Docket #2065 Date Filed: 1/11/2024

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re ALDRICH PUMP LLC and MURRAY BOILER LLC,[1] Debtors.	Chapter 11 No. 20-30608 (JCW) (Jointly Administered)
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS, Appellant, v. ALDRICH PUMP LLC, MURRAY BOILER LLC, TRANE TECHNOLOGIES COMPANY LLC, TRANE U.S. INC., and JOSEPH W. GRIER, III, in his capacity as Legal Representative for Future Asbestos Claimants, Appellees.	Civ. A. No. _____

THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO APPEAL ORDER DENYING MOTIONS TO DISMISS

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[1] The last four digits of Aldrich Pump LLC's taxpayer identification number is 2290; the last four digits of Murray Boiler LLC's taxpayer identification number is 0679. The Debtors' address is 800-E Beaty Street, Davidson, North Carolina 28036.

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Dated: January 11, 2024

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Appellant, the Official Committee of Asbestos Personal Injury Claimants ("**Committee**"), by and through its undersigned counsel, hereby moves this Court ("**Motion**") for leave to appeal from the *Order Denying the Motions to Dismiss* (No. 20-30608, ECF No. 2047) ("**Order**") entered by the Bankruptcy Court for the Western District of North Carolina (Whitley, J.) ("**Bankruptcy Court**") in accordance with 28 U.S.C. § 158(a)(3) and Rule 8004 of the Federal Rules of Bankruptcy Procedure. For the reasons set forth in Section II *infra*, the Committee believes that the Order is a final order that gives the Committee an appeal of right under 28 U.S.C. § 158(a)(1) and the ability to present for appellate review all factual and legal issues connected with the Order. Nevertheless, in light of the Court's recent *Bestwall* decision,[2] which determined that an order denying dismissal of a chapter 11 bankruptcy case was interlocutory, the Committee makes this Motion seeking leave to appeal from the Order and pursue appellate review of the questions of law described below. For the reasons explained below, the Court should grant the relief requested herein.

PRELIMINARY STATEMENT

1. The debtors, Aldrich Pump LLC ("**Aldrich**") and Murray Boiler LLC ("**Murray**," and together with Aldrich, "**Debtors**"), are the result of a controversial stratagem known as the "Texas Two-Step." Weeks before the Debtors filed for reorganization under chapter 11 of the Bankruptcy Code, their profitable predecessors engaged in a "divisional merger" under Texas law, each splitting into two new companies. Two of the new companies received virtually all their predecessors' operating assets. The other two companies, the Debtors, received all the asbestos liabilities of their predecessors and thereafter filed their chapter 11 petitions with the Bankruptcy

[2] *See Off. Comm. of Asbestos Claimants v. Bestwall LLC*, No. 3:19-CV-00396-RJC, 2023 WL 7361075 (W.D.N.C. Nov. 7, 2023).

Court, thereby preventing only the victims of their predecessors' asbestos-related torts from seeking relief and compensation in the civil justice system.

2. Through the Texas Two-Step, highly solvent corporations with liability for injuries sustained from exposure to their asbestos-containing products have manipulated state law, corporate form, venue loopholes, and bankruptcy law with the express goal of obtaining bankruptcy relief for themselves without actually filing for bankruptcy. These highly solvent, ***nondebtor*** tortfeasors intentionally—and admittedly—designed a structure with the goal of preventing the Bankruptcy Court from overseeing these nondebtor, asset-rich operating entities and subjecting their profitable business operations to bankruptcy.

3. The structure manufactured in these Texas Two-Step cases threatens the integrity of, and public confidence in, the bankruptcy system. Not only does it upend the otherwise constitutionally limited jurisdiction of the federal bankruptcy courts, but it also imposes harsh and irreversible consequences on the ***only class*** of creditors subjected to the bankruptcy: the victims seeking compensation for the very actions of the original ***nondebtor*** tortfeasors (along with their affiliates and successors) that are now protected during the "debtors'" bankruptcy.

4. Structurally, the claimants—tort victims of the original tortfeasors—are trapped in a process for years and denied compensation while they suffer and many of them ultimately die. The non-asbestos creditors of the present nondebtors—themselves creditors of the original tortfeasors as well—continue to be paid in the ordinary course. Even the present shareholders of the nondebtors—again, previously shareholders of the original tortfeasors—are currently receiving dividends while the asbestos claimants are stymied. The very fact that these shareholders are being paid ahead of asbestos claimants contravenes the absolute priority rule, a fundamental premise of bankruptcy law which requires creditors to be paid in full before distributions are made to shareholders. The Debtors' cases were filed, and are being pursued, for litigation advantage, to

obtain unjustified and unjustifiable relief in the nature of a cap on their asbestos liability, and to obtain that relief for entities not in bankruptcy.

5. To put an end to this abuse of the bankruptcy process, the Committee moved under 11 U.S.C. § 1112(b) to dismiss the Debtors' bankruptcy cases. However, after extensive briefing and a full day of oral argument, the Bankruptcy Court denied the Committee's motion for the reasons set forth in its Order. Nevertheless, the Bankruptcy Court itself appealed to the Fourth Circuit for guidance, suggesting "simply for the Fourth Circuit's consideration" that *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989), a case which the Bankruptcy Court stated sets forth the "standard in this Circuit for dismissal of a Chapter 11 bankruptcy case for bad faith in the filing" (Order at 42), may not apply in the case of a solvent, non-distressed chapter 11 debtor. *Id.* at 51.[3] In addition, the Bankruptcy Court noted, both explicitly and implicitly, the importance of higher courts weighing in on the Texas Two-Step to provide clarity on the applicable law. For example, it stated that "[u]ntil the propriety of the 'Texas Two-Step' and its use by solvent 'non-distressed' corporations is determined by the higher courts, no progress will be made in these bankruptcy cases. None has been made in *Bestwall* [another Two-Step bankruptcy], which was filed six years ago. None has been made in *DBMP* [another Two-Step bankruptcy], filed four years ago. And none has been made here. These cases are simply spinning round and about, to the growing frustration of all." Order at 21; *see also id.* at 61 ("Obviously, using an artificially created

[3] *See also* Order at 46-47 ("*Carolin's* exposition of how to look at 'objective futility' when examining a company that is financially distressed is facially inapplicable to companies that are not in financial distress. . . . In short, *Carolin* has been applied beyond its facts."); *id.* at 50 ("Because *Carolin* involved a fatally insolvent debtor, the application of its two-prong standard to a case filed by a solvent, financially non-distressed debtor means all such cases survive dismissal, regardless of purpose. And given the rarity of such non-distressed entities filing bankruptcy, particularly in 1989 when *Carolin* was decided, one wonders whether the *Carolin* majority contemplated that its test would be employed to the cases of solvent, non-distressed corporations."); *id.* at 56 ("There is some question about the applicability of *Carolin* in the post-filing period."); *id.* at 58 ("I have my doubts that the *Carolin* Two-Prong test was meant to apply to events arising during the chapter 11 case. . . . Because I am not able to dismiss these cases under the *Carolin* test, I am foreclosed from doing so by simply re-terming these as 'cause' for dismissal under Section 1112(b).").

subsidiary to obtain bankruptcy relief for a prosperous non-debtor corporate conglomerate is on the far reaches of the Congressional bankruptcy power, if within it at all. . . . A higher court than this will ultimately determine which side is correct."). Thus, the Bankruptcy Court itself believes that these fundamental issues regarding *Carolin* and the Texas Two-Step cannot linger below and should be immediately taken up by the appellate courts at this time.

6. The Committee believes that the Order is the product of factual and legal errors and that the matter is ripe for appellate review because the Order is final and appealable. If this Court determines that the Order is final and appealable as of right, the Committee intends to present for appellate review all factual and legal issues pertaining to the Order. If, however, the Court determines that the Order is interlocutory, it should grant leave to appeal because the Order raises controlling questions of law (described below) as to which there is substantial ground for difference of opinion. If this Court finds that the Bankruptcy Court committed reversible error as to any of these questions of law, the Order cannot stand and should be reversed or vacated. As to all the questions of law, an immediate appeal from the Order may materially advance the ultimate termination of the litigation because it could result in dismissal of the chapter 11 bankruptcies or narrow significant legal issues. Accordingly, this Court should grant the relief requested herein.

BACKGROUND[4]

7. The Debtors' predecessors, Ingersoll-Rand Company ("**Ingersoll-Rand**") and former Trane U.S., Inc. ("**Trane**")—companies that had book-value equity of approximately $7.8 billion and $3 billion as of December 31, 2020, respectively—spent decades in the tort system

[4] The Committee incorporates by reference the Factual Background section of the *Motion of the Official Committee of Asbestos Personal Injury Claimants to Dismiss the Debtors' Chapter 11 Cases*, ECF No. 1756 ("**Committee's Motion**"). Likewise, it incorporates by reference the procedural history of the motions to dismiss set forth in the first two paragraphs of the Order.

defending against lawsuits by individuals who were exposed to these companies' asbestos or asbestos-containing products. Committee's Motion ¶¶ 3, 19.

8. Concerned that their insurance would run out and they would have to start paying their liabilities out of pocket, Ingersoll-Rand and Trane each engaged in a divisional merger under Texas law.[5] *See id.* ¶ 5. As the first step, each effectively divided itself into two companies: Ingersoll-Rand divided itself into Aldrich and Trane Technologies Company LLC ("**TTC**"); and Trane divided itself into Murray and "new" Trane U.S., Inc. ("**New Trane**"). *See* Order at 9. While TTC and New Trane are "fully operating companies that retained their predecessor's employees, almost all of their assets and business operations, and their non-asbestos creditors," Aldrich and Murray "were not so blessed," having been allocated "no employees, no operations, and relatively few assets," but "100% of their respective predecessor's considerable asbestos liabilities." *Id.* at 9-10. As the second step, on June 18, 2020, just seven weeks after the divisional mergers occurred, Aldrich and Murray, the "bad" companies, filed for bankruptcy.[6] *Id.* at 10.

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[5] "The [predecessor] companies swore to the SEC and shareholders that there was no expectation of asbestos-related liability having any 'material adverse impact on [their] results of operations, financial condition, liquidity or cash flows.' . . . On multiple occasions they represented to their shareholders and the SEC that they 'believe our estimated reserves are reasonable and do not believe the final determination of the liabilities with respect to these matters would have a material effect on our financial condition, results of operations, liquidity or cash flows for any year.'" Order at 11 (citation omitted). "The Debtors' affiliates' growing annual profits—to say nothing of their total book value—dwarf the Debtors' sworn estimate of all-in, total asbestos liability. This is particularly true given that over half of that liability is covered by third-party insurance. In short, by their own estimation, the Debtors owe $240 million in asbestos liabilities net of insurance—a sum greater than the assets allocated to them in the merger. However, they were designed to be reliant on the Trane organization, through the Funding Agreement [with their affiliates]. And the Trane organization boasts $16 billion in *annual* revenues, *annual* excess cash flow eclipsing $1.8 billion ($620.7 million in dividends plus $1.2 billion stock buyback; three-year total over $1.5 billion in dividends and $2.5 billion in stock buybacks), and a market cap of $54 billion." *Id.* at 14 (citation omitted).

[6] The companies' Texas Two-Step plan, known as the "Corporate Restructuring," was the result of months of secret and meticulous planning involving a select group of Ingersoll-Rand employees, as well as in-house and outside counsel, which bore the codename "Project Omega." Committee's Motion ¶ 6. "Since its inception, the sole objective of Project Omega was the commencement of years-long bankruptcy cases that would secure the Trane plc enterprise group a 'bankruptcy discount' on their asbestos tort liabilities without any negative effect on the group's business operations." *Id.* ¶ 7 (citing Findings of Fact and Conclusions of Law Regarding Order: (I) Declaring That the Automatic Stay Applies to Certain Actions Against Non-Debtors, (II) Preliminarily Enjoining Such Actions, and (III) Granting in Part Denying in Part the Motion to Compel ¶ 50, 3:20-ap-03041, ECF No. 308 ("**Court's Findings and Conclusions**")). The Bankruptcy Court agreed: "The Corporate Restructuring (inclusive of the Divisional Merger which created these Debtors) contemplated that the newly created 'bad' subsidiaries would file bankruptcy. Their

9. The Debtors are "inert vessels," shell companies with no employees or operations of their own other than managing their tort liabilities in bankruptcy and overseeing two subsidiaries which the Trane organization allocated to the Debtors as part of the Corporate Restructuring (and likely for the very purpose of attempting to avoid dismissal) and which it contemplated merging back into the Debtors' affiliates after the Debtors' bankruptcies concluded. Committee's Motion ¶¶ 7, 73; Court's Findings and Conclusions ¶ 87. As such, the assets that the Trane organization allocated to the Debtors "are insufficient to pay the asbestos claims." Order at 2.

10. Each Debtor "holds one asset of potentially material value: a contract promise from its substantially more prosperous twin, denominated a 'Funding Agreement.'" *Id.* at 3. But, as the Bankruptcy Court has repeatedly recognized, the Funding Agreements have numerous deeply troubling features. *See id.* at 15; Court's Findings and Conclusions ¶¶ 71-81. As the Bankruptcy Court found, among other things, the "Funding Agreements are not secured, they are not enforceable by creditors, and they cannot be assigned without written consent." Order at 15. "Most significant, and in contrast to the unconditional funding agreements found in *Bestwall*, the present Funding Agreements stipulate that as a precondition to funding a § 524(g) trust, that the chapter 11 plan must provide New TTC or New Trane, as applicable, 'with all the protections of section 524(g) of the Bankruptcy Code.'" *Id.* Indeed, "once exclusivity has ended, these provisions of the Funding Agreements will . . . impair, if not disable, the ability and right of other parties-in-interest to propose a competing 524(g) plan." Court's Findings and Conclusions ¶ 78. The Bankruptcy Court concluded that "these agreements are conditional, potentially

goal was to enable the entire Trane enterprise to access the tools of Section 524(g) without having to file bankruptcy itself. . . . There is no dispute that the corporate restructuring was performed to isolate the asbestos liabilities from the rest of the Trane Enterprise." Order at 10 (citations omitted). "The Debtors' predecessors intently studied the *Bestwall* case before they tried their own Texas Two-Step filings. . . . They knew this to be an untested and highly controversial strategy, and they must have recognized their bankruptcy cases would be protracted, contested and difficult." *Id.* at 19 (citation omitted). "[F]or the past three years, both the Debtors and the Affiliates have enjoyed a respite from the tort system and a 'payment holiday' from the $100 million-a-year costs they were previously incurring." *Id.* at 20.

unenforceable, and they will be honored only if . . . [TTC and New Trane] wish them to be honored." Order at 15.

11. In its Order, the Bankruptcy Court first considered the Committee's argument that the Bankruptcy Clause of the Constitution limits the jurisdiction of bankruptcy courts to entities facing threats to their economic viability. Noting that the Committee's "arguments have considerable force" (Order at 33), the Bankruptcy Court declined to adopt such a limitation but acknowledged that this issue has "received scant attention" (*id.* at 7), and that the relevant case law only "suggests" the Bankruptcy Court's result. *Id.* at 33. Whether the Bankruptcy Court had subject matter jurisdiction to even hear these cases is certainly a critical question meriting appellate review.

12. The Bankruptcy Court also applied *Carolin* and determined that it could not dismiss the Debtors' cases under that standard. The Bankruptcy Court stated that the arguments of the Committee and other parties favoring dismissal are "persuasive . . . and if writing on a clean slate, I might well agree with the Movants." *Id.* at 50. It went on to show how "arguably both . . . prongs [of the *Carolin* standard] presuppose financial distress, just as the movants say," and that "if one accepts the Movants' premise that Aldrich and Murray are not 'financially distressed,' these may in fact be bad faith filings." *Id.* at 51-52. It further noted that "given the rarity of . . . non-distressed entities filing bankruptcy, particularly in 1989 when *Carolin* was decided, one wonders whether the *Carolin* majority contemplated that its test would be employed to the cases of solvent, non-distressed corporations." *Id.* at 50. And yet, the Bankruptcy Court was resigned that it had to deny dismissal under *Carolin*'s stringent standard. *See id.* at 52. However, as discussed above, the Bankruptcy Court appealed to the Fourth Circuit for guidance, suggesting that *Carolin* may not apply in the case of a solvent, non-distressed chapter 11 debtor. *Id.* at 51.

QUESTIONS OF LAW PRESENTED FOR REVIEW

13. If this Court determines that the Order is final and appealable, the Committee will seek review of all factual and legal issues connected with the Order. If, however, this Court determines that the Order is interlocutory, the Committee requests leave to pursue appellate review of the following questions of law:

(a) Does the power granted to bankruptcy courts by Congress under the U.S. Constitution's Bankruptcy Clause (U.S. CONST. art. I, § 8) limit subject matter jurisdiction of the bankruptcy court over a fully solvent entity, whose economic viability is not threatened?

(b) Does the dismissal standard set forth in *Carolin* apply beyond the "very portals of bankruptcy"? *Carolin*, 886 F.2d at 700.

(c) Does the *Carolin* standard "control[] the petition" while "Section 1112(b) [of the Bankruptcy Code] controls the case"? Order at 58.

(d) Does the dismissal standard in *Carolin* apply when there is a solvent or non-distressed debtor?

(e) Does the Bankruptcy Code provide relief to only financially distressed debtors?

(f) Does a chapter 11 debtor's use of the Bankruptcy Code's provisions to gain a "tactical litigation advantage" over its creditors constitute "cause" within the meaning of 11 U.S.C. § 1112(b)?

(g) Is the definition of "new debtor syndrome" limited to a single asset entity, and if not, does an expanded definition constitute "cause" under 11 U.S.C. § 1112(b)?

(h) Does a debtor solely in the business of managing tort litigation that it plans to resolve through a § 524(g) plan show a "hope of rehabilitation" under the *Carolin* standard?

ARGUMENT

I. IF THE ORDER DENYING DISMISSAL IS INTERLOCUTORY, THIS COURT SHOULD GRANT LEAVE TO APPEAL UNDER 28 U.S.C. § 158(a)(3)

14. If the Order is interlocutory, this Court should grant leave to appeal from the Order under 28 U.S.C. § 158(a)(3). This Court has recognized that "[c]ourts employ an analysis similar to that employed by the Court of Appeals in certifying interlocutory review when deciding whether to grant leave to appeal an interlocutory order of the Bankruptcy Court." *In re Bestwall LLC*, No. 3:21-CV-151-RJC, 2021 WL 1857295, at *3 (W.D.N.C. May 10, 2021) (Conrad, J.) (quoting *In re Biltmore Invs., Ltd.*, 538 B.R. 706, 710-711 (W.D.N.C. 2015)); *see also Craddock Washabaugh v. Miller*, No. 1:16CV694, 2016 WL 4574690, at *1 (M.D.N.C. Sept. 1, 2016) ("Given . . . [28 U.S.C. § 158(c)(2)] and the lack of direct guidance concerning a standard for the grant or denial of leave to appeal interlocutory orders in § 158 itself, courts apply an analysis similar to that employed when certifying interlocutory review by the circuit court of appeals under 28 U.S.C. § 1292(b)."); *In re Jemsek Clinic, P.A.*, No. 06-31766, 2011 WL 3841608, at *3 (W.D.N.C. 2011) ("[C]ourts apply an analysis similar to that employed by district courts in certifying interlocutory review by the circuit court of appeals under 28 U.S.C. § 1292(b)."). "Under 28 U.S.C. § 1292(b), leave to file an interlocutory appeal should be granted only when (1) the order to be appealed involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Bestwall LLC*, 2023 WL 7361075, at *4 (citing *Biltmore Invs., Ltd.*, 538 B.R. at 711; *MacGregor v. Sink*, No. 5:20-CV-210-BO, 2020 WL 3549990, at *2 (E.D.N.C. June 30, 2020)); *In re Wijewickrama*, No. 1:16-CV-00347-MR, 2018 WL 2212983, at *3 (W.D.N.C. Mar. 15, 2018) (granting leave to appeal from a bankruptcy court order).

A. Controlling Question of Law

15. The Fourth Circuit has defined a controlling question of law to be one that presents a "narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes." *Fannin v. CSX Transp., Inc.*, 873 F.2d 1438 (4th Cir. 1989) (per curiam) (unpublished table decision). More specifically, "[a] question of law refers to 'a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine' as opposed to an issue of fact." *Gaston v. Lexisnexis Risk Sols.*, No. 5:16-CV-9, 2017 WL 5340384, at *1 (W.D.N.C. Nov. 13, 2017) (quoting *Lynn v. Monarch Recovery Mgmt.*, 953 F. Supp. 2d 612, 623 (D. Md. 2013)). Also, "[a]n order involves a controlling question of law when . . . reversal of the bankruptcy court's order would terminate the action[] or . . . materially affect the outcome of the litigation." *Biltmore Invs., Ltd.*, 538 B.R. at 711 (citation omitted); *Barcelona Cap., LLC v. Neno Cab Corp.*, 648 B.R. 578, 586 (E.D.N.Y. 2023) (quoting *2178 Atl. Realty LLC v. 2178 Atl. Ave. Hous. Dev. Fund Corp.*, No. 20-CV-1278 (RRM), 2021 WL 1209355, at *4 (E.D.N.Y. Mar. 30, 2021)) (same); *see also Wijewickrama*, 2018 WL 2212983, at *3 (applying the same analysis in finding that the first factor weighed in favor of leave to appeal, even though the case would not terminate).

16. This Court has held that "a question of law is not controlling if litigation will 'necessarily continue regardless of how that question [is] decided.'" *David v. Alphin*, No. 3:07-CV-11-RJC-DLH, 2009 WL 3633889, at *3 (W.D.N.C. Oct. 30, 2009) (Conrad, J.) (alteration in original) (citation omitted). In that case, this Court held that the issue of standing was a controlling question of law because its "resolution will be dispositive" of claims. *Id.*

17. Each of the questions of law presented here[7] are controlling "pure questions of law" that would be dispositive. Each question of law concerns one or more issues of: constitutional law concerning the Bankruptcy Court's subject matter jurisdiction under the Bankruptcy Clause of the U.S. Constitution; the legal doctrine espoused in *Carolin*; and/or the interpretation of "cause" under 11 U.S.C. § 1112(b). Indeed, these questions would dispositively resolve the motions to dismiss filed under § 1112(b) regardless of the underlying facts supporting the motions.[8] For example, a determination on whether the Bankruptcy Court had subject matter jurisdiction can be resolved independent of the underlying facts. Likewise, the application of *Carolin* in a later stage of a chapter 11 case does not depend on interpreting the facts of a given case but rather on interpreting the *Carolin* decision itself. So too is the question of whether *Carolin* and/or the Bankruptcy Code applies to a solvent or non-distressed debtor. A determination on appeal that the *Carolin* test does not apply to postpetition acts or to an entity whose economic viability is unthreatened would be dispositive. The other questions are equally premised on pure questions of law, which this Court could resolve "quickly and cleanly without having to study the record." *See Barcelona Cap., LLC*, 648 B.R. at 586 (citation omitted). Moreover, resolution of each question presented would materially and dispositively affect the outcome of the litigations as it could result in dismissal of the Debtors' bankruptcies. *See Fannin*, 873 F.2d 1438. Resolving these questions of law would also provide certainty and finality as to the other Texas Two-Step cases currently "spinning round and about" in bankruptcy, as well as guidance for future cases. *See McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) ("The legal question must be stated at a high enough level of abstraction to lift the question out of the details of the

[7] *See supra* para. 13.

[8] Moreover, the facts about, *inter alia*, the creation of the Debtors by the Texas Two-Step, the Debtors' bankruptcy filings, and the availability of funds to pay asbestos judgments and/or settlement via the Funding Agreements, were uncontested below.

evidence or facts of a particular case and give it general relevance to other cases in the same area of law."); Order at 21.

B. Substantial Ground for a Difference of Opinion

18. "[A] controlling question of law involves a 'substantial ground for difference of opinion' only when the law remains unclear in the controlling jurisdiction and other courts have issued conflicting decisions." *COMM 2013 CCRE12 Crossing Mall Rd., LLC v. Tara Retail Grp., LLC*, No. 1:17CV67, 2017 WL 2837015, at *4 (N.D. W. Va. June 30, 2017) (citing *In re Health Diagnostic Lab'y., Inc.*, No. 15-32919-KRH, 2017 WL 2129849, at *4 (E.D. Va. May 16, 2017)); *see also Barcelona Cap., LLC*, 648 B.R. at 586 ("The second prong, requiring a substantial ground for difference of opinion, is satisfied where (1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the . . . Circuit." (quoting *Osuji v. U.S. Bank, N.A.*, 285 F. Supp. 3d 554, 558 (E.D.N.Y. 2018))). "An issue presents a substantial ground for difference of opinion if courts, as opposed to parties, disagree on a controlling legal issue." *Martin v. Garrett*, No. 1:17-CV-350-MOC-WCM, 2020 WL 4700717, at *3 (W.D.N.C. Aug. 13, 2020) (quoting *Randolph v. ADT Sec. Servs., Inc.*, No. CIV.A. DKC 09-1790, 2012 WL 273722, at *6 (D. Md. Jan. 30, 2012)). "In other words, for interlocutory appeals, it matters not whether the lower court simply got the law wrong, but whether courts themselves disagree as to what the law is." *Id.* (quoting *In re Nichols*, No. TDC-14-0625, 2014 WL 4094340, at *3 (D. Md. Aug. 15, 2014)).

1. Does the power granted to bankruptcy courts by Congress under the U.S. Constitution's Bankruptcy Clause (art. I, § 8) limit subject matter jurisdiction of the bankruptcy court over a fully solvent entity, whose economic viability is not threatened?

19. Interpretation of the limits of the Bankruptcy Clause is a novel and difficult issue of constitutional law that has not been addressed in other courts, even those that have confronted

the Texas Two-Step (or variations on that theme). *See generally In re LTL Mgmt., LLC*, 64 F.4th 84 (3d Cir. 2023); *In re Aearo Techs. LLC*, No. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023). The Order notes there are no cases holding financial distress to be a constitutional jurisdictional requirement (*see* Order at 7), while simultaneously not citing any precedent holding it was not. Instead, the Order attempts to separate a constitutional challenge to a statute from the jurisdictional limits of an Article I court by citing to *United States v. Lopez*, 514 U.S. 549 (1995). *Lopez* was not a bankruptcy case. Moreover, the Supreme Court did not address jurisdiction in *Lopez*—silence that the Bankruptcy Court utilized as support to avoid policing its own subject-matter jurisdiction. *See* Order at 24 n.16. Similarly, the Order's reliance on *United States ex rel. Bunk v. Gosselin World Wide Moving*, 741 F.3d 390 (4th Cir. 2013), is unavailing. *See* Order at 25. In *Bunk*, another non-bankruptcy case, the Court of Appeals resolved a standing issue under the existing standing test and concluded that the appellant waived any argument on the constitutional limits of jurisdiction because it had failed to raise that argument below. 741 F.3d at 405.[9] Neither case addresses even the more general question whether a constitutional provision—rather than a statute—can be considered non-jurisdictional.

20. In addressing the actual "subject of Bankruptcies," the Bankruptcy Court conflates Congress's power to enact a statute with a party's statutory eligibility to proceed under that statute. *See* Order at 27.[10] While acknowledging the Committee's arguments that "have considerable force" (*id.* at 33), the Bankruptcy Court refers only to cases that observe that bankruptcy concerns debtor and creditor relations (and as the Court states, only "suggests" a negative response), but

[9] The Supreme Court also did not address the issue of constitutional limits in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000), on which *Bunk* relies.

[10] For example, the Bankruptcy Court cites *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298 (2023) regarding the Supreme Court's treatment of statutory provisions as non-jurisdictional depending on Congress's intent. However, neither *MOAC* nor similar cases involve a constitutional provision, to which Congress cannot express an intent.

does not directly address—and is therefore not dispositive of—the Committee's argument. *Id.* In concluding that the "broad text and purpose" of the Bankruptcy Code, which has been progressively extended, and "the Supreme Court has never invoked it to invalidate a statute that provides uniform debtor-creditor rules" (Order at 34), the Order quotes—but appears to discount—prior statements issued by the Supreme Court in *Wright v. Union Central Life Insurance*, 304 U.S. 502, 513-14 (1938) ("The subject of bankruptcies is nothing less than 'the subject of the relations between an ***insolvent or nonpaying or fraudulent debtor*** . . . .'"), and *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648, 669 (1935) (noting that "it does not follow that the power [of Congress] has no limitations").

21. The Bankruptcy Court cites one out-of-circuit case that addresses and rejects the argument that "the founders intended that bankruptcy relief be limited to insolvent debtors." *In re Marshall*, 300 B.R. 507, 515 (Bankr. C.D. Cal. 2003), *aff'd*, 403 B.R. 668 (C.D. Cal. 2009), *aff'd*, 721 F.3d 1032 (9th Cir. 2013). However, *Marshall* relied on a technical definition of "insolvency" and also states "Congress is not free to define the contours of bankruptcy ***without any limitations***: the bankruptcy terrain clearly ***must have some boundaries***." *Id.* at 510 (emphasis added) (citing *Cont'l Ill.*, 294 U.S. at 669-70). In short, there is more than a substantial ground for a difference of opinion on this novel issue. The Fourth Circuit has not yet addressed these issues and, as such, this would be an issue of first impression for it.

2. Does the dismissal standard set forth in Carolin *apply beyond the "very portals of bankruptcy"? Does* Carolin *"control the petition" while "Section 1112(b) controls the case"?*

22. Courts within the Fourth Circuit disagree to what extent *Carolin* applies after the beginning of a chapter 11 bankruptcy. The Fourth Circuit in *Carolin* stressed that it was setting forth a heightened standard for bad-faith dismissals because "[d]ecisions denying access at the very portals of bankruptcy, before an ongoing proceeding has even begun to develop the total

shape of the debtor's situation, are inherently drastic and not lightly to be made." 886 F.2d at 700. Indeed, the Bankruptcy Court recently stated that the *Carolin* standard "is used to determine whether the Debtor filed the case in good faith and subject to dismissal at the ***outset*** of the case." *In re Patel*, No. 20-30455, 2022 WL 1420045, at *5 (Bankr. W.D.N.C. May 4, 2022). But a different court within the Fourth Circuit applied *Carolin*'s standard to dismiss a bankruptcy case that had been pending for three years—long after its initial filing. *Dunes Hotel Assocs. v. Hyatt Corp.*, 245 B.R. 492, 496 (D.S.C. 2000). Indeed, in determining whether to dismiss these chapter 11 cases, the Bankruptcy Court expressly noted that "[t]here is some question about the applicability *of Carolin* in the post-filing period" and that the Court had "doubts that the *Carolin* Two-Prong test was meant to apply to events arising during the chapter 11 case." Order at 56, 58.

3. Does the dismissal standard in Carolin *apply when there is a solvent or non-distressed debtor?*

23. The Fourth Circuit in *Carolin* crafted the "objective futility" prong of its dismissal standard in the context of the fact pattern of that case, which involved a terminally financially distressed debtor. *See Carolin*, 886 F.2d at 695-96, 701. The *Carolin* court expressly noted that the "objective futility inquiry" was designed to further the Bankruptcy Code's purpose of rehabilitating a "financially troubled" company. *Id.* at 701. Since *Carolin*, some lower courts in this circuit have strictly adhered to its two-prong test while ignoring the overarching principles upon which the *Carolin* standard is based.[11] The Fourth Circuit's decision in *Premier Automotive* suggests that the *Carolin* standard should not apply to non-distressed debtors. *In re Premier Auto. Servs., Inc.*, 492 F.3d 274 (4th Cir. 2007). In *Premier Automotive*, the Fourth Circuit held that dismissal is warranted where a "financially healthy company[y] with no need to reorganize" files for chapter 11 to use the Code's "powerful equitable weapons." *Id.* at 279-80 (quoting *In re SGL*

[11] *See, e.g.*, Motion to Dismiss on Behalf of Robert Semian and Other Clients of MRHFM, at 16, ECF No. 1712.

Carbon Corp., 200 F.3d 154, 166 (3d Cir. 1999)) (noting that "courts 'have consistently dismissed Chapter 11 petitions filed by financially healthy companies with no need to reorganize under the protection of Chapter 11.'"). The Bankruptcy Court also recognized that the *Carolin* standard "presuppose[s] financial distress" (Order at 52) and thus applying that standard to a solvent or non-distressed debtor leads to a nonsensical result (*i.e.*, permitting a non-distressed debtor to abuse the bankruptcy process while dismissing the bankruptcy of a fatally terminal company at the outset).[12] Accordingly, the state of affairs post-*Carolin* has resulted in conflicting authority within the Fourth Circuit on *Carolin*'s applicability in the case of a solvent or non-distressed debtor.[13]

4. Does the Bankruptcy Code provide relief to only financially distressed debtors?

24. The Fourth Circuit in *Carolin* is one of many circuit courts finding that a generalized "good faith filing" requirement is "implicit in § 1112(b)." *E.g.*, 886 F.2d at 699; *LTL Mgmt., LLC*, 64 F.4th at 100 ("Chapter 11 bankruptcy petitions are 'subject to dismissal under 11 U.S.C. § 1112(b) unless filed in good faith.'" (quoting *In re 15375 Mem'l Corp. v. Bepco, L.P.*, 589 F.3d 605, 618 (3d Cir. 2009))). The Third Circuit has held consistently that "a debtor who does not suffer from financial distress cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose supporting good faith." *LTL Mgmt., LLC*, 64 F.4th at 101; *see also In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 121 (3d Cir. 2004) ("[G]ood faith necessarily requires some degree of financial distress on the part of a debtor."); *SGL Carbon Corp.*, 200 F.3d

[12] *See also* Order at 33 ("Common sense dictates that a solvent, non-distressed corporation should rarely consider bankruptcy—and even less often be afforded its protections. After all, in a capitalistic society, those who can pay their creditors, must pay. Otherwise, the economic system would collapse. . . . This commonsense principle has held throughout our nation's history. The vast majority of cases filed in the bankruptcy courts over the years have been by persons and corporations who are both insolvent and highly distressed. Thus, it is hardly surprising that the case law generally describes bankruptcy in this fashion. It is equally true that debtors with no such need for relief who seek bankruptcy for improper purposes have found no favor with the Courts.").

[13] *See id.* at 52 ("All of which I say simply for the Fourth Circuit's consideration, if it elects to reconsider applicability of the *Carolin* Two-Prong Test in the case of a solvent, non-distressed Chapter 11 debtor.").

at 166, 169-70 (finding that a chapter 11 debtor's bankruptcy should be dismissed because, *inter alia*, it had "no defaults nor any financial distress when it filed for Chapter 11"). The Bankruptcy Court acknowledged that "[c]ommon sense dictates that a solvent, non-distressed corporation should rarely consider bankruptcy—and even less often be afforded its protections" and that "debtors with no such need for relief who seek bankruptcy for improper purposes have found no favor with the Courts." Order at 33. Notwithstanding Third Circuit precedent and its own admissions, the Bankruptcy Court held that "[i]n section 109(d) of the Bankruptcy Code, Congress determined which entities are eligible to file cases under chapter 11" and that "[t]here are no provisions in the Bankruptcy Code evidencing a Congressional intent to impose a financial distress or insolvency jurisdictional requirement on chapter 11 debtors." *Id.* at 27, 33.

5. Does a chapter 11 debtor's use of the Bankruptcy Code's provisions to gain a "tactical litigation advantage" over its creditors constitute "cause" within the meaning of 11 U.S.C. § 1112(b)?

25. This question of law presents a substantial ground for difference of opinion given that there is conflicting authority in this circuit over whether (and to what extent) these issues should be considered as "cause" under § 1112(b) or under the *Carolin* standard. While in the Third Circuit it is black letter law that a debtor's use of the Bankruptcy Code to gain a tactical litigation advantage over its creditors provides sufficient cause to dismiss,[14] in the Fourth Circuit there is conflicting authority on this issue. For example, while the Bankruptcy Court here refused to dismiss these chapter 11 cases despite finding that the Debtors filed for bankruptcy to gain a

[14] *See, e.g.*, *Bepco, L.P.*, 589 F.3d at 618-19 (affirming dismissal of chapter 11 cases where debtors filed their petitions to shield their nondebtor affiliates from environmental liability by employing procedural benefits gained from bankruptcy); *see also SGL Carbon Corp.*, 200 F.3d at 167 (reversing district court and ordering dismissal of bankruptcy case where debtor filed for chapter 11 to obtain a tactical litigation advantage over antitrust plaintiffs by "chang[ing] the negotiating platform" and "increas[ing] the pressure on . . . plaintiffs to settle" (alteration in original)).

tactical advantage,[15] in *In re Patel*, the Bankruptcy Court held that "using the bankruptcy system to frustrate the rights of creditors" provides sufficient cause for dismissal. *Patel*, 2022 WL 1420045, at *5. Moreover, this would be an issue of first impression for the Fourth Circuit. *See Barcelona Cap., LLC*, 648 B.R. at 586 ("The second prong, requiring a substantial ground for difference of opinion, is satisfied where . . . the issue is particularly difficult and of first impression for the . . . Circuit." (quoting *Osuji*, 285 F. Supp. 3d at 558)).

6. Is the definition of "new debtor syndrome" limited to a single asset entity, and if not, does an expanded definition constitute "cause" under 11 U.S.C. § 1112(b)?

26. While it is true that the *Carolin* court narrowly defined "new debtor syndrome" as a "one-asset entity [created] on the eve of foreclosure for the sole purpose of 'isolat[ing investors from] the insolvent property and its creditors,'"[16] it did so when bankruptcy courts in the late 1980s and 1990s were grappling with a wave of single-asset real estate debtors abusing the bankruptcy process.[17] Although the Debtors here are not single-asset entities, the current situation bears the hallmarks of "new debtor syndrome."[18] Indeed, since *Carolin*, other courts in this and other circuits have held that "new debtor syndrome" applies to debtors with multiple assets.[19] These

[15] *See, e.g.*, Order at 10 ("The Corporate Restructuring (inclusive of the Divisional Merger which created these Debtors) contemplated that the newly created 'bad' subsidiaries would file bankruptcy. Their goal was to enable the entire Trane enterprise to access the tools of Section 524(g) without having to file bankruptcy itself.").

[16] *Carolin*, 886 F.2d at 704 (alteration in original).

[17] Bruce T. Beesley, et al., *Here's Dirt in Your Eye: Advanced Issues in Reorganization Cases Involving Homebuilders; Other Residential Projects; Developers and Contractors*, 2007 ABI Sw. Bankr. Conference, 070906 ABI-CLE 201 (stating that "'single asset real estate debtors' were common in the 1980s and 1990s, when the Courts specifically addressed various abuses arising from early single asset debtors.").

[18] *See* Committee's Motion ¶¶ 87-95.

[19] *See, e.g.*, *In re Tamojira, Inc.*, 197 B.R. 815, 820, 820 n.3 (Bankr. E.D. Va. 1995) (finding that "new debtor syndrome" applied even though the debtor had multiple assets); *see also Resol. Tr. Corp. v. C & R, L.C.*, 165 B.R. 593, 595 (W.D. Va. 1994) (same); *In re Woodend, LLC*, No. 11-31672, 2011 WL 3741071, at *2, *4 (Bankr. W.D.N.C. Aug. 24, 2011) (dismissing chapter 11 case involving a "twist on 'the new debtor syndrome'"). In addition, other courts have applied the "new debtor syndrome" even more broadly. *See, e.g.*, *Clear Blue Water, LLC v. Oyster Bay Mgmt. Co.*, 476 B.R. 60, 69 (E.D.N.Y. 2012) (defining "new debtor syndrome" when "property is transferred solely for the purpose of commencing a bankruptcy case"); *In re Coastal Nursing Ctr., Inc.*, 164 B.R. 788, 796 (Bankr. S.D. Ga. 1993) ("'New debtor syndrome' is a term of art which describes a set of circumstances indicating that an asset has

decisions show that there is judicial conflict interpreting "new debtor syndrome," including within the Fourth Circuit. *See Tara Retail Grp., LLC*, 2017 WL 2837015, at *4 ("[A] controlling question of law involves a 'substantial ground for difference of opinion' only when the law remains unclear in the controlling jurisdiction and other courts have issued conflicting decisions.").

7. Does a debtor solely in the business of managing asbestos tort litigation that it plans to resolve through a § 524(g) plan show a "hope of rehabilitation" under the Carolin *standard?*

27. To prevent dismissal, the Fourth Circuit in *Carolin* required that a debtor show a "hope of rehabilitation."[20] While some courts point to confirmation of a chapter 11 plan as rehabilitation, others have suggested that the showing "is not a technical test of whether a debtor can confirm a plan, but rather, whether the debtor's business prospects justify continuance of the reorganization effort."[21] In *RainTree*, for example, the Bankruptcy Court for the Middle District of North Carolina found that a debtor was not likely to be rehabilitated where it operated no business in the first place.[22] The Bankruptcy Court here, on the contrary, has stated that there is no ongoing business requirement in the Bankruptcy Code. Order at 54.[23] The split of authority in this circuit (and in other circuits) has led to differences over how to apply *Carolin*'s "hope of rehabilitation" prong.

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been transferred to a newly created shell corporation immediately before the corporation files for bankruptcy for the purpose of evading creditors' rights.").

[20] *Carolin*, 886 F.2d at 701.

[21] *See, e.g.*, *In re Paterno*, 511 B.R. 62, 68 (Bankr. M.D.N.C. 2014); *In re Vallambrosa Holdings, L.L.C.*, 419 B.R. 81, 89 (Bankr. S.D. Ga. 2009); *In re Original IFPC S'holders, Inc.*, 317 B.R. 738, 742 (Bankr. N.D. Ill. 2004); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1112.04 (Richard Levin & Henry J. Sommer eds., 16th ed.) (noting that the likelihood-of-rehabilitation standard under § 1112(b) is a question of whether the debtor's business prospects justify continuance of the reorganization effort).

[22] *In re RainTree Healthcare of Forsyth LLC*, No. 17-51237, 2018 WL 770367, at *9 (Bankr. M.D.N.C. Feb. 7, 2018); *see also Paterno*, 511 B.R. at 68 (stating that the test for likelihood of rehabilitation includes "whether the debtor's business prospects justify continuance of the reorganization effort").

[23] *See also In re HONX, Inc.*, No. 22-90035, 2022 WL 17984313, at *2-3 (Bankr. S.D. Tex. Dec. 28, 2022).

C. Immediate Appeal May Materially Advance the Termination of the Litigation

28. "Generally, this requirement is met when resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *Martin*, 2020 WL 4700717, at *3 (quoting *Clark Constr. Grp., Inc. v. Allglass Sys., Inc.*, No. CIV.A. DKC 2002-1590, 2005 WL 736606, at *4 (D. Md. Mar. 30, 2005)). "The third prong, assessing whether an appeal would materially advance termination of the litigation, is satisfied where the appeal promises to advance the time for trial or to shorten the time required for trial." *Barcelona Cap., LLC*, 648 B.R. at 587 (quoting *Osuji*, 285 F. Supp. 3d at 558).

29. Further, leave to appeal is appropriate where "immediate reversal of . . . [the] issue at the appellate level will save the parties unnecessary time and expense." *Gaston*, 2017 WL 5340384, at *1 (quoting *Riley v. Dow Corning Corp.*, 876 F. Supp. 728, 731 (M.D.N.C. 1992)); *see also McNeilly v. Norman*, No. 1:17-CV-00286-MR-DLH, 2018 WL 4924553, at *2 (W.D.N.C. Oct. 10, 2018) ("[S]ignificant effort and expense would be spared by appellate review prior to the entry of final judgment." (quoting *City of Charleston v. Hotels.Com, LP*, 586 F. Supp. 2d 538, 542 (D.S.C. 2008))).

30. The resolution of all the foregoing questions of law may materially advance the termination of litigation for the same reason: if the Order were reversed or vacated (as it should be) and the Debtors' chapter 11 cases were dismissed, the Debtors and their affiliates would return to the tort system and asbestos victims would be free to pursue, resolve, and receive compensation for their injuries, which they have been unable to do while the Debtors' chapter 11 cases have been pending for over three and a half years. In short, this litigation would terminate. Moreover, dismissal of the Debtors' bankruptcies would end the delay and costs associated with their cases.

31. The "material advancement" resulting from dismissal is not hypothetical: those benefits were shown in *Aearo*, a recent mass-tort bankruptcy where the Bankruptcy Court for the

Southern District of Indiana dismissed the chapter 11 cases of subsidiaries of 3M Company on the basis that the debtors were not financially distressed. Months later, the parties globally settled outside of bankruptcy.[24] Being outside of bankruptcy would result in a more level playing field to potentially negotiate a global resolution. Furthermore, even without a global settlement like in *Aearo*, dismissing the bankruptcy and thus terminating the automatic stay and preliminary injunction would enable individual creditors to attempt to settle their claims or go to trial in the civil justice system, either of which materially advances the termination of litigation.[25] Moreover, an interlocutory appeal may result in definitive answers to the "discrete disputes" of law raised above.[26] In this respect, this Court's interlocutory review may resolve crucial questions that, in turn, would materially advance the ultimate termination of this litigation or even bring the chapter 11 cases to a close.

II. THE BANKRUPTCY COURT'S ORDER IS FINAL AND APPEALABLE AS OF RIGHT UNDER 28 U.S.C. § 158(a)(1)

32. District courts "have jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . of bankruptcy judges." 28 U.S.C. § 158(a)(1). In ordinary civil litigation, a case culminates in a "final decision" when a court "disassociates itself from a case." *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015) (citation omitted). However, the Fourth Circuit has "recognized on many occasions, the concept of finality in bankruptcy traditionally has been applied in a 'more pragmatic and less technical way' than in other situations." *Mort Ranta v. Gorman*, 721 F.3d 241, 246 (4th Cir. 2013) (quoting *McDow v. Dudley*, 662 F.3d 284, 287 (4th

[24] Press Release, *3M Announces Combat Arms Settlement*, 3M (Aug. 29, 2023, 6:33 AM), https://investors.3m.com/news-events/press-releases/detail/1797/3m-announces-combat-arms-settlement.

[25] For example, on November 16, 2023, following the second dismissal of the *LTL Management* bankruptcy in July 2023, Johnson & Johnson settled the first two cases set for trial following the dismissal. Brendan Pierson, *J&J Settles First Talc Cases to go to Trial After Failed Bankruptcies*, REUTERS (Nov. 16, 2023, 6:41 PM), https://www.reuters.com/legal/jj-settles-first-talc-cases-go-trial-after-failed-bankruptcies-2023-11-16/.

[26] *See Mort Ranta v. Gorman*, 721 F.3d 241, 247 (4th Cir. 2013).

Cir. 2011)). Therefore, in bankruptcy, the Fourth Circuit "allow[s] immediate appellate review of orders that 'finally dispose of discrete disputes within the larger case.'" *Mort Ranta*, 721 F.3d at 246 (quoting *McDow*, 662 F.3d at 287).

33. The Supreme Court agrees. "The rules are different in bankruptcy" because a "bankruptcy case involves 'an aggregation of individual controversies,' many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor." *Bullard*, 575 U.S. at 501. (citation omitted). Thus, "orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." *Id.* (citation omitted). Indeed, the Third Circuit has recognized that "an order denying a motion to dismiss a Chapter 11 proceeding is a final order within 28 U.S.C. § 158(a)." *In re Brown*, 916 F.2d 120, 124 (3d Cir. 1990). If an order denying dismissal is not immediately appealable, "the entire bankruptcy proceedings must be completed before it can be determined whether they were proper in the first place." *In re Christian*, 804 F.2d 46, 48 (3d Cir. 1986). The Fourth Circuit agreed with this logic in the context of a chapter 7 bankruptcy liquidation when it held that the denial of a motion to dismiss the chapter 7 case as abusive is a final order.[27] *McDow v. Dudley*, 662 F.3d 284, 289-90 (4th Cir. 2011).

[27] Although courts in the Fourth Circuit have held that an order denying dismissal of a chapter 11 bankruptcy is interlocutory (*see Tara Retail Grp., LLC*, 2017 WL 2837015; *Bestwall LLC*, 2023 WL 7361075), respectfully, the rationale of the Third Circuit is more sensible and equitable. Among other things, appealing an order denying dismissal at the conclusion of a bankruptcy case could potentially moot the Committee's arguments for dismissal, such as that the purpose of the Debtors' bankruptcies is to delay their payment of compensation to tort claimants and ultimately cap their asbestos liabilities at a depressed level that is not commensurate with settlement amounts and damages awarded in the tort system. It is an unfortunate reality that in the years that will pass before the Order can be appealed if this Court holds that it is interlocutory and denies this Motion, many tort claimants will die. This certainly "alters the status quo and fixes the rights and obligations of the parties." *Bullard*, 575 U.S. at 502.

Furthermore, although *McDow* (in dictum) distinguishes § 707(b) of the Bankruptcy Code, under which a motion to dismiss can only be brought at the outset of a chapter 7 case, with § 1112(b), under which cause to dismiss a chapter 11 case "may arise at any time," a party is not precluded from bringing a motion to dismiss a chapter 11 case based on an abuse of the bankruptcy system that *did* arise at the outset of a proceeding, and in such instances, an order denying dismissal should be final and immediately appealable so that if an appellate court reverses, the abuse can be timely redressed. *See McDow*, 662 F.3d at 289.

34. Here, the Order "finally dispose[d] of the discrete dispute" over whether there was "cause" to dismiss the Debtors' chapter 11 cases under § 1112(b). *See Bullard*, 575 U.S. at 501; *Mort Ranta*, 721 F.3d at 246; *McDow*, 662 F.3d at 285. Moreover, forcing asbestos victims to remain trapped in the Debtors' bankruptcies indefinitely before an appellate court can finally determine whether the bankruptcies were "proper in the first place" is neither "desirable" nor "practical." *See Christian*, 804 F.2d at 48. For all the reasons stated above, this Court should hold that the Order is final and appealable as of right.

CONCLUSION

For the reasons explained above, this Court should (1) determine that the Order is final and appealable as of right or, alternatively, (2) grant the Committee leave to pursue an interlocutory appeal from the Order, and in all events (3) grant such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

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Dated: January 11, 2024