Docket #2099 Date Filed: 2/5/2024

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re:	Chapter 11
ALDRICH PUMP LLC and MURRAY BOILER LLC,[1]	Case No. 20-30608 (Jointly Administered)
Debtors.	

OMNIBUS REPLY OF OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS TO DEBTORS' AND FUTURE CLAIMANTS' REPRESENTATIVE'S OBJECTIONS TO REQUEST FOR CERTIFICATION FOR DIRECT APPEAL OF ORDER DENYING MOTION TO DISMISS

The Official Committee of Asbestos Personal Injury Claimants (the "**Committee**"), by and through its undersigned counsel, hereby replies to the Debtors' and FCR's Objections (ECF Nos. 2092 and 2093) to the Committee's request (ECF No. 2074), pursuant to, *inter alia*, 28 U.S.C. § 158(d)(2) and Rules 8001-8006 of the Federal Rules of Bankruptcy Procedure, for entry of an order certifying the *Order Denying Motion to Dismiss*, dated December 28, 2023, ECF No. 2047 (the "**Order**"), for direct appeal to the U. S. Court of Appeals for the Fourth Circuit ("**Committee's Request**").

INTRODUCTION

In deciding the Committee's Motion to Dismiss (ECF No. 1756), this Court considered disparate case law and other authorities, in light of the unusual circumstances of these cases, to reach a decision. The question for this Court to decide now is whether the Order meets one of the four criteria under the direct appeal statute. If it meets ***any one*** of those four criteria, certification

[1] The last four digits of Debtors' taxpayer identification are 2990 (Aldrich Pump LLC, "**Aldrich**") and 0679 (Murray Boiler LLC, "**Murray**"). The Debtors' address is 800-E. Beaty Street, Davidson, North Carolina 28036.

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by this Court is mandatory.

The Debtor's Objection ("**D.Obj.**") seeks to distract this Court from that responsibility and to distort the governing legal standard.[2] Debtors seek to reargue the underlying merits of the Motion to Dismiss, restating issues presented and decided by the Order, and then argue why such strawmen are not eligible for certification. Their dissembling argument on the four separate statutory certification criteria blurs the very distinctions—attempting to avoid the clear disjunctive application—between each of those criteria. Debtors' attempt to persuade this Court to rely on case law from all over the country is hypocritical in the face of their repeated contentions that this Court should ignore the decision of its sister bankruptcy court in this district—a decision dealing with the very same issues in much the same context.

In their arguments, Debtors invoke this Court's analysis and rulings when it serves them but ignore what this Court said when it proves unhelpful to them, such as this Court's consistent questioning of *Carolin*'s applicability either beyond the "very portals of bankruptcy"[3] or to a fully solvent debtor who faces no threat to its economic viability. Debtors even begin their objection here by attempting to recycle an argument they manufactured in opposition to the Motion to Dismiss—the Committee's alleged delay in bringing its Motion to Dismiss—as a reason the Court should not certify its Order. Just as this Court considered and disposed of that issue in connection with deciding the Motion to Dismiss, so should the Court hold here that the Debtors' delay argument on dismissal provides no basis for refusing to consider the issues presented for certification at this time.[4]

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[2] The FCR Objection completely ignores the § 158 standard and provides no meaningful argument, as will be discussed *infra* in Part V.

[3] *Carolin Corp. v. Miller*, 886 F.2d 693, 700 (4th Cir. 1989).

[4] This Court concluded that the Committee's Motion "[could not be]—nor should [it] be—decided by laches," because the motion makes "jurisdictional, constitutional arguments" which "can be asserted at any time," and "dismissal motions" for cause—such as the motion to dismiss here—"may be filed *whenever cause has arisen*." Order at 17-18

Debtors' efforts and arguments cannot succeed. The certification statute sets out four separate and distinct bases for certification. If this Court finds any one of them, it must certify the Order for direct appeal.[5] The Committee's request meets three of these criteria. This Court should grant the Committee's request to certify its Order for direct appeal to the Fourth Circuit.

ARGUMENT

I. THE LEGAL STANDARD FOR CERTIFICATION IS BOTH MANDATORY AND DISJUNCTIVE

Debtors do not directly address the mandatory nature of § 158(d)(2). Instead, they suggest that certification "may be granted" and that this Court has discretion regarding certification. *See* D.Obj. at 4. Regardless of what the Debtors wish the law was, the Court is not authorized to exercise discretion when it comes to certification. The statute itself says a court "**shall**" make the certification, upon determining one of the criteria is met. § 158(d)(2)(B) (emphasis added). The case law confirms this. *See Troisio v. Erikson et al. (In re IMMC Corp.),* Adv. Proc. No. 10-53063 (BLS), 2016 WL 356026, *3 (D. Del. Jan 28, 2016) (certification "is mandatory'); *In re Qimonda AG*, 470 B.R. 374, 383 (E.D. Va. 2012) (the bankruptcy court "must certify an appeal if one of the statutory conditions is met").

Debtors are more overt in arguing that the criteria are dependent, so that a failure to meet the first criterion—no controlling decision of the Court of Appeals or Supreme Court—means the public importance and material advancement criteria should not be relied upon. *See* D.Obj. at 12-13, 16-17. Debtors are wrong. The criteria under the statute are independent and disjunctive. As

(emphasis added). Moreover, this Court concluded that it was "hard pressed to find undue prejudice to the Debtors" caused by any delay, given that their predecessors "intently studied the *Bestwall* case before they tried their own Texas Two-Step filings," and both "knew this to be an untested and highly controversial strategy" and "must have recognized that their bankruptcy cases would be *protracted, contested, and difficult*." Order at 19 (emphasis added).

[5] As the Committee pointed out (Comm. Request at 6 n.6), while there are only three subsections to § 158(d)(2)(A), there are actually four separate criteria for certification. Debtors do not dispute this, although they do try to elide certain criteria together.

the Supreme Court pointed out in *Bullard v. Blue Hills Bank,* "§ 158(d)(2) permits certification **when any one of several such factors exist,** a distinction that allows a broader range of interlocutory decisions to make their way to the courts of appeals." *See* 575 U.S. 496, 508 (2015) (emphasis added); *see also In re LATAM Airlines Grp., S.A.,* No. 20-11254(JLG), 2022 WL 2962948, *2 (Bankr. S.D.N.Y. July 26, 2022) (statute "is disjunctive—meaning the Court must certify an appeal if any of the factors [ ] are satisfied"); *In re Adkins*, 517 B.R. 698, 699 (N.D. Tex. 2014) ("If any of the four conditions precedent are met, the bankruptcy court shall make the certification."); *DaimlerChrysler Financial Servs. Americas L.L.C. v. Waters,* No. 5:07cv00057, 2007 WL 2107428, *2 (W.D. Va. July 18, 2007) ("court finds at least one circumstance compelling certification"). The Committee's Request pointed out that, in granting certification in *Bestwall*, Judge Beyer held "the standard for certifying a direct appeal is both disjunctive and mandatory." *See* Comm. Request at 6 (citing *Certification for Direct Appeal to the United State Court of Appeals for the Fourth Circuit Under 28 U.S.C. § 158(d)(2)*, *In re Bestwall LLC,* Case No. 17-31795, ECF No. 987, at 3 (Bankr. W.D.N.C. 2019) (the **"Bestwall Certification Order**")).

As discussed more fully below, for each of the criteria for certification of direct appeal, Debtors not only attempt to circumvent the disjunctive nature of § 158 but also expressly dismiss Judge Beyer's ruling and ask this Court not to follow it. Debtors' reasoning for this is as flawed, as their attempt to avoid the statutory basis for certification.[6]

[6] Debtors also try to impose an additional requirement that a case be "exceptional" to qualify for certification. D.Obj. 4-5. Section 158 does not include that as a requirement and the cases that Debtors rely on do not require it either. In *Qimonda*, for example, the case was certified so its comments are dicta. 470 B.R. at 390. *In re Robinson* involved a pro se debtor whose attempt to appeal was treated as a request to certify but the *pro se* debtor did not give reasons for meeting any of the criteria. No. 09-11109, 2010 WL 3943779 (Bankr. W.D.N.C. Oct. 7, 2010).

II. THIS COURT'S ORDER INVOLVES QUESTIONS OF LAW FOR WHICH THERE IS NO CONTROLLING DECISION

Debtors' claim that the issue of the limits imposed by the Bankruptcy Clause of the Constitution "was not even the issue before this Court" is erroneous. *See* D.Obj. at 6; *see also id*. at 2. This Court recognized that the Committee was arguing that the Bankruptcy Clause language "the subject of Bankruptcies" controlled the jurisdiction of the court over solvent or non-distressed debtors. Order at 22 (the ACC argues "that Congress cannot grant—and bankruptcy courts cannot exercise—jurisdiction unless it is provided for in the Constitution"); *see also id.* at 4 ("The ACC also maintains that affording bankruptcy relief to such solvent non-distressed entities exceeds the enabling powers granted to Congress by the Bankruptcy Clause of the Constitution").

Debtors misstate the Committee's constitutional argument so they can make the irrelevant claim that the Committee should have challenged the constitutionality of Section 1334. D.Obj. at 6. Such an argument was unnecessary since the doctrine of constitutional avoidance requires this Court to interpret Section 1334 in a way "to avoid serious doubt of [its] constitutionality." *See Stern v. Marshall*, 131 S.Ct. 2594, 2605 (2011) (citing *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 841 (1986)). Section 1334 contains no provision saying a fully solvent, unthreatened entity may file for bankruptcy. It is Debtors—who have the burden to prove jurisdiction—that ask this Court to interpret § 1334, and the Bankruptcy Code, to encompass use of bankruptcy by entities fully able to satisfy all of their legal liabilities in the ordinary course. By distorting the Committee's argument, Debtors seek to simply rely on § 1334 and not address the underlying and indisputable fact that there is no controlling decision.

This Court concluded that jurisdiction could be decided based solely on § 1334 in conjunction with Article I. Order at 22-26. If this Court were to adopt the Debtors' proposed approach, it effectively would read the Bankruptcy Clause out of the Constitution. Congress could

include anything in the Bankruptcy Code and, as long as there was a case or controversy, a bankruptcy court would have jurisdiction."[7] As the Committee argued, the "subject of Bankruptcies" language must be a limit on jurisdiction, or its inclusion in the Constitution on the power of Congress has no meaning. This issue remains undecided by controlling precedent.

This Court relied on the cases of *MOAC Mall Holdings v. Transform Holdco,* 598 U.S. 288 (2023) and *U.S. v. Lopez*, 514 U.S. 549 (1995) to conclude that the Bankruptcy Clause was not a jurisdictional limit. *See* Order at 23-24. In contending that these cases were not controlling decisions on the issue, the Committee (Comm. Request at 10) pointed out that these cases dealt with statutory and regulatory limits on jurisdiction where Congress should be heard as to whether it intended a provision to have jurisdictional effect. These decisions, and similar ones by the Supreme Court, do not deal with provisions in the Constitution, where Congress has no voice in determining their effect. Notably, Debtors do not even respond to this argument. Although the Court extrapolated from the reasoning of these cases, it is readily apparent (and not disputed) that they are not controlling for the purposes of § 158(d)(2)(A)(i).

A. The Constitutional Question of Law Regarding Bankruptcy Court Jurisdiction Has No Controlling Decision

Debtors assert that the case law concerning the constitutional history of the Bankruptcy Clause is controlling. D.Obj. at 7-8. However, they merely repeat some of this Court's language discussing cases and describe them as a "wall of Supreme Court authority." This Court did not so hold. Instead, this Court stated that the "case law **suggests** an answer." Order at 33 (emphasis added). After discussing the arguments of Professors Plank and Brubaker—which this Court

[7] As a *reductio ad absurdum* example, Congress could address the immigration judge shortage by amending the Bankruptcy Code to empower bankruptcy court judges to hear immigration cases and subsequently respond to constitutional attack by arguing that, under Article I, there is a case or controversy, so Congress can give bankruptcy courts the necessary jurisdiction to deal with the crisis. This would clearly not be an enactment on "the subject of Bankruptcies."

observed "have considerable force" (*id.* at 33)—as well as some of the prior cases, this Court "conclude[ed] 'financial distress' is not a constitutional prerequisite . . . ." *Id.* at 35 (emphasis in original). However, this Court acknowledged that "[t]here are, of course, constitutional limits on the bankruptcy power." *Id.*

Debtors address none of these elements of the Order. Nor do they respond to the Committee's argument that some of the very cases cited in the Order contain language that indicates the issue of constitutional limits has never been decided. *See* Comm. Request at 11-12. For example, Debtors recite this Court's references to *Siegel v. Fitzgerald*, 596 U.S. 464 (2022) and *Central Va. Comm. College v. Katz*, 546 U.S. 356 (2006), as evidence that the Supreme Court has "reject[ed]" the ACC's interpretation . . . ." D.Obj. at 7. In fact, both of those more recent decisions repeat the critical language from *Wright v. Union Central Life Ins. Co.* that "[t]he subject of bankruptcies is incapable of final definition . . . . The subject of bankruptcies is nothing less than the subject of the relations **between an insolvent or nonpaying or fraudulent debtor**, and his creditors, extending to his and their relief." *See* 304 U.S. 502, 513–514 (1938) (emphasis added).[8]

Debtors also repeat their reference to solvency not being a barrier to jurisdiction. D.Obj. at 3. The Committee has repeatedly stated that it has not, and does not, contend that a "solvent" entity cannot file for bankruptcy. Rather the Committee's consistent argument is that entities, such as the Debtors, which are not only fully solvent (having annual revenues four times the value of the Debtors' and FCR's estimated costs of paying all asbestos victims in full), but are not

[8] *Siegel* simply leaves out of its quotation from *Wright* the phrase "insolvent or nonpaying or fraudulent" before "creditors."

economically threatened, cannot properly file since they do not qualify as "bankrupt" under the Bankruptcy Clause.

Debtors reiterate this Court's point that in the "more than a century of federal bankruptcy law and almost a half century under the Bankruptcy Code," there is a "lack of caselaw" as to whether the Constitution imposes a financial distress requirement. D.Obj. at 8. Debtors' admission alone requires direct certification. The issue for certification is that there is no controlling decision. And lack of controlling precedent is particularly important when it concerns the issue of subject matter jurisdiction.

For the purposes of this Request, it is not a question of whether this Court's ultimate conclusion as to the effect of the Bankruptcy Clause on jurisdiction was correct—that is an issue that the Fourth Circuit can address after certification. Rather the issue now is whether there is a controlling decision holding that the Bankruptcy Clause does not limit the jurisdiction of the bankruptcy court. None exists.

B. The *Carolin* Decision Does Not Establish the Test for Bad Faith Dismissal of a Non-Distressed Debtor

The first legal issue presented is whether *Carolin* controls a motion to dismiss the case of a non-distressed debtor as a bad faith filing. The *Carolin* decision was decided in the context of a hopelessly insolvent and distressed entity. The test articulated in *Carolin* was intended to provide a debtor with the opportunity to rehabilitate. The Fourth Circuit's focus on rehabilitation in *Carolin* at least suggests that the objective futility prong it established would not apply in the case of a debtor not in need of bankruptcy for its viability and survival. That uncertainty is reinforced by the Fourth Circuit's decision in *Premier Automotive*, which calls into question whether subjective bad faith alone could be a sufficient basis for dismissal in the case of a financially

healthy company with no need to reorganize. *In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 279-80 (4th Cir. 2007).

C. *Carolin* Does Not Control After the "Very Portals" of a Bankruptcy Case or to Post-Petition Conduct

The other legal question concerning *Carolin* is whether the decision controls a motion to dismiss by a fully solvent, unthreatened debtor, well after the commencement of the case. Debtors (D.Obj. at 9) rely upon this Court's ultimate conclusion that *Carolin* was binding precedent, ignoring the pages of the Order where this Court wrestled with the arguments of why *Carolin* should not apply. *See* Order at 46-52. This Court ultimately concluded that while those were "persuasive arguments" (*id.* at 50) it felt constrained to apply *Carolin*. Order at 53. Part of this Court's conclusion was predicated on language in the Fourth Circuit's decision last year. *See In re Bestwall*, 71 F.4th 168 (4th Cir. 2023). However, neither *Carolin* nor the question of jurisdiction over the debtor was an issue in that case. The appellants (the Committee and FCR in that case) had specifically excluded that issue and only raised the bankruptcy court's jurisdiction to issue an injunction in favor of third-party non-debtors. As the *Carolin* standard was never argued, the dicta in the majority's opinion does not bind this Court.[9]

The Fourth Circuit certainly did not "affirm" (D.Obj. at 9) the application of the two-prong *Carolin* test to fully solvent entities whose economic viability is not threatened, as that issue was never before the Court of Appeals. Nor did the District Court's subsequent decision denying interlocutory review, which only left the bankruptcy court's decision denying dismissal as a bad faith filing for later review (the issue of dismissal based on Bestwall's conduct of its case was raised by the Bestwall Committee in a second, separate motion subsequent to the denial of the

[9] As en banc review was denied in that case, the panel ruling was not "endorsed by the full Fourth Circuit." Order at 52.

motion to dismiss as a bad faith filing and was not addressed in the appeal).[10] The Fourth Circuit has never had the opportunity to decide the parameters of the *Carolin* decision. As *Carolin* dealt with an insolvent debtor at the portals of bankruptcy, it is not a controlling decision with respect to other grounds for dismissal, including those raised by the Committee in its Motion to Dismiss.

Debtors seek to avoid certification by relabeling the issue as one of application of settled law to specific facts. D.Obj. at 10. However, this effort cannot succeed. A controlling decision is one that "admits of no ambiguity in resolving the issue." *IMMC Corp*., 2016 WL 356026 at *4. For example, the decision *In re Essar Steel Minnesota,* found certification appropriate, in part, because a prior decision issued by the Third Circuit interpreting a bankruptcy sale order as core did not resolve whether the same was true of a confirmation order. *See* Case No. 16-11626 (BLS), 2020 WL 3574743, *6 (D. Del. 2020) (citing *Centennial & Allegheny Univ. Hosps.-East Tenet Healthsystem Phila., Inc. v. Nat'l Union of Hosp. & Health Care Emples., AFSCME, Dist. 1199C (In re Allegheny Health, Educ. & Research Found.)*, 383 F.3d 169, 175-76 (3d Cir. 2004), while finding no binding decision of the Third Circuit or Supreme Court unambiguously addressed confirmation order's core nature."); *see also 5200 Enterprises Ltd. v City of N.Y.,* Case No. 3:19-cv-1045-J-39, 2020 WL 10054400, *2 (M.D. Fla. July 16, 2020) (specific issue presented had not been addressed by Court of Appeals "in light of the facts and circumstance" of the case); *In re Adkins*, 517 B.R. 698, 700 (Bankr. N.D. Tex. 2014) (while prior decisions addressed related issue it was dicta as to issue properly framed and certification was proper). Like those cases, the issue of the scope of *Carolin* in this context is not a fact-bound decision but a question of law on which the Fourth Circuit has yet to speak.

[10] Moreover, Judge Conrad's order denying leave to appeal an interlocutory order in *Bestwall* under an entirely different statute—28 U.S.C. § 158(a)—is inapposite. 2023 WL 7361075 (W.D.N.C. Nov. 7, 2023).

III. THE COURT'S ORDER INVOLVES MATTERS OF PUBLIC IMPORTANCE

Regardless of whether, in these circumstances, the *Carolin* decision constitutes a controlling decision of the Fourth Circuit, the issue of its proper application is one of public importance.[11] As pointed out above, the Debtors seek to undermine the disjunctive nature of this second criterion by arguing that courts that have relied upon public importance, most commonly have found a lack of controlling decision as well. From this, Debtors wrongly conclude that, because in their view the legal issue has already been decided, "there is no issue of public importance." D.Obj. at 13 (citing *In re General Motors*, 409 B.R. 24, 28 (S.D.N.Y. 2009)). Debtors' cited case, *General Motors*, does not support their argument because, in deciding the public importance factor, that court made a critical error in considering only three (not four) factors, stating that "the judgment, order, or decree [must] involve[ ] a question of law" ***that*** "involves a matter of public importance." *Id*. In effect, the court in *General Motors* read the critical word "or," before the "public importance" criterion, out of the statute. As the cases in this Circuit, and elsewhere, cited above demonstrate, Debtors (and the court in *General Motors*) are wrong; public importance is its own, stand-alone basis for certification.

The standard for public importance is whether the case transcends the litigants, involving issues that will advance the cause of jurisprudence or that could impact vital interests in the community. *Qimonda*, 470 B.R. at 387 (citing Collier on Bankruptcy, ¶ 5.06[4][b]). In *Qimonda* the court identified the issue as one that would "have substantial ramification" for the industry and related businesses. *Id*. at 388; *see also In re Carroll*, No. 09–01177–8–JRL, 2012 WL 5960077,

[11] The issue of constitutional limits on the jurisdiction of Bankruptcy Court is of public importance as well. However, there should be no question of the absence of a controlling decision on that issue, which the Supreme Court has repeatedly failed to reach. Absence of a controlling decision on that issue is sufficient for certification.

*3 (E.D.N.C. Nov. 28, 2012) (important issues "that will continue to come before the bankruptcy courts")

The most relevant decision on the issue of public importance is Judge Beyer's ruling granting certification in *Bestwall*. Judge Beyer found public importance in light of the "prepetition restructuring of the [predecessor] entities and the Debtor's formation on the eve of this case . . . [which] transcends this case, its litigant and asbestos cases in general; and has far reaching implications, and arguably constitutional implications, regarding pre-bankruptcy restructuring and whether non-debtor entities are entitled to benefit from a bankruptcy filing as a result of such pre-bankruptcy restructuring." *In re Bestwall*, Case No. 17-31795, ECF No. 987, at 4 (citing *Qimonda*, 470 B.R. at 386).

Debtors attempt to diminish that ruling's effect because the Fourth Circuit did not accept the appeal after Judge Beyer's certification. D.Obj. at 13-14.[12] However, that was in 2019—almost five years ago. The world has changed since then. *Bestwall* was the first of the Texas Two-Step cases filed. At the time the Fourth Circuit considered whether to hear *Bestwall*, these cases, *DBMP*, and *LTL* had not even been filed yet. *Aearo Technologies LLC* and *Tehum Care Services Inc.* (cases with similar restructurings on the eve of bankruptcy), among others, were still to follow. The public importance of the validity of the filing by these (and similar) Debtors should be much more obvious to the Fourth Circuit in light of developments since it first considered accepting

[12] The Debtors strangely dismiss *In re Nortel Networks Inc.*, No. 15196LPS15197LPS, 2016 WL 2899225 (D. Del. May 17, 2016), stating that it would not support certification in this case. D. Obj. at 13 n.6, 17. The Debtors dismiss this case as being an outlier because it included "coordinated, cross-border trials." Debtors' Objection, at 17. That is simply incorrect. The *Nortel* court noted that the cross-border nature of the case caused increased public attention. 2016 WL 2899225, at *4-5. However, the most important factor pointing towards public importance was the sheer size of the liabilities involved. *Id.* at *4. *Nortel* found that the public importance criterion was met regardless of whether there were "conflicting decisions or an absence of controlling precedent." *Contra* D. Obj. at 17. Since the underlying reasoning behind the *Nortel* findings mirror the reasoning espoused by the Committee here, *Nortel* supports certification in this case.

certification of a direct appeal raising these critical issues. This Court emphasized the public importance of these issues, stating:

> Until 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*, which was filed six years ago. None has been made in *DBMP*, 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. As the Committee pointed out, this Court included a number of other statements in the Order "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." *Id.* at 52. These statements recognize that the issues on appeal transcend this litigation. For example, the Court recognized that if permitted, "all such cases must survive dismissal, regardless of purpose." *Id.* at 50. Further this Court "wonder[ed] whether the *Carolin* majority contemplated that its test would be employed to the cases of solvent, non-distressed corporations." *Id*.; *see also id* at 52 ("arguably both *Carolin* prongs presuppose financial distress"); *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").[13] While this Court felt bound by *Carolin*, it apparently harbored serious questions concerning the application of the *Carolin* test, particularly in these circumstances. All of those are reasons why this case transcends the present parties and is important to the public at large. Most striking in Debtors' argument on public importance is the absence of any mention of these comments on the matter. Public importance is a separate basis for certification. Like Judge Beyer before it, this

[13] The Court's questions about the outer bounds of the *Carolin* standard make clear that it did not "merely appl[y] the law to the facts here." *Contra* D. Obj. at 3.

Court should certify the Order for direct appeal and allow the Fourth Circuit to answer the important questions that cause uncertainty and affect the greater public.

IV. DIRECT APPEAL WILL MATERIALLY ADVANCE THE PROGRESS OF THESE CASES

In addressing material advancement of the case, the Debtors once more improperly try to subsume this criterion under the first one of absence of a controlling decision. Like public importance, material advancement of the progress of these cases is a distinct criterion that could (and here does) independently require certification. Judge Beyer in her ruling in *Bestwall* actually considered this factor first and would have certified her denial of a motion to dismiss for bad faith on this criterion alone. Bestwall Certification Order at 3.[14] Judge Beyer recognized that the issues raised in *Bestwall*—and mirrored here—are "surely destined for the Fourth Circuit." Bestwall Certification Order, at 3 (citing *Qimonda*, 470 B.R. at 382). As Judge Beyer pointed out, because of the potential effect of *Carolin* on any regular appeal to the District Court, such cases "will not benefit from percolating though the normal appellate practice." *Id*. Therefore, to save money and time, which are principal underlying rationales for direct appeal, such cases should be certified. *See 5200 Enters.,* 2020 WL 1005400, at *3 (direct appeal will "conserve judicial resources and those of the parties" because deciding this issue "is vital to the resolution of the underlying bankruptcy action").[15]

[14] Debtors also contend that this Court should not follow Judge Beyer on this point because the Fourth Circuit five years ago did not accept that appeal and because the most recent ruling by the Fourth Circuit in Bestwall reaffirmed the *Carolin* standard. Both of these unfounded claims have been debunked above.

[15] Debtors cite two cases in support of their argument that inevitable appeal is not a basis for material advancement. Both *WestLB Ag v. Kelley*, 514 B.R. 287, 293 (D. Minn. 2014) (addressing substantive consolidation) and *Polk 33 Lending, LLC v. THL Corporate Finace, Inc. (In re Aerogroup Int'l)*, C.A. No. 19-648(MN), 2020 WL 757892 (D. Del. Feb. 14, 2020) (misnamed as *Polk 33 Lending*) (addressing allocation following a credit bid)) deal with the different situation where appeal of a non-dismissal motion is argued will materially advance progress because further appeal is inevitable. The district courts there were considering whether skipping the normal appellate process would actually advance the progress of the case and concluded it would not. As Judge Beyer recognized, this is not an argument that further appeal is inevitable but rather consideration by the District Court would not affect the ultimate result because the *Carolin* would constrain the District Court.

Debtors argue that an appeal will not end this litigation because only the Fourth Circuit en banc can overturn *Carolin* and the Supreme Court would be needed to resolve the constitutional issues. Neither of these is true. A panel of the Fourth Circuit could interpret *Carolin* and determine that it does not apply to fully solvent, unthreatened entities, particularly post-petition. Such a decision would not require *Carolin* to be overturned as its test would continue to apply to insolvent, economically threatened entities when they filed for bankruptcy. As for the constitutional issue, nothing would stop the Fourth Circuit from ruling on the question that the Supreme Court has repeatedly not reached, while indicating that some limits—based on the Bankruptcy Clause—do exist. Thus, these issues "sound a death-knell" for these cases, qualifying them for certification under the final criterion. *Weber,* 484 F.3d at 159; *see also Douglas v. Dry Clean Concepts*, Case No. GJH-20-3184, 2021 WL 4951918, *6 (D. Md. Oct. 25, 2021) (certification would be appropriate "where a prompt ruling by the Court of Appeals will advance the ongoing litigation in the Bankruptcy Court").[16]

Debtors also erroneously claim that even a resolution of these issues will not terminate this litigation because the higher courts would have to remand the cases for further proceedings. Debtors' claim only addresses the *Carolin* issues because, if the Fourth Circuit and/or the Supreme Court decides that this Court constitutionally has no jurisdiction, the cases are over. But even if the *Carolin* test is determined not to apply under the current circumstances, a more favorable test for dismissal would likely bring these cases materially closer to their conclusion via dismissal.

[16] Debtors cite *Douglas* to argue certification would not materially advance progress here because other issues will remain to be decided. D.Obj. 19. In *Douglas*, the Bankruptcy Court had denied dismissal of one count. 2021 WL 4951918 at *6. Regardless of the result of appeal on certification, therefore, the case would have to go back to the Bankruptcy Court. (The certification request did not even seek review of all the counts that were dismissed). Here success on appeal of either the constitutional issue or the application of *Carolin* would result in dismissal of the bankruptcy cases. There would be nothing to return to the bankruptcy court.

Moreover, the higher courts need not remand because the record is clear that these Debtors' cases should be dismissed.

Debtors obviously want these cases to drag on because it saves them at least $100 million a year, while their revenues are in the tens of billions. Order at 9, 28. However there are thousands of victims represented by the Committee who have gotten nothing and will be aided by a quick resolution of these legal issues.[17]

This Court's Order astutely recognizes that "[l]ittle progress has been made towards confirmation" in this case (Order, 19), nor in *Bestwall* nor *DBMP,* despite years of litigation. *Id.* at 21. To put an end to the "growing frustration" from "simply spinning around," *id*., certification should be granted so that these cases, and the pernicious theory that formed their basis, is put to rest.

V. THE FCR'S OBJECTION IGNORES THE STATUTORY STANDARD

The FCR focuses its Objection ("**FCR Obj.**") on what he believes are the "best interests" of future claimants. *Id.* at 2. The FCR criticizes current claimants for an unwillingness to resolve these cases along the path taken by the parties in *Paddock* and for not adopting a trust like in *Garlock*. The Committee disagrees with the FCR's characterizations of both *Paddock* and *Garlock* and incorporates by reference its arguments on that score in Section V of the *Reply in Support of Motion of the Official Committee of Asbestos Personal Injury Claimants to Dismiss the Debtors' Chapter 11 Cases* (ECF No. 1847).

[17] The Debtors self-congratulatory assertion of "progress" in the bankruptcy cases relates only to the plan the Debtors negotiated with the FCR. *See* D. Obj. at 19. However, the Committee disputes the meaningfulness of this progress. The Debtors have taken no "meaningful" steps to craft a plan that current asbestos claimants would approve. *Id.*; *see also* Order at 15 (Court notes that 75 percent of current asbestos claimants must approve any plan).

Noticeably absent from the FCR's submission is **any** mention, no less discussion, of the standard for certification under §158(d)(2). Therefore, the FCR Obj. adds nothing to this Court's consideration of the Committee's Request and the Court should therefore not consider it.[18]

The Committee is deeply concerned about the FCR's use in a public filing of confidential settlement information that is subject to the Agreed Protective Order Governing Confidential Information (ECF No. 345) (the "**Protective Order**").[19] *See* FCR Obj. at 2 n.3. The Committee reserves all rights to pursue any rights or remedies arising out of that potential violation of the Protective Order.

CONCLUSION

For the reasons set forth above, this Court should reject the Debtors' arguments in opposition and certify for direct appeal to the United States Court of Appeals for the Fourth Circuit the Committee's appeal of the Order Denying Motion to Dismiss.

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[18] Indeed, the FCR should be supporting the Request, because, setting the FCR's irrelevant proclamations aside, a direct certification would resolve these cases more swiftly for the benefit of both present and future claimants, which is what the FCR is advocating. *See, e.g.*, FCR Obj. at 2 (the best interests of future claimants "are not served by further delay . . . .").

[19] The FCR agreed to be a party to the Protective Order. *Notice of Future Claimants' Representative's Election to Be a Party to Agreed Protective Order Governing Confidential Information* (ECF No. 395).

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