

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re

ALDRICH PUMP LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 20-30608 (JCW)

(Jointly Administered)

**DEBTORS' OBJECTION TO REQUESTS OF THE
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS AND
THE CLAIMANTS OF MAUNE RAICHLE FOR CERTIFICATION
FOR DIRECT APPEAL OF ORDER DENYING MOTIONS TO DISMISS**

Aldrich Pump LLC ("Aldrich") and Murray Boiler LLC ("Murray"), as debtors and debtors in possession in the above captioned cases (together, the "Debtors"), object to the motion [Dkt. 2074] (the "ACC Motion") of the Official Committee of Asbestos Personal Injury Claimants (the "ACC") and the motion [Dkt. 2061] (the "Maune Motion" and, together with the ACC Motion, the "Motions") of Robert Semian and other clients of MRHFM ("Maune" and, together with the ACC, the "Movants") to certify direct appeals to the United States Court of Appeals for the Fourth Circuit of this Court's order [Dkt. 2047] (the "Dismissal Order") denying the ACC's and Maune's motions to dismiss these chapter 11 cases [Dkts. 1712, 1756].²

INTRODUCTION

For years, the Movants have been content to allow their disputes in these cases to play out in this Court. They opposed the Debtors' motion for preliminary injunction, but opted not to appeal this Court's order granting the preliminary injunction. And even though the Committee in

¹ The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Aldrich Pump LLC (2290) and Murray Boiler LLC (0679). The Debtors' address is 800-E Beaty Street, Davidson, North Carolina 28036.

² Capitalized terms not otherwise defined herein have the meanings given to them in the Dismissal Order.



Bestwall (with five of the same law firms as the ACC here) had previously moved to dismiss that chapter 11 case and then sought direct appellate review, the Movants here chose to wait—for three years. Now, after their largely "inexcusable" delay, Dismissal Order 17, the Movants insist that they must go to the Fourth Circuit, *immediately*. But their effort to bypass ordinary bankruptcy and appellate procedures cannot be justified and should be denied. The Dismissal Order applied clear, controlling precedent and presents none of the circumstances warranting an immediate appeal to the Fourth Circuit under 28 U.S.C. § 158(d)(2)(A).

Most importantly, the Movants fail to identify any relevant issues lacking controlling caselaw. The ACC (at 11) contends that no Supreme Court precedent has marked out the limits of the Bankruptcy Clause. But the contours of limits on Congress' power to legislate under the Bankruptcy Clause were not even the issue directly before the Court in considering the Motions. Instead, the ACC argued that the Court did not have jurisdiction over these cases. But, as the Court duly noted, it unquestionably had jurisdiction under 28 U.S.C. § 1334 (Dismissal Order 22). The ACC *did not* challenge the constitutionality of that statute under the Bankruptcy Clause. Further, the Bankruptcy Clause in Article I of the Constitution is directed at Congress, not the courts, and any constitutional challenge would have required additional notice and court procedures that the Movants did not take (see *infra* Part II.A.1.).

In any case, the ACC also simply ignores all the Supreme Court precedent that *has* defined the limits of the Bankruptcy Clause. Among other things, and as this Court explained, the Supreme Court both has defined Congress's power, as "encompass[ing] 'nothing less than the subject of the relations between a debtor and his creditors,'" and has set out the "[c]ritical features of every bankruptcy proceeding." Dismissal Order 33 (quoting Siegel v. Fitzgerald, 596 U.S. 464, 473 (2022), and Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 363-64 (2006)).

These Supreme Court decisions set clear limits; solvency is simply not one of them. That straightforward question does not warrant immediate review, especially when the issue was not directly before the Court.

The Movants further argue that the good-faith dismissal standard raises unsettled legal questions, including whether the standard applies to a solvent debtor years after it filed its petition. But, as this Court also recognized, the Fourth Circuit established its good-faith standard more than three decades ago, Carolin Corp. v. Miller, 886 F.2d 693, 698 (4th Cir. 1989); has consistently applied it to all debtors, insolvent and solvent alike, e.g., In re Premier Auto. Servs., Inc., 492 F.3d 274, 280 (4th Cir. 2007); and recently reiterated it as the controlling test in Bestwall (another, similar divisional merger case) six years after that debtor filed for bankruptcy. See In re Bestwall LLC, 71 F.4th 168, 182 (4th Cir. 2023). Faced with this controlling precedent, this Court merely applied the law to the facts here. Dismissal Order 53.

Lacking an unresolved question of law, the Movants resort to the secondary grounds for certification, the alleged "public importance" of the issues presented and the alleged potential for a direct appeal to "materially advance" these cases. 28 U.S.C. § 158(d)(2)(A). In practice, courts almost never certify on these narrow grounds unless they first find a lack of controlling precedent or a division among the lower courts in the circuit. The main exception to this rule is the bankruptcy court's certification order in Bestwall, but the Fourth Circuit there declined to authorize a direct appeal, allowing the case to follow ordinary appellate review.

Certification here would not transcend the parties and resolve some important public issue, nor would it materially advance the cases, as those concepts have been developed in the case law. As to the latter, even if, notwithstanding Bestwall, the Fourth Circuit accepted a direct appeal, a panel could not reverse the Carolin/Premier precedent, much less revisit the Supreme

Court interpretations of the Bankruptcy Clause. Regardless, changing these rules would only force a remand back to this Court to determine whether the Debtors had sufficient financial distress under some new standard. That factual issue was not decided in the Dismissal Order; instead, the Court expects to resolve it in some fashion in the pending adversary proceedings,³ in which the ACC contends Debtors are *insolvent*. So, immediate appeal or not, this factual dispute ultimately must be resolved by this Court. The most efficient course would be to focus on continuing to progress here. See Dismissal Order 17, 19, 54, 60-61.

ARGUMENT

I. CERTIFICATION OF DIRECT APPEALS UNDER 28 U.S.C. § 158(d)(2) REQUIRES EXCEPTIONAL CIRCUMSTANCES.

Section 158(d)(2) paves a narrow pathway for a bankruptcy court's order to reach an appellate court immediately. See 28 U.S.C. § 158(d)(2). Congress enacted § 158(d)(2) to "foster the development of coherent bankruptcy-law precedent" by facilitating "guidance on pure questions of law" from the circuit courts of appeals. Weber v. United States, 484 F.3d 154, 158-59 (2d Cir. 2007). Consequently, the direct-appeal route is generally reserved for an order that "involves a question of law as to which there is no controlling decision" or "involves a question of law requiring resolution of conflicting decisions." 28 U.S.C. § 158(d)(2)(A)(i), (ii).

Certification may also be granted for an order that "involves a matter of public importance" or for which immediate appeal "may materially advance the progress of the case," § 158(d)(2)(A)(i), (iii), but these considerations apply "only in narrow circumstances." In re Qimonda AG, 470 B.R. 374, 387 (E.D. Va. 2012); see also Polk 33 Lending LLC v. THL Corp. Fin., Inc., 2020 WL 757892, at *5 (D. Del. Feb. 14, 2020) (rejecting certification on a mixed

³ Adv. Proc. Nos. 21-03029, 22-03028 and 22-03029.

question of law and fact where nothing "'extraordinary or urgent' ... 'recommends departing from the standard appellate process'").

Faced with the text and purpose of § 158(d)(2), courts have emphasized that certification must be "reserved for exceptional circumstances in which guidance of the circuit court of appeals is necessary." Zewdie v. PNC Bank, N.A., 2015 WL 6007410, at *1 (D. Md. Oct. 9, 2015); see In re Robinson, 2010 WL 3943779, at *2 (Bankr. W.D.N.C. Oct. 7, 2010) (declining certification where the court could not find "anything extraordinary or remarkable about this case that justifies a direct appeal to the Fourth Circuit").

II. THE COURT'S DISMISSAL ORDER DOES NOT WARRANT DIRECT APPEAL.

Although the Movants seek an immediate appeal from denial of their motions to dismiss, the Fourth Circuit has already declined to authorize a direct appeal of the denial of dismissal in the substantially similar Bestwall case. Official Committee of Asbestos Claimants v. Bestwall LLC, No. 19-408 (4th Cir. 2019), Dkt. 13. The district court recently denied leave to appeal, reasoning that there are no "exceptional circumstances" to "justify a departure from the basic policy of postponing appellate review" of an interlocutory order. Official Committee of Asbestos Claimants v. Bestwall LLC, No. 19-396 (W.D.N.C. Nov. 7, 2023), Dkt. 19, at 10. This Court's Dismissal Order involves essentially the same dismissal issues that both the Fourth Circuit and the district court thought warranted ordinary appellate review in Bestwall. Repeated certification of the same issues in almost identical cases will only cause the "needless litigation" that § 158(d)(2) was created to avoid, Weber, 484 F.3d at 158, especially where the issues are already governed by controlling law.

A. The Dismissal Order Does Not Involve Any Unsettled Question of Law.

Clear precedents guided this Court's analysis of the Bankruptcy Clause and application of the dismissal standard, as it recognized. Courts have found certification improper so long as an

authoritative court "has articulated principles governing" the legal issues. Douglas v. Dry Clean Concepts, Inc., 2021 WL 4951918, at *4 (D. Md. Oct. 25, 2021); see also In re Ladder 3 Corp., 2018 WL 2298349, at *3 (E.D.N.Y. Mar. 28, 2018) (explaining precedent must establish the "controlling principles," not address the "precise question"). Accordingly, a party cannot manufacture a direct appeal by "defin[ing] an issue so narrowly" as to avoid precedent. In re MF Glob. Holdings Ltd., 2012 WL 1438262, at *1 (Bankr. S.D.N.Y. Apr. 25, 2012). The Movants here cannot define their way around the governing principles of Carolin that control this Court's decision.

1. Controlling Caselaw Dictates the Constitutional Analysis.

As its lead reason for direct appeal, the ACC argues that the Bankruptcy Clause's "limits have not been addressed by either the Supreme Court or the Fourth Circuit." ACC Mot. 8. As noted above, that was not even the issue before the Court. Instead, the ACC challenged the jurisdiction of the Court over these cases. But, as the Court properly found, Section 1334 clearly gives the Court jurisdiction. 28 U.S.C. § 1334. There is no ambiguity on this statutory point—indeed, the Movants do not argue otherwise. The Bankruptcy Clause, being directed to Congress and not private actors, would have been directly relevant only if the ACC had sought to challenge the constitutionality of Section 1334. Such a challenge which would have required various notices to federal officials. See Bankruptcy Rule 9005.1 (requiring movant to notice the Attorney General) and 28 U.S.C. § 2403(a) (requiring similar notice from the Court). But that is not what occurred.

Regardless, this Court cited ample precedent interpreting the bounds of Congress' power over the subject of bankruptcies. Indeed, the Court quoted extensively from several Supreme Court cases that set out the clear and expansive boundaries of the power:

- This Court observed the generally "unrestricted" "power of Congress to establish uniform laws on the subject of bankruptcies." Dismissal Order 33 (quoting Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929)).
- This Court defined the "core" bankruptcy power as "the restructuring of debtor-creditor relations," recognizing that the power "encompasses 'nothing less than 'the subject of the relations between a debtor and his creditors.'"" Id. (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) and Siegel, 596 U.S. at 473).
- This Court further identified the three "[c]ritical features of every bankruptcy proceeding," namely (1) "the exercise of exclusive jurisdiction over all of the debtor's property," (2) "the equitable distribution of that property among the debtor's creditors," and (3) "the ultimate discharge that gives the debtor a 'fresh start.'" Id. at 33-34 (quoting Cent. Virginia Cmty. Coll., 546 U.S. at 363-64).
- Finally, the Court emphasized that "all laws 'tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.'" Id. at 34 (quoting Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902)).

The ACC ignores this wall of Supreme Court authority, omitting any mention of these cases.

Only by turning a blind eye to the controlling precedent can the ACC assert "there are no cases rejecting" its view of the Constitution. ACC Mot. 11. But the on-point Supreme Court precedent does reject the ACC's interpretation, by broadly defining the bankruptcy power to encompass the relations between *any* "debtor and his creditors," Siegel, 596 U.S. at 473, as well as by marking out the "[c]ritical features of every bankruptcy" without any reference to financial distress, Cent. Virginia Cmty. Coll., 546 U.S. at 363-64.⁴

⁴ Citing these and similar precedents, other courts have expressly rejected the same reading of the Bankruptcy Clause that the ACC advances. See In re Marshall, 300 B.R. 507, 509, 521-22 (Bankr. C.D. Cal. 2003) (rejecting insolvency requirement); Bestwall, No. 17-31795-LTB, July 28, 2023 Hr'g Tr. 8-9 (rejecting financial distress requirement based on Congress' "plenary power" under the Bankruptcy Clause).

The ACC recognizes that "there are no cases holding that the constitution imposes a financial distress requirement." ACC Mot. 11 (quoting Dismissal Order 11). Across more than a century of federal bankruptcy law and almost a half century under the Bankruptcy Code, this lack of caselaw itself confirms the absence of such a requirement. Not only have courts permitted "any number of solvent entities" to employ Chapter 11, but also "no court" dismissing a case for bad faith "has couched [its decision] as a constitutional imperative." Dismissal Order 35. If there were an open question within this Circuit, the ACC's theory should find at least some support in the caselaw, somewhere, but they can point to none.

Nor did this Court's order involve any other constitutional questions lacking clear authority. Maune contends that the Debtors were "designed to manufacture bankruptcy court jurisdiction" while allowing third parties to enjoy the benefits of bankruptcy. Mot. 9, 15. But the Dismissal Order did not consider, much less resolve, any argument about "manufactured" jurisdiction. Rather, this belated argument raises contentions against the preliminary injunction. Though the ACC and Maune both opposed the preliminary injunction, Adv. Pro. Dkt. 017, at 1 n.2, neither appealed the preliminary injunction order. Because the issue was not "involve[d]" in the Dismissal Order, it cannot serve as a basis for direct appeal. 28 U.S.C. § 158(d)(2)(A).

Equally important, the Fourth Circuit already directly rejected this argument in Bestwall, holding that "Old GP, New GP, and Bestwall did not manufacture jurisdiction via their Texas divisional merger." 71 F.4th at 181. Absent restructuring, the Circuit reasoned, "the asbestos claims would have remained with Old GP," the predecessor entity. Id. The "bankruptcy court would have had jurisdiction over those claims," so the "corporate restructuring leaves the jurisdictional result the *same*." Id. (citation omitted). The Fourth Circuit also denied rehearing *en banc*.

In light of the relevant precedents, the Movants have not identified any constitutional issues involved in the Dismissal Order that lacked controlling caselaw.

2. The Fourth Circuit's Carolyn Standard Controls the Good-Faith Dismissal Analysis.

The Movants also contend that this Court's application of Carolyn presents a novel question of law, but this Court recognized it was not "writing on a clean slate." Dismissal Order 50. To the contrary, it applied Carolyn as the "controlling [dismissal] standard." Id. at 29; see also, e.g., Id. at 47, 53. The Court also emphasized that the Fourth Circuit, just last year, "reiterated" this standard "in a related appeal" in Bestwall. Id. at 47; see Bestwall, 71 F.4th at 182. There, the Fourth Circuit affirmed "that the Carolyn Two-Prong Test applies to Chapter 11 bad faith dismissal motions, even those involving solvent, and arguably financially non-distressed corporate debtors." Dismissal Order 53.

Ignoring this Court's analysis of Bestwall, the Movants fall back on Premier Automotive. ACC Mot. 13; see also Maune Mot. 16. But that case does not help them. It actually bolsters this Court's analysis, because the Fourth Circuit there "applied Carolyn" to a "solvent debtor." Dismissal Order 52 n.35 (citing 492 F.3d at 280-82). In doing so, the Fourth Circuit "upheld dismissal," id., proving that its standard works even when a solvent debtor files. Contra Mot. 11 (wrongly asserting Debtors' reading of Carolyn would make bankruptcy courts "free of all limitations on federal jurisdiction"). "Importantly," of course, the Premier Automotive debtor had "no unsecured creditors and few, if any secured creditors," whereas the Debtors here are subject to tens of thousands of current claims and future demands. Dismissal Order 52 n.35 (quoting Premier Auto., 492 F.3d at 280). So while the outcome differs here, the controlling standard remains the same.

Thus, the only question on appeal is whether this Court correctly applied controlling law to the specific facts here. Yet, as the Movants' own cases show, fact-bound application of precedent does not warrant direct appeal: "[C]ourts have often asserted that mixed questions of law and fact or decisions committed to a lower court's discretion are ordinarily not appropriate 'questions of law' for certification." Qimonda, 470 B.R. at 387; e.g., Weber, 484 F.3d at 158 ("Congress believed direct appeal would be most appropriate . . . to resolve a question of law not heavily dependent on the particular facts of a case.").

The same is true for this Court's fact-bound application of Carolin. Those facts include (1) the Debtors' exposure to substantial asbestos liabilities, see Dismissal Order 41 (recognizing § 524(g) allows debtors with "'substantial' asbestos liabilities to access" bankruptcy); id. at 55 (noting the "tens of thousands of creditors"); (2) their funding of their proposed plan without contribution under the funding agreements, id. at 54; (3) their right to secure funding from affiliates if needed, id. at 54; (4) a proposed plan "that would pay . . . hundreds of millions of dollars" to the myriad creditors, id. at 55; and (5) the Debtors' "agreement with the largest claimant constituency," the Future Claimants' Representative, "on the terms of a plan," id. at 54.

Although Maune again remarks on collateral issues about Debtors' *third-party affiliates*, Maune Mot. 3, 7-8, the Movants do not dispute (nor could they) that the *Debtors'* pursuit of a § 524(g) plan is a valid bankruptcy purpose. See Dismissal Order 41.

B. The Movants Identify No Conflicting Decisions To Support Certification.

Although both the ACC and Maune cite purported conflicts in caselaw, none supports certification at all. To start, Maune argues that Carolin "conflicts with the standards required" in other circuits, including the Third Circuit. Maune Mot. 18. It is true that the Fourth Circuit "applies a more comprehensive standard" than the Third Circuit. Bestwall, 71 F.4th at 182. As the Movants admit, however, "courts have held that inter-circuit splits are not a proper basis for

seeking direct appeal." Maune Mot. 19 (collecting cases); see ACC Mot. (noting need for "conflicting decisions between courts within a circuit"). If anything, the ability to contrast the Fourth Circuit's dismissal test underscores its well-established and clear definition and thus is reason *not* to certify.

The ACC also says courts in the Fourth Circuit "disagree as to what extent Carolyn applies after the beginning of a chapter 11 bankruptcy." ACC Mot. 13-14 (citing In re Patel, 2022 WL 1420045 (Bankr. W.D.N.C. May 4, 2022); Dunes Hotel Assocs. v. Hyatt Corp., 245 B.R. 492 (D.S.C. 2000)). That is incorrect. The ACC's cases reveal no "conflicting decisions," § 158(d)(2)(A)(ii), but instead accord with this Court's Dismissal Order. While the ACC concedes that Dunes applied Carolyn "to dismiss a bankruptcy case long after its initial filing," id. at 14, it overlooks that Patel did so too. Patel, 2022 WL 1420045, *5 (finding "both the subjective bad faith and objective futility prongs are satisfied in this case"). This Court in Patel did wonder whether Carolyn should continue to apply "at confirmation" (where section 1129(a)(3)'s good faith standard applies), but since these bankruptcies (unlike that in Patel) have not yet reached that advanced stage, even this *dicta* (rather than decision) offers the ACC no support. Id. This is especially true because, despite their delay in requesting dismissal, the Movants have challenged each case as "filed in bad faith." Dismissal Order 56.

It is not surprising that the ACC lacks support to limit Carolyn's application only to recently filed petitions. After all, the Fourth Circuit itself has consistently applied the Carolyn standard late in Chapter 11 cases. See, e.g., Premier Auto. Servs., 492 F.3d at 279-80 (applying standard in opinion more than two years after petition date); In re Coleman, 426 F.3d 719, 725 (4th Cir. 2005) (applying same more than four and a half years after petition date). Any other

rule would invite absurd gamesmanship and delayed dismissal motions by those hoping to dodge the standard. The uniform application of Carolin's sensible rule cannot justify certification.

C. No Extraordinary Circumstances Transform the Straightforward Application of Settled Law Into A Special Matter of Public Importance.

Although certification may be granted when an order "involves a matter of public importance," 28 U.S.C. § 158(d)(2)(A)(i), courts construe this basis as applying "only in narrow circumstances," Douglas, 2021 WL 4951918, at *5 (D. Md. Oct. 25, 2021) (quoting Zewdie, 2016 WL 6007410, at *2); see also Maune Mot. 6-7 (admitting same). To satisfy the "public importance" standard, "the movant is required to show that the 'issue ... transcend[s] the litigants *and* involve[s] a legal question the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case.'" ACC Mot. 14 (quoting Am. Home Mortg., 408 B.R. at 44) (emphasis added); see also Polk 33 Lending, 2020 WL 757892, at *5 ("an issue involving a mixed question of law and fact generally does not constitute a matter of public importance").⁵ By the same token, a legal issue that has "already been decided" by precedent "is not a matter of public importance." In re Gen. Motors Corp., 409 B.R. 24, 28 (Bankr. S.D.N.Y. 2009).

Consistent with this framework, the Movants' cited cases generally denied certification on public-importance grounds where there was no identifiable legal issue in need of "resolution." In American Home Mortgage, for example, the court held that the case did not involve any "pure legal questions warranting direct certification" and went on to find no public importance. 408 B.R. at 44. Similarly, in Sabine Oil & Gas, the court determined that its order "involved a settled question of law that does not carry the level of 'public importance' required for a direct appeal." 551 B.R. at 142.

⁵ Matters of public importance might also "include decisions affecting a large number of jobs or vital community interests," Zewdie, 2015 WL 6007410, at *2 (D. Md. Oct. 9, 2015), though the Movants do not identify any jobs or vital community interests affected by the Dismissal Order.

Indeed, with one exception (Bestwall, discussed below), each of the Movants' reported cases cited for public importance also found at least one undecided question of law in need of resolution:

- In re Qimonda AG, 470 B.R. at 388 (finding "numerous matters of first impression," with "substantial ramifications" for the entire "semiconductor industry" and other businesses).
- In re Ransom, 380 B.R. 809, 812 (B.A.P. 9th Cir. 2007) (noting the lack of any binding "decisions that have addressed the issue," as well as the frequency with which the issue arises).
- In re Pac. Lumber Co., 584 F.3d 229, 242 (5th Cir. 2009) (finding certification appropriate based on "the novel issues raised" and the importance of the case to "one of the nation's most ecologically diverse forests").
- In re SemCrude, L.P., 407 B.R. 112, 139 (Bankr. D. Del. 2009) (certifying where "there is no governing law on the issue before the Court").

But, again, the questions involved here do not present the Fourth Circuit with *any unresolved* question of law, supra Part II.A, let alone one that could materially "advance the cause of jurisprudence," Qimonda AG, 470 B.R. at 387. Because the legal issues have "already been decided by the [Fourth] Circuit" or Supreme Court, there is no "matter of public importance" to adjudicate. General Motors, 409 B.R. at 28.

The ACC resorts to the certification decision in Bestwall, which is their *sole* case to have found a matter of public importance without identifying either a need for controlling precedent or a conflict among courts within the circuit.⁶ That certification order should not be followed at this point both because of the Fourth Circuit's denial of that direct appeal and its recent reiteration of

⁶ Although the ACC does not cite it as support for its "public importance" argument, In re: Nortel Networks Inc., 2016 WL 2899225, at *1 (D. Del. May 17, 2016), which the ACC otherwise cites (at 19), found matters of public importance without expressly locating any matter of unresolved law. That unusual case, discussed below in Section II.D, does not support certification.

the Carolin standard in "Texas Two-step" cases in the Bestwall preliminary-injunction appeal.

Asking the Fourth Circuit to weigh in again does nothing to advance the law.

None of the Movants' other public-importance arguments withstand scrutiny either.

First, Maune distracts with several issues that were neither at issue nor decided in the Dismissal Order at all. To start, it questions whether the Debtors' affiliates should "have benefitted by orders extending the Debtors' stay of litigation." Maune Mot. 13; see also id. at 12. Again, the legality of that temporary protection arises from this Court's interpretation of the automatic stay and preliminary injunction, not its Dismissal Order, so is not presented here. If Maune wished to challenge the injunction, it should have appealed it (though a similar appeal failed in Bestwall).

While Maune's challenge to the injunction comes too late, its invocation of the "right to a trial by jury" comes too soon. Maune Mot. 14. This Court discussed due process and jury-trial rights, Dismissal Order 35-40, but it expressly found those issues should be resolved later, id. at 40. In any event, the claimants' right to a jury trial is fully preserved, see 28 U.S.C. 157(b)(5); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1012 (4th Cir. 1986), as are their due process rights to be heard on issues that may affect their interests.

Second, and relatedly, the Movants suggest that the Dismissal Order implicates matters of public importance because it involves "the constitutionality of a provision of title 11." Maune Mot. 7 (quoting In re MPF Holdings U.S. LLC, 444 B.R. 719, 726 (Bankr. S.D. Tex. 2011)). The MPF Holdings court, however, did not address a constitutional issue or find any matter of public importance. Likewise, the Movants have not actually "drawn in question" the constitutionality of any statutory provision, as noted above.

Third, Maune asserts that the pre-petition activity of the Debtors' predecessors "provides a playbook" for others. Maune Mot. 11. Cases, including one the ACC cites, reject such "entirely speculative" arguments. Sabine Oil & Gas Corp., 551 B.R. at 141. Pre-petition corporate restructuring is commonplace, which is recognized by section 524(g) itself (§ 524(g)(4)(A)(ii)(IV)). Insofar as the restructurings in these cases represent anything novel, its "playbook" was written earlier in Bestwall, from which the Fourth Circuit declined a direct appeal. Apart from Bestwall and the cases here, only two other debtors have sought a similar restructuring in this Circuit in over six years, and each merely sought to resolve asbestos litigation as Congress provided in section 524(g). In sum, these cases lack far-reaching effects beyond the parties involved in them. The issues do not, and will not, arise in a large number of cases, a hallmark of orders certified based on public importance, see, e.g., Ransom, 380 B.R. at 812.

Fourth, the Movants cite the "nationwide press attention" to Texas Two-step cases. ACC Mot. 15. Much of that publicity appears to have been ginned up by the efforts of claimants themselves. See Official Committee of Talc Claimants I v. LTL Mgmt. LLC, Nos. 22-8015 et al. (3d Cir.), Dkt. 9, at 14 (collecting admissions and evidence). "Public importance" in any event does not exist simply "because this dispute has received substantial news coverage." Sabine Oil & Gas, 551 B.R. at 141. And the Movants do not contend otherwise.

Finally, Maune threatens that applying the longstanding precedent of Carolyn here will supposedly erode public confidence in the judicial system. Maune Mot. 11; see also ACC Mot. 3 (asserting the "cases threaten the integrity of the bankruptcy process"). In addition to again being purely speculative, this suggestion ignores that Carolyn has been applied in a variety of contexts since 1989, including for solvent debtors, to dismiss and to deny dismissal—all without

any demonstrable erosion of public confidence or any other harm to the integrity of the bankruptcy process.

D. An Immediate Appeal of the Dismissal Order Would Not Materially Advance the Progress of These Cases.

Finally, the Movants argue that a direct appeal would "materially advance" the progress of these cases because appeal "could result in their dismissal." ACC Mot. 17; see also Maune Mot. 17. Movants' argument would mean that every order denying dismissal of a case should be certified, hardly a result Congress could have intended. Movants' other arguments are similarly unsupported and unpersuasive.

Although the Movants suggest an inevitable appeal to the Fourth Circuit, see ACC Mot. 19, their expressed intention to appeal cannot serve as the basis for certification. Otherwise, certification for direct appeal would be warranted in every case where movant alleges it will go to the Circuit. See WestLB AG v. Kelley, 514 B.R. 287, 293 (D. Minn. 2014) ("[I]t is not enough to rely on the truism that leapfrogging district-court review always advances litigation."); see also Polk 33 Lending, 2020 WL 757892, at *4 (same; "[a]ny litigant could" claim as much).

Rather, as the Movants' cited cases demonstrate, courts typically grant certification on "material advancement" grounds *only as a supplemental ground*, when they also have identified conflicting in-circuit decisions or a lack of controlling authority. MPF Holding U.S. LLC, 444 B.R. at 726 (certifying only after finding a "question of law requiring resolution of conflicting decisions"); Qimonda, 470 B.R. at 388 (first finding "numerous matters of first impression").⁷ Similarly, the Movants emphasize that § 158(d)(2) can be used "to generate binding appellate

⁷ The ACC (at 19) cites In re City of San Bernardino, 260 F. Supp. 3d 1216 (C.D. Cal. 2013), which considered the standard for appeal under 28 U.S.C. § 1292. Though generally similar to § 158, the § 1292(b) standard asks more broadly if "reasonable jurists" could disagree. 260 F. Supp. 3d at 1225. So the court there considered the "widely divergent views," including those expressed in out-of-circuit cases. Id.

precedent" if a circuit's "caselaw has been plagued by indeterminacy." Maune Mot. 17 (quoting In re Pac. Lumber Co., 584 F.3d 229, 242 (5th Cir. 2009)); ACC Mot. 19 (same). None of these circumstances exist here. See supra Part II.A.

The Movants cite only two certification orders that found material advancement without also finding conflicting decisions or an absence of controlling precedent. The first, In re Nortel Networks Inc., had a unique procedural posture. The bankruptcy case was proceeding in "courts around the globe," which resulted in "coordinated, cross-border trials." 2016 WL 2899225, *1, 5 (D. Del. May 17, 2016). Appeals from those joint trials had been proceeding in two courts, in Canada and Delaware, but the Canadian appellate process abruptly ended when the Canadian appeals court declined discretionary appeal. Id. at *2. In the Delaware case, the district judge *sua sponte* raised § 158(d)(2) and ultimately granted certification to spur the case to keep pace with Canadian proceedings. Id. at *3. The court also found that the estate's limited assets were going to waste. Id. at *4. The coordinated, cross-border nature of the case plus the sudden decline in limited assets prompted the court to hold both that the case was publicly important and that material advancement was necessary. Id. at *7-8. Nothing like that has happened here.

The ACC also relies on the Bestwall certification order. But the events in Bestwall counsel *against* certification of the Dismissal Order, because the Fourth Circuit (i) opted not to take up a direct appeal from the Bestwall dismissal order and then (ii) reaffirmed the relevant dismissal standard in the Bestwall injunction appeal. It would be a wasteful exercise to ask the Fourth Circuit yet again if it wishes to take an immediate appeal of another dismissal order raising the same issues as those in Bestwall when it has recently confirmed binding caselaw. The Movants cite no case granting certification under the "material advancement" prong where a circuit court has *already declined* a direct appeal of similar issues.

Further, even if the Fourth Circuit authorized a direct appeal, the odds of successfully challenging the Dismissal Order would remain vanishingly small. Modification of the Carolin standard would require *en banc* review by the Fourth Circuit (the only way a circuit court can overturn its precedent, e.g., United States v. Guglielmi, 819 F.2d 451, 457 (4th Cir. 1987)) or a grant of *certiorari* by the Supreme Court, and reinterpretation of the Bankruptcy Clause would likewise require the Supreme Court's intervention. See, e.g., Maune Mot. 19 (asserting direct certification will allow it "to either seek ... *en banc* review of the propriety of the Carolin standard ... or begin the process of seeking *certiori* from the United States Supreme Court"); ACC Mot. 18. Accordingly, the Movants would need to (i) obtain a direct appeal, even after the Fourth Circuit denied it in Bestwall; (ii) secure *en banc* and/or Supreme Court review; and then (iii) overturn the relevant precedents. In all likelihood, certifying an appeal of the Dismissal Order will thus result in the expenditure of time and resources for nothing.

The Movants nonetheless insist that an immediate appeal could provide a "determinative ruling" that "might avoid needless litigation." ACC Mot. 18 (quoting Weber, 484 F.3d at 158, 161); Maune Mot. 17 (same). Not so. Even if the Movants somehow managed to overturn the controlling caselaw, that would not "dispositively resolve the motions to dismiss," ACC Mot. 9. At most, the Fourth Circuit or Supreme Court could revise the relevant standard for a "good faith" filing and remand for this Court to determine if the Debtors faced sufficient financial distress. But even without an appeal, this Court is *already* "likely" to address the issue of the Debtors' "financial distress" in connection with the adversary proceeding. See Dismissal Order 29 & n.18. Accordingly, this factual issue will need to be resolved at some point—with or without an immediate appeal. In fact, the Court's finding on this issue may itself prompt its own appeal. The most efficient course would be to avoid piecemeal appeals. There is no material

advancement with an appeal now. See Douglas, 2021 WL 4951918, at *6 (finding no material advancement where other issues remained unresolved).

Although this Court expressed concern that these cases "are simply spinning round and about," Dismissal Order 21, it also recognized the meaningful progress in the cases. For example, the Debtors "filed an estimation motion," and "discovery is well underway." Dismissal Order 61-62. More importantly, the Debtors have already negotiated a plan with the Future Claimants' Representative and funded it. Id. at 61. The only way to continue advancing these cases is to move forward with the matters before this Court and then for the dissatisfied parties to contest both the application of the relevant standards and the Court's fact findings at once.

CONCLUSION

For all these reasons, the ACC Motion and the Maune Motion fail to meet the standards for certification and should be denied.

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Charlotte, North Carolina

Respectfully submitted,

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