case to Delaware. The Debtor continued to oppose any transfer of the case.

Discussion

Venue is proper for a bankruptcy case in any judicial district where the Debtor's "domicile, residence, principal place of business . . . or principal assets" have been located for "a longer portion" of the 180 days prior to the petition date. 28 U.S.C. § 1408(1). Venue is proper in this judicial district since the Debtor was a North Carolina entity on the filing date, if only for two days. Even if venue is proper, the court may transfer venue to another district "in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412.[2] "The moving party bears the burden of showing by a preponderance of the evidence that either the interests of justice or the convenience of the parties would be served by a transfer of the case." In re Grand Dakota Partners, LLC, 573 B.R. 197, 201 (Bankr. W.D.N.C. 2017) (citing In re Lakota Canyon Ranch Dev., LLC, No. 11-03739-8, 2011 WL 5909630, at *2–3 (Bankr. E.D.N.C. June 21, 2011)). Ultimately, the decision to transfer venue is within the sound discretion of the court based on "a case-by-case analysis of the facts underlying each particular case." Grand Dakota Partners, LCC, 573 B.R. at 201 (citation omitted). "Substantial weight and deference" is given to a debtor's choice of forum. In re Bestwall LLC, 605 B.R. 43, 51 (Bankr. W.D.N.C. 2019). As a result, a court does not lightly transfer venue, and it is highly unusual to do so; however, this case is highly unusual. Both the convenience of the parties and the interests of justice warrant transfer of this case to the District of New Jersey.

I. Convenience of the Parties

In determining whether to transfer venue for the convenience of the parties, courts use six factors: "(1) the proximity of creditors of every kind to the court; (2) the proximity of the Debtor to the court; (3) the proximity of the witnesses necessary to the administration of the estate; (4) the location of the assets; (5) the economic administration of the estate; and (6) the necessity for ancillary administration if a liquidation should occur." Id. at 53 (quoting Lakota Canyon Ranch

[2] Made applicable by Fed. R. Bankr. P. 1014(a)(1).

Dev., LLC, 2011 WL 5909630, at *3). The economic administration of the estate is given the most weight in determining whether to transfer venue. See Bestwall LLC, 605 B.R. at 53.

Here, the first and fifth factors both weigh in favor of transferring this case to the District of New Jersey. Substantial litigation in another district supports the transfer of the case to that district. See In re Asset Resol. LLC, No. 09-16142 (AJG), 2009 WL 4505944, at *3 (Bankr. S.D.N.Y. Nov. 24, 2009) ("For purposes of efficiency and judicial economy, the substantial learning curve that the Nevada courts have already developed in presiding over these on-going disputes . . . weighs in favor of transferring venue to Nevada."). The overwhelming number of ovarian cancer cases against the Debtor—approximately 35,000 of approximately 38,000—are pending in the MDL in New Jersey. Plaintiffs in the MDL are not necessarily located in New Jersey, but the United States Judicial Panel on Multidistrict Litigation (the "Panel") chose the District of New Jersey as the appropriate venue. The Panel did this at the request of Old JJCI and J&J. The presiding judge, Judge Wolfson, the attorneys in the MDL, and other interested parties have now devoted significant time and resources over the past five years litigating in this forum.

The Debtor asserts that the MDL does not alter the fact that the claimants reside in states throughout the country, and, ultimately, most of these cases will be resolved in each plaintiff's home state. This assertion ignores that to date, the cases are still currently pending in New Jersey, and the plaintiffs and their professionals are accustomed to appearing in New Jersey, making this venue preferrable to the vast majority of the creditors. The Panel chose New Jersey as the forum for the MDL because it was convenient and accessible for all the parties involved.

Furthermore, the MDL presents a unique opportunity to help work towards an estimation of present and future claims that could take place in any future bankruptcy proceeding. Talc claims, unlike asbestos claims, are a relatively new type of claim in this country. The verdict and settlement history only goes back a few years as opposed to decades. As a result, any estimation proceeding that could take place in a bankruptcy lacks a litigation history to help accurately estimate what is already tens of thousands of claims. Absent a bankruptcy, upon completion of the MDL's pre-trial process, six cases would be tried before the rest of the cases are sent back to their respective courts. Although far from a final ruling in other courts, those cases could serve as a template for other courts to help efficiently try their cases and could help resolve important issues. To date, the MDL has resolved important issues and gained an understanding of potential liability, causation, defenses, and settlement discussions. Although presently stayed, the MDL should be accounted for during the bankruptcy case and, it could even be joined with the bankruptcy case to help efficiently resolve thousands of talc related claims and aid in any future estimation proceeding. Therefore, the administration of this estate is best served by transferring this case to the District of New Jersey.

The District of New Jersey is convenient for other interested parties as well. Cyprus and Imerys are involved in bankruptcy proceedings in Delaware, a state that borders New Jersey. Furthermore, the New Jersey Coverage Action, which impacts certain insurance companies with an interest in this case, remains pending in Middlesex County, New Jersey.

The second, third, and fourth factors all further weigh in favor of transferring this case to the District of New Jersey based on the Debtor's continuing connections to that district. A New Jersey address is listed as the Debtor's headquarters and as the Debtor's mailing address. The employees seconded to the Debtor, and most of the potential witnesses for the Debtor, including the Debtor's Chief Legal Officer, continue to work in New Jersey. New JJCI and J&J are also headquartered in New Jersey. In contrast to New Jersey, the Debtor's connections to North Carolina are limited. The only physical asset located in North Carolina is a bank account with $6 million. The Debtor owns an interest in a North Carolina limited liability company, Royalty A&M, but this asset is intangible and was formed on the eve of the bankruptcy case. Royalty A&M, along with all the Debtor's assets, were all set up primarily for the purpose of filing bankruptcy in this district, and the assets are not involved in any further business in North Carolina.

In arguing against a transfer of venue, the Debtor primarily cites to two prior rulings of this Court—Bestwall and Kaiser. Bestwall LLC, 605 B.R. 43; In re Kaiser Gypsum Co., Inc., No. 16-31602 (Bankr. W.D.N.C. Jan. 30, 2017) (Order Denying Motion of Certain Kaiser Gypsum Claimants to Transfer Chapter 11 Cases to the United States District Court for the Western District of Washington), ECF No. 348. Both cases are distinguishable. In Kaiser, the movants sought to transfer the case to the District of Washington. Kaiser Gypsum was a wholly owned subsidiary of

HPCI that became a Washington corporation in or about 1965. Kaiser existed solely to manage its legacy asbestos and environmental liabilities and had no material assets, active employees, or ongoing business operations. In 2016, Kaiser Gypsum reincorporated in North Carolina and filed for bankruptcy. We held that no other potential venue was inherently more favorable. Kaiser Order at 3. Kaiser's listed address was in Texas, its parent was domiciled in Arizona, and all the interested parties and claimants were scattered throughout the country.

Here, there is a venue preferrable to all parties. The Debtor's parent company and key witnesses are located in New Jersey, and most of the interested parties and claimants are currently involved in proceedings pending in the District of New Jersey.

The facts in Bestwall closely track this case but are still distinguishable. Like the Debtor in this case, Bestwall was first created through a Texas divisional merger and incorporated in North Carolina shortly before filing for bankruptuptcy. In Bestwall, The Official Committee of Asbestos Claimants (the "ACC") sought transfer to the District of Delaware. Bestwall LLC, 605 B.R. at 53. None of Bestwall's representatives were located in Delaware, and the majority of the creditors were not clustered around Delaware. Id. In addition, Bestwall's headquarters and its predecessor were headquartered in Atlanta, Georgia, a city closer to this district than to Delaware. Id. Thus, Judge Beyer could not conclude a transfer of venue was appropriate. Id. Here, in contrast to Bestwall, most of the parties have strong connections to New Jersey, and it is the most convenient venue.

There is another important difference between this case and Bestwall. In Bestwall, the debtor first filed the case in November 2017, the ACC filed its motion to transfer venue in August 2018. The Court heard arguments in November 2018 and January 2019 and entered its final order denying the ACC's motion in July 2019. Nearly two years passed from the filing of the case to the order denying the venue transfer. In the meantime, the Court invested significant time in the case. Transferring the case would have meant additional costs for a new judge incurred in connection with learning the facts and relevant law of the case. This case is less than a month old, and the additional learning curve costs for a new judge are not as great.

The Debtor references three other mass tort cases all currently pending in this district: In re DBMP LLC, No. 20-30080 (Bankr. W.D.N.C. filed Jan. 23, 2020); In re Aldrich Pump LLC, No. 20-30608 (Bankr. W.D.N.C. filed June 18, 2020); and In re Murray Boiler LLC, No. 20-306069 (Bankr. W.D.N.C. filed June 18, 2020). However, no party filed a motion to transfer venue in these cases. In DBMP, that lack of a motion was likely due to the same circumstances existent in Bestwall. DBMP's predecessor existed in Pennsylvania, its ultimate parent resided in Paris, France, and the claimants were located throughout the country. As to Aldrich and Murray, the debtors' predecessors were headquartered in Davidson, North Carolina, which is in this judicial district. This is was the most appropriate venue for those cases. Therefore, all the prior mass tort cases the Debtor cites as support for denying a motion to transfer venue are factually distinct.

In summary, the Debtor's strong connections to New Jersey; New Jersey's proximity to relevant witnesses, creditors and other interested parties; and the MDL's potential to aid in any possible administration of the estate support transferring venue to the District of New Jersey for the convenience of the parties.

II. Interest of Justice

The interest of justice standard is "a broad and flexible standard that is applied based on the facts and circumstances of each case." In re Enron Corp., 284 B.R. 376, 403 (Bankr. S.D.N.Y. 2002). In evaluating the interest of justice, courts consider whether transferring venue promotes "the efficient administration of the bankruptcy estate, judicial economy, timeliness and fairness." Bestwall LLC, 605 B.R. at 51 (quoting In re Manville Forest Prods. Corp., 896 F.2d 1384, 1391 (2d Cir. 1990)). "As a practical matter . . . if the convenience of the parties and witnesses will be served by transfer, it usually follows that justice will also be served by transfer." Grand Dakota Partners, LLC, 573 B.R. at 205 (quoting In re Pinehaven Assoc., 132 B.R. 982, 990 (Bankr. E.D.N.Y. 1991)). Here, as previously laid out, the convenience of the parties is served by a transfer of venue to the District of New Jersey.

Whether the Debtor is forum shopping is also a consideration. See In re Patriot Coal Corp., 482 B.R. 718, 743 (Bankr. S.D.N.Y. 2012). In Patriot Coal Corp., the debtor created two new entities and incorporated them in the State of New York just weeks prior to the petition date, allowing 97 other affiliates across the country to file for bankruptcy in the Southern District of New York pursuant to 28 U.S.C. § 1408(2). Id. at 726–28. The court held that:

> Notwithstanding the absence of bad faith on the part of the Debtors and the deference to which the Debtors' venue choice is entitled . . . the Debtors' purposeful creation of the venue-predicate affiliates in New York on the eve of filing must be considered in the "interest of justice" analysis set forth in section 1412.

Id. at 743. The court in Patriot Coal further stated that it could not "allow the Debtors' venue choice to stand, as to do so would elevate form over substance in [a] way that would be an affront to the purpose of the bankruptcy venue statute and the integrity of the bankruptcy system." Id. at 744.

This case is analogous to Patriot Coal, although instead of using of using a subsidiary to serve as the lead filer, the Debtor's predecessor underwent a Texas divisive merger, resulting in the formation of the Debtor. Upon creation, the Debtor immediately converted its state of incorporation to North Carolina—a stratagem known as the "Texas Two Step"—as a predicate to venue in this District. As in Patriot Coal, this stratagem achieved literal compliance with section 1408, and no party has presented evidence of a bad faith filing.[3] However, the Debtor's undertaking "created facts in order to satisfy the statute." Id. at 746.

The Debtor contends that this case is distinguishable from Patriot Coal since, in this case, the Debtor is not a shell company and has substantial assets. The Debtor may have assets, but they were all created to effectuate a bankruptcy filing and have no other business purpose. The Debtor compares these cases to Bestwall and Kaiser, but as previously noted, these cases are different, particularly considering the Debtor only existed two days in North Carolina before filing bankruptcy. Such a short existence indicates that the Debtor subjected itself to the laws of North Carolina purely for the purpose of filing bankruptcy. Setting up a company with the sole intent of filing bankruptcy in a certain district cannot be "the thing which the [venue] statute intended." Id. at 745. Even without any evidence of bad faith, courts are not required to "condone every strategy devised by clever lawyers to outsmart statutory purpose." Patriot Coal Corp., 482 B.R. at 745.

[3] To date, no party has filed a motion to dismiss. Thus, the court has never weighed in as to whether this case is a bad faith filing.

Here, the Debtor is trying to manufacture venue and is attempting to outsmart the purpose of the statute. In response to this argument, the Debtor contends that the claimants are forum shopping themselves. The Debtor attests that the claimants are only seeking transfer of this case to, according to the Debtor's belief of the claimant's perception, a circuit with a more friendly dismissal standard. Any forum shopping by the parties weighs against them both in looking at the factors, but in this case, the Debtor is not just forum shopping; the Debtor is manufacturing forum and creating a venue to file bankruptcy. Thus, the purposeful creation of venue, although not dispositive by itself, must be considered in the interest of justice analysis. The more dispositive factor, however, remains that that there is a more appropriate venue for the administration of the estate.

The Debtor further argues that for the benefit of all parties and in the interest of justice, this case should remain in this district given this Court's experience with mass tort cases and divisional mergers. It is not an accident that this Court has this experience. Rather, the Debtor's actions indicate a preference to file bankruptcy in this district, likely due to the Fourth Circuit's two-prong dismissal standard[4] and Judge Hodges's estimation ruling in the Garlock case. See In re Garlock Sealing Techs., LLC., et al., 504 B.R. 71 (Bankr. W.D.N.C. 2014).

This case mirrors four other bankruptcy cases filed in this district: Bestwall, DBMP, Aldrich Pump, and Murray Boiler. In each of these cases, a corporation with substantial asbestos liability hired the law firm of Jones Day, the corporation used the "Texas Two Step" to create a North Carolina entity with limited assets and all or most of its predecessors' asbestos liability, and the North Carolina entity filed for bankruptcy in this district shortly after its creation. See In re DBMP LLC, No. 20-30080, 2021 WL 3552350, at *16 (Bankr. W.D.N.C. Aug. 11, 2021). The first time any debtor in the country used this procedure was in Bestwall in 2017. Thereafter, every debtor using the Texas Two Step filed for bankruptcy in this district. As a result, any superior experience and purported expertise this Court may possess as to divisional mergers exists only because it is the only court that has ever seen these issues.

[4] In the Fourth Circuit, a court can dismiss a Chapter 11 filing as a bad faith filing when the bankruptcy reorganization is both (i) objectively futile *and* (ii) filed in subjective bad faith. Carolin Corp. v. Miller, 886 F.2d 693, 700-01 (4th Cir. 1989).

There is no reason this Court should be the only bankruptcy court to have the opportunity to weigh in on these novel legal issues, especially considering that the "Texas Two Step" tactic is being employed by national corporations and impacts tens of thousands of present and future claimants across the country. Moreover, the New Jersey Bankruptcy Court has significant mass tort experience, having sat on at least two cases—In re Congoleum Corp., case no. 20-18488 filed in 2007 and In re G-I Holdings, Inc., case no. 01-30135 filed in 2001. Both of the judges who presided over those cases still sit on that bench.

Finally, this Court must consider its own docket as it affects judicial economy when evaluating whether to transfer venue. There are currently five mass tort bankruptcy cases pending in this district, including the four involving the "Texas Two Step." This is a two-judge district with limited resources to devote to these highly complex cases. It is possible to augment judicial resources using a visiting judge, but that judge would likely be assigned over one of these asbestos cases. Thus, any efficiencies in keeping this case here in light of this court's experience would be lost. Therefore, this case may as well be heard in the more appropriate venue.

In sum, transferring this case to the District of New Jersey is in the interest of justice and will promote an effective administration of the estate, fairness, and judicial economy.

CONCLUSION

In conclusion, pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P 1014(a), for the convenience of the parties and in the interest of justice, this Court transfers this case to the U.S. District Court for the District of New Jersey, potentially to be referenced to the Bankruptcy Court, should that Court deem it appropriate.

SO ORDERED.

This Order has been signed electronically. The Judge's signature and Court's seal appear at the top of the Order.

United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
Western District of North Carolina
Charlotte Division

Case No. 21−30589
Chapter 11

In Re: Debtor(s) (name(s) used in the last 8 years, including married, maiden, trade, and address):

LTL Management LLC
fka Chenango One LLC
501 George Street
New Brunswick, NJ 08933
Social Security No.:
Debtor EIN:
87−3056622

COURT'S NOTICE OF TRANSFER OF CASE

NOTICE IS HEREBY GIVEN that an Order transferring this case was entered on November 16, 2021..

NOTICE IS FURTHER GIVEN that this case is transferred to the Bankruptcy Court for the District of New Jersey.

Dated: November 16, 2021

Steven T. Salata
Clerk of Court

Electronically filed and signed (11/16/21)

This is Exhibit "D" referred to in the Affidavit of Monica Faheim sworn by Monica Faheim of the City of Mississauga, in the Regional Municipality of Peel, before me at the Town of Milton, in the Province of Ontario, on December 16, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

DocuSigned by:

Asim Iqbal

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Commissioner for Taking Affidavits (or as may be)

ASIM IQBAL

FILED & JUDGMENT ENTERED
Steven T. Salata

November 15 2021

Clerk, U.S. Bankruptcy Court
Western District of North Carolina

J. Craig Whitley
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	Chapter 11
LTL MANAGEMENT LLC,[1]	Case No. 21-30589 (JCW)
Debtor.	
LTL MANAGEMENT LLC,	
Plaintiff,	
v.	Adv. Pro. No. 21-03032 (JCW)
THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT and JOHN AND JANE DOES 1-1000,	
Defendants.	

ORDER GRANTING THE DEBTOR'S
<u>REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF</u>

This matter coming before the Court on the *Complaint for Declaratory and Injunctive Relief (I) Declaring That the Automatic Stay Applies to Certain Actions Against*

[1] The last four digits of the Debtor's taxpayer identification number are 6622. The Debtor's address is 501 George Street, New Brunswick, New Jersey 08933.

Non-Debtors or (II) Preliminarily Enjoining Such Actions and (III) Granting a Temporary Restraining Order Pending a Final Hearing (the "Complaint") and the *Debtor's Motion for an Order (I) Declaring that the Automatic Stay Applies to Certain Actions Against Non-Debtors or (II) Preliminarily Enjoining Such Actions and (III) Granting a Temporary Restraining Order Pending a Final Hearing* (the "Motion"),[2] both filed by the above-captioned plaintiff and debtor (the "Debtor"); the Court having reviewed and considered (a) the Complaint, (b) the Motion, together with any responses or answers to the Motion or the Complaint, (c) the evidence submitted by the parties and admitted at the hearing held on November 4 and 5, 2021 (the "Hearing"), including declarations, testimony and exhibits filed with the Court or presented at the Hearing; and having heard the arguments of counsel at the Hearing, and having made oral rulings on November 10, 2021, which are incorporated herein as if fully set forth, the Court finds and concludes as follows:

Background, Jurisdiction and Venue

A. For purposes of this Order only, the term "Enjoined Talc Claims" shall mean, collectively, any talc-related claims against the Debtor, including all claims relating in any way to talc or talc-containing materials that formerly were asserted against (or that could have been asserted against) the former Johnson & Johnson Consumer Inc. ("Old JJCI") on any theory of liability (whether direct, derivative, joint and several, successor liability, vicarious liability, fraudulent or voidable transfer or conveyance, alter ego or otherwise). For the avoidance of doubt, Enjoined Talc Claims include, without limitation, all talc personal injury claims and other talc-related claims allocated to the Debtor from Old JJCI in the documents implementing the

[2] Capitalized terms not otherwise defined herein have the meanings given to them in the Motion.

2021 Corporate Restructuring. The Enjoined Talc Claims do not include talc-related claims for which the exclusive remedy is provided under workers' compensation statutes and similar laws.

B. The Plaintiff in this adversary proceeding is Debtor LTL Management LLC. The Defendants in this adversary proceeding are those parties listed on Appendix A to the Complaint, as amended [Adv. Pro. Dkt. 60], as well as John and Jane Does 1-1000. The Defendants listed on Appendix A are all named plaintiffs in talc-related lawsuits against the Debtor (or for which the Debtor is responsible or alleged responsible) as of the Petition Date who sought to hold, or may seek to hold, the Protected Parties liable for the Enjoined Talc Claims. The Protected Parties are listed in Appendix B to the Complaint, which is also attached to this Order. Defendants John and Jane Does 1-1000 are prospective plaintiffs who may at any time while the above-captioned chapter 11 case is pending seek to hold the Protected Parties liable for the Enjoined Talc Claims.

C. The Debtor seeks, pursuant to sections 105 and 362 of the Bankruptcy Code, an order prohibiting the Defendants from continuing or commencing against any of the Protected Parties any action or claim asserting, on any theory of liability (whether direct, derivative, joint and several, successor liability, vicarious liability, fraudulent or voidable transfer or conveyance, alter ego or otherwise), any Enjoined Talc Claims.

D. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Pursuant to Bankruptcy Rule 7008, the Debtor has consented to the entry of final orders or a final judgment by this Court in this adversary proceeding although other parties have not consented. Venue for this matter is proper in this District pursuant to 28 U.S.C. § 1409.

Request for Declaratory Relief

E. For the avoidance of doubt, all of the Court's findings and conclusions herein are without prejudice, as set forth in the record, to (i) any further finding by a subsequent court with jurisdiction over this proceeding (the "Presiding Court") that there are direct claims against any of the Protected Parties, other than the Debtor and Old JJCI, which should not be stayed or enjoined, and (ii) the right of any party to challenge on any basis the corporate transactions that created the Debtor.

F. The Court finds and concludes that Enjoined Talc Claims by the Defendants against Old JJCI are actions that are "against the debtor" or that seek to "recover a claim against the debtor" within the meaning of section 362(a)(1) of the Bankruptcy Code.

G. The Court further finds and concludes that Enjoined Talc Claims against Protected Parties asserting fraudulent transfer or voidable transfer or conveyance claims, or alter ego, successor liability, vicarious liability or other theories of recovery through which Defendants would seek to assert Enjoined Talc Claims against a Protected Party, and actions against the Insurers on account of Enjoined Talc Claims, constitute property of the Debtor's estate within the meaning of section 362(a)(3) of the Bankruptcy Code.

H. The Court further finds and concludes that Enjoined Talc Claims by the Defendants against the Protected Parties are inherently intertwined with talc-related claims against the Debtor. Therefore, application or extension of the automatic stay of section 362 of the Bankruptcy Code to Enjoined Talc Claims by the Defendants against the Protected Parties is warranted because those actions or claims are "against the debtor" or seek "to recover a claim against the debtor" within the meaning of section 362(a)(l) of the Bankruptcy Code.

I. The legal and factual bases set forth in the Complaint, the Motion, and the evidence and argument presented at the Hearing establish just cause for the relief granted herein.

Request for Preliminary Injunction

J. The Court finds that the Debtor has satisfied the four-prong test for the issuance of a preliminary injunction applied in the Fourth Circuit.

K. *Likelihood of Success on the Merits.* There is a reasonable likelihood that the Debtor will succeed on the merits by successfully reorganizing in chapter 11, including by confirming a plan that will establish a trust pursuant to sections 105 and/or 524(g) of the Bankruptcy Code to resolve the Debtor Talc Claims. The Debtor maintains that it has filed its chapter 11 case (the "Chapter 11 Case") in good faith, and it intends to engage in good-faith negotiations with representatives for current and future claimants regarding a plan of reorganization. The Debtor has sufficient resources to fund the costs of the Chapter 11 Case and implement a plan of reorganization that includes a trust pursuant to sections 105 and/or 524(g).

L. *Irreparable Injury.* Failure to enjoin prosecution of the Debtor Talc Claims in the tort system would cause irreparable injury to the Debtor and defeat the purpose of the Chapter 11 Case. Without the injunctive relief sought herein, the Debtor would suffer the following irreparable harm:

i) Recoveries against the Protected Parties could trigger the Debtor's indemnification obligations, reduce available insurance, and have the effect of fixing talc-related claims against the Debtor outside of the Chapter 11 Case;

ii) Under the doctrines of collateral estoppel and res judicata, the resolution of issues in litigation of Debtor Talc Claims against New JJCI, J&J or other Protected Parties could bind the Debtor;

iii) Statements, testimony and other evidence generated in litigation of Debtor Talc Claims against the

Protected Parties could be used to try to establish the Debtor's own liability for the exact same talc-related claims; and

iv) As a result of the foregoing, the Debtor would be compelled to actively monitor, participate in and defend litigation of Debtor Talc Claims against the Protected Parties, and key personnel would be diverted from assisting the Debtor in achieving its reorganization goals.

M. *Balance of the Harms.* The balance of harms supports granting the preliminary injunction on account of the following factors:

i) The purpose of the Debtor's Chapter 11 Case would be defeated if the litigation of Debtor Talc Claims were allowed to proceed against the Protected Parties;

ii) Failure to grant injunctive relief would cause irreparable harm to the Debtor and its estate, as described in paragraph K, above;

iii) An injunction will not necessarily harm the Defendants or their efforts to obtain compensation for their claims.

a) First, nothing about the injunction in this case would prohibit the Defendants from continuing to proceed against, and collecting from, any other alleged tortfeasors in state court (other than the Protected Parties); and

b) In addition, the injunction will ensure that the benefits of a complete and equitable resolution of talc-related claims against the Debtor flow to all claimants. Ultimately, the Chapter 11 Case should provide both existing and future claimants with an efficient and expedited means by which to address their claims through a trust; and

iv) Delay, in and of itself, is insufficient to overcome irreparable harm caused to the Debtor and its estate.

N. *Public Interest.* The public interest lies with the Debtor completing its reorganization process and resolving the Debtor Talc Claims in a uniform and equitable manner.

Based on these findings and conclusions and the findings and conclusions of the Court set forth on the record at the Hearing, IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a preliminary basis to the extent set forth herein.

2. The Defendants are prohibited and enjoined, pursuant to sections 105 and 362 of the Bankruptcy Code, from commencing or continuing to prosecute any Enjoined Talc Claim against any of the Protected Parties, on any theory of liability, whether direct, derivative, joint and several, successor liability, vicarious liability, fraudulent or voidable transfer or conveyance, alter ego or otherwise, for the period this Order is effective pursuant to paragraph 4, below. This injunction includes, without limitation: (a) the pursuit of discovery from the Protected Parties or their officers, directors, employees or agents; (b) the enforcement of any discovery order against the Protected Parties; (c) further motions practice related to the foregoing; and (d) any collection activity on account of an Enjoined Talc Claim against any Protected Party or its officers, directors, employees or agents or its respective assets.

3. In addition, and without limiting the foregoing, the Court finds and declares that the commencement or continued prosecution of any Enjoined Talc Claim by any Defendant against any of the Protected Parties, including the actions listed in the last sentence of paragraph 2, above, would violate the automatic stay imposed by sections 362(a)(l) and 362(a)(3) of the Bankruptcy Code and therefore are prohibited for the period this Order is effective pursuant to paragraph 4 below.

4. This Order is not intended to bind a subsequent Presiding Court. The injunction and the Court's interim stay ruling herein shall expire on the date that is 60 days after

the entry of this Order (the "Termination Date"), unless modified or extended by an order of the Presiding Court.

5. This Order is entered without prejudice to and nothing in this Order shall in any way limit any: (i) statutory committee appointed in this chapter 11 case; or (ii) party-in-interest to this chapter 11 case from: (x) seeking or obtaining discovery under Rules 2004 and 9014 of the Federal Rules of Bankruptcy Procedure and such other portions of the Federal Rules of Civil Procedure that the Presiding Court directs against any entity including the Debtor and the Protected Parties, or any entity, including the Debtor or any Protected Party, from objecting to such efforts; (y) seeking and obtaining standing to pursue any estate cause of action against any person or entity, including any Protected Party; or (z) seeking to lift, modify or terminate the stay or this injunction upon a request to the Presiding Court. This Order is entered without prejudice to the Debtor's right to request that the Presiding Court extend this Order to include other entities or persons not previously identified in Appendix A or Appendix B to the Complaint. In the event that the Debtor seeks to supplement either Appendix A or Appendix B, the Debtor shall file with the Presiding Court and serve a notice, together with a proposed order, setting forth any such modifications to Appendix A or Appendix B. The burden of proof for any modification of Appendix A or Appendix B is not affected by this Order. Parties shall have 14 days from the date of service of the notice to object to the modification(s) to Appendix A or Appendix B, and the Debtor shall have 7 days from the service of such objection to file and serve a response. Absent a timely objection, the Debtor's proposed modifications to Appendix A or Appendix B shall be approved by order of the Presiding Court without the necessity of a hearing. For the avoidance of doubt, the inclusion of a talc-related claim on Appendix A is not an

admission that such Defendant holds a currently pending claim against either the Debtor or the Protected Parties.

6. Notwithstanding anything to the contrary in this Order, Imerys Talc America, Inc. and its affiliates (collectively, the "Imerys Entities") or Cyprus Mines Corporation and its affiliates (collectively, the "Cyprus Entities") are not Defendants in this proceeding. The relief granted herein shall not apply to the Imerys Entities or the Cyprus Entities, and the findings of fact and conclusions of law set forth in this Order shall not bind the Imerys Entities or the Cyprus Entities. The right of the Debtor to seek to enjoin the Imerys Entities or the Cyprus Entities, and the right of the Imerys Entities or Cyprus Entities to oppose such relief, are hereby preserved in all respects.

7. Notwithstanding anything to the contrary in this Order, governmental units (as defined under section 101 of the Bankruptcy Code) are not Defendants in this proceeding. The relief granted herein, including any relief granted under this Order under section 105 of the Bankruptcy Code, shall not apply to restrict or enlarge the rights of the Debtor or any governmental unit under applicable bankruptcy law and all such rights are hereby preserved.

8. Any party subject to this Order may seek relief from any of the provisions of this Order for cause shown. This Order is without prejudice to the Debtor's or others' rights to seek relief pursuant to section 362 of the Bankruptcy Code.

9. Notwithstanding anything to the contrary in this Order, any party asserting Enjoined Talc Claims, without leave of the Presiding Court, may take reasonable steps to perpetuate the testimony of any person subject to this Order who is not expected to survive the duration of this Order or who otherwise is expected to be unable to provide testimony if such testimony is not perpetuated during the duration of this Order. Notice shall be provided to the

Debtor by notifying counsel for the Debtor of the perpetuation of such testimony. The Debtor shall have the right to object to the notice on any grounds it would have if it were a party to the underlying proceeding and not subject to the terms of this preliminary injunction, and the Debtor may raise any such objection with the Presiding Court, except that the Debtor, Old JJCI and J&J waive objecting to the use of such testimony based on lack of notice or lack of opportunity to cross-examine. The use of such testimony in any appropriate jurisdiction shall be subject to the applicable procedural and evidentiary rules of such jurisdiction. All parties reserve and do not waive any and all objections with respect to such testimony. Defendants or other individuals asserting Enjoined Talc Claims may not seek to perpetuate the testimony of representatives, including directors, officers, employees and agents of the Debtor or the Protected Parties without the consent of the Debtor or an order of the Presiding Court. Notwithstanding the forgoing, parties in lawsuits pending in the MDL who wish to perpetuate the testimony of any person subject to this Order who is not expected to survive the duration of this Order or who otherwise is expected to be unable to provide testimony if it is not perpetuated during the duration of this Order shall comply with the process outlined in the <u>In Extremis Deposition Protocol</u> entered on January 23, 2017 in the MDL.

10. Pursuant to Bankruptcy Rule 7065, the Debtor is relieved from posting any security in connection with this Order pursuant to Civil Rule 65(c).

11. The deadline to file any answer to the Complaint is tolled indefinitely subject to an order of the Presiding Court.

12. This Order shall be immediately effective and enforceable upon its entry.

13. In accordance with section 108(c) of the Bankruptcy Code, this Order shall toll, as of November 10, 2021, any applicable non-bankruptcy law, any order entered in a

non-bankruptcy proceeding, or any agreement that fixes a period under which an enjoined Defendant is required to commence or continue a civil action in a court other than this Court or the Presiding Court on any Debtor Talc Claim asserted against the Debtor or any of the Protected Parties until the later of: (a) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (b) 30 days after the termination or expiration of the preliminary injunction issued by this Order.

14. The automatic stay shall no longer be lifted as provided in paragraph 9 of the *Order Regarding Debtor's Motions for an Order (I) Declaring the Automatic Stay Applies to Certain Actions Against Non-Debtors or (II) Preliminarily Enjoining Such Actions, and (III) Granting a Temporary Restraining Order Pending a Final Hearing* [Adv. Pro. Dkt. 28], and instead shall be lifted solely to permit the applicable Defendants to proceed with and complete the following appeals, in each of which surety bonds have been issued in connection with the appeal: (a) Leavitt: (b) Olson; (c) Schmitz; (d) Barden (as to Barden, Etheridge, McNeill and Ronning); (e) Soskin; and (f) Prudencio.

15. The personal injury claims (including pain and suffering damages) of the plaintiff in the Vanklive lawsuit shall be preserved even if the plaintiff subsequently dies (with no impairment of such plaintiff's personal injury damages, including pain and suffering damages). The Debtor, JJCI, and J&J specifically consent and agree to this provision.

16. The Debtor shall cause a copy of this Order to be served via e-mail, facsimile, hand delivery or overnight carrier on counsel for the known Defendants within three business days of its entry on the Court's docket.

17. This Order shall be promptly filed in the Clerk of Court's office and entered into the record.

18. The Presiding Court shall have exclusive jurisdiction over this Order and any and all matters arising from or relating to the implementation, interpretation or enforcement of this Order.

This Order has been signed electronically.
The Judge's signature and Court's seal appear
at the top of the Order.

United States Bankruptcy Court

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF LTL MANAGEMENT LLC

Court File No.: CV-21-00673856-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST
Proceeding commenced at Toronto

AFFIDAVIT OF MONICA FAHEIM
(sworn December 16, 2021)

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