

**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

SIXTH REPORT OF THE INFORMATION OFFICER

MARCH 27, 2023

INTRODUCTION

1. LTL Management LLC (the “**Debtor**” or “**LTL**”) is an indirect subsidiary of Johnson & Johnson (“**J&J**”), which operates a worldwide business in healthcare, pharmaceuticals, and consumer goods. The Debtor was formed through a corporate restructuring within the J&J group of companies that was completed prior to the Debtor commencing proceedings under the U.S. Bankruptcy Code (the “**2021 Corporate Restructuring**”).¹ As part of the corporate restructuring, LTL was allocated certain assets and liabilities, including the liabilities of its predecessor company (the entity formerly known as Johnson & Johnson Consumer Inc. (“**Old JJCI**”)) arising from talc-related claims against it.

¹ Capitalized terms not defined have the meaning set forth below.

2. Since December 1, 2021, the parties in the Chapter 11 Case have been engaged in litigation regarding (i) certain motions to dismiss the Chapter 11 Case and (ii) a related preliminary injunction which currently stays litigation against certain third parties related to Enjoined Talc Claims². The U.S. litigation has been described in detail in the Information Officer's prior reports.

3. On February 16, 2023, the Information Officer issued a report advising that a panel of the United States Court of Appeals for the Third Circuit (the "**Third Circuit**") had issued an opinion directing the New Jersey Bankruptcy Court to dismiss the Chapter 11 Case (the "**Fifth Report**"). The Fifth Report further advised that the Debtor had taken steps to seek a rehearing on the matter and that pending a ruling on the petition for rehearing, the stay in the United States and the stay granted by the CCAA Court, would remain in place by their terms.

PURPOSE

4. The purpose of this Sixth Report of the Information Officer (the "**Sixth Report**") is to provide information to the CCAA Court and Canadian stakeholders with respect to:

- (i) the Chapter 11 Case including, among other things, the status of the Chapter 11 Case and the appeals in the Third Circuit; and
- (ii) the status of these CCAA Recognition Proceedings and anticipated next steps.

² "Enjoined Talc Claims" means, collectively, any talc-related claims against the Debtor, including all claims relating in any way to talc or talc containing materials that were formerly asserted (or that could have been asserted) against 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 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.

TERMS OF REFERENCE

5. In preparing this Sixth Report and making the comments herein, the Information Officer has relied solely on information and documents provided by the Debtor and its Canadian and U.S. legal counsel and on publicly available court documents filed by various parties (collectively, the “**Information**”).

6. The Information Officer has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Information Officer has not audited, or otherwise attempted to verify the accuracy or completeness of such information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards (“**GAAS**”) pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Information Officer expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information.

7. Unless otherwise indicated, the Information Officer’s understanding of factual matters expressed in this Sixth Report concerning the Debtor and its businesses is based on the Information, and not independent factual determinations made by the Information Officer.

STATUS OF THE PROCEEDINGS

8. On October 14, 2021, LTL commenced a case (the “**Chapter 11 Case**”) by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “**U.S. Bankruptcy Code**”) with the United States Bankruptcy Court for the Western District of North Carolina (the “**North Carolina Bankruptcy Court**”).

9. The Debtor commenced the Chapter 11 Case following, among other things, an increase in the number and pace of filing of lawsuits against Old JJCI and J&J, which allege that

JOHNSON'S® Baby Powder and, in some cases, a product called "Shower to Shower", cause ovarian cancer and mesothelioma. The Debtor is of the view that these claims have no valid scientific basis. The plaintiffs take the opposite view.

10. Following the first day hearings held on October 20, 2021 and October 22, 2021, the North Carolina Bankruptcy Court granted certain administrative orders and a temporary restraining order that enjoined talc claims solely against the Debtor and Old JJCI.

11. The North Carolina Bankruptcy Court entered an order on November 15, 2021: (i) declaring that the automatic stay applies to prohibit; and (ii) preliminarily enjoining the commencement or continuation of Enjoined Talc Claims against certain "Protected Parties", as set out in the order, for 60 days (i.e., until January 14, 2022), subject to modification or extension by an order of any court (the "**U.S. Preliminary Injunction Order**").

12. On that same day, the North Carolina Bankruptcy Court made a ruling (reflected in an order dated November 16, 2021) transferring the Chapter 11 Case to the District of New Jersey. The case is now before Judge Kaplan of the United States Bankruptcy Court for the District of New Jersey (the "**New Jersey Bankruptcy Court**").

13. On December 1, 2021 and the following days, the Official Committee of Talc Claimants filed a motion to dismiss the Chapter 11 Case, which was followed by similar motions and joinders from other parties representing individual plaintiffs (collectively, the "**Motions to Dismiss**"). The Motions to Dismiss argued, among other things, that the Chapter 11 Case was not filed in good faith and that the plaintiffs should be permitted to pursue their claims against the Debtor and its non-Debtor affiliates in the tort system.

14. On December 15, 2021, the New Jersey Bankruptcy Court entered an order authorizing the Debtor to act as foreign representative (in such capacity, the “**Foreign Representative**”) on behalf of its estate (the “**Foreign Representative Order**”).

15. On December 16, 2021, the Debtor served an application pursuant to Part IV of the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) to have the Chapter 11 Case recognized by the Ontario Superior Court of Justice (Commercial List) (the “**CCAA Court**”) as a foreign main proceeding (the “**CCAA Recognition Proceedings**”).

16. On December 17, 2021, the CCAA Court issued two orders pursuant to Part IV of the CCAA:

- (i) the Initial Recognition Order (Foreign Main Proceeding) (the “**Initial Recognition Order**”), which, *inter alia*, recognizes the Debtor as the “foreign representative” and the Chapter 11 Case as a “foreign main proceeding”, as defined in section 45 of the CCAA, and stays all proceedings in Canada against the Debtor; and
- (ii) the Supplemental Order (Foreign Main Proceeding) (the “**Supplemental Order**”), which, *inter alia*, recognizes the U.S. Preliminary Injunction Order and the Foreign Representative Order, gives the U.S. Preliminary Injunction Order and the Foreign Representative Order full force and effect in all provinces and territories in Canada pursuant to section 49 of the CCAA, and appoints Ernst & Young Inc. (the “**Information Officer**”) as Information Officer in the CCAA Recognition Proceedings.

17. On January 15, 2022, the New Jersey Bankruptcy Court entered an order *inter alia* extending the terms of the U.S. Preliminary Injunction Order to February 28, 2022.

18. From February 14 to 18, 2022, the New Jersey Bankruptcy Court conducted a hearing of the Motions to Dismiss and the motion for an extension of the U.S. Preliminary Injunction Order (the “**Extended Injunction**”).

19. On February 25, 2022, the New Jersey Bankruptcy Court released two opinions, denying the Motions to Dismiss (the “**Dismissal Opinion**”) and granting the Extended Injunction (the “**Injunction Opinion**”).

20. Also on February 25, 2022, Justice Conway granted an extension of the stay of proceedings set out in the Supplemental Order to March 8, 2022, to allow all parties in Canada the opportunity to review and consider the impact of the New Jersey Bankruptcy Court’s decisions.

21. On March 1, 2022, the Foreign Representative served a motion record, seeking an order recognizing the order implementing the Extended Injunction (the “**Extended Injunction Order**”) to be entered by the New Jersey Bankruptcy Court.

22. On March 7, 2022, Justice Wilton-Siegel granted an order which, among other things, recognizes the Extended Injunction Order and gives the Extended Injunction Order full force and effect in all provinces and territories in Canada pursuant to section 49 of the CCAA (the “**Injunction Recognition Order**”). The Injunction Recognition Order, in addition to recognizing the Extended Injunction Order, stays the Enjoined Talc Claims in Canada “until the expiry of the Extended Injunction Order by its terms” unless further modified by the applicable U.S. courts.

THE APPEALS AND THE THIRD CIRCUIT OPINION

23. As described in detail in the Fifth Report, certain talc claimants appealed the Dismissal Opinion and the Injunction Opinion, and the related orders (the “**Appealing Parties**”), through a procedure that allowed for an expedited appeal to the Third Circuit (bypassing a lower court).

24. On January 30, 2023, the Third Circuit issued an opinion dismissing the bankruptcy filing of LTL (the “**Third Circuit Opinion**”) and finding that the dismissal of the Chapter 11 Case will annul the litigation stay and render review of the Injunction Opinion moot.

25. On February 13, 2023, LTL filed a petition for rehearing and rehearing *en banc* with the Third Circuit (the “**Rehearing Petition**”). Because the Debtor filed the Rehearing Petition, the Third Circuit has not yet issued its mandate, which means that the Chapter 11 Case remains pending and the Extended Injunction remains in place.

26. On February 23, 2023, the Third Circuit entered an order directing the Appealing Parties to file responses to the Rehearing Petition within the following fourteen days.

27. On March 22, 2023, the Third Circuit entered an order denying the Rehearing Petition (the “**Petition Order**”). A copy of the Petition Order is attached hereto as **Appendix “A”**.

28. On March 23, 2023, LTL filed a motion with the Third Circuit seeking to stay the issuance of the mandate and advising that LTL intends to seek certiorari of the Third Circuit Opinion to the United States Supreme Court (the “**Mandate Stay Motion**”). A copy of the Mandate Stay Motion is attached hereto as **Appendix “B”**.

29. At the direction of the Third Circuit, responses to the Mandate Stay Motion are due on or before March 28, 2023. US Counsel to the Debtor advises that it is possible that the Third Circuit

could permit the Debtor to file a reply, which could delay a ruling on the Mandate Stay Motion. US counsel to the Debtor has also advised that the applicable rules provide that the Third Circuit would issue a mandate seven days after a denial of the Mandate Stay Motion if there is no stay issued by the United States Supreme Court. Thus, if the Mandate Stay Motion is denied on or about March 28, 2023 and there is no stay by the United States Supreme Court, the Third Circuit would issue the mandate on or before April 4, 2023. If the Third Circuit issues its mandate, the New Jersey Bankruptcy Court would still need to enter an order dismissing the Chapter 11 Case and dissolving the injunctions.

CONCLUSION

30. The Information Officer understands that if the New Jersey Bankruptcy Court enters an order dismissing the Chapter 11 Case and the preliminary injunction is terminated, the stay in favour of the Debtor and the other parties in the Injunction Recognition Order will terminate, consistent with its terms. The stay in favour of the Debtor provided for in the Initial Recognition Order is a separate stay issued pursuant to this CCAA Court's jurisdiction and remains in place subject to a further order of this CCAA Court. In the event that there is an order dismissing the Chapter 11 Case, Canadian counsel to the Foreign Representative has advised the Information Officer that, in consultation with the Information Officer, it would promptly return to the CCAA Court to seek appropriate relief.

31. The Information Officer further understands that notwithstanding the dismissal of the Chapter 11 Case, the New Jersey Bankruptcy Court may retain jurisdiction to address administrative matters related to the Chapter 11 Case that require resolution following the termination of the proceeding.

32. The Information Officer reminds stakeholders that as of the date of this Sixth Report, the stay of proceedings found in the Injunction Recognition Order, the Initial Recognition Order and the Supplemental Order remain in place and no action should be taken in violation of that stay and any such action will be brought to this Court's attention.

All of which is respectfully submitted this 27th day of March, 2023.

ERNST & YOUNG INC.

Solely In its capacity as Information Officer of
LTL Management LLC, and not in its personal capacity

Per:  Alex Morrison Senior Vice President	Per:  Stuart Clinton Senior Vice President
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APPENDIX “A”

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

In Re: LTL MANAGEMENT LLC,
Debtor

OFFICIAL COMMITTEE OF TALC CLAIMANTS,
Appellant

v.

THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT AND JOHN AND JANE
DOES 1-1000

(District Court Civil No.: 21-bk-30589; 21-ap-03032)

SUR PETITION FOR REHEARING

Present: JORDAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY,
FREEMAN, CHUNG, Circuit Judges,
AMBRO* and FUENTES*, Senior Circuit Judges

ORDER

The petition for rehearing (D.I. 153) filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge

* Pursuant to Third Circuit I.O.P. 9.5.3, the votes of Judge Fuentes and Judge Ambro are limited to panel rehearing only. Judge Ambro assumed senior status on February 6, 2023.

who concurred in the decision having asked for rehearing, and none of the eligible judges of the circuit in regular service having voted for rehearing, the petition for rehearing by the panel and the Court *en banc* is denied.

BY THE COURT,

s/ THOMAS L. AMBRO

Circuit Judge

Dated: March 22, 2023
JK/cc: All Counsel of Record

APPENDIX “B”

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

IN THE
**United States Court of Appeals
for the Third Circuit**

IN RE: LTL MANAGEMENT LLC,
Debtor

*OFFICIAL COMMITTEE OF TALC CLAIMANTS,
Appellant

*(Amended per Court's Order dated 06/10/2022)

On direct appeal from the United States Bankruptcy Court
for the District of New Jersey, No. 21-30589, Adv. Proc. No. 21-3023

MOTION TO STAY THE MANDATE

GREGORY M. GORDON
BRAD B. ERENS
DAN B. PRIETO
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201

C. KEVIN MARSHALL
DAVID S. TORBORG
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

NEAL KUMAR KATYAL
SEAN MAROTTA
WILLIAM E. HAVEMANN
JO-ANN TAMILA SAGAR
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

March 22, 2023

Counsel for LTL Management LLC

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MOTION TO STAY THE MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

Debtor LTL Management LLC intends to seek certiorari of the Court's judgment. To avoid the chaos that would occur if LTL's petition were dismissed by the Bankruptcy Court then reinstated by the Supreme Court, LTL respectfully requests the Court stay the mandate pending LTL's filing of its petition and until the Supreme Court's final disposition. *See* Fed. R. App. P. 41(d). Appellants all oppose the motion.

INTRODUCTION

"Courts have not been unanimous about what constitutes 'good faith' in the Chapter 11 filing context." *In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999). The Court found that LTL's petition did not meet this standard, Op. 54, but acknowledged that LTL had "[g]ood intentions" and a "sincerely held" belief that bankruptcy was justified, Op. 18, 56.

All of that would have forced a different outcome in the Fourth Circuit where "a lack of good faith" requires both " 'objective futility' and 'subjective bad faith.' " *In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 279-280 (4th Cir. 2007) (quoting *Carolin Corp. v. Miller*, 886 F.2d 693, 700-701(4th Cir. 1989)); *see also In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986) (considering both "financial condition[s]" and "motives"). And while the Court treated good faith as "essentially[]" a question of law reviewed de novo, Op. 33 (citation omitted), its

sister circuits review a bankruptcy court's good-faith finding under "the clearly erroneous standard," *Premier Auto. Servs.*, 492 F.3d at 279 (quoting *Carolin Corp.*, 886 F.2d at 702); accord *In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 379 (8th Cir. 2000); *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994).

Because, as the Bankruptcy Court put it, one "cannot help but ponder how a bankruptcy filing, which took place in North Carolina and most likely satisfied the good faith standards under the applicable law in that jurisdiction, suddenly morphs post-petition into a bad faith filing simply because the case travels 400 miles up I-95 to Trenton, New Jersey," A13, there is a very real possibility the Supreme Court will grant certiorari to reverse the panel's decision and provide much-needed clarity regarding the good-faith standard. See Fed. R. App. P. 41(d)(2); see also *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007). The Court obviously believes in the correctness of its decision. But it should nonetheless stay the mandate because the issues here are important, unsettled, and subject to reasonable "debat[e]." *American Mfrs. Mut. Ins. Co. v. American Broad.-Paramount Theatres, Inc.*, 87 S. Ct. 1, 2 (1966) (Harlan, J., in chambers).

Finally, if the mandate issues, and then the Supreme Court reviews and reverses, chaos and confusion will ensue. The Bankruptcy Court will have to pick up where it left off after having dismantled the infrastructure that supported the bankruptcy case. The Bankruptcy Court will dissolve the TCC, who then will not

have the opportunity to respond to LTL’s certiorari petition; will approve final fee arrangements; and will discharge the fee examiner and future claims representative, all for naught. Meanwhile in courts across the country, claimants and LTL will need to move cases forward once more at the risk that they could be stayed again, this time mid-trial. This bankruptcy is large and affects a lot of people in a lot of ways. The Court should preserve the status quo until the Supreme Court has its say.

ARGUMENT

This Court will stay the mandate pending the filing of a petition for a writ of certiorari if the movant “show[s] that the petition would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(1). This case qualifies. LTL’s petition will present substantial questions regarding the good-faith standard and the standard of review that applies to it, and the potential chaos from the mandate issuing and the Supreme Court then reversing is good cause to hold the mandate until the Supreme Court weighs in.

I. LTL’S CERTIORARI PETITION WILL PRESENT SUBSTANTIAL QUESTIONS FOR SUPREME COURT REVIEW.

A certiorari petition will present a “substantial question”—and thus warrants a stay of the mandate pending its disposition—if there is “a reasonable probability that the Supreme Court will grant certiorari,” and “a reasonable possibility that at least five Justices would vote to reverse this Court’s judgment.” *Nara*, 494 F.3d at

1133. By both entrenching a longstanding circuit split regarding the content of the good-faith standard, and also creating a split regarding the standard of review applicable to a bankruptcy court's good-faith analysis, the panel's decision tees up two substantial questions for review. *See* Dkt. 155, *Brief of Washington Legal Foundation as Amicus Curiae* at 1-6 (explaining that "forum-shopping will skyrocket" unless the Supreme Court resolves the panel's split from the Fourth Circuit).

A. LTL's petition for certiorari will present a substantial question regarding the standard for good faith.

1. There is an longstanding division of authority over the test for good faith. Some courts consider only whether the debtor has a real chance at rehabilitation. *See, e.g., In re C-TC 9th Ave. P'ship v. Norton Co.*, 113 F.3d 1304 (2d Cir. 1997). Others consider "subjective bad faith" alongside objective futility. *Premier Auto. Servs.*, 492 F.3d at 279-280 (quoting *Carolin Corp.*, 886 F.2d at 700-701); *see also, e.g., In re Little Creek Dev. Co.*, 779 F.2d at 1072; *Phoenix Piccadilly, Ltd. v. Life Ins. Co. (In re Phoenix Piccadilly, Ltd.)*, 849 F.2d 1393, 1394-95 (11th Cir.1988). And still others, like this Court, raise the bar even higher, determining the debtor's bad faith objectively by broadly considering "whether the petition serves a valid bankruptcy purpose" and "whether the petition is filed merely to obtain a tactical litigation advantage." *In re 15375 Mem'l Corp. v. BEPCO, L.P.*,

589 F.3d 605, 618 (3d Cir. 2009) (citation omitted); *see also Laguna Assocs. L.P. v. Aetna Cas. & Sur. Co.*, 30 F.3d 734, 738 (6th Cir. 1994).

This division of authority was outcome determinative in this case. The panel concluded that LTL’s petition must be dismissed because “[o]ur precedents show a debtor who does not suffer from financial distress cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose supporting good faith,” Op. 35, and, in the panel’s view, “LTL was not in financial distress,” Op. 53-54. Yet this petition would satisfy the good-faith standard in courts on the other side of the split—a fact the Bankruptcy Court recognized, A13, and the panel effectively conceded, *see* Op. 28 n.8. LTL’s bankruptcy petition is not objectively futile and the panel did not dispute LTL’s “sincerely held” belief that bankruptcy was justified. Op. 56. Unsurprisingly, then, bankruptcy courts in the Fourth Circuit have upheld similar bankruptcies, *see, e.g., In re Bestwall LLC*, 605 B.R. 43, 49 (Bankr. W.D.N.C. 2019), and determined that attempts to obtain dismissal would be futile because of the Fourth Circuit’s standard, *see, e.g., In re DBMP LLC*, No. 20-30080, 2021 WL 3552350, at *4, *23 (Bankr. W.D.N.C. Aug. 11, 2021) (noting that “dismissal would be difficult to obtain” at an early stage because the “Fourth Circuit’s exacting *Carolin* standard” means such a challenge would “likely fail”); *In re Aldrich Pump LLC*, No. 20-30608, 2021 WL 3729335, at *3, *26 (Bankr. W.D.N.C. Aug. 23, 2021) (similar).

Contrary to Claimants’ suggestions, *Carolyn*’s two-prong bad-faith standard is alive and well in the Fourth Circuit. *Compare* TCC Rehearing Opp. 12 (discussing *Premier Auto. Servs.*, 492 F.3d at 280), *with Premier Auto. Servs.*, 492 F.3d at 280-281 (citing, discussing, and applying *Carolyn*). The Fourth Circuit in *Premier Automobile Services* noted the debtor’s lack of financial difficulty as part of discussing the debtor’s subjective bad faith; the Fourth Circuit also observed that the debtor had “no unsecured creditors and few, if any, secured creditors,” and reasoned that each of these facts showed that the bankruptcy filing’s sole purpose was to forestall an eviction. 492 F.3d at 280. These facts also meant the debtor’s petition was objectively futile, as any hope for reorganization was “wholly illusory.” *Id.* In those circumstances, lack of financial distress “alone” might lead to dismissal because that evidence “overlaps” with and satisfies both *Carolyn* prongs—subjective bad faith *and* objective futility—just as *Carolyn* expected could happen. 886 F.2d at 701 (“Evidence of subjective bad faith in filing may tend to prove objective futility, and *vice versa*.”). Here, of course, LTL has tens of thousands of unsecured creditors and a realistic path to reorganization under 11 U.S.C. § 524(g). And because of that reality, LTL’s petition was not objectively futile. *See* Op. 28 n.8, 56.

2. There is a “reasonable probability that the Supreme Court will grant certiorari” to resolve this division for two independent reasons. *Nara*, 494 F.3d at

1133. *First*, as the law stands, a debtor’s access to Chapter 11 hinges more on a case’s venue than its facts. And the Supreme Court routinely grants review to resolve divisions among the courts of appeals in how to interpret a federal statute. *See* S. Ct. R. 10(a). Indeed, the Court has granted certiorari to resolve circuit splits regarding the Bankruptcy Code in the recent past. *See, e.g., In re Coughlin*, 33 F.4th 600, 608 (1st Cir. 2022), *cert. granted sub nom. Lac du Flambeau Band v. Coughlin*, 143 S. Ct. 645 (2023) (certiorari granted where circuits disagreed on proper application of the Bankruptcy Code); *In re Bartenwerfer*, 860 F. App’x 544 (9th Cir. 2021), *cert. granted sub nom. Bartenwerfer v. Buckley*, 142 S. Ct. 2675 (2022) (same), *aff’d*, 143 S. Ct. 665 (2023). Underscoring the urgency of review, this Court is on the short side of the split. Although the Court may believe that it has reached the correct result, its sister circuits’ disagreement indicates that a stay is appropriate.

Second, the issues in this case easily qualify as “important.” S. Ct. R. 10(c); *see also, e.g., U.S. ex rel. Chandler v. Cook County*, 282 F.3d 448, 450 (7th Cir. 2002) (Ripple, J., in chambers) (granting a stay based on the importance of the issue and the disagreement among other judges, even though the panel was “unanimous” and “[n]o judge . . . requested a vote for rehearing en banc”). This Court has already recognized the importance of this case by first certifying it for direct review and then by calling for a response to LTL’s rehearing petition. *See*

Dkt. 12-1 in No. 22-8015; *see also* 28 U.S.C. § 158(d)(2)(A)(i)-(ii) (providing for direct appeal where, among other things, the bankruptcy court’s decision “involves a matter of public importance” or “a question of law requiring resolution of conflicting decisions”). *Cf. In re Integrated Telecom Express, Inc.*, No. 04-2411 (3d Cir. Dec. 6, 2004) (granting stay of mandate until filing and disposition of petition for writ of certiorari).

This case will determine whether other companies in LTL’s shoes—facing mass-tort liability, “which can entail a seemingly infinite number of present and future claims that could impose enterprise-ending liability”—are allowed to use an “important mechanism” under the Code “to achieve widespread resolution of mass-tort liability in a single forum, preserving the debtor’s assets so that creditors (both past and future) may receive equitable recovery and the business debtor may have a hope of achieving the ‘fresh start’ that bankruptcy promises.” Dkt. 111, *Brief for National Association of Manufacturers and Product Liability Advisory Council, Inc. as Amici Curiae* at 5, 26. Although many entities face mass-tort claims and have successfully used the Bankruptcy Code to reach a fair and equitable resolution of mass tort claims, *see* Dkt. 118, *Brief for the Chamber of Commerce and American Tort Reform Association as Amici Curiae* at 5-9, the panel’s decision takes that “fresh start” off the table for LTL and creates uncertainty for other entities buckling under the weight of similar suits.

The panel’s decision is in particular tension with Congress’s policy in 11 U.S.C. § 524(g), its enactment for resolving asbestos mass-tort liability. That provision addresses the need “to deal equitably with claims and future demands” and to form a trust that “will value, and be in a financial position to pay, present claims and future demands.” 11 U.S.C. § 524(g)(2)(B). The panel’s stringent financial-distress requirement neglects the interests of future claimants, the very group that Congress acted to protect.

Commentators and legal scholars have expressed concerns about the panel decision’s effects on bankruptcy law. The panel’s groundbreaking decision will produce “increased litigation costs as courts attempt to determine ‘financial distress’ for each individual case.” James Nani & Alex Wolf, *J&J Bankruptcy Ruling Knocks Money Deal in ‘Texas Two-Step’*, Bloomberg Law (Jan. 31, 2023), available at <https://news.bloomberglaw.com/bankruptcy-law/j-j-bankruptcy-ruling-undercuts-central-move-in-texas-two-step>. Dismissal of LTL’s bankruptcy will preclude mass-tort debtors and claimants from using Chapter 11’s most powerful tools—including centralization of claims, the automatic stay, bankruptcy jurisdiction’s broad reach, claims estimation, extensive disclosure requirements, appointment of a future claims representative with fiduciary duties, and the Chapter 11 plan process—to reach an equitable resolution for present *and future* claimants. See Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L.

Rev. 447, 485-493 (2022). Claimants must instead turn back to the traditional tort system, where massive collective-action and hold-out problems exist, “encourag[ing] claimants who are worried about available recoveries to race to the courthouse to collect ahead of others.” Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. ____ (forthcoming 2023). This race “can destroy going concern value and lead to the dismemberment of valuable firms.” *Id.* And these real-world consequences confirm that LTL’s forthcoming petition will be a strong candidate for Supreme Court review.

3. Although LTL need not show that this Court’s standard is wrong in order to secure a stay, the standard’s shaky textual foundation underscores the need for Supreme Court review. *See Nara*, 494 F.3d at 1133 (a stay is warranted when there is “a reasonable possibility that at least five Justices would vote to reverse this Court’s judgment.”). The good-faith requirement is a judicially created gloss on the Bankruptcy Code that the Supreme Court is likely to view with skepticism. And considering whether a petition has a valid “bankruptcy purpose” or whether a debtor experiences “financial distress” is a further gloss on the already judicially created gloss that is “good faith.” The panel’s focus on a financial-distress requirement loses sight of 11 U.S.C. § 1112(b)’s goal of preventing abuse of the bankruptcy process, *SGL Carbon*, 200 F.3d at 161-162, and thereby risks

“miss[ing] the forest for the trees,” *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005).

The Supreme Court will start with the text. *See, e.g., Bartenwerfer v. Buckley*, 143 S. Ct. 665, 671 (2023). This Court roots its good-faith doctrine in 11 U.S.C. § 1112(b)(1), which permits a bankruptcy court to dismiss a Chapter 11 petition “for cause.” *SGL Carbon*, 200 F.3d at 160. But the words “good faith” do not appear in § 1112(b)(1). “For cause” is illuminated by the factors defining “cause” in that provision, but the enumerated factors that would permit dismissal of a bankruptcy case for cause bear no relationship to the good-faith standard crafted by this Court. *Compare, e.g.,* 11 U.S.C. § 1112(b)(4) (explaining that “the term ‘cause’ includes,” among other things, “diminution of the estate,” “failure to maintain appropriate insurance,” and “failure timely to pay taxes owed”), *with In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119-121 (3d Cir. 2004) (explaining that the “good faith” inquiry looks at whether the debtor was experiencing “financial distress,” “whether the petition serves a valid bankruptcy purpose,” and whether the petition seeks “merely to obtain a tactical litigation advantage”). This Court has admitted that the “for cause” standard in § 1112(b)(1) “neither requires nor prohibits imposition of a ‘good faith’ requirement on Chapter 11 petitions.” *SGL Carbon*, 200 F.3d at 160. And Congress prescribed

requirements in 11 U.S.C. § 524(g) for debtors seeking to confirm a plan handling mass-tort liabilities.

The Supreme Court has rejected similar efforts to inject new language into the Bankruptcy Code. In *Toibb v. Radoff*, 501 U.S. 157, 159-160 (1991), for example, the bankruptcy court had dismissed the individual nonbusiness debtor's petition, reasoning that a debtor not engaged in an ongoing business may not reorganize under Chapter 11. The Supreme Court canvassed the Code for an ongoing-business requirement in Chapter 11. Noting that various provisions in the Code created exclusions from eligibility, yet no section required an ongoing business, the Court reached the obvious conclusion that "Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor." *Id.* at 161.

The same is true here. Given the express textual requirements in § 1112 and § 524(g), courts should be reluctant to add further requirements that cause early dismissal. The Fourth Circuit's standard appropriately "contemplates that it is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even a remote chance that a reorganization effort so motivated might nevertheless yield a successful rehabilitation." *Carolin Corp.*, 886 F.2d at 701. The Supreme Court has similarly expressed reluctance to dismiss for lack of good faith in the Chapter

13 context, noting that limiting such dismissals to “extraordinary cases is particularly appropriate” given that lack of good faith is an express statutory ground for later denying plan confirmation in Chapter 13, *see* 11 U.S.C. § 1325(a)(3), and Chapter 11, *see id.* § 1129(a)(3), both. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 n.11 (2007). Bankruptcy courts “should be more reluctant to dismiss a petition for lack of good faith than to reject a plan for lack of good faith.” *Id.* (citation omitted). Even if the Supreme Court does not entirely jettison the good-faith requirement, it is likely to be persuaded that this Court’s standard is a bridge too far.

B. LTL’s petition for certiorari will present a substantial question regarding the standard of review that an appellate court applies to a bankruptcy court’s good-faith findings.

The panel decision also creates a split regarding the standard of review that an appellate court applies in assessing good faith. The panel treated good faith as “essentially[] a conclusion of law” reviewed de novo without any deference to the Bankruptcy Court. Op. 33 (quoting *BEPCO*, 589 F.3d at 616). It “likewise” treated the Bankruptcy Court’s finding of financial distress the same, giving it a “fresh look.” Op. 33. The panel “[w]eigh[ed] the totality of facts and circumstances” itself, leading it to reject the Bankruptcy Court’s conclusion that Old JJCI—rather than LTL—was the proper focus of the financial-distress analysis even though the funding agreement was part of the bankruptcy-driven

restructuring, and the restructuring was a “single integrated transaction” to resolve Old JJCI’s talc liabilities. Op. 43-44. And the panel “evaluate[d] the financial condition of LTL” for itself, concluding it would “not accept [the bankruptcy court’s] projections of future liability.” Op. 45-46. By contrast, other courts of appeals review a bankruptcy court’s good-faith finding under “the clearly erroneous standard.” *Premier Auto. Servs.*, 492 F.3d at 279; *see also In re Brazos Emergency Physicians Ass’n, P.A.*, 471 F. App’x 393, 394 (5th Cir. 2012); *In re Cedar Shore Resort, Inc.*, 235 F.3d at 379; *In re Trident Assocs. Ltd. P’ship*, 52 F.3d 127, 132 (6th Cir. 1995); *In re Marsch*, 36 F.3d at 828.

Here, again, the Court’s analysis is likely wrong and there is a reasonable possibility it will be reversed by the Supreme Court. *See Nara*, 494 F.3d at 1133. The instances in which the Supreme Court has “articulated a standard of deference for appellate review of district-court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts.” *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). “[A] federal appellate court [has the] primary function as an expositor of law,” *Miller v. Fenton*, 474 U.S. 104, 114 (1985), and is therefore best-suited to resolve questions that “contribute to the clarity of legal doctrine,” *Salve Regina*, 499 U.S. at 233. But a second (and in many cases, third) round of de novo consideration imposes added costs on judges and litigants alike, and it is ill-suited to occasions when an appellate court’s

application of a legal standard to particular facts “will not much clarify legal principles or provide guidance to other courts resolving other disputes.” *U.S. Bank Nat’l Assn. v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 968 (2018). These “case-specific factual issues” are better resolved by the bankruptcy court, which “has both the closest and the deepest understanding of the record.” *Id.* at 967-968. An appellate court reviewing those factual findings should place “a serious thumb on the scale for the bankruptcy court.” *Id.* at 966.

A “change[]” in “authority on review,”—“from de novo review . . . to clearly erroneous review”—can be “outcome determinative.” *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999). It certainly was here. The panel’s reversal would not have been possible but for the panel’s decision to reweigh the facts to reach a different conclusion than the Bankruptcy Court. The panel, for example, faulted the Bankruptcy Court for failing to account for “the possibility of meaningful settlement.” Op. 49. But the Bankruptcy Court *did* account for that possibility. The court acknowledged that since 2014 “there have been approximately 6,800 cases which have settled,” but explained that this “number is dwarfed” by the “projected 10,000 new cases to be filed each year going forward,” A20, and that no “meaningful settlement” discussions had taken place since the global Imerys settlement discussions fell apart, A24.

Similarly, the panel faulted the Bankruptcy Court for failing to account for the likelihood of “successful defense” in litigation. Op. 49. But the Bankruptcy Court readily acknowledged that JJCI “ultimately prevailed in most of the talc cases it tried,” A26 n.15, while recognizing that even a very low plaintiff success rate could ruin the company, A36. The panel also suggested that the Bankruptcy Court failed to justify its finding that future litigation costs would be higher than the “\$4.5 billion” JJCI had incurred over the previous five years. Op. 50. But the Bankruptcy Court again reasonably concluded that recent events—the collapse of the Imerys settlement, the Supreme Court’s decision not to review the *Ingham* verdict, and damaging reports by the FDA and its Canadian equivalent—meant that “[n]either the settlements nor verdicts which predated these events” were “dependable guideposts for expectations going forward.” A41.

In sum, after hearing the evidence presented during a five-day trial, the Bankruptcy Court was better situated than the panel to weigh the evidence and make credibility judgments. Yet the panel applied a *de novo* standard of review to create a do-over and reach a different conclusion. As cases like *Premier Automobile Services* underscore, this Court is the only jurisdiction in which this could have happened. It is reasonable to expect that the Supreme Court will grant certiorari to bring the circuits into alignment. *Cf., e.g., In re Village at Lakeridge, LLC*, 814 F.3d 993, 997 (9th Cir. 2016), *cert. granted in part sub nom. U.S. Bank*

Nat'l Ass'n v. Village at Lakeridge, LLC, 137 S. Ct. 1372 (2017) (certiorari granted where circuits disagreed on standard of review applicable to issue in bankruptcy proceedings).

II. STAYING THE MANDATE WILL AVOID CHAOS IN THE BANKRUPTCY COURT AND MASS-TORT PROCEEDINGS IF THE SUPREME COURT GRANTS REVIEW AND REVERSES AND WILL PREVENT IRREPARABLE HARM TO LTL.

LTL seeks to maintain the status quo for a short period while it seeks a writ of certiorari. The stay will be temporary: Certiorari briefing will be completed over the summer, and the Supreme Court would likely rule on the petition no later than the first Monday in October. Thus, if certiorari is ultimately denied, a stay would last only about six months. *See, e.g., In re Integrated Telecom Express, Inc.*, No. 04-2411 (3d Cir. Dec. 6, 2004) (this Court granted stay of mandate pending certiorari petition and stay was dissolved six months later after certiorari denied). If review is granted, however, that further weighs in favor of staying the mandate pending the Supreme Court's final disposition of this case.

Without a stay, LTL and courts across the country will be thrust into chaos. Moreover, the bankruptcy process will be dismantled, and time, effort, and money expended, all for naught if the Supreme Court ultimately reverses this Court. The panel recognized LTL's good intentions in filing its bankruptcy petition and LTL's financial means to effectuate its planned reorganization. Op. 18, 55. Those good intentions apply to LTL's certiorari petition, too.

1. Allowing the mandate to take effect will create chaos in the Bankruptcy Court and across mass-tort proceedings nationwide if the Supreme Court reverses this Court.

The Bankruptcy Court has noted that upon the mandate issuing, it will dismiss the petition and retain jurisdiction over only administrative matters, like fees. Dismissal of the bankruptcy brings with it dissolution of the TCC and discharge of its retained professionals, meaning claimants represented by the TCC would lack representatives to respond to LTL's petition for certiorari. *See* 11 U.S.C. § 103(g); *In re Great N. Paper, Inc.*, 299 B.R. 1, 5 (D. Me. 2003) ("When the statutory basis of the case is changed, either through dismissal or . . . conversion, the statute under which the Committee was created no longer applies and the committee is automatically dissolved.") (quotation marks omitted). In addition, dismissal will result in the discharge of the Bankruptcy Court's retained professionals, such as the mediators, the fee examiner, and the future claims representative. Then, if the Supreme Court reverses, the Bankruptcy Court would have to rewind all its efforts and rebuild the significant infrastructure that it had just dismantled.

Moreover, in the absence of a stay, there would be significant chaos and confusion across the mass-tort proceedings. Approximately 1,000 individually set ovarian-cancer claims are pending in various state courts outside of the federal

MDL and consolidated state proceedings in California and New Jersey. That means there are roughly 1,000 ovarian-cancer claims that are not subject to deliberate and measured docket-wide coordination procedures, and each will require state court judges and their staff to expend resources to “on track” the cases back into the system. Moreover, an additional 470 mesothelioma claims are pending in state courts across the country, none of which are coordinated, and many of which are filed on specialized, asbestos-specific accelerated dockets. Each of these cases would suddenly spring back into activity and proceed towards trial absent a stay.

The mesothelioma docket alone makes the point. The currently pending mesothelioma claims would return to 44 different courts across 25 different States. Many of the cases have proceeded in the interim against other defendants and without LTL’s involvement, but suddenly LTL would be thrown into the mix—potentially significantly impacting the progress, scope, and nature of the cases. Worse, there are at least 20 mesothelioma cases now on the eve of trial or which could be set for trial in the next 60 days, each of which would demand significant investment in expedited, catch-up discovery; expert-witness engagement; trial-lawyer time; and other resources.

In other words, the complex mass-tort machinery could swiftly spring to life in dozens upon dozens of courts across the country, requiring unexpected time and

resources from not just LTL but also court personnel, only to potentially grind to a halt (again)—possibly even in the middle of multiple trials—if the Supreme Court were to grant review. And to be clear, this machinery does not run itself. From just LTL’s perspective, prior to the bankruptcy petition, 30 firms and 40 experts were retained to handle the mesothelioma cases referenced above. Reconstituting this complex operation would be for naught if the Supreme Court decides to hear the case. This Court can—and should—avoid this chaos by maintaining the status quo while LTL seeks certiorari.

2. LTL will also suffer irreparable harm absent a stay pending certiorari. *See Nara*, 494 F.3d at 1133 (an applicant can demonstrate good cause by showing “a likelihood of irreparable injury absent a stay.”). The purpose of LTL’s bankruptcy petition was to channel into post-confirmation trusts all present and future asbestos-related tort claims against it, permitting compensation to be paid in a manner that ensures fair and equitable treatment of present and future claimants. As LTL explained in defending the automatic stay, its efforts to reorganize would be irreparably harmed if the mandate issues before final review of this case. *See* Dkt. 104, LTL Response Br. 76-99.

Furthermore, if the mandate issues, LTL will be forced to resume litigation of the tens of thousands of stayed claims. *See supra* pp. 18-20. Before bankruptcy, defense costs alone ran upwards of \$10-20 million per month, A458, a

number that is sure to increase as the number of claims filed against LTL and its affiliates soars. *See Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (“If expenditures cannot be recouped, the resulting loss may be irreparable.”). Claimants would not lose any rights during an approximately six-month stay, nor could they reasonably expect to start receiving payments if their lawsuits proceed in that same period. Although LTL will not become insolvent in the time it takes the Supreme Court to review this case, the sheer cost of restarting LTL’s talc-litigation apparatus plus the monthly defense costs thereafter is sure to begin depleting the funds available for claimants with no offsetting benefits for anyone.

The harm to LTL and its ability to create a trust to benefit present and future claimants, if the Supreme Court reverses, also outweighs any harm the present claimants would suffer as a result of the stay. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (“[I]n a close case, it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.”). Courts consistently recognize the public interest in a successful reorganization. *See, e.g., United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983). That is particularly so in the mass-tort context, where “completing the reorganization process . . . [will] resolv[e] thousands of claims in a uniform and equitable manner.” *In re W.R. Grace & Co.*, 386 B.R. 17, 36 (Bankr. D. Del. 2008). And here, as the Bankruptcy

Court explicitly found, A29, and the panel did not dispute, Op. 54-55, a trust that is ultimately established by a confirmed plan of reorganization for LTL would allow for more efficient recoveries for claimants than generally are possible in the tort system. “Refusing a stay,” at bottom, “may visit an irreversible harm on [LTL], but granting it will apparently do no permanent injury to” Claimants. *Philip Morris*, 561 U.S. at 1305.

CONCLUSION

For these reasons, the Court should stay the mandate pending the filing and disposition of a petition for writ of certiorari.

Respectfully submitted,

Gregory M. Gordon
Brad B. Erens
Dan B. Prieto
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

C. Kevin Marshall
David S. Torborg
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

March 22, 2023

/s/ Neal Kumar Katyal
Neal Kumar Katyal
Sean Marotta
William E. Havemann
Jo-Ann Tamila Sagar
Patrick C. Valencia
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for LTL Management LLC

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local R. 28.3(d) and Local R. 46.1(e), I certify that I, Neal Kumar Katyal, am admitted as an attorney and counselor of the United States Court of Appeals for the Third Circuit.

/s/ Neal Kumar Katyal
NEAL KUMAR KATYAL
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

March 22, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify the following:

1. This petition complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 5,165 words, excluding those parts exempted by Fed. R. App. P. 32(f).

2. This petition complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because the petition has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

/s/ Neal Kumar Katyal
NEAL KUMAR KATYAL
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

March 22, 2023

CERTIFICATE OF SERVICE

I certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on March 22, 2023. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Neal Kumar Katyal
NEAL KUMAR KATYAL
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

March 22, 2023

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
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SIXTH REPORT TO COURT

Cassels Brock & Blackwell LLP

2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Shane Kukulowicz LSO #: 30729S
Tel: 416.860.6463
skukulowicz@cassels.com

Natalie Levine LSO #: 64908K
Tel: 416.860.6568
nlevine@cassels.com

Alec Hoy LSO #85489K
Tel: 416.860.2976
ahoy@cassels.com

Lawyers for the Information Officer