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

United States Court of Appeals for the Third Circuit

IN RE: LTL MANAGEMENT, LLC,
Debtor

OFFICIAL COMMITTEE OF TALC CLAIMANTS,
Appellant

On Direct Appeal from the United States Bankruptcy Court
for the District of New Jersey, Chapter 11 No. 21-30589, Adv. Pro. No. 21-3032

JOINT BRIEF OF APPELLANTS ARNOLD & ITKIN LLP; AYLSTOCK, WITKIN, KREIS & OVERHOLTZ, PLLC; AND AD HOC COMMITTEE OF MESOTHELIOMA CLAIMANTS IN OPPOSITION TO MOTION TO STAY THE MANDATE

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INTRODUCTION AND SUMMARY

LTL has failed to make the exceptional showing necessary to warrant a stay of the mandate. LTL must show not only a reasonable probability of obtaining Supreme Court review, but also a significant possibility of winning a reversal and irreparable harm from denial of a stay in the meantime. It cannot make any of those showings.

LTL's purported circuit splits do not exist. It cites no circuit court decision upholding the good faith of a Chapter 11 debtor that lacked financial distress, and all Circuits agree that good-faith determinations are reviewed for abuse of discretion. LTL's irreparable-harm argument is equally unfounded. Denying a stay will restore the pre-bankruptcy status quo, enabling resumption of state- and federal-court litigation that LTL's bad-faith filing halted. In the improbable event the Supreme Court grants review and reverses, the bankruptcy court simply can reinstate this case and proceed.

Even if a stay were a close call, LTL would need to show that the balance of equities and the public interest favor a stay. The equities overwhelmingly favor issuing the mandate now. LTL's myopic focus on litigation costs—which its wealthy parent, Johnson & Johnson ("J&J") has promised to fund—obscures the interests of talc claimants diagnosed with fatal cancers. LTL's bad-faith bankruptcy already has blocked those claimants from litigating and obtaining judgments or settlements for 18 months, during which many claimants died. The survivors should now be able to pursue their claims.

LTL's bad-faith bankruptcy stopped litigation in state courts and the Article III MDL court, where those cases belong. The public has a vital interest in resolving the ongoing dispute over J&J's wrongdoing—which LTL continues to deny, claiming even now that "Johnson's Baby Powder does not contain asbestos and does not cause cancer." The public interest therefore also strongly favors issuing the mandate immediately.

ARGUMENT

Applications to stay a mandate pending a certiorari petition are granted only "[i]n exceptional cases." *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007). The applicant "must show that the petition would present a substantial question and that there is good cause for a stay," Fed. R. App. P. 41(d)(1), and must satisfy the "conditions" that "[t]he Supreme Court has established . . . before it will stay a mandate." Fed. R. App. P. 41 advisory committee's note to 1994 amendment.

The applicant must show: "(1) 'a reasonable probability' that [the Supreme] Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (brackets in original) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)); *Barnes v. E-Systems Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers) ("significant possibility" of reversal required). "[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." *Conkright*, 556 U.S. at 1402 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)); *Barnes*, 501 U.S. at 1305 (same). Each of these factors weighs against granting a stay here.

I. LTL Fails To Show Its Petition Is Likely To Succeed

Obtaining Supreme Court review is difficult. LTL itself has emphasized this, citing the denial of certiorari in *Ingham* to justify its bankruptcy filing. JA424-425; *see Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2716 (2021). It will be especially difficult here because this Court correctly applied settled law to specific facts.

A. This Court's Decision Was Correct

The Supreme Court is unlikely to grant review because this Court's ruling that LTL's bankruptcy should be dismissed for lack of good faith followed longstanding precedent. "[T]he requirement of good faith has been held to be an implicit condition to the filing and maintenance of a bankruptcy case for over a century." 7 *Collier on Bankruptcy* § 1112.07 (16th ed. 2022); *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1071 (5th Cir. 1986) ("Every bankruptcy statute since 1898" has incorporated a good-faith standard.).

The debtor's financial distress is central to the good-faith inquiry conducted by this Court and others. *See*, *e.g.*, *In re SGL Carbon Corp.*, 200 F.3d 154, 163 (3d Cir. 1999) (dismissing debtor that "face[d] no immediate financial difficulty"); *Little Creek*, 779 F.2d at 1072 (good faith "depends largely" on debtor's "financial condition" and "local financial realities"); *In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 380 (8th Cir. 2000) (no good faith where debtor was "not in dire financial straits"); *In re Marsch*, 36 F.3d 825, 829 (9th Cir. 1994) (per curiam) (same, where debtor "had the financial means to pay" its obligations).

This Court's decision thus stands on firm ground. Holding a Funding Agreement with J&J worth $61.5 billion and "likely to grow," LTL proclaimed its ability to meet all liabilities "in the ordinary course" and disclaimed "any imminent or even likely need" to invoke "anything close to" that maximum amount. Op.28, 48, 53 (emphases omitted) (quoting JA3747, JA4313). This Court correctly recognized that "LTL, at the time of its filing, was highly solvent with access to cash to meet comfortably its liabilities as they came due for the foreseeable future." Op.53. LTL therefore does not belong in Chapter 11. Op.55. Every Circuit would reach the same conclusion.

LTL erroneously asked this Court to defer to the bankruptcy court's view of LTL's projected financial condition. *See* Mot. 13-17. This Court correctly refused. The bankruptcy court relied on "back-of-the-envelope forecasts of hypothetical worst-case scenarios," which "contradict[ed] the record" by ignoring the realities of settlement and dismissal and "by assuming most, if not all, [cases] would go to and succeed at trial." Op.51. The panel appropriately rejected these "conjectures," expressing "doubt as to whether they were factual findings at all." *Id.* "[N]o other inferences or support in the record" corroborated the bankruptcy court's views of LTL's financial condition. *Id.* (quoting JA23).

Thus, this case will present the Supreme Court with an application of settled principles to specific facts. Petitions in such cases are "rarely granted." Sup. Ct. R. 10; *Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring in the judgment).

B. LTL Fails To Show Its Petition Is Likely To Succeed On Good-Faith Standards

LTL fails to show any circuit conflict on good-faith standards, much less a conflict warranting Supreme Court review.

1. Courts agree on the vital importance of the good-faith requirement to prevent abuse of the bankruptcy system. *See SGL Carbon*, 200 F.3d at 161-62; *Cedar Shore*, 235 F.3d at 379 ("The good faith requirement 'is designed to prevent abuse of the bankruptcy process, or the rights of others.'") (quoting 7 *Collier on Bankruptcy* § 1112.07[1] (2000)) (citations omitted); *Carolin Corp. v. Miller*, 886 F.2d 693, 698, 701-02 (4th Cir. 1989) ("good faith filing requirement" is "indispensable to proper accomplishment of the basic purposes of Chapter 11 protection"); *Little Creek*, 779 F.2d at 1072 ("Requirement of good faith prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes."). And they agree on the centrality of financial distress to the debtor's proof of its good faith. *See supra* p.4.

LTL fails to show a circuit split on good-faith standards as they apply here. The Supreme Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Lab'ys*, 351 U.S. 292, 297 (1956)). Virtually every case in LTL's purported split (at 4-5) reached the same result: dismissal for lack of good faith. *See In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 280-81 (4th Cir. 2007) (affirming dismissal of Chapter 11 petition filed in bad faith); *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1313

(2d Cir. 1997) (same); *In re Laguna Assocs. L.P.*, 30 F.3d 734, 738 (6th Cir. 1994) (same); *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1395 (11th Cir. 1988) (same); *Carolin*, 886 F.2d at 703-06 (same). In the lone exception, *Little Creek*, the Fifth Circuit held only that the debtor was entitled to defend itself from charges of bad faith. 779 F.2d at 1074 (reversing bankruptcy court's "somewhat hasty" dismissal).

None of LTL's cases upheld the good faith of a debtor that lacked financial distress. Thus, none conflicts with this Court's decision. The various statements in opinions that LTL tries (at 4-5) to shape into a circuit split reflect only that bad faith can take many forms beyond a lack of financial distress. *See*, *e.g.*, *Laguna Assocs.*, 30 F.3d at 736, 738 (bad faith where "asset-less" debtor was created one day before bankruptcy filing "solely" to obstruct creditors' foreclosure of apartment complex). The Circuits recognize that the good-faith standard requires flexibility and depends on the totality of circumstances. *See Cedar Shore*, 235 F.3d at 379; *SGL Carbon*, 200 F.3d at 161-62; *C-TC 9th Ave.*, 113 F.3d at 1311-12; *Laguna Assocs.*, 30 F.3d at 738; *Carolin*, 886 F.2d at 700-01; *Little Creek*, 779 F.2d at 1073. This flexibility reflects the good-faith requirement's "strong roots in equity," *SGL Carbon*, 200 F.3d at 161, as LTL itself has emphasized. *See* Pet. for Reh'g at 8 (Feb. 13, 2023) ("Pet."); *see also Marsch*, 36 F.3d at 828 ("[T]he 'good faith' filing requirement encompasses several, distinct equitable limitations that courts have placed on Chapter 11 filings."); *cf. United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) ("essence" of equity is the power "to mould each decree to the necessities of the particular case") (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

That equitable flexibility is necessary because clever lawyers and businesspeople long have made bad-faith bankruptcy filings. *See*, *e.g.*, *In re Cook*, 104 F.2d 981, 985 (7th Cir. 1939) (dismissing bankruptcy for lack of good faith where debtors entered bankruptcy not to save "a corporation in financial distress," but "to escape . . . the day of reckoning for their alleged acts of misconduct [that] was at hand" in another court). Bankruptcy will not tolerate those who "violate rules of fair play"; instead, "equity will undo the wrong or intervene to prevent its consummation." *Pepper v. Litton*, 308 U.S. 295, 311 (1939). The Circuits agree that the good-faith standard, as an application of fundamental equitable principles, bars improper filings.

2. LTL fails to support its assertion (at 5) that the supposed "division of authority was outcome determinative." LTL's claim (at 5) that the Court "conceded" LTL would satisfy the Fourth Circuit standard reads too much into the

Court's noncommittal footnote 8. *See* Op.30 n.8. The Court did not decide that question, which was neither briefed nor necessary to resolve.

LTL's reliance (at 1, 5, 17) on the Court's statements about "good intentions" and "sincerely held" beliefs to show an outcome-determinative split is misplaced. The Court explained that a debtor lacking financial distress "cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose," Op.36, the only type of intention that matters for good faith. The Court referred to the possible beliefs and intentions of J&J to "protect [its] brand or comprehensively resolve litigation" only to say that those intentions are irrelevant. Op.19, 57.

LTL also errs in arguing that those statements mean LTL would satisfy the Fourth Circuit's good-faith standard. Like this Court, the Fourth Circuit ruled in *Premier* that the debtor's lack of financial distress meant it entered bankruptcy "for an impermissible purpose" and thus with "subjective bad faith." 492 F.3d at 280. As LTL concedes (at 6), *Premier* ruled that fact "alone" could justify dismissal, following this Court's *SGL Carbon* decision. *Id.* (quoting *SGL Carbon*, 200 F.3d at 166, in stating that "courts 'have consistently dismissed Chapter 11 petitions filed by financially healthy companies with no need to reorganize under the protection of Chapter 11'"). A debtor lacking financial distress in the Fourth Circuit therefore would meet the same fate as in the Third Circuit.

Until the Fourth Circuit actually decides a Chapter 11 debtor can file in good faith despite lacking financial distress, no circuit split exists warranting Supreme Court review. Accordingly, LTL's citation (at 5) of bankruptcy-court decisions in the Fourth Circuit reduces, rather than bolsters, its chances of obtaining certiorari. None of those cases has yielded a Fourth Circuit decision yet. And Supreme Court Justices often say that the Court benefits from "percolation" of an issue. *See*, *e.g.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam) (denying certiorari on question that only one Circuit had addressed, citing "our ordinary practice of denying petitions insofar as they raised legal issues that have not been considered by additional Courts of Appeals"); *id.* at 1784 (Thomas, J., concurring) (agreeing that "further percolation may assist our review"); *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., respecting the denial of certiorari) ("complex" question "would benefit from further percolation in the lower courts prior to this Court granting review"). That adage applies here.

3. LTL's other arguments for the likelihood of a grant of certiorari lack merit. This case has no similarity to the recent grants they cite (at 7) other than that they also involve the Bankruptcy Code. Those cases each involved acknowledged circuit splits on discrete issues. *See* Brief in Opposition at 9, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, No. 22-227 (U.S.

Nov. 8, 2022), 2022 WL 16855905 (respondent recognizing "a conflict now exists" on tribal immunity from suit under Bankruptcy Code); Brief in Opposition at 16, *Bartenwerfer v. Buckley*, No. 21-908 (U.S. Mar. 21, 2022), 2022 WL 864550 (respondent acknowledging that "Petitioner has identified a longstanding split of authority" on dischargeability of debt obtained by fraud). No such split exists here; only the application of the good-faith standard to an unusual record.

LTL's arguments for this case's importance also do not show a reasonable probability that the Supreme Court will grant review. This case is important to the thousands of people with ovarian cancer or mesothelioma whom LTL has obstructed from litigating against J&J for the past 18 months, but their interest is in seeing the mandate issue so they can resume their cases. *See infra* p.21-22. LTL's arguments for importance instead rest (at 8) on a specious analogy to other mass-tort bankruptcies. This Court persuasively explained why LTL is different from prior mass-tort defendants that entered bankruptcy. Op.43-44 (distinguishing financial challenges of Johns-Manville, A.H. Robins Company, and Dow Corning). Those debtors' liabilities genuinely pushed them "to the brink," and they lacked "the capacity . . . to meet" those liabilities that J&J's massive financial backstop provides to LTL. Op.44. This Court's decision dealt only with LTL, an anomalous debtor. Op.55. The decision leaves Chapter 11 open to future debtors who, like prior mass-tort debtors, are in genuine financial distress. Op.39-40.[1]

4. Finally, LTL offers (at 10-13) the novel argument that the good-faith standard should be curtailed or jettisoned based on the absence of the words "good faith" from 11 U.S.C. § 1112(b). LTL never argued that to this Court. Because the Supreme Court is "a court of review, not of first view," it does not consider "pleas . . . not addressed by the Court of Appeals." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Brownback v. King*, 141 S. Ct. 740, 747 n.4 (2021) (same). This argument thus does not increase LTL's probability of obtaining review.

LTL's statutory interpretation is unpersuasive in any case. Bankruptcy courts generally have the power to issue any order or judgment necessary "to prevent an abuse of process." 11 U.S.C. § 105(a); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 (2007). In particular, the Bankruptcy Code expressly authorizes dismissal "for cause" when it is "in the best interests of creditors and the estate." 11 U.S.C. § 1112(b)(1). "[T]he term 'cause' includes" an enumerated list

[1] LTL's invocation (at 9) of 11 U.S.C. § 524(g) fails for the same reason. That provision offers special relief "for an insolvent debtor facing the unique problems and complexities associated with asbestos liability." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004). It is meant for debtors facing "overwhelming liability." H.R. Rep. No. 103-835, at 41 (1994). A debtor in no financial distress like LTL does not warrant that special relief.

of 16 grounds for dismissal. *Id.* § 1112(b)(4). The statute's use of "includes," not "means," "makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012); 11 U.S.C. § 102(3) (in Bankruptcy Code, "'includes' and 'including' are not limiting").

LTL's interpretation (at 12) would turn the illustrative enumeration in § 1112(b)(4) into an exhaustive list—precluding dismissal on good-faith grounds unless there is not even "a remote chance" of a successful reorganization. But the statute's enumeration already permits dismissal when an estate is diminishing and there is no "reasonable likelihood of rehabilitation" or when the debtor shows an "inability to effectuate substantial consummation of a confirmed plan." 11 U.S.C. § 1112(b)(4)(A), (M). LTL's duplicative interpretation functionally eliminates good faith as a separate basis for dismissal. No court has adopted LTL's proposed reading; on the contrary, every Circuit agrees with this one that good faith is required. *See supra* p.6.

LTL's cited cases (at 12-13) lend no support to its statutory interpretation. *Toibb v. Radloff* considered a very different issue: whether an individual, non-business debtor was eligible for Chapter 11 bankruptcy under 11 U.S.C. § 109, which says that "a person" can be a Chapter 11 debtor, subject to specific exceptions. 501 U.S. 157, 160-61 (1991). That provision's structure is the inverse of § 1112(b)(4), which explains "cause" for dismissal with a non-exhaustive list. *Toibb*'s recognition that "Congress knew how to restrict recourse to the avenues of bankruptcy relief," *id.* at 161, weighs against LTL here, given the expansive language authorizing dismissals for cause.

Marrama v. Citizens Bank of Massachusetts also supports this Court's decision, not LTL's criticisms. *Marrama* used lower courts' routine practice of dismissing or converting petitions for lack of good faith under Chapter 13's equivalent "for cause" provision as a key premise of its holding that bankruptcy courts could deny Chapter 7 debtors' attempts to convert to Chapter 13 if they had filed in bad faith. 549 U.S. at 372-75. As for *Marrama*'s suggestion that dismissal for cause should be reserved for "atypical" or "extraordinary" cases, *id.* at 375 n.11, this case fits the bill by any standard.

C. LTL Fails To Show Its Petition Is Likely To Succeed On Standards Of Review

1. LTL's asserted split on the standard of review for good-faith determinations (at 13-14) is illusory. This Court reviewed the bankruptcy court's ruling for abuse of discretion, which "exists when the decision 'rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact.'" Op.34 (quoting *In re 15375 Mem'l Corp. v. BEPCO, L.P.*, 589 F.3d 605, 616 (3d Cir. 2009)).

The Circuits agree that abuse-of-discretion review applies in good-faith cases. *See Cedar Shore*, 235 F.3d at 379 ("a dismissal [for lack of good faith] will only be reversed if the court abused its broad discretion"); *Jackson v. U.S. ex rel. IRS*, 131 F.3d 134 (4th Cir. 1997) (tbl.) (per curiam), 1997 WL 746763, at *3 ("we review a decision of the bankruptcy court dismissing a case pursuant to § 1112(b) of the Bankruptcy Code for an abuse of discretion") (citing *In re Superior Siding & Window, Inc.*, 14 F.3d 240, 242 (4th Cir. 1994)); *In re Trident Assocs. L.P.*, 52 F.3d 127, 132 (6th Cir. 1995) ("bankruptcy court did not abuse its discretion by . . . dismissing the petition"); *Marsch*, 36 F.3d at 828 ("We review for abuse of discretion the bankruptcy court's decision to dismiss a case as a 'bad faith' filing."); *In re Brazos Emergency Physicians Ass'n, P.A.*, 471 F. App'x 393, 394 (5th Cir. 2012) (per curiam) (dismissal "was not an abuse of discretion"). It is uncontroversial that the abuse-of-discretion standard entails "*de novo*" review of "matters of law," including "the factors to be considered" in dismissing a bankruptcy under § 1112(b). *Superior Siding*, 14 F.3d at 242.

2. The Supreme Court is unlikely to grant review on LTL's argument that *only* clear-error review applies in good-faith cases because this case does not cleanly present that question. As LTL agrees, this Court could review the bankruptcy court's decision for clear error. The Court did so and accepted the bankruptcy court's findings of historical fact, such as the value of J&J's funding commitment to LTL. Op.27-28. But it reasonably concluded that the bankruptcy court's "back-of-the-envelope forecasts" of future liability were clearly erroneous because they lacked support and contradicted the record, assuming they even were fact-findings and not just sheer surmise. Op.51. With clear error present, LTL loses, whatever else it may argue.

The bankruptcy court also committed "legal error" by focusing its financial-distress inquiry on the wrong entity—the differently situated, non-existent Johnson & Johnson Consumer, Inc.—rather than LTL, the sole debtor. Op.45, 50. When findings are made under the wrong legal standard, a court of appeals need not defer to them. *See Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 855 n.15 (1982) ("Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard.").

3. The Supreme Court also is unlikely to grant review because it already gave close attention to appellate standards of review in bankruptcy in a recent case. *See U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at*

Lakeridge, LLC, 138 S. Ct. 960, 965-69 (2018). All the cases that LTL cites (at 13-14) in its supposed circuit split predate *U.S. Bank*. Accordingly, the Supreme Court is likely to see if *U.S. Bank* produces disagreement among courts before it grants review again. *See supra* p.10.

In any event, this Court's review of the legal and factual aspects of the bankruptcy court's financial-distress ruling tracks *U.S. Bank*. The Supreme Court explained there that some "[m]ixed questions" of law and fact "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard." 138 S. Ct. at 967. "[W]hen applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*." *Id.* Financial distress was that kind of issue here. The Supreme Court is unlikely to take another case on the same subject it addressed so recently, much less to reverse a circuit ruling that faithfully applies it.

II. LTL Fails To Show Irreparable Harm From Denial Of A Stay

LTL's motion blurs the alleged harms it claims to suffer from denial of a stay with the other equities and public interests at stake. Viewed on their own, LTL's claims of irreparable harm are exceedingly thin. None justifies a stay.

1. LTL cites (at 18-19) the difficulty of resuming litigation in the pending cases its bankruptcy obstructed. The resumption of litigation merely will restore the status quo that LTL disrupted with its bad-faith bankruptcy. Restoring that status quo is not harmful, much less irreparably so. Defending oneself in litigation—even if it involves "cost, anxiety, and inconvenience"—is not irreparable harm. *In re Davis*, 691 F.2d 176, 178 (3d Cir. 1982) (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)).

LTL laments (at 17) the "time, effort, and money" that must be expended to resume litigation, but "injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay[] are not enough" to show irreparable harm. *Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir. 1994) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). In addition, no "machinery" will "spring to life" of its own accord. Mot.19-20. The machinery is controlled by trial judges, who can manage cases appropriately after the 18-month interruption that LTL caused. LTL can direct its pleas for more time to them.

LTL cites no case finding irreparable harm in comparable circumstances. *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301 (2010) (Scalia, J., in chambers), is off point. *Philip Morris* involved possibly wrongful recovery by class plaintiffs—recovering on fraud claims without each proving detrimental reliance—and the risk that "a substantial portion of the fund" at issue would dissipate with the certiorari petition pending. *Id.* at 1304-05. Here, any talc claimant's recovery outside bankruptcy would be proper; these suits are tried or settled individually. And unlike in *Philip Morris*, LTL can recoup its costs from J&J via the Funding Agreement. The monthly defense costs LTL asserts (at 20) are tiny fractions of its available funding, not "a substantial portion." *Philip Morris*, 561 U.S. at 1304; *see also Conkright*, 556 U.S. at 1403 (denying stay of mandate in ERISA case in which plan did not show that making contested "outlays" during pendency of certiorari petition would "place the plan itself in jeopardy").

2. Nor will there be irreparable harm to LTL's "reorganization" efforts. *See* Mot.20-21. The costs of litigation during pendency of the certiorari petition will be well within LTL's vast financial means. In no way is LTL's existence or ability to "reorganize" in jeopardy. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 802 (3d Cir. 1989) (no irreparable harm to company where no evidence showed it might go out of business absent stay). LTL has no business to reorganize anyway; it was created for bankruptcy and has never made or sold anything.

LTL's overblown claims of chaos are predicated on a fanciful description (at 18) of the mechanics of dismissing a bankruptcy case while an appeal is pending. The case will be closed; in the event of a reversal, the same case will be reopened. The bankruptcy in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017), is illustrative. It was dismissed in 2014 and its docket closed. *See* Text Docket Entry, *In re Jevic Holding Corp.*, No. 08-11006 (Bankr. D. Del. Sept. 9, 2014). After the Supreme Court reversed, the same docket was reopened. Text Docket Entry (May 17, 2017). The same judge set a status conference and the case resumed. *See* Notice of Status Conference (May 18, 2017), ECF No. 1760. Contrary to LTL's suggestion (at 18) that claimants would lack representatives in the Supreme Court, the unsecured creditors' committee in *Jevic* participated throughout the appeal, joining the Supreme Court brief filed by non-committee respondents. *See* Brief for Respondents, *Czyzewski v. Jevic Holding Corp.*, No. 15-649 (U.S. Oct. 12, 2016), 2016 WL 5957079. In any event, the undersigned will oppose LTL in the Supreme Court.

III. The Balance Of Equities And Public Interest Overwhelmingly Favor Denial Of A Stay

The balance of equities and the public interest overwhelmingly favor denying LTL's motion to stay the mandate.

1. Because LTL has the gall to assert (at 22) that claimants here face "no permanent injury," it bears repeating that the claimants have either ovarian cancer or mesothelioma. Their prognoses are dire; many died during LTL's bankruptcy. *They*, not LTL, face real, irreparable harm from further delay. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (eviction moratorium posed "risk of irreparable harm" to landlords "by depriving them of rent payments with no guarantee of eventual recovery").

LTL's bad-faith bankruptcy already has blocked for 18 months the claimants' efforts to prove J&J's wrongdoing and obtain damages. LTL's bankruptcy filing also stopped settlements altogether. 6,800 talc plaintiffs had settled in the preceding five years, Op.22, obtaining needed compensation as they face medical bills and other challenges of battling cancer. LTL admits (at 17) it may take six more months for the Supreme Court to rule on LTL's certiorari petition. LTL's appeal (at 20-21) to the litigation costs it could save with a stay is trifling in comparison, particularly since J&J pays those costs.

LTL is also well equipped to handle litigation outside bankruptcy. It is "a shell company" crafted "almost exclusively" for that purpose. Op.54. It has no business that could be threatened with failure, and J&J's $61.5 billion funding commitment means LTL can meet its liabilities as they come due. Op.52-53. LTL can draw on that funding straightaway outside bankruptcy—"not unlike an ATM" —to pay litigation costs, settlements, and judgments. Op.53. That scenario is far better for claimants than an ongoing bankruptcy in which LTL can draw payments from J&J only after final confirmation of a reorganization plan and the exhaustion of appeals. JA483-484.

Furthermore, resuming litigation will aid the reorganization process in the unlikely event the Supreme Court rules the bankruptcy should continue. LTL claims (at 16) there were no "dependable guideposts" to inform a global settlement due to "the Supreme Court's decision not to review the *Ingham* verdict," among other recent events. Continued litigation will yield more trials and settlements, providing the guideposts LTL says are missing.

2. The public interest strongly favors denying a stay. Before LTL's bad-faith bankruptcy, talc litigation was proceeding in state courts and the Article III court presiding over multi-district litigation, which had made significant progress. LTL claims (at 17) these courts "will be thrust into chaos." But these courts will just resume the cases the bankruptcy halted. Denying the stay will restore normal order to the litigation and give effect to the constitutional principles underpinning that order: state and federal courts decide personal injury claims.

Resumption of litigation also serves the public interest because LTL and J&J continue to deny wrongdoing. Pet.3 (claiming "Johnson's Baby Powder does not contain asbestos and does not cause cancer"). The public deserves to know whether one of the most prominent companies in America knowingly sold asbestos-riddled powders and encouraged people to put them all over their bodies and their babies. That inquiry should not be bottled up in bankruptcy or stopped by a stay. Litigation had begun to reveal the truth before LTL's bankruptcy cut it short. Resuming that litigation therefore is fully warranted.

CONCLUSION

The motion to stay the mandate should be denied.

Dated: March 28, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,044 words.

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3. In addition, pursuant to 3rd Cir. L.A.R. 31.1(c) (2011), the undersigned hereby certifies that the text of the electronic brief filed with the Court is identical to the paper copies, that a virus detection program (CylancePROTECT) has been run on the electronic file, and that no virus was detected.

Dated: March 28, 2023

/s/ David C. Frederick
David C. Frederick

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on March 28, 2023, I caused an electronic copy of the Joint Brief of Appellants in Opposition to Motion to Stay the Mandate to be electronically filed with the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will automatically send notification of such filing to counsel of record.

Dated: March 28, 2023

/s/ David C. Frederick
David C. Frederick

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to 3rd Cir. L.A.R. 28.3(d) and 46.1 (2011), I, David C. Frederick, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: March 28, 2023

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