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

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: LTL MANAGEMENT, LLC,

Debtor,

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*OFFICIAL COMMITTEE OF TALC CLAIMANTS,

Appellant.

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

Direct Appeal from the United States Bankruptcy Court
for the District of New Jersey
Chapter 11 No. 21-30589, Adv. Proc. No. 21-3023

BRIEF FOR NATIONAL ASSOCIATION OF MANUFACTURERS AND PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the National Association of Manufacturers and the Product Liability Advisory Council, Inc. state that they have no parent corporation and have issued no stock.

Dated: August 22, 2022

s/ Jaime A. Santos
Jaime A. Santos

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12.7 million men and women, contributes $2.71 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to improving and reforming the law in the United States and elsewhere, particularly the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective derives from the experiences of a corporate membership spanning a diverse group of industries throughout the manufacturing sector. In addition, several hundred leading product liability defense attorneys are

[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 amicus briefs in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law affecting product risk management.

The NAM and PLAC are interested in this case because their membership includes companies that may find themselves as defendants in mass-tort suits. Members of the NAM and PLAC believe that bankruptcy is an important tool for manufacturers in financial distress, including those that face mass-tort liability, to resolve their liabilities in an efficient manner that is both fair to their creditors and claimants, and also affords the businesses an opportunity to reemerge as productive market participants.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellee LTL Management, LLC ("LTL") faces a torrent of lawsuits alleging that Johnson & Johnson's Baby Powder causes mesothelioma and ovarian cancer. *In re LTL Mgmt., LLC*, 637 B.R. 396, 400-01 (Bankr. D.N.J. 2022). Since 2016, the number of lawsuits has grown to nearly 40,000, with an "average [of] one or more ovarian cancer complaint[s] [being served] every hour of every day, every single day of the week" since January 2020. *Id*. at 401. LTL thus faces "thousands of additional claims … annually for decades to come." *Id*. at 408. And although Johnson & Johnson Consumer Inc. ("Old JJCI") has prevailed in numer-

ous trials, it has also occasionally lost, including a $2.25 billion adverse verdict in 2020. *Id*. at 401 & n.4. Faced with this cascade of lawsuits and potential liability, LTL has sought to resolve these claims through bankruptcy—just as numerous manufacturers and other businesses have done before.

Bankruptcy is well equipped to resolving mass-tort lawsuits, particularly those of this magnitude, in an efficient manner so that financially distressed businesses can obtain the "fresh start" that lies at the core of bankruptcy law. *Schwab v. Reilly*, 560 U.S. 770, 791 (2010). Bankruptcy enables a debtor's liabilities to be resolved in an efficient manner by staying all efforts—in either federal or state court—to collect against the debtor outside the bankruptcy forum, thereby channeling claimants into a single forum so that the company's liabilities can be addressed in a coordinated manner. This channeling function also preserves the financially distressed company's value against a rush-to-the-courthouse frenzy of creditors that will deplete the company's remaining assets to the detriment of its employees, shareholders, and other creditors. At the same time, bankruptcy promotes global resolution of a company's liabilities, particularly in the asbestos context, by sweeping in even future claims based on injuries that have not yet manifested. All of this is crucial for businesses facing mega mass-tort liability, given the sheer number of claims scattered across dozens of jurisdictions and the accompanying risk that the company's resources will be quickly depleted resources by tens (or hundreds) of

thousands of separate lawsuits. In the end, bankruptcy not only benefits the financially distressed company, but also its employees, shareholders, and other stakeholders who are invested in its continued existence.

Some *amici* for Appellants contend that multi-district litigation ("MDL") is the ideal vehicle for resolving mass-tort litigation. But while MDL has been successful in some circumstances, it is not a panacea. First, MDL cannot reliably achieve widespread resolution of mass-tort litigation: it cannot stay efforts in state court to collect from the debtor; it cannot bind *present* claimants without their consent; and it cannot reliably address *future* claimants. It is thus unsurprising that numerous entities that have started out in MDL ultimately went into bankruptcy.

Second, MDL historically has struggled to resolve mass-tort litigation efficiently; the MDL in this case, for example, has being active for nearly six years with "no progress toward a global resolution." *LTL Mgmt., LLC*, 637 B.R. at 412. And others have persisted for much longer. At the same time, MDL is notorious for attracting—indeed, incentivizing—meritless claims, which only causes additional delays and unfairly prejudices defendants who have to weed them out. The risk of meritless claims is only exacerbated in mega mass-tort lawsuits, such as this one. In short, MDL is not a one-size-fits-all model meant to displace other options—such as bankruptcy—that are capable of bringing efficient and widespread resolution to an ever-growing mountain of lawsuits.

ARGUMENT

I. Bankruptcy Provides An Important And Legitimate Mechanism For A Financially Distressed Manufacturer Or Other Business To Efficiently Resolve Its Liabilities And Obtain A Fresh Start.

A manufacturer, like any business or person, may find itself in "financial distress" for any number of reasons outside its control. *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 613 (7th Cir. 2013). When that happens, bankruptcy offers an important mechanism for the troubled company to resolve its liabilities while "ensuring an equitable distribution" to creditors and affording the debtor a chance at a "fresh start"—a chance to reorder its affairs and return as a productive market participant. *In re Neff*, 824 F.3d 1181, 1187 (9th Cir. 2016) (citation omitted). This "fresh start" goal lies "[a]t the core of the Bankruptcy Code," *id*. (citation omitted), and is one of its "fundamental" objectives, *Schwab*, 560 U.S. at 791.

The bankruptcy code contains a number of important features that enable financially distressed businesses to obtain this "fresh start." These features are particularly salient for businesses facing mega mass-tort lawsuits, which can entail a seemingly infinite number of present and future claims that could impose enterprise-ending liability. But bankruptcy is not only valuable for the struggling manufacturer; its benefits inure to the manufacturer's stakeholders, too—employees, shareholders, and business partners—who are invested in its continued viability.

A. Bankruptcy benefits manufacturers and other businesses by providing an efficient mechanism for channeling "all claims against [the company] in a sin-

gle forum for collective resolution." Troy A. McKenzie, *Toward A Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. Rev. 960, 999 (2012). This is accomplished, in large measure, through the "automatic stay" that is triggered by the filing of a bankruptcy petition and which enjoins all ongoing or future efforts by creditors to collect against the debtor, including efforts to collect in state court. *See* 11 U.S.C. § 362(d)(2); Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. Davis L. Rev. 1613, 1639 (2008). By closing the door to all other avenues of recovery against the debtor, bankruptcy brings all creditors into one "centralized" location to "resolve competing economic interests in an orderly and effective way." Smith, *Resolution of Mass Tort Claims*, *supra*, at 1639-40 (citation omitted); *accord LTL Mgmt., LLC*, 637 B.R. at 414 ("The bankruptcy courts offer a unique opportunity to compel the participation of all parties in interest … in a single forum"). This centralization of claims benefits the bankrupt entity, claimants, and the judicial system—protecting the debtor from having to litigate claims across the country while promoting the efficient resolution of a debtor's liabilities in a single forum. *See* McKenzie, *Toward A Bankruptcy Model*, *supra*, at 1004-05 ("the judicial system and society benefit from unified proceedings in a single forum in which all interested parties in the debtor's fate are represented").

This channeling mechanism is vitally important for preserving the troubled

company's value against a cascade of creditors seeking to collect before the company's assets run dry. Upon learning a business is in financial trouble, creditors often "rush to get paid before the money runs out." David A. Skeel, Jr., *When Should Bankruptcy Be an Option (for People, Places, or Things)?*, 55 Wm. & Mary L. Rev. 2217, 2227 (2014). But this rush to the courthouse can be enormously harmful as it rapidly depletes the company's remaining assets, leaving its employees with little hope the company will recover and depriving many creditors (present and future) who miss the rush of any chance at even partial recovery. Here, for example, although Old JJCI largely prevailed in its talc-related lawsuits, one adverse verdict alone resulted in a *$2.25 billion* judgment. *See LTL Mgmt., LLC*, 637 B.R. at 401 & n.4. Bankruptcy "imposes a cease fire": "[b]y halting creditors' individual efforts to collect … and providing a collective proceeding for resolving the debtor's financial distress," bankruptcy preserves the business's ongoing value against a "disorderly liquidation," Skeel, *When Should Bankruptcy*, *supra*, at 2227, 2235, and offers the business the opportunity to "look ahead to a future of productivity," Brook E. Gotberg, *Small Business Disaster Relief and Restructuring*, 131 Yale L.J. Forum 388, 404 (2021). This provides the "fresh start" that lies at the core of bankruptcy. *Schwab*, 560 U.S. at 791.

B. Bankruptcy is particularly important for businesses, including manufacturers, that are threatened with mass-tort liability. Mass-tort litigation poses

numerous problems for the efficient resolution of liability due to the sheer number of claims that can be filed over incredibly long time periods. For example, at the time of bankruptcy filing, LTL "faced nearly 40,000 pending tort claims, with thousands of additional claims expected annually for decades to come," amounting to "billions of dollars in … liability." *LTL Mgmt., LLC*, 637 B.R. at 408; *see* U.S. J.P.M.L., *MDL Statistics Report – Distribution of Pending MDL Dockets by Actions Pending*, at 1, 2 (Aug. 15, 2022)[2] (*"MDL Statistics Report - Distribution"*) (identifying MDL proceedings with 312,789, and 192,130 claims). Bankruptcy's ability to centralize claims in a single forum makes it "uniquely equipped to efficiently address the large numbers of claims that are characteristic of mass tort litigation." Smith, *Resolution of Mass Tort Claims*, *supra*, at 1649; *accord* McKenzie, *Toward A Bankruptcy Model*, *supra*, at 1004 (bankruptcy "greatly aids the coordination of aggregate litigation"). By concentrating litigation in one place, bankruptcy protects the debtor from being forced to litigate thousands of claims across numerous federal and state forums while protecting its assets from being depleted through thousands of individual lawsuits. *See* pp. 6-7, *supra*.

Bankruptcy's ability to achieve global resolution of claims is particularly beneficial in mass-tort litigation, where large numbers of claimants' injuries will not manifest for years—even decades. McKenzie, *Toward A Bankruptcy Model*,

[2] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-August-15-2022.pdf.

supra, at 1001-02; *see LTL Mgmt., LLC*, 637 B.R. at 413-14 (recognizing bankruptcy's benefits in light of the "acknowledged latency period for" mesothelioma and ovarian cancer). The bankruptcy code defines "claim[s]" subject to a bankruptcy court's jurisdiction expansively to include "unmatured," "contingent," and "unliquidated" obligations, 11 U.S.C. § 101(5)—terms which encompass future claims that arise from an injury, such as "exposure to a product," that "occur[s] pre-petition, even though the injury manifest[s]" after the bankruptcy has concluded. *In re Grossman's Inc.*, 607 F.3d 114, 125 (3d Cir. 2010). The bankruptcy court's jurisdiction thus sweeps broadly to include such "future" claims, thereby enabling the court to effectuate "a global resolution and discharge of current and future liability." *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 359 (3d Cir. 2012).

Not only is bankruptcy well-suited to addressing mega mass-torts generally, but it has specific provisions designed for mass-tort suits—like this one—in which a plaintiff's injury is "allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products." 11 U.S.C. § 524(g)(2)(B)(i)(I). Section 524(g) empowers a bankruptcy court in an asbestos case to "issue an injunction channeling all current *and future* claims" into a "personal injury trust" for payment. *Fed.-Mogul Glob. Inc.*, 684 F.3d at 357 (emphasis added); *see* 11 U.S.C. § 524(g). This mechanism seeks to ensure that future claimants "would be compensated comparably to present claims," while also "enabling corporations saddled with asbestos lia-

bility to obtain the 'fresh start' promised by bankruptcy." *Fed.-Mogul Glob. Inc.*, 684 F.3d at 357, 359 (citation omitted).

C. Bankruptcy thus provides an important mechanism for manufacturers and other businesses to obtain efficient and widespread resolution of liabilities, particularly those arising from mass-tort litigation where the company faces tens of thousands of high-dollar claims in the present, and the prospect of thousands more accruing for the foreseeable future. For these reasons, thousands of businesses utilize bankruptcy every year to obtain a fresh start,[3] including over 6,000 manufacturers that have sought bankruptcy since 2014.[4]

Bankruptcy's benefits also inure to the distressed business's stakeholders, including its employees and shareholders. By preserving the company's value against a rush-to-the-courthouse frenzy of creditor claims, *see* pp. 6-7, *supra*, bankruptcy maximizes the potential that the company will reemerge as a productive market participant, continue to employ workers, and preserve value for its share-

[3] *See, e.g.*, U.S. Judiciary, *U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending March 31, 2018* (recording 6,628 Chapter 11 filings by businesses), https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2018/03/31; U.S. Judiciary, *U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending March 31, 2020* (recording 6,274 Chapter 11 filings by businesses), https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2020/03/31.

[4] Dun & Bradstreet, *Bankruptcy Statistics by Industry*, https://www.dnb.com/resources/business-bankruptcies.html#statistics.

holders. These protections for employees, shareholders, and other stakeholders are not peripheral; they are central to bankruptcy's goal: the "purpose of a business reorganization is to 'restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.'" *In re Deer Park, Inc.*, 10 F.3d 1478, 1485 (9th Cir. 1993) (quoting H.R. Rep. No. 595, 95th Cong., 2nd Sess. 220, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6179); *see In re Gonic Realty Tr.*, 909 F.2d 624, 627 (1st Cir. 1990) (recognizing that a "purpose of the Bankruptcy Code is … to … preserv[e] jobs and shareholder interests").

In short, bankruptcy offers an important tool for manufacturers and other businesses in financial hardship to "produce comprehensive, equitable, and timely" resolution of their liabilities for the benefit of the company and its stakeholders, *LTL Mgmt., LLC*, 637 B.R. at 414—benefits that are all the more relevant in the context of mass-tort litigation.

II. Multi-District Litigation Cannot Reliably And Efficiently Achieve Widespread Resolution Of Mega Mass-Tort Litigation.

Some *amici* for Appellants argue that MDL is the best mechanism for resolving this mass-tort litigation. *See, e.g.*, Br. of the Am. Ass'n for Just. (ECF No. 66) at 19-28; Br. for *Amici Curiae* by Certain Complex Litig. Law Professors (ECF No. 94) at 2-5. But MDL is not a one-size-fits-all model, particularly for mass-tort cases of this magnitude in which tens of thousands of new claims are anticipated

every year for the foreseeable future. *LTL Mgmt., LLC*, 637 B.R. at 408. Contrary to *amici*'s unbridled praise, MDL lacks key features of bankruptcy that are particularly well-suited to reliably achieve a fair and widespread resolution of mass-tort litigation. Indeed, Appellants' other *amici* recognize that bankruptcy can be "an appropriate way to address mass tort cases" and that "a long line of mass tort cases" have been resolved through bankruptcy. Br. for *Amici Curiae* Law Professors (ECF No. 74) at 7-8. *Amici* are thus incorrect "that the tort system offers the only fair and just pathway of redress and that other alternatives"—like bankruptcy—"should simply fall by the wayside." *LTL Mgmt., LLC*, 637 B.R. at 414 (emphasis omitted).

A. Multi-District Litigation Is Ill Equipped To Reliably Achieve Global Resolution In Mega Mass-Tort Litigation.

MDL is ill equipped to provide global resolution in mega mass-tort controversies, thus prolonging litigation for defendants and claimants alike while delaying recovery and depleting the debtor's resources.

Unlike bankruptcy, MDL cannot reliably produce widespread resolution of a debtor's liabilities. This problem is particularly acute with respect to future claimants. As discussed, mega mass-tort suits often involve claimants with latent injuries that will not manifest for years, possibly decades. McKenzie, *Toward A Bankruptcy Model*, *supra*, at 1001. Here, for example, Plaintiffs' experts have suggested that the latency period for mesothelioma resulting from talc exposure can be as

long as 60 years. *See* Debtor's Omnibus Resp. to Amicus Brs. Supporting the Comm.'s Mot. to Dismiss, at 15, *In re LTL Mgmt., LLC*, No. 21-30589 (Bankr. D.N.J. Feb. 22, 2022), ECF No. 1554 (*"Debtor's Omnibus Resp."*). The "sheer volume of claims" stretching so far out over time "means that there is no natural termination to the litigation." Natalie R. Earles, *The Great Escape: Exploring Chapter 11's Allure to Mass Tort Defendants*, 82 La. L. Rev. 519, 533 (2022). Unlike bankruptcy, however, MDL lacks a reliable mechanism for resolving the claims of unknown future parties whose injuries do not manifest until years later. *Cf*. pp. 8-9, *supra*. So even if MDL were to produce settlement of present claims, it could not resolve the potentially hundreds of thousands of future claims that may be asserted decades from now. *See* pp. 2, 7-8, *supra*. This presents "an obvious problem" for global resolution: defendants will be less likely to "enter into a global settlement if they cannot be reasonably certain that it will bring peace." S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 Clev. St. L. Rev. 391, 403 (2013).

MDL's inability to obtain global resolution extends also to present claims. To start, MDL judges are authorized to conduct only "*pretrial* proceedings" and must "remand[]" each case "to the district from which it was transferred" after pretrial proceedings have concluded. 28 U.S.C. § 1407(a) (emphasis added). But MDL's restriction to pretrial proceedings means that post-remand cases risk

"break[ing] down into … thousands of individual actions … that may involve additional discovery, repetitive litigation concerning similar issues across forums, and inconsistent rulings concerning these issues." Brown, *Plaintiff Control*, *supra*, at 402.

That is especially true in mega mass-tort litigation, like this one, given the significant issues that cannot be resolved in the MDL proceedings. For example, causation is a necessary element of each plaintiff's claim, but it is also "extremely difficult to establish for mass tort victims," particularly where (as in this case) "[l]ong latency periods allow for other variables" unique to the individual claimant "to intervene in the causal chain." Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. __ (forthcoming 2022) (manuscript at 10).[5] Coordinated discovery in MDL could not possibly uncover all the information necessary to resolve whether Old JJCI's products proximately caused each of *40,000* claimants' alleged injuries (and those are just the *current* claimants). *See* Expert Rep. of Charles H. Mullen, Ph.D. ¶¶ 15-18, *In re LTL Mgmt., LLC*, No. 21-30589 (Bankr. D.N.J. Dec. 22, 2021), ECF No. 956-7; *see also* Parikh, *The New Mass Torts Bargain*, *supra*, at 10 (noting that the "lack of unanimity in the scientific community" regarding whether talc exposure "increase[s] the risk of ovarian cancer" further complicates the proximate cause inquiry). Similarly, the amount of each claimant's damages

[5] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3649611.

(if any) will depend on highly individualized factors that will almost certainly require further discovery after remand. *See, e.g.*, *In re Condustrial, Inc*., No. 09-04425, 2011 WL 3290389, at *6 (Bankr. D.S.C. Aug. 1, 2011) (recognizing that mass torts "typically" involve claimants with "individualized claims for damages … based on separate and distinct factual circumstances particular to each claimant"); *see also* Edward F. Sherman, *When Remand is Appropriate in Multidistrict Litigation*, 75 La. L. Rev. 455, 464 (2014) (noting that mass-tort cases "may require additional individualized plaintiff discovery … [on] remand, particularly on such issues as specific causation and damages").

Thus, resolving issues like causation and damages will necessarily require additional proceedings and discovery upon remand to the transferee court—which will only cause additional years of delay. Even so-called "bellwether trials" are unlikely to meaningfully advance resolution of mega mass-torts like this one, where there are thousands of "[d]iverse plaintiffs with individualized discovery needs" who are "unlikely to benefit" from trials of plaintiffs "that are differently situated and few in number." *See* Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 Am. U. L. Rev. 175, 221 (2019). Thus, as Judge Kaplan recognized, compelling the parties to proceed through MDL will "force[]" them to "relitigate causation, and damages, and apportion liability among defendants in every case," ultimately burden[ing] the tort system with un-

necessarily drawn-out litigation." *LTL Mgmt., LLC*, 637 B.R. at 412.[6] In contrast, consolidated bankruptcy actions can result in *complete* adjudication of claims, including trial before a federal bankruptcy judge. 28 U.S.C. § 157(b).

Even if MDL were to result in settlement, rather than adjudication through trial, it has further limitations that make it an unsatisfying solution. To begin with, MDL cannot "bind[] non-consenting plaintiffs" to a proposed settlement. Brown, *Plaintiff Control*, *supra*, at 401. Bankruptcy judges, in contrast, are empowered to ensure that global resolution is truly global. *See* 11 U.S.C. § 1141(a) (providing that Chapter 11 confirmation plan "bind[s] … any creditor … whether or not such creditor … has accepted the plan"); *see also* McKenzie, *Toward A Bankruptcy Model*, *supra*, at 1006 (noting that a bankruptcy "discharge is binding even against a claimant who did not submit a proof of claim … or who submitted a proof of claim and objected to the [reorganization] plan"); *see also* pp. 5-9, *supra*.

State lawsuits also pose a problem for global resolution, as "[s]tate claims are not subject to the jurisdiction of the transferee court in a federal MDL." Amy L. Saack, *Global Settlements in Non-Class MDL Mass Torts*, 21 Lewis & Clark L. Rev. 847, 855 (2017); *see* Parikh, *The New Mass Torts Bargain*, *supra*, at 27 (noting that "state law claims … cannot be aggregated" in MDL). These shortcomings

[6] MDL is especially ill equipped to obtain global resolution in this case, because it "does not include" any of the mesothelioma cases. *LTL Mgmt., LLC*, 637 B.R. at 412.

pose a particular problem in this case where nearly 40,000 claims are currently pending in MDL and almost all of the mesothelioma-related cases were filed in state court, along with some 3,300 ovarian cancer cases. *See Debtor's Omnibus Resp.*, *supra*, at 13-14. MDL simply cannot reliably achieve widespread resolution of these claims. And the inability of MDL to resolve state claims in particular also means it cannot prevent a debtor's assets from being rapidly depleted through uncoordinated litigation in state court as MDL progresses—all to the detriment of other claimants and those invested in the company's continued survival.

It is thus unsurprising that prominent mass-tort cases that started out in MDL ultimately ended with defendants filing for bankruptcy. For example, in the 1990s Dow Corning Corp. was subject to an increasing number of product injury lawsuits arising from its silicone gel breast implants—with 3,000 suits filed in 1992, 8,000 in 1993, and over 7,000 in 1994. *In re Dow Corning Corp.*, 187 B.R. 919, 922 (E.D. Mich. 1995), *supplemented* (Sept. 14, 1995), *rev'd*, 103 F.3d 129 (6th Cir. 1996). By early 1995, Dow Corning "was a Defendant in 45 putative class action lawsuits … and over 19,000 individual lawsuits." *Id*. These cases were transferred to MDL in 1992, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1099 (J.P.M.L. 1992), but efforts to obtain a global settlement ultimately failed. The parties initially agreed to settlement terms, but more than 400,000 claims were filed—an amount that "clearly exceeded defendants' expecta-

tions" and required a significant reduction in the benefits that would be paid to plaintiffs. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1408 (1995); *see Dow Corning Corp.*, 187 B.R. at 922 (noting that the settlement was "oversubscribed" because "claims … exceed[ed] the Defendants' funding commitments"). This, in turn, led a substantial number of plaintiffs to opt out of the settlement, putting Dow Corning in the position of "both fund[ing] the settlement and continu[ing] to incur substantial litigation costs in connection with the opt-out claimants." *Dow Corning Corp.*, 187 B.R. at 922. The settlement "had clearly failed to achieve a global peace," and Dow Corning sought bankruptcy reorganization in May 1995. Coffee, *Class Wars*, *supra*, at 1408-09.

Numerous asbestos manufacturers took the same route. By 1991, the volume of asbestos litigation in federal courts had overwhelmed the federal docket, with "nearly two new asbestos actions … being filed for every action terminated," a pace that would result in "more than 48,000 actions pending in the federal courts at the end of three years." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991). In July 1991, some 26,639 actions (pending in 87 districts) were transferred to the Eastern District of Pennsylvania. *Id*. at 416. By 2002, "730,000 individuals had filed asbestos claims." Smith, *Resolution of Mass Tort Claims*, *supra*, at 1618. Years passed as the court sought to "orchestrate a

global settlement." *See* D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 Law & Contemp. Probs. 21, 27 (2021). Meanwhile, the "federal cases in the MDL largely remained at a standstill," while state court litigation proceeded, resulting in "thousands of claims [being] resolved through piecemeal" litigation and settlements. *Id*. at 28. Unable to reach global finality, "most of the major asbestos manufacturers sought protection in bankruptcy." *Id*.; *see* Parikh, *The New Mass Torts Bargain*, *supra*, at 16 ("[B]y 2007, 'nearly all of the major [asbestos] manufacturers ha[d] declared bankruptcy.'" (alteration in original) (citation omitted)).

The opioid MDL presents a more recent example. That litigation "dates back to the early 2000s, shortly after Purdue Pharma began marketing OxyContin in 1996." Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 21 (2021). The MDL panel transferred 64 separate actions pending in nine districts to the Southern District of Ohio, *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1377 (J.P.M.L. 2017), but only two years later Purdue filed for bankruptcy with some 2,600 separate lawsuits pending against it.[7] Today, the MDL continues with other defendants, but no global resolution has

[7] Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. Times (Sept. 15, 2019, updated Nov. 24, 2020), https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html; Michael R. Sisak, *Purdue Pharma to stay in business as bankruptcy unfolds*, AP News (Sept. 17, 2019), https://apnews.com/article/white-plains-wv-state-wire-us-news-opioids-health-8bf66a5868b5460a84104b9f5ea801d0.

been reached; in fact, fewer than 100 of the thousands of total claims have been resolved. *See MDL Statistics Report - Distribution*, *supra*, at 1.

B. Multi-District Litigation Is Often Inefficient And Unfair To Financially Struggling Companies.

MDL is also not well equipped to resolve mega mass-tort litigation like this one in an efficient and fair manner, particularly given the enormous number of claims that are expected to be filed for the foreseeable future. Although resolving tens (or hundreds) of thousands of claims will necessarily take time—in bankruptcy or elsewhere—MDL proceedings are notorious for inefficiency and attracting meritless claims.

1. "[A]s compared to the processing time of an average case, MDL practice is slow, very slow." *DeLaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006). Indeed, "scholars vigorously debate whether an MDL more closely resembles a black hole or a roach motel." *See* Rave & McGovern, *A Hub-and-Spoke Model*, *supra*, at 24. Such delay is "a common feature of mass tort litigation" in particular, resulting in years of litigation that can "effectively preclud[e] plaintiffs from any meaningful recovery." Christopher J. Roche, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 Va. L. Rev. 1463, 1469 (2005).

This reputation is well-earned: MDL lasts almost four times as long as the average civil case, with products-liability MDLs on the whole lasting an average of

4.7 years. *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, __ Cornell L. Rev. __ (forthcoming 2022) (manuscript at 35).[8] For example, lawsuits related to C-Qur mesh products were transferred to MDL on December 8, 2016, *In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig.*, 223 F. Supp. 3d 1355 (J.P.M.L. 2016), which still continues to this day—nearing six years later—having resolved fewer than 100 of the more than 3,300 total claims, *MDL Statistics Report – Distribution*, *supra*, at 1. Some have gone on even longer. The lawsuits related to the Stryker modular-neck hip implant products were transferred to MDL in mid-2013, *In re Stryker Rejuvenate, ABG II Hip Implant Prods. Liab. Litig.*, 949 F. Supp. 2d 1378 (J.P.M.L. 2013), but the MDL remains unresolved over nine years later, *MDL Statistics Report – Distribution*, *supra*, at 1. Similarly, suits regarding DePuy Orthopedics' hip implants were transferred to MDL on May 23, 2011, *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, 787 F. Supp. 2d 1358 (J.P.M.L. 2011), but nearly 400 cases still remain after more than a decade, *MDL Statistics Report – Distribution*, *supra*, at 1. And the asbestos MDL, which commenced in July of 1991, has not been resolved thirty years later. *See MDL Statistics Report – Distribution*, *supra*, at 2; U.S. J.P.M.L., *MDL Statistics Report –*

[8] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900527.

Docket Type Summary, at 5 (Aug. 15, 2022).[9]

This case is a prime example of MDL's inability to efficiently resolve mega mass-tort litigation. The Johnson & Johnson MDL has been ongoing for nearly six years—since October 4, 2016. *See In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 220 F. Supp. 3d 1356 (J.P.M.L. 2016). Even so, more than 37,000 cases remain pending as of August 15, 2022, *MDL Statistics Report – Distribution*, *supra*, at 1, with a "projected *10,000 new cases* to be filed *each year* going forward," *LTL Mgmt., LLC*, 637 B.R. at 410 (emphasis added); *id*. at 408 (noting that "in the first nine months of 2021, more than 12,300 new lawsuits were filed"). And "in nearly six years, there has been no progress toward a global resolution through the current MDL." *Id*. at 412. Without global settlement—which MDL cannot reliably produce, *see* pp. 12-19, *supra*—or resolution by dispositive motion, thousands of individual cases will be "remanded" "to the district from which [they were] transferred," 28 U.S.C. § 1407(a), "to await … trial and appeals," delaying resolution for years more, *LTL Mgmt., LLC*, 637 B.R. at 412 (citation omitted).

2. At the same time, MDL produces significant unfairness to defendants by subjecting them to a flood of non-meritorious claims. It is no secret that the aggregation of an enormous number of claims under one judicial roof necessarily re-

[9] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-August-15-2022.pdf.

sults in the filing of meritless claims or claims that would never have been brought otherwise. *See* Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 107 Ky. L.J. 467, 471 (2018-2019) ("[A]ggregation tends to incentivize the filing of claims of dubious merit"). Indeed, MDL is "notorious[]" for attracting meritless claims, but "the structure of the modern MDL does not provide as strong a check upon these claims as exists in single-plaintiff litigation." Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329, 350 (2014). As one judge observed based on "fifteen years on the federal bench and a front row seat as an MDL transferee judge on two separate occasions," "MDL consolidation for products liability actions" results in "producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise." *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-MD-2004, 2016 WL 4705807, at *2 (M.D. Ga. Sept. 7, 2016).

In fact, MDL's incentive structure *encourages* the filing of meritless claims. The "most obvious cause" is "the financial incentive plaintiff lawyers have to maximize their returns[:] [t]he more claims that are filed, the greater the potential recovery." Smith, *The Myth of Settlement*, *supra*, at 471. The problem is compounded by the fact that "a firm's inventory of claims is often a key determinant" of whether the firm will be selected by the presiding judge to serve on the "plaintiff steering committee" that will control the litigation. *Id*. Thus, plaintiffs' attorneys

have an incentive to rack up as many cases as possible; indeed, MDL often involves "mass-advertising campaigns" that "encourage members of the public to file claims if they believe they have been injured." *Id*. at 472. But this causes a problem: "the larger the volume of claims, the more difficult it becomes for the lawyers to adequately screen the claims before filing them," all of which strains the lawyer's resources and inhibits effective screening mechanisms. *Id*.

The overwhelming tendency of MDL to settle creates an additional magnet for meritless claims. "[T]he 'settlement culture' for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice." *DeLaventura*, 417 F. Supp. 2d at 150; *see also* Parikh, *The New Mass Torts Bargain*, *supra*, at 27 ("the supermajority of mass tort litigation is resolved through contractual settlements"). But this settlement culture can have a "profoundly negative effect—incentivizing counsel to file meritless claims at the expense of both defendants and those plaintiffs whose claims have merit." Smith, *The Myth of Settlement*, *supra*, at 473.

The risk of meritless claims is not theoretical. For example, the Silica MDL consisted of more than 10,000 separate claims. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 573 (S.D. Tex. 2005).[10] Through the use of "increasingly aggressive" discovery, defendants uncovered "numerous flaws" in the plaintiffs' attor-

[10] Silica is a common mineral that can cause respiratory swelling and scarring when inhaled. *Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 569.

neys' screening of cases, leading to a "rate of positive diagnosis [that] was shockingly high," S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. Mem. L. Rev. 559, 580, 582 (2012), prompting the district court to conclude that "they were manufactured for money," *Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 635. High numbers of meritless claims were also uncovered in the Fen-Phen MDL, which involved claims that an anti-obesity treatment caused valvular heart disease and pulmonary hypertension. Brown, *Specious Claims*, *supra*, at 583, 586; *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834, 835 (J.P.M.L. 1998). Even though the settlement was "carefully structured to screen out weak claims," many made it through; a post-settlement audit of the claim pool "revealed that roughly 12.5% of the claims submitted were legitimate." Brown, *Specious Claims*, *supra*, at 584, 586. Here, too, LTL has identified numerous meritless claims. *See* Informational Br. of LTL Mgmt. LLC at 112-15, *In re LTL Mgmt., LLC*, No. 21-30589 (Bankr. W.D.N.C. Oct. 14, 2021), ECF No. 3. And with tens of thousands of new claims expected to be filed annually, *see* p. 8, *supra*, there are sure to be many more.

* * * * *

MDL is no panacea for mass-tort lawsuits, particularly those of this magnitude. MDL "lacks any direct structural framework" capable of ensuring that a case "can be resolved once and for all through litigation or global settlement in the

transferee court," Brown, *Plaintiff Control*, *supra*, at 401, much less in an efficient and fair manner to defendants. By contrast, bankruptcy is an important mechanism for manufacturers and other business defendants to achieve widespread resolution of mass-tort liability in a single forum, preserving the debtor's assets so that creditors (both past and future) may receive equitable recovery and the business debtor may have a hope of achieving the "fresh start" that bankruptcy promises—for its benefit and those of its employees and shareholders.

CONCLUSION

This Court should affirm the judgment of the bankruptcy court.

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Respectfully submitted,

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This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,085 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Pursuant to L.A.R. 46.1(e), the undersigned certifies that she is a member of the bar of the United States Court of Appeals for the Third Circuit.

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