No. 23-

IN THE

Supreme Court of the United States

SANDER L. ESSERMAN, IN HIS CAPACITY AS FUTURE CLAIMANTS' REPRESENTATIVE,

Petitioner,

v.

BESTWALL LLC (DEBTOR), GEORGIA-PACIFIC LLC, AND OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under 28 U.S.C. § 1359, a federal court "shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

The Fourth Circuit below held that a sophisticated corporation could create federal subject-matter jurisdiction by reshuffling its organization and entering into contracts with a specially formed affiliate that then filed bankruptcy, all with the goal of obtaining a nationwide preliminary injunction to shield the company, itself a non-debtor, from litigation. The dissent would have rejected these transactions as a basis for federal jurisdiction.

The Fourth Circuit further held that a debtor in bankruptcy need not make a clear showing of a likelihood of success on the merits to obtain a preliminary injunction. Instead, an injunction was appropriate if the debtor's reorganization was a "realistic possibility." The Bankruptcy Court itself said this was "not intended to be a particularly high standard."

This Petition thus presents two important questions:

First, may a sophisticated corporate defendant use an organizational reshuffling to devise bankruptcy jurisdiction for a nationwide preliminary injunction halting litigation against it?

Second, may a bankruptcy court issue that injunction without applying the standard that an Article III court would be required to apply outside of bankruptcy?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Sander L. Esserman, in his capacity as the court-appointed legal representative for persons who have not yet asserted an asbestos-related personal-injury claim against Bestwall LLC but may in the future assert such a claim, was an appellant in the district court proceedings and an appellant in the court of appeals proceedings.

Respondent Official Committee of Asbestos Claimants was an appellant in the district court proceedings and an appellant in the court of appeals proceedings.

Respondent Bestwall LLC (debtor) was the plaintiff in the bankruptcy court proceedings, an appellee in the district court proceedings, and an appellee in the court of appeals proceedings.*

Respondent Georgia-Pacific LLC was an appellee in the district court proceedings and an appellee in the court of appeals proceedings.

RELATED CASES

In re Bestwall LLC, No. 17-31795, Adv. Proceeding No. 17-03105 (Bankr. W.D.N.C.) (judgment entered July 29, 2019)

In re Bestwall LLC, No. 3:20-cv-105-RJC (W.D.N.C.) (judgment entered Jan. 6, 2022)

In re Bestwall LLC, Nos. 22-1127(L) & 22-1135 (4th Cir.) (judgment entered June 20, 2023)

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* The individuals listed on Appendix A to the Complaint are plaintiffs or potential plaintiffs in state court proceedings involving asbestos claims against the predecessor and affiliates of the debtor. Those individuals were not parties to the bankruptcy court proceedings, the district court proceedings, or the court of appeals proceedings, and thus are not parties to the proceedings before this Court. Appendix A to the Complaint can be found on Pacer for the United States Bankruptcy Court for the Western District of North Carolina, *In re Bestwall LLC*, No. 17-31795, Adv. Proceeding No. 17-03105 (Nov. 2, 2017), ECF No. 1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sander L. Esserman, in his capacity as the Bankruptcy Court-appointed representative for future claimants, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 71 F.4th 168. App. 1a. The order of the court of appeals denying rehearing en banc is unreported. App. 128a. The order of the District Court is not reported but is available at 2022 WL 68763. App. 54a. The memorandum opinion and order of the Bankruptcy Court is reported at 606 B.R. 243. App. 83a. Appendices A and B to the Bankruptcy Court's memorandum opinion and order are being filed with this petition in a Supplemental Appendix and can be found on Pacer for the United States Bankruptcy Court for the Western District of North Carolina, *In re Bestwall LLC*, No. 17-31795, Adv. Proceeding No. 17-03105 (July 29, 2019), ECF No. 164. The Bankruptcy Court's order on motion for reconsideration was not reported. App. 77a.

JURISDICTION

The court of appeals entered judgment on June 20, 2023, and denied requests for rehearing en banc on August 7, 2023. On October 27, 2023, the Chief Justice granted the Petitioner's application to extend the time to file a petition for a writ of certiorari until December 20, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1359 of Title 28 (Judiciary and Judicial Procedure) of the United States Judicial Code provides:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

Section 1359 is reproduced at App. 140a. The other relevant statutory provisions are 11 U.S.C. § 105(a) (reproduced at App. 130a), 11 U.S.C. § 524(g) (reproduced at App. 131a–138a), and 28 U.S.C. § 1334(a) and (b) (reproduced at App. 139a).

INTRODUCTION

This case raises the question whether Georgia-Pacific, a solvent multibillion-dollar corporation, can implement a series of transactions with a specially created affiliate to vest a bankruptcy court with subject-matter jurisdiction to issue an injunction shielding Georgia-Pacific and other non-debtors from tens of thousands of lawsuits across the country.

Based on its maneuverings, Georgia-Pacific has obtained bankruptcy relief, in the form of immunity from asbestos-related claims, without subjecting itself to the Bankruptcy Court's oversight. Georgia-Pacific did not want that oversight, which would have required disclosure of Georgia-Pacific's assets and financial affairs, 11 U.S.C. § 521, and would have prohibited Georgia-Pacific from

issuing dividends to its ultimate parent company, Koch Industries, Inc., without court approval, *id.* § 363(b).

The Bankruptcy Court awarded Georgia-Pacific preliminary injunctive relief indefinitely. To date, Georgia-Pacific has enjoyed immunity from asbestos-related claims for more than six years. By its own admission, Georgia-Pacific has paid Koch billions of dollars in dividends during these six years, while the victims of Georgia-Pacific's asbestos-containing products continue to be denied their day in court.

The issues raised here are exceptionally important. Other sophisticated corporate defendants have already followed Georgia-Pacific's blueprint: if Georgia-Pacific can create bankruptcy jurisdiction to obtain an injunction simply by signing some documents, so can anyone else. Instead of being an extraordinary remedy, preliminary injunctions protecting non-debtors prior to confirmation would, under the decision below, become entirely routine.

Bankruptcy is meant for "the honest but unfortunate debtor" that seeks to make peace with its creditors. *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (internal quotation marks omitted). Bankruptcy is not properly a repository for unwanted creditors whom a sophisticated corporate defendant could pay, on time and in full, but would rather not. As the dissent aptly summarized below:

> [I]n recent years, major and fully solvent business corporations have managed to skirt that debtor-centric objective and obtain shelter from sweeping tort litigation without having to file for bankruptcy themselves. It

> is precisely that sort of manipulation of the Bankruptcy Code—and by extension the Article I bankruptcy courts—that lies at the heart of this important appeal.

App. 33a (King, J., dissenting in part).[1]

The Court's intervention is needed to maintain the uniformity, and the integrity, of bankruptcy proceedings.

STATEMENT OF THE CASE

I. Statutory Background

1. Under 28 U.S.C. § 1334(b), district courts have original, but not exclusive, jurisdiction of all "civil proceedings arising under title 11 or arising in or related to cases under title 11." The district courts may refer all such bankruptcy matters to the bankruptcy judges for the district. 28 U.S.C. § 157(a).

To define the parameters of related-to jurisdiction under Section 1334(b), courts have generally adopted a version of the test initially laid out in the Third Circuit's *Pacor* decision, which focuses on whether the outcome of a proceeding could have an effect on the debtor's estate being administered in bankruptcy. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995); *see also Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), *overruled in part on other grounds by Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). Under the *Pacor* test,

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1. Judge King concurred with the panel majority's determination that the Petitioner has appellate standing to challenge the injunction.

"[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Pacor*, 743 F.2d at 994. A critical component of the test is that "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Celotex*, 514 U.S. at 308 n.6; *cf. Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369–70 (2006) ("Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction . . . . [C]ourts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications."). If resolution of an action would leave the debtor's estate unaffected, a bankruptcy court has no jurisdiction over that action.

The burden of proving that a bankruptcy court is properly vested with related-to jurisdiction rests with the party asserting that jurisdiction. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction . . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." (citations omitted)). Subject-matter jurisdiction is a constitutional requirement that "functions as a restriction on federal power," and as a result, a party may not artificially vest the court with such jurisdiction. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *see also Hertz Corp. v. Friend*, 559 U.S. 77, 97 (2010); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228 (3d Cir. 2004), *as amended* (Feb. 23, 2005) ("Where a court lacks subject

matter jurisdiction over a dispute, the parties cannot create it by agreement[.]" (internal citations omitted)).

Under 28 U.S.C. § 1359, accordingly, a federal court "shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

Section 1359 is most commonly deployed in the context of diversity jurisdiction, which lends itself to creative efforts to bring actions before a federal court. Nothing in the statute, however, limits the jurisdictional prohibition to only those civil actions commenced outside of a bankruptcy case. *Cf.* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); Fed. R. Bankr. P. 7003 ("Rule 3 F.R.Civ.P. applies in adversary proceedings.").

The purpose of Section 1359 is to prevent a party from manipulating jurisdiction by using a stand-in to avail itself of federal jurisdiction. As the Court explained in *Kramer v. Caribbean Mills, Inc.*, if federal jurisdiction could be created simply by assigning claims from one party to another, "which [is] easy to arrange and involve[s] few disadvantages for the assignor, then a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties." 394 U.S. 823, 828–29 (1969).

In *Kramer*, the stand-in party defended the assignment giving rise to jurisdiction by arguing that the assignment was valid under state law. According to the Court, however, accepting that argument would render Section

1359 "largely incapable of accomplishing its purpose; this very case demonstrates the ease with which a party may 'manufacture' federal jurisdiction by an assignment which meets the requirements of state law." *Id.* at 829. Creating federal jurisdiction by assigning claims from one party to another was in fact "the very thing which Congress intended to prevent when it enacted [Section] 1359 . . . ." *Id.* Accordingly, under Section 1359 and *Kramer*, a party may not manipulate the underlying facts to create federal jurisdiction as it sees fit.

2. Congress has granted bankruptcy courts jurisdiction to issue injunctions protecting non-debtors in one specific instance—under Section 524(g) of the Bankruptcy Code. Enacted in 1994, Section 524(g) is a unique provision of the Code that attempts to balance a debtor's desire to achieve a final resolution of its asbestos liability with the need to provide due process and fair compensation to the "future claimants" whose asbestos-related diseases do not manifest until after the bankruptcy.

Section 524(g) provides that a bankruptcy court may, specifically in connection with an order confirming a plan of reorganization under chapter 11, issue an injunction "to supplement the injunctive effect of a discharge[.]" 11 U.S.C. § 524(g)(1)(A). This supplemental injunction channels claims against the debtor to a separate trust that is appropriately funded and structured to pay fair compensation to the debtor's asbestos claimants when and as their diseases arise. *Id.* § 524(g)(2)(B)(ii)(V), (g)(4)(B)(ii). Assuming the requirements of the Bankruptcy Code and federal law are met, the confirmation injunction can extend to non-debtors whose liability for asbestos

claims against the debtor "arises by reason of" one of four circumstances specified in the statute. *Id.* § 524(g)(4)(A)(ii)(I)-(IV); *see also Combustion Eng'g*, 391 F.3d at 234 ("Importantly for this case, § 524(g) limits the situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor[.]"); *In re Pittsburgh Corning Corp.*, 453 B.R. 570, 590 (Bankr. W.D. Pa. 2011) (a court may channel asbestos liability only "to the extent that the liability of such third party is derivative of the [d]ebtor's liability under one of four circumstances").

Section 524(g) conditions the issuance of the supplemental confirmation injunction on multiple requirements, including (1) a finding that "pursuit of [future] demands outside the procedures prescribed by such plan is likely to threaten" the goal of treating current and future claims fairly,[2] (2) acceptance of the plan by a 75% supermajority of current asbestos claims,[3] (3) reasonable assurance that the trust is funded and structured to "be in a financial position to pay" future claims, whenever they arise, pro rata with current claims,[4] and (4) a determination that the terms of the injunction would be "fair and equitable" to future claimants.[5] Many of these requirements for a confirmation injunction are designed specifically to protect the due-process rights of a debtor's future claimants. *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 359 (3d Cir. 2012); *Combustion Eng'g*,

2. 11 U.S.C. § 524(g)(2)(B)(ii)(III).

3. *Id.* § 524(g)(2)(B)(ii)(IV)(bb).

4. *Id.* § 524(g)(2)(B)(ii)(V).

5. *Id.* § 524(g)(4)(B)(ii).

391 F.3d at 234. Only if a debtor has carried its burden to show that these and other requirements of the Code and federal law are satisfied may a court issue a Section 524(g) injunction.

II. Factual Background

1. From 1965 through 1977, Georgia-Pacific manufactured and distributed asbestos-containing products. App. 5a. Since 1979, Georgia-Pacific has been named in thousands of lawsuits for injuries caused by the asbestos in its products. *Id.* Georgia-Pacific, an indirect subsidiary of Koch Industries, is worth tens of billions of dollars and concedes that it is able to pay all pending and future asbestos claims in full. *See* App. 35a–36a (King, J., dissenting in part).

Despite its admitted ability to fully pay its asbestos liabilities, Georgia-Pacific embarked on a plan in 2017 to resolve them through a bankruptcy filing. *See* App. 5a. However, Georgia-Pacific did not want to file for bankruptcy itself. *See* App. 5a–6a. Instead, Georgia-Pacific used a "divisional merger" under Texas state law, commonly called a "Texas Two-Step," to split itself into two entities. *See* App. 5a. Georgia-Pacific, a Delaware entity, first transferred to Texas by filing paperwork with the Texas Secretary of State. *See* App. 35a (King, J., dissenting in part). Georgia-Pacific then split itself into two entities: (i) a newly constituted Georgia-Pacific, which received nearly all the operating assets of former Georgia-Pacific and immediately transferred back to Delaware; and (ii) Bestwall, which received few assets,[6] but all of

6. Bestwall holds equity in a plasters business but does not conduct any business operations itself.

Georgia-Pacific's asbestos liability, and was immediately transferred to North Carolina. *See id.* These actions all occurred in a span of hours. *See id.*

Georgia-Pacific's Plan of Divisional Merger accomplished several things. It allocated to Bestwall "[a]ll Liabilities of the Company related in any way to asbestos or asbestos containing materials[.]" C.A. J.A. 554; *see also* C.A. J.A. 575.[7] It obligated Bestwall to indemnify Georgia-Pacific with respect to those asbestos claims. *See* C.A. J.A. 555. It assigned Bestwall a funding agreement under which the new Georgia-Pacific would provide funding for Bestwall to pay asbestos claims and the associated indemnification obligations. *See* C.A. J.A. 554, 566. It obligated Bestwall and the new Georgia-Pacific to execute two more agreements (in the forms attached to the Plan of Divisional Merger): a Divisional Merger Support Agreement, under which Bestwall and Georgia-Pacific would "agree to be bound by the terms of this Plan of Divisional Merger," and a Secondment Agreement, under which a team of in-house asbestos-defense lawyers assigned from Georgia-Pacific would become Bestwall's only employees. *See* C.A. J.A. 557, 558.

On the same date as the divisional merger, Georgia-Pacific implemented the three agreements with Bestwall (i.e., the Divisional Merger Support Agreement, the Funding Agreement, and the Secondment Agreement). *See* C.A. J.A. 557. At no point did Bestwall have any independent counsel or advisors representing its interests. None of Bestwall's officers or directors were independent.

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7. "C.A. J.A." refers to the joint appendix filed in the court of appeals.

See C.A. J.A. 616. In fact, the individual who signed all of the documents on Bestwall's behalf was employed by a Georgia-Pacific affiliate. *See* C.A. J.A. 373–84, 580–85, 690–94; *see also* C.A. J.A. 616.

III. Procedural Background

1. Less than three months after the divisional merger, as soon as it could meet the requirements for venue in North Carolina, *see* 28 U.S.C. § 1408(1), Bestwall filed for chapter 11 bankruptcy in the Bankruptcy Court for the Western District of North Carolina, seeking to use Section 524(g) to resolve asbestos claims for itself and Georgia-Pacific. *See* App. 9a, 58a, 84a. Upon its bankruptcy filing, Bestwall immediately filed a complaint with the Bankruptcy Court to commence a civil action seeking a preliminary injunction blocking asbestos victims from pursuing their claims against Georgia-Pacific during the pendency of the bankruptcy case (the "Injunctive Action"). App. 10a, 85a.

The Bankruptcy Court issued the preliminary injunction in the Injunctive Action over the objection of the Petitioner and the Official Committee of Asbestos Claimants (the "Committee"). App. 11a–12a, 84a, 86a. The Bankruptcy Court ruled that it had related-to jurisdiction in that action because litigation against Georgia-Pacific could have affected Bestwall by (1) triggering Bestwall's obligation to indemnify Georgia-Pacific, (2) distracting the seconded asbestos-defense team from the reorganization of Bestwall, and (3) undermining Section 524(g) and the stated purpose of Bestwall's bankruptcy. App. 11a–12a, 91a–95a.

The Bankruptcy Court also ruled that, for a preliminary injunction in an action related to a bankruptcy proceeding, the requirement to show a likelihood of success on the merits "is not intended to be a particularly high standard" and is satisfied as long as the debtor has a "realistic possibility of achieving a successful reorganization." App. 103a.

The District Court affirmed on appeal, concluding that the Bankruptcy Court was correct in its analysis of related-to jurisdiction over the Injunctive Action and the preliminary-injunction standard. App. 55a. Neither the Bankruptcy Court nor the District Court addressed Section 1359 or examined the jurisdictional significance of Georgia-Pacific's maneuverings, though the issue was presented. *See* App. 44a & n.6 (King, J., dissenting in part).

2. A panel of the Fourth Circuit affirmed in a split 2-1 decision, with a tie between the Circuit Court judges broken by Judge Hudson, a Senior United States District Judge for the Eastern District of Virginia, who sat by designation. *See* App. 4a. The decision was published, with Judge Agee penning the majority opinion and Judge King authoring a sharp dissent. *See id.* As a result, the two Circuit Judges to consider this matter on the merits reached vastly different conclusions.

The panel majority held that the Bankruptcy Court was properly vested with subject-matter jurisdiction over the Injunctive Action. *Id.* The panel, however, generally eschewed the indemnification and secondment obligations that the lower courts had relied on to support related-to jurisdiction. The panel relegated its discussion of those purported effects to a footnote. App. 18a–20a n.13. Instead,

the panel premised jurisdiction on the Bankruptcy Court's finding that claims against Georgia-Pacific and claims against Bestwall were identical. App. 16a–18a. According to the panel majority, if Georgia-Pacific were to litigate and pay asbestos claims, it would relieve Bestwall of the obligation to pay such claims from the estate, and eliminating claims seeking to recover *from* the estate was itself an effect *on* the debtor's estate sufficient to support jurisdiction. *See* App. 17a–18a. Essentially, the panel majority found that the Bankruptcy Court had jurisdiction over the Injunctive Action because the Bankruptcy Court's preliminary injunction would itself impair Bestwall's bankruptcy estate by perpetuating claims that Georgia-Pacific would otherwise have extinguished. At the same time, the panel majority suggested that rulings or judgments against Georgia-Pacific in asbestos cases could have preclusive effects in proceedings related to Bestwall, which "would inevitably affect the bankruptcy estate." App. 18a.

The panel majority dismissed the idea that Georgia-Pacific had artificially created jurisdiction over the Injunctive Action seeking a preliminary injunction protecting Georgia-Pacific. App. 20a. According to the panel majority, Georgia-Pacific's maneuverings were irrelevant to the jurisdictional inquiry: if Georgia-Pacific itself had filed for bankruptcy, the Bankruptcy Court would have had jurisdiction to enjoin claims against it. App. 22a. The panel majority explained that its finding of jurisdiction was "based on the thousands of identical claims pending against [Georgia-Pacific] outside of the bankruptcy proceeding[.]" App. 25a. According to the panel majority, Georgia-Pacific "clearly could not and did not manufacture" the effect that those claims could have

on Bestwall's bankruptcy estate. *Id.* Even if Bestwall were required to show a legitimate business justification for Georgia-Pacific's maneuverings, the panel majority found that it had done so—Georgia-Pacific sought to resolve its asbestos liability without subjecting itself to bankruptcy. App. 25a–26a.

The panel also affirmed the preliminary injunction on the merits. App. 28a. The panel majority held that the standard for issuance of a preliminary injunction in bankruptcy was different from the standard the Court set forth in *Winter v. National Resource Defense Council, Inc.*, 555 U.S. 7 (2008). App. 31a. The panel majority cited no supporting authority for that proposition. *Id.* According to the panel majority, the Bankruptcy Court had properly focused on the likelihood that Bestwall could successfully reorganize rather than the likelihood that Bestwall would prevail in obtaining permanent injunctive relief for Georgia-Pacific under Section 524(g). App. 28a–30a. Likewise, the majority ruled that a "realistic possibility" of reorganization was sufficient, not the "clear showing" of a likelihood of success on the merits that would be required outside of bankruptcy. App. 31a.

3. In dissent, Circuit Judge King strongly disagreed with the panel majority's conclusion on jurisdiction and would have reversed without reaching the merits of the injunction. App. 33a. The dissent readily concluded that Georgia-Pacific had manufactured the Bankruptcy Court's related-to jurisdiction in violation of Section 1359. App. 45a. Using the Texas divisional merger and the contracts imposed on Bestwall, Georgia-Pacific "carefully structured" the terms of its relationship with Bestwall "in such a way as to permit the bankruptcy

court to spare [Georgia-Pacific] from the legal headache of continued asbestos litigation by way of an 11 U.S.C. § 105(a) injunction[.]" App. 42a–43a. Without those maneuverings, "there would have been no 'effects' for the bankruptcy court to rely on in resolving that it was vested with 'related-to' jurisdiction." App. 43a.

Moreover, Circuit Judge King also found that, as the party asserting jurisdiction and seeking an injunction, Bestwall had "the burden of proving that the bankruptcy court was *properly*—not artificially—vested with subject matter jurisdiction" over the Injunctive Action. App. 44a–45a. For purposes of Section 1359, this meant that Bestwall was obligated to demonstrate that Georgia-Pacific's transactions "were driven by an independent, legitimate business justification, and that those maneuvers were not 'pretextual.'" App. 45a. Bestwall, however, conceded that Georgia-Pacific engaged in its corporate reshuffling *because* it wanted to obtain bankruptcy relief without filing bankruptcy itself. *Id.* Georgia-Pacific had contrived the entire factual basis for related-to jurisdiction "in an unmistakable effort to gain leverage over future asbestos claims" against it. App. 34a, 41a. As a result, the Bankruptcy Court's injunction lacked a legitimate jurisdictional basis and ran "directly counter to the purposes of the Bankruptcy Code." App. 52a–53a.

The dissent also explained the shortcomings in the panel majority's analysis. For one, the panel majority's conclusion that jurisdiction would exist if Georgia-Pacific had filed bankruptcy was tautological and avoided the question that the court had been called on to resolve. App. 49a. Moreover, the jurisdictional defects were not cured by the panel majority's decision to predicate

jurisdiction on the commonality between claims against Georgia-Pacific and claims against Bestwall, rather than on the agreements between Georgia-Pacific and Bestwall (as the District and Bankruptcy Courts had done). *See* App. 47a–48a. In either event, the effects supporting jurisdiction "arise *only* because [Georgia-Pacific] ensured that they would." App. 48a (King, J., dissenting in part). Georgia-Pacific "purposefully created privity between its successor entities such that claims against one (the solvent, productive corporation) would necessarily have some impact on the other (the debtor hampered with old liabilities), thereby allowing the bankruptcy court to intervene on [new Georgia-Pacific's] behalf." *Id.* Even under the majority's approach, "the bankruptcy court's jurisdiction consistently flows from an orchestrated endeavor to fabricate it." App. 50a (King, J., dissenting in part).

On July 5, 2023, the Petitioner and the Committee petitioned the Fourth Circuit for rehearing en banc. Twenty States and the District of Columbia filed an amicus brief in support of the petition for rehearing en banc. App. 129a. The petition was denied, however, again in a split decision (8-5, with one recusal). *Id.* At the very least, a significant portion of the Fourth Circuit believes that the panel decision below merits further consideration.

REASONS FOR GRANTING THE WRIT

I. The Circuit Courts are split on the level of scrutiny required for subject-matter jurisdiction created by transactions between corporate affiliates.

1. As noted above, Section 1359 denies federal courts jurisdiction over any "civil action in which any party,

by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." The Circuit Courts are split, however, on the level of scrutiny that Section 1359 requires when the transactions purportedly giving rise to federal jurisdiction are between corporate affiliates. The First, Second, Eighth, and Ninth Circuits hold that the transactions between affiliates must withstand careful scrutiny to overcome the presumption that the action lies outside the federal courts' limited jurisdiction.[8] The Seventh and Eleventh Circuits, by contrast, hold that transactions between closely related entities are not inherently suspect and do not merit any special consideration in a jurisdictional analysis.[9] The Tenth Circuit has expressly acknowledged the Circuit split while declining to wade into it.[10]

On one side of the split, the Circuit Courts applying a presumption against jurisdiction emphasize the need to police the limits of federal jurisdiction under *Kramer*

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8. *See Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 917 (8th Cir. 2015); *Toste Farm Corp. v. Hadbury, Inc.*, 70 F.3d 640, 643–44 (1st Cir. 1995); *Yokeno v. Mafnas*, 973 F.2d 803, 809–10 (9th Cir. 1992); *Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 475 (2d Cir. 1976); cf. *In re Samsung Elec. Co.*, 2 F.4th 1371, 1377 (Fed. Cir. 2021) (explaining in dicta that Section 1359 prohibits "litigants' attempts to manipulate jurisdiction" and that courts should disregard "property transfers among entities under common ownership designed to create jurisdiction").

9. *Ambrosia Coal & Const. Co. v. Pages Morales*, 482 F.3d 1309, 1315 (11th Cir. 2007); *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1067 (7th Cir. 1992).

10. *See Nat'l Fitness Holdings, Inc. v. Grand View Corp. Ctr.*, LLC, 749 F.3d 1202, 1208 (10th Cir. 2014).

and the difficulty of determining whether transactions are collusive or improper when they occur between closely related entities. *See Branson Label*, 793 F.3d at 916 & n.5; *Toste Farm*, 70 F.3d at 643; *Yokeno*, 973 F.2d at 809; *Prudential Oil*, 546 F.2d at 474. In *Prudential Oil Corp v. Phillips Petroleum Co.*, for example, a corporation assigned a claim to a subsidiary that could bring a diversity action, but the claim assignment occurred in the context of a larger corporate reorganization. 546 F.2d at 470. According to the Second Circuit, the affiliation between the parties to the assignment "serves to increase the possibility of collusion and compound the difficulty encountered in detecting the real purpose of the assignment." *Id.* at 475. As a result, the Second Circuit concluded that "[t]he scrutiny normally applied to transfers or assignments of claims which have the effect of creating [jurisdiction] must be doubled . . . ." *Id.*

Thus, in adopting a "presumption" against jurisdiction arising from transactions between affiliates, the Second Circuit quoted this Court's instruction in *Lehigh Mining*: "[W]hen the inquiry involves the jurisdiction of a Federal court the presumption in every stage of a cause is that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record[.]" *Id.* (quoting *Lehigh Mining & Mfg. v. Kelly*, 160 U.S. 327, 337 (1895)); *see also Yokeno*, 973 F.2d at 809–10 (explaining that, under Section 1359, "[a]ssignments between parent companies and subsidiaries . . . are presumptively ineffective to create diversity jurisdiction" (internal quotation marks omitted)).

To overcome this presumption, the party asserting jurisdiction must show that the transaction was done

"for a legitimate business purpose unconnected with the creation of [federal] jurisdiction." *Prudential Oil*, 546 F.2d at 476. The First, Eighth, and Ninth Circuits have similarly concluded that a party asserting jurisdiction based on transactions between corporate affiliates "must show a legitimate business reason" for the transactions. *Yokeno*, 973 F.2d at 810; *see also Branson Label*, 793 F.3d at 917 ("Heightened scrutiny compounds this burden on [the party asserting jurisdiction] because its assignment was made between closely related business entities."); *Toste Farm*, 70 F.3d at 644 ("[S]imply articulating a business reason is insufficient; the burden of proof is with the party asserting [the basis for jurisdiction] to establish that the reason is legitimate and not pretextual." (quoting *Yokeno*, 973 F.2d at 810)); *Yokeno*, 973 F.2d at 811 ("The business reason must be sufficiently compelling that the assignment would have been made absent the purpose of gaining a federal forum. Where a jurisdictional motive is apparent in assignments between corporations and their subsidiaries or officers, the probability of collusion is simply too great to require a lesser showing.").

Assessing the legitimacy of transactions between corporate affiliates requires the court to examine the transactions' details and context, such as whether the party invoking jurisdiction had any prior connection with the litigation at issue, whether that party had assets or business functions other than the litigation, whether the party selected and paid for its own counsel and litigation expenses, whether the transactions were at arms' length, whether the party provided meaningful consideration in the transactions, whether the transactions' timing was suspicious, and whether the transactions were motivated by a desire to obtain jurisdiction. *Branson Label*, 793

F.3d at 916; *see also Toste Farm*, 70 F.3d at 645; *Yokeno*, 973 F.2d at 811.

On the other side of the split, the Seventh and Eleventh Circuits have "decline[d] to follow the law of other Circuits that apply the presumption of collusion. . . ." *Ambrosia Coal*, 482 F.3d at 1315; *see also Herzog*, 976 F.2d at 1067. These Circuit Courts see no reason to be skeptical of jurisdiction-creating transactions between affiliates and have thus "explicitly rejected the use of a presumption when evaluating assignments between related entities." *Ambrosia Coal*, 482 F.3d at 1314. According to the Eleventh Circuit, the motivation for transferring a claim between corporate affiliates is irrelevant under *Kramer* when the transfer is absolute. *Id.* at 1315 & n.7.

In *Herzog*, the Seventh Circuit stated that Congress did not adopt a *per se* rule in Section 1359 against jurisdiction arising from transactions between affiliates, and the court saw "no urgent reason to try to do so in [Congress's] place even to the extent of creating a soft rule, that is, a presumption." 976 F.2d at 1067. The Eleventh Circuit found this notion "persuasive" and held in *Ambrosia Coal* that the district court had in fact erred in applying a "presumption of collusion" to the transaction between affiliates giving rise to jurisdiction in that case. 482 F.3d at 1314.

2. The Fourth Circuit here did not apply any presumption against jurisdiction arising from transactions between corporate affiliates. Nor did it evaluate the extent to which the original Georgia-Pacific had "purposefully created privity between its successor entities . . . , thereby allowing the bankruptcy court to intervene on New

[Georgia-Pacific's] behalf[.]" App. 48a (King, J., dissenting in part). Instead, the Fourth Circuit declared that it was simply "evident" that Georgia-Pacific did not manufacture jurisdiction over Bestwall's civil action. App. 22a. For the Fourth Circuit, it was a sufficient basis for jurisdiction that Georgia-Pacific had created two successor entities that would be subject to allegedly identical claims. App. 25a. It was not necessary to inquire into the reasons for, or the particulars of, that transaction. The Bankruptcy Court could simply accept that the transaction was legitimate for jurisdictional purposes because Georgia-Pacific wanted to use Bestwall to obtain bankruptcy relief without actually filing for bankruptcy. App. 26a; *cf. Prudential Oil*, 546 F.2d at 476 (finding that jurisdiction was improper under Section 1359 when "[t]he most that can be said is that [the claim] was assigned to the wholly owned subsidiary for prosecution by the subsidiary rather than by the parent because the parent's management desired it to be handled that way").

The First, Second, Eighth, and Ninth Circuits would have applied a presumption and rejected jurisdiction here. In these Circuits, Georgia-Pacific's self-serving rationalizations for its restructuring, such as the transfer of token assets or its purported desire to align business segments, would reasonably be viewed as "make-weights" because "[t]he significant reason appears to be the improper one: to invoke the jurisdiction of the federal court." *Toste Farm*, 70 F.3d at 645 (citation and internal quotation marks omitted); *Branson Label*, 793 F.3d at 919. Accepting Georgia-Pacific's make-weights, the panel majority took issue with the dissent's observation that Bestwall "never offered any substantive explanation" along the lines of an independent, legitimate business justification for Georgia-

Pacific's corporate reshuffling. App. 25a–26a; App. 45a (King, J., dissenting in part). By Bestwall's own admission, however, the restructuring "was specifically intended to shield the corporation's assets without the need for a wholesale declaration of bankruptcy." App. 45a (King, J., dissenting in part). Bestwall would have no connection to the action it commenced seeking injunctive relief but for Georgia-Pacific's machinations; Bestwall was not itself the tortfeasor—Georgia-Pacific was. Bestwall did not receive any consideration from Georgia-Pacific in exchange for absorbing its liability. Bestwall has no business function beyond absorbing the liability that Georgia-Pacific assigned to it. The Texas divisional merger and contracts imposed on Bestwall were not arms'-length transactions. Bestwall did not have any independent counsel or advisors representing its interests. None of its officers or directors were independent. Bestwall did not select its own counsel in connection with the action it brought, nor is it paying its own attorneys' fees. Georgia-Pacific's corporate reshuffling occurred 94 days before Bestwall commenced its Injunctive Action, which was just long enough for Bestwall to obtain venue to bring that civil action in North Carolina.

There is a reason that Georgia-Pacific's imitators have filed their affiliates' bankruptcies in the Fourth Circuit. *See, e.g.*, *In re LTL Mgmt. LLC*, No. 21-30589, 2021 WL 5343945, at *6 (Bankr. W.D.N.C. Nov. 16, 2021). Under the decision below, related-to jurisdiction can be manufactured with certainty. A question as foundational as federal subject-matter jurisdiction, however, should not vary from Circuit to Circuit.

II. The injunction standard adopted by the Fourth Circuit conflicts with this Court's precedent.

In its decision below, the Fourth Circuit held that bankruptcy courts can grant sweeping nationwide injunctions without satisfying the injunction standards applicable to district courts. It is the only Circuit Court to so hold. In doing so, the Fourth Circuit adopted a test that the Bankruptcy Court described as one "not intended to be a particularly high standard." App. 103a. That decision cannot be reconciled with this Court's precedent.

In *Munaf v. Geren*, the Court held that "a party seeking a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits." 553 U.S. 674, 690 (2008). The Court reiterated this requirement in *Winter* when it set out the four required elements for a preliminary injunction. 555 U.S. at 20 ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . . ."); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion."). The Court in *Winter* further directed that injunctive relief is "an extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief." 555 U.S. at 20 (emphasis added); *see also Munaf*, 553 U.S. at 689–90 ("A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." (citations and internal quotation marks omitted)).

In the decision below, the Fourth Circuit adopted a lower standard for preliminary injunctions in bankruptcy

cases. According to the Fourth Circuit, debtors seeking a preliminary injunction shielding non-debtors from litigation are not required to show a likelihood of success on the merits. *See* 28a, 31a. Instead, all that is required is a showing that the debtor has a "realistic possibility" of reorganizing in chapter 11. *See* 28a, 31a. Even the Bankruptcy Court recognized that its standard was a low bar. *See* App. 103a. It is a particularly low bar for debtors like Bestwall that have no business operations and were created and funded specifically to file a chapter 11 bankruptcy.

The Fourth Circuit acknowledged that its realistic-possibility standard did not rise to the level of the clear showing required under *Winter*. App. 31a. Without citing any authority, the Fourth Circuit simply stated that *Winter's* clear-showing standard did not apply because this Court decided *Winter* outside the bankruptcy context. *Id.* This Court has not addressed the standard for preliminary injunctions issued by a bankruptcy court specifically, *see, e.g.*, *Celotex*, 514 U.S. at 312, but nothing in the text of *Winter* suggests that a lesser standard applies. Preliminary injunctions require a clear showing because they are an extraordinary remedy, *see Winter*, 555 U.S. at 20, and this is no less true in bankruptcy.

According to the decision below, any request for a preliminary injunction in bankruptcy would automatically satisfy the likelihood-of-success-on-the-merits prong as long as the debtor's reorganization was not impossible. *See* App. 28a–31a. Under the Fourth Circuit's preliminary-injunction test, the relief that a debtor is actually seeking is irrelevant to the "merits" analysis. Here, for example, Bestwall's complaint expressly alleged that the

requested injunction was "merely a precursor to the type of injunction pursuant to section 524(g) of the Bankruptcy Code that [Bestwall] expects will be issued at the end of its chapter 11 case." C.A. J.A. 407. Yet according to the Fourth Circuit, there was no need to inquire into the likelihood that Bestwall could confirm a Section 524(g) plan permanently shielding Georgia-Pacific from asbestos-related litigation. Nor was there any need to inquire into the likelihood that Georgia-Pacific could fit into any of the four statutory situations in which Section 524(g) could afford relief to non-debtors. *See* App. 30a ("[W]e reject the Claimant Representatives' argument that the bankruptcy court needed to find that it would likely enter a permanent injunction in order to grant a preliminary injunction.").

Under the Fourth Circuit's test, it did not matter that the Bankruptcy Court expressly declined to address Georgia-Pacific's eligibility for permanent injunctive relief under Section 524(g). App. 82a. Because Georgia-Pacific would provide whatever funding was necessary for Bestwall's chapter 11 case, the reorganization was not futile. *See id.* According to the Fourth Circuit, Bestwall had a realistic possibility of success regardless of its ability to fulfill the stated purpose of its bankruptcy and confirm a plan that would provide permanent injunctive relief of the type that the Bankruptcy Court awarded Georgia-Pacific preliminarily. *See* App. 30a; *cf. Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").

The Fourth Circuit's decision thus conflicts with this Court's precedent holding that a court may not grant preliminary injunctive relief that differs from the relief that would be available on a final basis. *See De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945). In *De Beers*, the Court held that a preliminary injunction freezing assets was improper when the plaintiff would not have been able to recover those assets in the underlying proceeding. According to the Court, preliminary injunctions may appropriately "grant intermediate relief of the same character as that which may be granted finally" but may not address matters "which in no circumstances can be dealt with in any final injunction that may be entered." *Id.* Similarly, in *Winter*, the Court instructed that there was "no basis for enjoining" the Navy's sonar training "[g]iven that the ultimate legal claim is that the Navy must prepare an [environmental impact statement], not that it must cease sonar training[.]" 555 U.S. at 32. The relief awarded preliminarily must fit the relief available finally.

The Fourth Circuit decision below disregarded this principle and affirmed a nationwide injunction that prevents all asbestos claimants from pursuing litigation in state or federal court against Georgia-Pacific regardless of Georgia-Pacific's eligibility for final injunctive relief under Section 524(g). In other contexts, the Court has cautioned against the issuance of such sweeping injunctions, particularly where the professed need for injunctive relief is doubtful. For instance, in considering injunctions granted under the All Writs Act, the Court has stated that such injunctions should be used "sparingly" and only when "the legal rights at issue are indisputably clear." *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist,

C.J. in chambers); *see also In re Jimmy John's Overtime Litig.*, 877 F.3d 756, 762 (7th Cir. 2017) (citing *Brown* to support the proposition that "an anti-suit injunction is an 'extraordinary' form of relief"). Likewise, when evaluating whether exceptions to the Anti-Injunction Act apply, the Court has stated that a federal court may not grant an injunction to stay proceedings in a state court except "in rare cases," *Smith v. Bayer Corp.*, 564 U.S. 299, 302 (2011), and that such an injunction should not be granted unless the need for the relief is "clear beyond peradventure," *id.* at 307; *see also Atl. Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970) ("Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.").

The risk of judicial overreach is especially acute in the bankruptcy context. This Court has repeatedly recognized that bankruptcy courts lack the full judicial power of Article III courts. *See, e.g., Stern v. Marshall*, 564 U.S. 462, 503 (2011). Despite this, the Fourth Circuit's decision below holds that Article I bankruptcy courts can award nationwide injunctions under a lower standard than the Court would require an Article III court to apply even in a garden-variety lawsuit between two parties. This result cannot be reconciled with the Court's precedent or with the fundamental limitations on the authority of the bankruptcy courts under the Constitution.

Issuance of a preliminary injunction is supposed to be an extraordinary and drastic remedy even for an Article III court, *see Munaf*, 553 U.S. at 689–90, but under the standard adopted by the Fourth Circuit, the issuance of

such injunctions in a bankruptcy case becomes entirely routine. The Court should grant the petition for certiorari to avoid that result.

At a minimum, the Court should hold this petition pending the Court's decision in *Harrington v. Purdue Pharma L.P.*, No. 23-124 (argued Dec. 4, 2023). As in this case, *Purdue* raises issues related to the scope of a bankruptcy court's authority to grant non-debtors relief from liability. Given the issues raised in *Purdue*, it is likely that the Court's decision in *Purdue* will have some impact, even if indirect, on the issues raised in this case. Thus, depending on the Court's ruling in *Purdue*, the Court should grant certiorari, vacate the Fourth Circuit's opinion, and remand the case so that the Fourth Circuit can reconsider the issues with the benefit of this Court's ruling in *Purdue*. *See Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (GVR order appropriate where "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.").

III. The decision below contradicts the language and intent of Section 524(g).

The preliminary injunction approved by the Fourth Circuit below upsets the careful balancing of interests that Congress enshrined in Section 524(g) and removes any real incentive for Georgia-Pacific to negotiate a fair resolution of the bankruptcy.

Section 524(g)(1)(A) authorizes an injunction shielding non-debtors only "in connection with" the order confirming a chapter 11 plan of reorganization; the injunction is

explicitly meant "to supplement the injunctive effect of a discharge" under chapter 11. Under Section 524(g)(2)(B)(ii)(IV)(bb), moreover, the court may issue such an injunction only after 75% of the asbestos claimants vote in favor of that relief. As part of that vote, Section 524(g) requires that "any provisions barring actions against third parties" (such as Georgia-Pacific) be prominently noticed to those claimants before they vote. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(aa). Here, the Bankruptcy Court issued an injunction of indefinite duration prior to plan confirmation without the supermajority consent of claimants required by Section 524(g). Instead, over the objection of the Petitioner and the Committee, the Bankruptcy Court disenfranchised more than 64,000 asbestos victims with lawsuits pending against Georgia-Pacific across the country. As a result, in the six years since the Bankruptcy Court first awarded "preliminary" injunctive relief, many claimants have died without being able to pursue their claims against Georgia-Pacific, without the protections afforded by Section 524(g), and without any inquiry into whether Georgia-Pacific could even qualify for permanent relief under Section 524(g).

The Fourth Circuit took the view below that Georgia-Pacific was entitled to a preliminary injunction because "§ 524(g) does not require such proof [that Georgia-Pacific is entitled to an injunction] until the plan confirmation stage." App. 30a. This turns the statutory framework on its head. Congress requires a debtor to satisfy Section 524(g) at confirmation precisely because relief under Section 524(g) is available *only at confirmation*. If Congress wanted non-debtors to be automatically protected from asbestos lawsuits whenever a corporate affiliate filed for bankruptcy with the stated goal of seeking Section 524(g) relief, Congress would have put that in Section 524(g). *Cf.*

11 U.S.C. § 1301 (automatically staying the enforcement of consumer debts against non-bankrupt co-debtors).

A pre-confirmation injunction blocking claims against non-debtors is not a prerequisite to a successful reorganization, and Bestwall's bankruptcy is not "rendered futile" if Georgia-Pacific is denied a pre-confirmation injunction here. App. 11a. In fact, *most* Section 524(g) cases confirm a plan without a pre-confirmation injunction protecting non-debtors. In most Section 524(g) cases, eligible non-debtors are folded into the channeling injunction that is issued to the debtor at confirmation. Assuming that the requirements of the Bankruptcy Code and federal law are met and that Georgia-Pacific is eligible for non-debtor relief under Section 524(g) (a question that the Bankruptcy Court expressly left undecided), nothing would preclude Bestwall from doing the same here.

Pre-confirmation injunctions protecting non-debtors are not, and should not be, routine occurrences in a chapter 11 case. They are properly reserved for the limited situations where actions against non-debtors might diminish estate assets. That was the case in *A.H. Robins Co. v. Piccinin*, where the injunction was based on the need to preserve the limited fund available under the debtor's shared insurance policy. 788 F.2d 994, 1008 (4th Cir. 1986). The *Robins* court noted that the result would be different if the shared insurance was adequate to cover all claims. *Id.* at 1002 & n.10. Where preliminary injunctions are necessary to preserve estate assets as in *Robins*, bankruptcy courts can issue preliminary injunctions to protect the bankruptcy estate and maximize recovery for creditors. In those situations, the future claimants' representative and the claimants' committee typically agree that a preliminary injunction is necessary

and appropriate to maximize creditor recoveries. That situation does not exist here.

In this case, Georgia-Pacific unveiled a new strategy—a preliminary injunction divorced from the need to maximize creditor recoveries that has justified bankruptcy-court injunctions in the past. The preliminary injunction entered below is not designed to protect the debtor's estate and creditors against diminution—even Bestwall asserts that it has access to more than enough funding to pay all claims in full. It is designed to protect non-debtor Georgia-Pacific from the claims of its asbestos victims.

Having obtained an injunction of indefinite duration from the Bankruptcy Court, Georgia-Pacific has no reason to negotiate for a permanent injunction. It has less incentive to agree to a fair amount of trust funding or to bring Bestwall's chapter 11 case to a prompt conclusion. More than six years in, Bestwall's chapter 11 case is no closer to a resolution than when the Bankruptcy Court first issued the preliminary injunction protecting Georgia-Pacific.

IV. The questions presented are frequently recurring and important.

The question of whether a sophisticated corporate entity can devise bankruptcy jurisdiction to obtain pre-confirmation injunctive relief for non-debtors is exceptionally important. As the Court found in *Kramer*, "this very case demonstrates the ease with which a party may 'manufacture' federal jurisdiction by an assignment which meets the requirements of state law." 394 U.S. at 829. As in *Kramer*, any subject-matter jurisdiction

here arises from a concerted effort to create the factual predicate underlying that jurisdiction. According to the Bankruptcy and District Courts below, all that is required to create related-to jurisdiction is the Texas divisional merger and the imposition of three contracts on a specially created affiliate. App. 56a–57a, 96a–98a, 105a–06a. Under the decision below, the Fourth Circuit would require even less: the Texas divisional merger is itself sufficient to create identical claims that could support jurisdiction for an injunction shielding the non-debtor.

There is no reason why Georgia-Pacific's blueprint would even be limited to mass-tort defendants. The procedure would work equally well any time a solvent company wanted to offload undesired liabilities onto an affiliate created solely to file for bankruptcy. That is why a coalition of 20 States and the District of Columbia supported the Petitioner's request for rehearing *en banc* below. *See* Brief for the States of North Carolina *et al.* as Amici Curiae in Support of Petition for Rehearing En Banc at 8, *In re Bestwall LLC*, No. 22-1127 (4th Cir. 2023) ("The panel's decision thus allows a non-Article III federal bankruptcy court to effectively overrule a State's sovereign decision to seek redress against a non-bankrupt company in its own state court.").

Importantly, as the dissent explained below, other sophisticated corporate entities—including Johnson & Johnson, Trane Technologies, and CertainTeed LLC[11]—

11. *See, e.g.*, *In re LTL Mgmt. LLC*, No. 21-30589, 2021 WL 5343945, at *6 (Bankr. W.D.N.C. Nov. 16, 2021) ("This case mirrors four other bankruptcy cases filed in this district: Bestwall, DBMP, Aldrich Pump, and Murray Boiler. In each of these cases, a corporation with substantial asbestos liability hired [the same law

have already followed Georgia-Pacific's roadmap. App. 38a. Each of these companies (1) underwent a Texas divisional merger to create a shell company; (2) imposed a merger-support agreement, a funding agreement, and a secondment agreement on the shell company; and (3) filed the shell company for bankruptcy in North Carolina to obtain a nationwide injunction blocking personal-injury actions against the corporation.[12]

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firm], the corporation used the 'Texas Two Step' to create a North Carolina entity with limited assets and all or most of its predecessors' asbestos liability, and the North Carolina entity filed for bankruptcy in this district shortly after its creation. The first time any debtor in the country used this procedure was in Bestwall in 2017. Thereafter, every debtor using the Texas Two Step filed for bankruptcy in this district." (citation omitted)).

12. *See* Complaint ¶ 15, *In re LTL Mgmt. LLC*, Case No. 21-30589 (JCW), Adv. No. 21-03032 (JCW) (Bankr. W.D.N.C. Oct. 21, 2021) ("The 2021 Corporate Restructuring was implemented to enable the Debtor to fully resolve talc-related claims through a chapter 11 reorganization without subjecting the entire Old JJCI enterprise to a bankruptcy proceeding."); Complaint ¶ 18, *In re Aldrich Pump LLC*, Case No. 20-30608 (JCW), Adv. No. 20-03041 (JCW) (Bankr. W.D.N.C. June 18, 2020) ("The 2020 Corporate Restructuring provided the Debtors with additional flexibility to address Old IRNJ's and Old Trane's asbestos-related claims. This flexibility included the commencement of a chapter 11 reorganization proceeding to globally resolve these claims without unnecessarily subjecting the entire Old IRNJ and Old Trane enterprises . . . to a chapter 11 proceeding." (internal citations omitted)); Complaint ¶ 15, *In re DBMP LLC*, Case No. 20-30080 (JCW), Adv. No. 20-03004 (JCW) (Bankr. W.D.N.C. Jan. 23, 2020) ("The purpose of the 2019 Corporate Restructuring was to provide additional flexibility to address Old CT's asbestos related claims, including through the commencement of a chapter 11 reorganization proceeding to globally resolve these claims without subjecting the entire Old CT enterprise to chapter 11.").

If Georgia-Pacific can orchestrate jurisdiction for a preliminary injunction here, then in the Fourth Circuit a preliminary injunction is available to any company willing to file a Certificate of Divisional Merger with the Texas Secretary of State. As the dissent correctly explained below, "[i]t is precisely that sort of manipulation of the Bankruptcy Code—and by extension the Article I bankruptcy courts—that lies at the heart of this important appeal." App. 33a. To preserve the integrity of the bankruptcy process, the Court should grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 20, 2023

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 20, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1127

IN RE: BESTWALL LLC,

Debtor.

BESTWALL LLC; GEORGIA-PACIFIC LLC,

Plaintiffs–Appellees,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS,

Defendant–Appellant,

and

SANDER L. ESSERMAN, IN HIS CAPACITY AS FUTURE CLAIMS REPRESENTATIVE; THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT; JOHN AND JANE DOES 1-1000,

Defendants.

Appendix A

No. 22-1135

IN RE: BESTWALL LLC,

Debtor.

BESTWALL LLC; GEORGIA-PACIFIC LLC,

Plaintiffs–Appellees,

v.

SANDER L. ESSERMAN, IN HIS CAPACITY AS FUTURE CLAIMANTS REPRESENTATIVE,

Defendant–Appellant,

and

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF BESTWALL, LLC; CLAIMANTS OF BRAYTON PURCELL, LLP; CLAIMANTS OF LAW OFFICES OF PETER G. ANGELOS, P.C.; CLAIMANTS OF WEITZ & LUXENBERG, P.C.; CLAIMANTS OF NASS CANCELLIERE; CLAIMANTS OF REBECCA S. VINOCUR, P.A.; CLAIMANTS OF THE DEATON LAW FIRM; CLAIMANTS OF O'BRIEN LAW FIRM, P.C.; CLAIMANTS OF BEVAN AND ASSOCIATES LPA, INC.; CLAIMANTS OF WILENTZ, GOLDMAN &

Appendix A

SPITZER, P.A.; CLAIMANTS OF THE FERRARO LAW FIRM, PA; CLAIMANTS OF SHEPARD LAW, P.C.; CLAIMANTS OF SHRADER & ASSOCIATES, L.L.P.; CLAIMANTS OF SWMW LAW, LLC AND ERNEST J. FOUCHA; CLAIMANTS OF WATERS & KRAUS, LLP LISTED; CLAIMANTS OF LEVY KONIGSBERG, LLP; CLAIMANTS OF FLINT LAW FIRM, LLC; CLAIMANTS OF MAUNE, RAICHLE, HARTLEY, FRENCH & MUDD, LLC; CLAIMANTS OF COHEN PLACITELLA & ROTH P.C.; CLAIMANTS OF THE LANIER LAW FIRM, PC; CLAIMANTS OF KELLER FISHBACK & JACKSON, LLP; CLAIMANTS OF KAZAN, MCCLAIN, SATTERLEY & GREENWOOD; CLAIMANTS OF GORI JULIAN & ASSOCIATES, P.C.; CLAIMANTS OF SAVINIS KANE & GALLUCI, LLC AND PRIM LAW FIRM, PLLC; CLAIMANTS OF COONEY AND CONWAY; CLAIMANTS OF BUCK LAW FIRM; CLAIMANTS OF NEMEROFF LAW FIRM, PC; CLAIMANTS OF MICHAEL B. SERLING, P.C.; CLAIMANTS OF KELLEY & FERRARO LLP; CLAIMANTS OF THORNTON LAW FIRM; CLAIMANTS OF BAILEY PEAVY BAILEY COWAN HECKAMAN PLLC; CLAIMANTS OF WALLACE & GRAHAM, P.A., LISTED ON APPENDIX A TO THE COMPLAINT,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:20-cv-00103-RJC)

Appendix A

December 6, 2022, Argued;
June 20, 2023, Decided

Before KING and AGEE, Circuit Judges, and Henry E. HUDSON, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Agee wrote the opinion in which Judge Hudson joined. Judge King wrote an opinion dissenting in part.

AGEE, Circuit Judge:

The district court affirmed a bankruptcy court order that entered a preliminary injunction preventing thousands of third-party asbestos claims from proceeding against debtor Bestwall LLC's affiliates, including affiliate and non-debtor Georgia-Pacific LLC ("New GP"). The Official Committee of Asbestos Claimants ("Committee") and Sander L. Esserman, in his capacity as Future Claimants' Representative ("FCR") (collectively "Claimant Representatives"), appeal. They argue that the bankruptcy court lacked jurisdiction to enjoin non-bankruptcy proceedings against New GP and, alternatively, that the bankruptcy court erred in entering the preliminary injunction because it applied an improper standard.

As explained below, based on the specific facts of this case, we agree with the district court that the bankruptcy court had "related to" jurisdiction to issue the preliminary injunction and applied the correct standard in doing so. Accordingly, we affirm the judgment of the district court.

Appendix A

I.

Georgia-Pacific LLC ("Old GP"), the corporate parent and predecessor of New GP and Bestwall, merged with Bestwall Gypsum Company ("Old Bestwall"), a manufacturer of asbestos-containing products, in 1965. Old GP then sold those products until 1977. Commencing in or before 1979, Old GP has faced thousands of asbestos-related personal-injury lawsuits based on its sale of those products.

In 2017, Old GP underwent a divisional merger under Texas law.[1] *See* Tex. Bus. Orgs. Code § 1.002(55)(A); *see also In re LTL Mgmt., LLC*, 64 F.4th 84, 96 (3d Cir. 2023) (explaining that such a "merger splits a legal entity into two, divides its assets and liabilities between the two new entities, and terminates the original entity"). As a result of this restructuring, Old GP ceased to exist, and its assets and liabilities were divided between two new entities as wholly owned subsidiaries of Georgia-Pacific Holdings, LLC: Bestwall and New GP. The purpose of this restructuring was twofold:

> (a) to separate and align [Old GP's] business of managing and defending asbestos-related claims with the assets and team of individuals primarily related to or responsible for such claims; and (b) to provide additional optionality regarding potential alternatives for addressing

1. The corporate-law validity of this restructuring is not at issue.

> those claims in the future, including through the commencement of a chapter 11 reorganization proceeding to utilize section 524(g) of the Bankruptcy Code without subjecting the entire Old GP enterprise to chapter 11.

J.A. 591.

In accordance with this purpose, Bestwall received certain of Old GP's assets[2] and became solely responsible for certain of its liabilities, including all asbestos-related

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2. The assets Bestwall received included, among other things, approximately $32 million in cash; all contracts of Old GP related to its asbestos litigation, such as settlement agreements, insurance policies, and engagement contracts; a tract of land and a related long-term lease of that land to an affiliate; and the full 100 percent equity interest in GP Industrial Plasters LLC ("PlasterCo").

PlasterCo and its subsidiaries operate a profitable plasters business as a wholly owned subsidiary of Bestwall. They "develop[], manufacture[], sell[] and distribute[] gypsum plaster products," including, *e.g.*, industrial plaster, medical plaster, pottery plaster, and general purpose plaster, and utilize three facilities around the country for their business. J.A. 590. At the time Bestwall received the equity interest in PlasterCo, PlasterCo "was projected to generate approximately $14 million in EBITDA in 2018 and approximately $18 million in the years thereafter." J.A. 595. Further, as of the date of the bankruptcy petition, PlasterCo and its subsidiaries were valued at approximately $145 (Continued) million. Therefore, although the dissent speculates that Bestwall has not "do[ne] much of anything" aside from filing for bankruptcy, *post* at 32, that characterization is not supported by the record. Since Bestwall's inception, its plaster subsidiary has operated a significant business available to contribute millions to the Bestwall bankruptcy estate.

liabilities. As a result, Bestwall "ha[d] the same ability to fund asbestos claims that Old GP had." J.A. 595. New GP received all other assets of Old GP and became responsible for all other non-asbestos-related liabilities of Old GP.

Following the restructuring, asbestos claimants began naming New GP as a defendant in asbestos lawsuits even though Bestwall had taken on sole responsibility for asbestos claims and would process those claims in its bankruptcy proceeding (described below).

A.

As part of the restructuring of Old GP, Bestwall and New GP entered into a number of agreements between them.

First, in a plan of merger and merger support agreement, Bestwall and New GP agreed that:

> Bestwall will indemnify and hold harmless New GP from and against all Losses to which New GP may become subject, insofar as such Losses (or Proceedings in respect thereof) arise out of, in any way relate to, or result from . . . (a) a claim in respect of, any Bestwall Assets or Bestwall Liabilities or (b) reimbursement or other obligations of New GP under or in respect of any appeal bonds or similar litigation related surety Contracts that are or have been posted or entered into by New GP in connection with Proceedings in respect of any Bestwall

> Liabilities. New GP will indemnify and hold harmless Bestwall from and against all Losses to which Bestwall may become subject, insofar as such Losses (or Proceedings in respect thereof) arise out of, in any way relate to, or result from a claim in respect of, any New GP Assets or New GP Liabilities.

J.A. 581; *see* J.A. 555.

In addition, the two companies entered into a funding agreement, which required New GP to cover expenses that Bestwall incurred in the normal course of its business and to fund Bestwall's obligations to New GP, including Bestwall's indemnification obligations as described above. Based on this funding agreement, "New GP's evidently bountiful assets"—while "out of reach" via the tort system, *post* at 32—will be and have been available to claimants through the Bestwall bankruptcy estate.

Upon Bestwall filing for bankruptcy, New GP's indemnification obligations included the costs of administering the bankruptcy and the costs of funding a § 524(g) asbestos trust.[3] However, New GP was required to fund the trust only to the extent that Bestwall's other

3. Section 524(g) provides for the creation of a trust that, pursuant to a chapter 11 plan of reorganization, "is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products." 11 U.S.C. § 524(g)(2)(B)(i)(I).

assets were insufficient. Alternatively, if Bestwall did not file for bankruptcy, New GP was to provide any amounts necessary to satisfy Bestwall's asbestos liabilities. Overall, Bestwall was not required to repay New GP for such funding, and New GP was to provide funding only to the extent that Bestwall's subsidiaries' distributions were insufficient to cover Bestwall's costs and expenses (except as to the funding of the § 524(g) trust, as explained above). Thus, New GP's assets are available to the Bestwall bankruptcy estate to cover approved asbestos claims.

In addition, Bestwall and New GP entered into a secondment[4] agreement whereby New GP assigned some of its employees to Bestwall, including its in-house legal team that had managed the defense of the asbestos-related claims. Bestwall determined the amount of each seconded employee's time that it needed each month so that the employee could work for Bestwall's other affiliates in any remaining time. New GP was not permitted to recall any of the seconded employees from Bestwall without Bestwall's consent.

B.

Following the restructuring, Bestwall filed a voluntary petition for chapter 11 bankruptcy in the Western District of North Carolina. The goal of the bankruptcy was to:

4. "Secondment" refers to "[a] period of time that a worker spends away from his or her usual job, usu[ally] either doing another job or studying." *Secondment*, Black's Law Dictionary (11th ed. 2019).

> consummate a plan of reorganization that would . . . provide for (a) the creation and funding of a trust established under section 524(g) of the Bankruptcy Code to pay valid asbestos-related claims and (b) issuance of an injunction under section 524(g) of the Bankruptcy Code that will permanently protect [Bestwall] and its affiliates from any further asbestos claims arising from products manufactured and sold by, or operations or conduct of, Old Bestwall or Old GP.

J.A. 603.[5]

Bestwall also filed an adversary proceeding seeking a preliminary injunction under 11 U.S.C. § 105(a) enjoining any asbestos-related claims against New GP or, alternatively, a declaration that the automatic stay under § 362(a)[6] applied to such claims against New GP. Bestwall

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5. Section 524(g) provides the process by which a court that confirms a chapter 11 reorganization plan may issue a channeling injunction "to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that . . . is to be paid in whole or in part by a trust." 11 U.S.C. § 524(g)(1)(B). "[S]uch an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction . . . and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor[.]" *Id.* § 524(g)(4)(A)(ii).

6. In relevant part, this section provides that when a voluntary petition for bankruptcy is filed under chapter 11, all cases or claims against the debtor are automatically stayed. 11 U.S.C. § 362(a). The bankruptcy court and the district court did not address whether

asserted that its requested relief was necessary to avoid defeating the essential purpose of the bankruptcy. Without such relief from the bankruptcy court, Bestwall contended that asbestos claimants would proceed against New GP for the same claims already in the Bestwall bankruptcy proceeding, thereby rendering the bankruptcy futile.

The bankruptcy court first determined that it had "related to" subject matter jurisdiction under 28 U.S.C. § 1334(b)[7] to enjoin the claims against New GP because allowing the claims against New GP to proceed outside of Bestwall's bankruptcy proceeding could detrimentally affect the Bestwall bankruptcy estate for at least three reasons.[8] *In re Bestwall LLC*, 606 B.R. 243, 249-51 (Bankr. W.D.N.C. 2019). First, the purpose of the bankruptcy would be defeated without the injunction because Bestwall would be unable to address all the claims against it in one

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the protections of the automatic stay extended to the asbestos-related claims against New GP, so we do not address that particular argument either.

7. As explained below, the bankruptcy court has jurisdiction over civil proceedings "arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

8. The dissent claims the bankruptcy court failed to address whether Old GP, New GP, and Bestwall attempted to manufacture jurisdiction. But, in response to Claimant Representatives' jurisdictional argument that "[t]he parties cannot confer jurisdiction . . . through the artificial construct of the contractual indemnification provided to New GP" by Bestwall, J.A. 510, the bankruptcy court concluded that the indemnification obligations between Bestwall and New GP were not "contrived." *In re Bestwall*, 606 B.R. at 250.

forum. *Id.* at 249. Second, without the injunction, Bestwall's personnel would be forced to spend time defending the claims against New GP at the expense of performing tasks necessary to Bestwall's reorganization. *Id.* And third, Bestwall's indemnity obligations to New GP would "make judgments against [New GP] . . . tantamount to judgments against" the Bestwall bankruptcy estate. *Id.* at 250. The bankruptcy court also concluded that Bestwall met the requirements for the entry of a preliminary injunction in relevant part because it had a realistic possibility of a successful reorganization. *Id.* at 255.

C.

The Claimant Representatives appealed to the district court, which affirmed the judgment of the bankruptcy court. *In re Bestwall LLC*, No. 3:20-cv-105-RJC, 2022 U.S. Dist. LEXIS 2996, 2022 WL 68763, at *1 (W.D.N.C. Jan. 6, 2022).[9] In doing so, the district court concluded that the FCR had standing to appeal the bankruptcy court's order because the FCR represents those parties who may become claimants during the pendency of the injunction and would thereby be enjoined from pursuing their as-yet-unfiled claims against New GP. 2022 U.S. Dist. LEXIS 2996, [WL] at *4. The court reasoned that this was "a direct and adverse effect on the future claimants[']pecuniary interests" and therefore sufficient to show standing. *Id.*

9. The appeals by the Committee and the FCR were docketed under separate docket numbers, so the district court issued two separate orders affirming the bankruptcy court. Because the two separate orders mirror each other, we cite only the order from No. 3:20-cv-00105-RJC for simplicity.

Next, the district court determined that the bankruptcy court had "related to" jurisdiction based on (1) the purpose of Bestwall's reorganization—which would be defeated absent the injunction; (2) the distraction of Bestwall's personnel if they needed to assist in defending litigation against New GP while also trying to pursue Bestwall's reorganization; and (3) the impact of the indemnification obligations between Bestwall and New GP on the Bestwall bankruptcy estate. 2022 U.S. Dist. LEXIS 2996, [WL] at *5-6.

Lastly, the district court found that the bankruptcy court did not abuse its discretion in granting the preliminary injunction. 2022 U.S. Dist. LEXIS 2996, [WL] at *7. Relevant to this appeal, when analyzing the likelihood-of-success element, the district court rejected Claimant Representatives' argument that the bankruptcy court applied the incorrect legal standard. It further reasoned that based on Bestwall's significant assets and contractual rights under the funding agreement, the bankruptcy court did not abuse its discretion in concluding that Bestwall had a reasonable likelihood of a successful reorganization. 2022 U.S. Dist. LEXIS 2996, [WL] at *8.

On appeal, the parties dispute appellate standing, subject matter jurisdiction, and the merits of the preliminary injunction. We analyze each argument in turn. We have jurisdiction under 28 U.S.C. § 158(d) and § 1291.

We begin with Bestwall's threshold argument that the district court erred in finding that the FCR had

appellate standing.[10] The presence of appellate standing is a legal conclusion that we review de novo. *See Mort Ranta v. Gorman*, 721 F.3d 241, 250 (4th Cir. 2013) (explaining that when this Court reviews a decision by a district court operating as a bankruptcy appellate court, the Court reviews legal conclusions de novo); *see also LaTele Television, C.A. v. Telemundo Commc'ns Grp., LLC*, 9 F.4th 1349, 1357 (11th Cir. 2021) (explaining that determinations regarding appellate standing are reviewed de novo).

The test for standing to appeal a bankruptcy court's order is whether the party is a "person aggrieved" by the order, *In re Urb. Broad. Corp.*, 401 F.3d 236, 243 (4th Cir. 2005), meaning that the party is "directly and adversely affected pecuniarily," *id.* at 244 (quoting *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991)); *see In re Imerys Talc Am., Inc.*, 38 F.4th 361, 371 (3d Cir. 2022) (explaining that "parties meet that standard only when a contested order 'diminishes their property, increases their burdens, or impairs their rights'" (citation omitted)).

We conclude that in this case, the district court properly found that the FCR had standing to challenge the bankruptcy court's order on appeal. As the district court reasoned, the FCR represents individuals who may become claimants during the pendency of the injunction and will be enjoined from litigating their asbestos-related

10. We can consider this argument although Bestwall did not file a cross-appeal because Bestwall does not seek to alter the district court's judgment. *See Mayor of Balt. v. Azar*, 973 F.3d 258, 295 (4th Cir. 2020).

claims outside of Bestwall's bankruptcy. The injunction thus "increases [the future claimants'] burdens" and "impairs their rights," *In re Imerys Talc Am.*, 38 F.4th at 371 (citation omitted), such that they are directly and adversely affected by the bankruptcy court's entry of the preliminary injunction. *See In re Amatex Corp.*, 755 F.2d 1034, 1041 (3d Cir. 1985) (explaining that future claimants "clearly have a practical stake in the outcome of the [bankruptcy] proceedings"); *id.* at 1043 (stating that bankruptcy proceedings "will vitally affect [future claimants'] interests").[11]

III.

Next, we turn to the Claimant Representatives' argument that the bankruptcy court lacked jurisdiction to enjoin the asbestos litigation against New GP. They assert that (1) the bankruptcy court lacked "related to" jurisdiction to enter the preliminary injunction, and (2) Old GP attempted to improperly manufacture jurisdiction. Whether the court has subject matter jurisdiction is a legal question that we review de novo. *New Horizon of NY LLC v. Jacobs*, 231 F.3d 143, 150 (4th Cir. 2000).

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11. The district court also briefly addressed Fourth Circuit case law indicating that a party without a pecuniary interest in a case can have appellate standing arising from that party's "official duty to enforce the bankruptcy law in the public interest." *In re Bestwall*, 2022 U.S. Dist. LEXIS 2996, 2022 WL 68763, at *4 (citing *In re Clark*, 927 F.2d at 796). However, the district court did not base its finding of standing on this precedent, and we need not address it in light of our conclusion above.

Appendix A

A.

Under 28 U.S.C. § 1334(b), a bankruptcy court has jurisdiction over civil proceedings "arising in or related to cases under title 11." This Court follows the broad test for "related to" jurisdiction first articulated by the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), *overruled in part on other grounds by Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 116 S. Ct. 494, 133 L. Ed. 2d 461 (1995). *See A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986) (adopting *Pacor* test). Under *Pacor*, a civil proceeding is "related to" a bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." 743 F.2d at 994 (cleaned up). In other words, if the outcome of the proceeding "could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and . . . in any way impacts upon the handling and administration of the bankrupt estate," the bankruptcy court has "related to" jurisdiction. *Id.* This "test does not require certain or likely alteration of the debtor's rights, liabilities, options or freedom of action, nor does it require certain or likely impact upon the handling and administration of the bankruptcy estate." *In re Celotex Corp.*, 124 F.3d 619, 626 (4th Cir. 1997). Instead, "[t]he possibility of such alteration or impact is sufficient to confer jurisdiction." *Id.*

As the bankruptcy court correctly determined, the asbestos-related claims against Bestwall are identical to the claims against New GP pending now or likely to be pending in the future in the various state courts. *See In*

re Bestwall, 606 B.R. at 251 ("The liability being asserted against New GP and Bestwall would be identical and co-extensive in every respect."). The Committee's counsel admitted that litigating the *same claims* in thousands of state-court cases, that will also be resolved within the Bestwall bankruptcy case, could have an effect on the Bestwall bankruptcy estate.[12] *See* Oral Argument at 16:25-17:06 (acknowledging that it was "broadly . . . true" that litigating the exact same claims in state courts and in bankruptcy court would affect what happens in the bankruptcy). And the possible effect on the Bestwall bankruptcy estate of litigating thousands of identical claims in state court is sufficient to confer "related to" jurisdiction. *See Piccinin*, 788 F.2d at 1004, 1007 (relying on "persuasive guidance" from a bankruptcy court decision that reasoned that an injunction could be extended to litigation against non-debtors where the covered actions were "inextricably interwoven with the debtor" (quoting *In re Johns-Manville Corp.*, 26 B.R. 405, 418 (Bankr. S.D.N.Y. 1983))); *In re Dow Corning Corp.*, 86 F.3d 482, 493 (6th Cir. 1996) (finding "related to" jurisdiction over claims pending against non-debtor defendants because the debtor and the non-debtor defendants "are closely related with regard to the pending . . . litigation").

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12. There could also be asbestos-related cases against New GP pending now or in the future in federal courts based on diversity jurisdiction or otherwise. The same reasoning and rule apply to any of those cases just as they do to state-court cases. We simply use "state-court cases" as a comprehensive generic phrase referring to all asbestos-related claims pending against New GP outside of the Bestwall bankruptcy proceedings.

For example, if New GP were found liable for asbestos-related claims in the state-court cases, that could reduce the claimants' recovery on those claims in the bankruptcy proceeding, thereby reducing the amount of money that would be paid out of the bankruptcy estate and leaving more funds in the estate for other claimants. *See* Oral Argument at 2:55-4:17 (the Committee's counsel admitting that "there's obviously only one recovery, but . . . the plaintiffs have the right to pursue multiple sources for reimbursement"); *see also In re Celotex Corp.*, 124 F.3d at 626 (indicating that "related to" jurisdiction exists if the proceeding *could* alter the debtor's liabilities positively or negatively). Furthermore, issue preclusion, inconsistent liability, and evidentiary issues could well arise in the bankruptcy proceeding based on the results of the state-court litigation against New GP, and the resolution of those issues would inevitably affect the bankruptcy estate. *See Piccinin*, 788 F.2d at 1005, 1007 (describing as "persuasive guidance" a bankruptcy case in which the court granted an injunction against lawsuits against non-debtors in part due to collateral estoppel concerns (citing *In re Johns-Manville Corp.*, 26 B.R. at 435)).

Therefore, we agree with the district court that the bankruptcy court properly concluded that it had "related to" jurisdiction to enjoin the claims against New GP.[13] We emphasize that this conclusion is based on the specific

13. Separately, we observe that the indemnification and secondment obligations—which provide for the transfer of funds and personnel between entities—would also likely have a cognizable effect on the Bestwall bankruptcy estate in the absence of the injunctive relief.

For example, based on the indemnification obligations, if the asbestos-related litigation against New GP continues during the pendency of Bestwall's bankruptcy, and New GP sustains losses, the Bestwall bankruptcy estate would be required to indemnify New GP, but without any adjudication of those same claims otherwise pending before the bankruptcy court. New GP would step in to provide funds to cover the indemnification only if Bestwall's subsidiaries' distributions were insufficient to cover its obligations. It is difficult to see how this exchange of money with a debtor could *not* conceivably affect the bankruptcy estate. And if New GP provided funds to Bestwall to pay for Bestwall's indemnification of New GP—as the dissent speculates is likely to happen—that would clearly alter Bestwall's liabilities and thereby impact how the bankruptcy estate is handled. *See Pacor*, 743 F.2d at 994. (Also, while the dissent relies on an allegation in the briefing that New GP has provided Bestwall with $150 million under the funding agreement, the parties do not point to any record evidence supporting that statement. *See I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n.6, 104 S. Ct. 584, 78 L. Ed. 2d 401 (1984) (explaining that unsupported assertions in briefing are not evidence).)

Similarly, as to the secondment agreement, if litigation were permitted to continue against New GP and Bestwall assented to its employees leaving to assist New GP, as the dissent imagines will occur, those employees would likely have to spend significant time managing the defense of the claims against New GP such that the handling and administration of Bestwall's bankruptcy estate and Bestwall's rights and liabilities in bankruptcy would be affected.

And if—as the Claimant Representatives assert—Bestwall refused to so assent and retained its employees, New GP would have to find and train new employees to assist in managing its defense in the litigation, and Bestwall's estate could thereby be affected by adverse judgments against New GP that would implicate Bestwall's indemnity obligations or liability through collateral estoppel. Further, if New GP retained new employees to assist in its

circumstances of this case, including the involvement of thousands of identical claims against New GP and Bestwall and the fact that the claims against New GP are, or could be, pending in many state courts around the country.[14]

B.

Our conclusion concerning "related to" jurisdiction does not end the jurisdictional analysis. The Claimant Representatives also assert that Old GP impermissibly sought to manufacture jurisdiction in the bankruptcy court which could prevent this Court from exercising "related to" jurisdiction. We disagree with the Claimant Representatives' argument and the dissent's acceptance of that argument.

Under 28 U.S.C. § 1359, federal courts do not have jurisdiction over civil actions "in which any party, by assignment or otherwise, has been improperly or

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defense, Bestwall would have to indemnify New GP for the expenses associated with those employees, which would further deplete the bankruptcy estate. *See* J.A. 581 ("Bestwall will indemnify and hold harmless New GP from and against all Losses to which New GP may become subject, insofar as such Losses . . . arise out of, in any way relate to, or result from a claim in respect of, any Bestwall Assets or Bestwall Liabilities[.]"); J.A. 559 (defining "Losses" to include "costs and expenses, including reasonable attorneys' fees"). Therefore, under either scenario, the operation of the secondment agreement could impact the bankruptcy estate.

14. Because we conclude that the bankruptcy court had "related to" jurisdiction over the claims against New GP, we need not consider whether the bankruptcy court separately possessed "arising in" jurisdiction.

collusively made or joined to invoke the jurisdiction of such court." We have found this statute violated when a nominal party has no real stake in the outcome of a case such that the only possible reason for its involvement is to create jurisdiction. *See Lester v. McFaddon*, 415 F.2d 1101, 1106 & n.11 (4th Cir. 1969) ("It is the lack of a stake in the outcome coupled with the motive to bring into a federal court a local action normally triable only in a state court which is the common thread of the cases holding actions collusively or improperly brought."). For example, we found § 1359 violated when a South Carolina citizen procured the appointment of a Georgia citizen as administrator of an estate seemingly to create diversity jurisdiction.[15] *See id.* at 1103-04 (noting that the dispute was "superficially converted into a dispute between citizens of different states" because the appointed administrator had no stake in the litigation, likely would not play a role, and was clearly a "straw party . . . appoint[ed] for the purpose of creating apparent diversity of citizenship" (internal quotation marks omitted)); *see also Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 827-28, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969) (finding that a party improperly manufactured jurisdiction where he "total[ly] lack[ed] [a] previous connection with the matter" and "candidly admit[ted] that the assignment was in substantial part motivated by a desire . . . to make diversity jurisdiction available" (internal quotation marks omitted)); *Lehigh*

15. Bestwall and New GP argue that § 1359 only applies in suits based on diversity jurisdiction. Although neither the statute itself nor case law interpreting it suggests such a limitation, we need not decide this issue because assuming the statute applies in the bankruptcy context, it does not apply to this case.

Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 339, 16 S. Ct. 307, 40 L. Ed. 444 (1895) (affirming dismissal based on lack of jurisdiction—prior to the enactment of § 1359—where a Virginia corporation created a Pennsylvania corporation and conveyed to it land "for the express purpose" of enabling the Pennsylvania corporation to file suit in federal court against Virginia residents based on diversity jurisdiction).

Separate from § 1359, we have held that "neither the parties nor the bankruptcy court can create § 1334 jurisdiction." *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 837 (4th Cir. 2007); *see Orquera v. Ashcroft*, 357 F.3d 413, 416 (4th Cir. 2003) (indicating that parties cannot create subject matter jurisdiction). For example, parties cannot include a provision in a plan of reorganization purporting to confer jurisdiction on a bankruptcy court because "the Debtor cannot write its own jurisdictional ticket." *Valley Historic*, 486 F.3d at 837 (cleaned up).

But unlike the cases referenced above, Old GP, New GP, and Bestwall did not manufacture jurisdiction via their Texas divisional merger. This is evident because without the restructuring, the asbestos claims would have remained with Old GP. And, if Old GP had filed for bankruptcy, the bankruptcy court would have had jurisdiction over those claims as it does over the same claims here. *See* 28 U.S.C. § 1334(b) (providing for bankruptcy court jurisdiction over civil proceedings "related to" cases under title 11); *Valley Historic*, 486 F.3d at 836 (explaining that "related to" jurisdiction is implicated if

a civil action could alter the debtor's rights and liabilities and impacts the administration of the bankruptcy estate). Thus, as Bestwall and New GP point out, "the corporate restructuring leaves the jurisdictional result the *same*." Resp. Br. 40; *see U.S.I. Props. Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 6 (1st Cir. 1988) ("[P]arties may legitimately try to obtain the jurisdiction of federal courts, as long as they lawfully qualify under some of the grounds that allow access to this forum of limited jurisdiction. On the other hand, using a strawman, or sham transactions, solely for the creation of otherwise *unobtainable jurisdiction*, is clearly forbidden both by statute and by the policies that underlie diversity jurisdiction." (emphasis added)). This distinction differentiates the present circumstances from the cases on which Claimant Representatives rely and precludes the application of § 1359.

The dissent contends that we "miss[] the point" by "focusing on jurisdiction over claims instead of parties." *Post* at 43. But there is no way to separate the parties from the claims here and, even if there were, we would decline to do so because § 1334(b) requires us to analyze whether the *claims* involving New GP are "related to" the bankruptcy case. *See* 28 U.S.C. § 1334(b) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."); *see also Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (explaining that subject matter jurisdiction is "jurisdiction over the category of claim in suit" as compared to personal jurisdiction, which is jurisdiction over the parties). The

statute does not instruct us to consider the parties in isolation.

A recent Third Circuit decision that involved a divisional merger followed by the bankruptcy of one of the parties does not affect the manufactured-jurisdiction analysis. In *In re LTL Management, LLC*, 64 F.4th 84 (3d Cir. 2023), that court was confronted with a restructuring similar to Old GP's divisional merger—namely, a corporation undergoing a divisional merger pursuant to Texas law in order to isolate its asbestos-related liabilities in one subsidiary and its "productive business assets" in another subsidiary. *Id.* at 93. Following the restructuring, the asbestos-related subsidiary filed for bankruptcy, and the claimants moved to dismiss the bankruptcy petition as not filed in good faith. *Id.* The bankruptcy court denied the motion, but the Third Circuit reversed and dismissed the bankruptcy petition under 11 U.S.C. § 1112(b). *Id.* at 93, 111. The appellate court held that the debtor was not in financial distress and the bankruptcy petition therefore was not filed in good faith. *Id.* at 106, 109-10.

In this appeal, by contrast, Claimant Representatives do not make the arguments raised by the claimants in *LTL Management*. They do not contend that Bestwall was not in financial distress when it filed for bankruptcy, nor does this appeal involve a motion to dismiss filed on that basis. Further, as the Third Circuit recognized in *LTL Management*, this Court applies a more comprehensive standard to a request for dismissal of a bankruptcy petition for lack of good faith; that is, the complaining party must show both "subjective bad faith" and the

"objective futility of any possible reorganization." *Id.* at 98 n.8 (quoting *Carolin Corp. v. Miller*, 886 F.2d 693, 694 (4th Cir. 1989)). The Claimant Representatives have made no showing to this Court of either required element.

As importantly, the court in *LTL Management* did not address the critical issue present here: whether the bankruptcy court had jurisdiction to enter a preliminary injunction. *See id.* at 99 n.11 ("The parties contest whether the Bankruptcy Court had jurisdiction to issue the order enjoining the Third-Party Claims against the Protected Parties. Dismissing LTL's petition obviates the need to reach that question."). *LTL Management* is simply not relevant to the resolution of the case before us.

Moreover, while Claimant Representatives assert that Old GP's restructuring caused Bestwall and New GP to enter into the indemnification and funding agreements for the sole purpose of creating jurisdiction over the claims against New GP, this argument is a nonstarter because our finding of jurisdiction is not predicated on those agreements. Rather, it is based on the thousands of identical claims pending against New GP outside of the bankruptcy proceeding and the effect of those claims on Bestwall's bankruptcy estate, which Old GP clearly could not and did not manufacture.

Finally, the dissent argues that Bestwall was obligated—but failed—to prove that the restructuring was "driven by an independent, legitimate business justification" rather than being pretextual. *Post* at 40. Assuming without deciding that such a showing is

necessary, Bestwall did make that showing. The record establishes that the restructuring was driven by Old GP's desire to pursue its non-asbestos-related business apart from asbestos-related litigation or a bankruptcy proceeding while keeping its assets available to satisfy any asbestos-related liabilities, if required. *See, e.g.*, J.A. 591 ¶ 13 (explaining that the purpose of the restructuring was "to separate and align [Old GP's] business of managing and defending asbestos-related claims with the assets and team of individuals primarily related to or responsible for such claims"; to provide options for addressing those claims "without subjecting the entire Old GP enterprise to chapter 11"; and "to make certain that [Bestwall] had the same ability to fund the costs of defending and resolving present and future asbestos claims as Old GP").

To conclude our discussion of jurisdiction, the Court notes that Claimant Representatives appear to be using their jurisdictional arguments as a back-door way to challenge the propriety of the reorganization and the merits of a yet-to-be-filed chapter 11 plan. This is both premature and improper.

If the claimants are adversely affected monetarily by the ongoing bankruptcy, then the time and place to raise that concern is at plan confirmation, not by a purported jurisdictional challenge that really goes to the merits of the reorganization. At plan confirmation, claimants holding "at least two-thirds in amount and more than one-half in number of the allowed claims of such class" must accept the plan for the bankruptcy court to confirm it (with some exceptions not relevant here). 11 U.S.C.

§ 1126(c); *id.* § 1129(a)(7)-(8). Therefore, Bestwall must propose a plan that addresses the concerns held by a majority of the claimants. This mandatory reality of chapter 11 bankruptcy belies the dissent and Claimant Representatives' false narrative that some subterfuge will befall the claimants.

Alternatively, rather than waiting for plan confirmation, claimants can bring individual actions for relief based on the specific facts of a particular claim. That is done in bankruptcy proceedings on a routine basis where appropriate. Notably, Claimant Representatives have failed to do so here.

These bankruptcy procedures promote the equitable, streamlined, and timely resolution of claims in one central place compared to the state tort system, which can and has caused delays in getting payment for legitimate claimants. *Compare Katchen v. Landy*, 382 U.S. 323, 328, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966) (explaining that "a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period" (cleaned up)), *with* Oral Argument at 33:23-33:50 (Bestwall's counsel explaining that when Bestwall filed for bankruptcy in 2017, of the 64,000 pending asbestos-related claims, seventy-five percent had been pending for ten years or more, and fifty-five percent had been pending for fifteen years or more). In fact, while Claimant Representatives complain that the over four-year preliminary injunction proceeding has impeded the resolution of asbestos-related claims, the main interference with the timely resolution of the

claims in Bestwall's bankruptcy proceeding appears to be Claimant Representatives' challenge to the preliminary injunction, thereby prolonging the bankruptcy process and preventing the claimants from obtaining prompt relief. It is not clear why Claimant Representatives' counsel have relentlessly attempted to circumvent the bankruptcy proceeding, but we note that aspirational greater fees that could be awarded to the claimants' counsel in the state-court proceedings is not a valid reason to object to the processing of the claims in the bankruptcy proceeding.

The district court thus correctly rejected the Claimant Representatives' argument that Old GP, Bestwall, and New GP improperly manufactured jurisdiction.

IV.

Finally, we consider the merits of the preliminary injunction. The Claimant Representatives argue that even if the bankruptcy court properly exercised jurisdiction over the claims against New GP, the bankruptcy court should not have granted the preliminary injunction because it (1) engaged in the wrong legal inquiry by focusing on the likelihood of reorganization rather than on the likelihood of the court confirming a plan that included a *permanent* injunction, and (2) applied the wrong standard by focusing on the *realistic possibility* of reorganization instead of requiring a *clear showing* of a successful reorganization. Again, we disagree.

First, in order to grant a preliminary injunction, courts must evaluate, *inter alia*, whether the plaintiff is

likely to succeed on the merits. *Mountain Valley Pipeline v. W. Pocahontas Props.*, 918 F.3d 353, 366 (4th Cir. 2019). Normally, the "merits" in litigation are the resolution of an underlying civil dispute. But in a chapter 11 bankruptcy, the focus is not on resolving a particular dispute but rather on the debtor's rehabilitation and reorganization. *See In re White Mountain Mining Co., L.L.C.*, 403 F.3d 164, 170 (4th Cir. 2005) (explaining that the purpose of chapter 11 is the "rehabilitation of the debtor"); *Providence Hall Assocs. Ltd. P'ship v. Wells Fargo Bank, N.A.*, 816 F.3d 273, 279 (4th Cir. 2016) (same); *In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 284 (4th Cir. 2007) ("The purpose of Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state." (citation omitted)); *see also Carolin Corp.*, 886 F.2d at 702 (suggesting that chapter 11's purpose is "to reorganize or rehabilitate an existing enterprise" (citation omitted)). Therefore, as our sister circuits have stated explicitly, the "merits" that must be considered for purposes of a preliminary injunction in a chapter 11 bankruptcy case are the debtor's rehabilitation and reorganization. *See In re Excel Innovations, Inc.*, 502 F.3d 1086, 1095 (9th Cir. 2007) (holding that an injunction under § 105(a) requires "a reasonable likelihood of a successful reorganization"); *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 860 (6th Cir. 1992) (indicating that the likelihood-of-success factor requires a "realistic possibility of successfully reorganizing"); *see also Piccinin*, 788 F.2d at 1008 (affirming grant of preliminary injunction and focusing on whether "*any effort at reorganization of the debtor will be frustrated*, if not permanently thwarted" should the third-party

litigation proceed (emphasis added)); *Willis v. Celotex Corp.*, 978 F.2d 146, 149 (4th Cir. 1992) (indicating that a § 105(a) injunction is appropriate, *inter alia*, if third-party proceedings "will have an adverse impact on the Debtor's *ability to formulate a Chapter 11 plan*" (emphasis added) (quoting *Piccinin*, 788 F.2d at 1003)). The bankruptcy court thus appropriately considered Bestwall's realistic likelihood of successfully reorganizing when granting an injunction under § 105(a).

The Claimant Representatives assert that, under the first prong of the preliminary injunction test, the district court should have determined whether Bestwall would ultimately be able to obtain permanent injunctive relief. But requiring a party to show entitlement to a permanent channeling injunction this early in the bankruptcy proceeding puts the cart before the horse; § 524(g) does not require such proof until the plan confirmation stage. *See* 11 U.S.C. § 524(g)(1)(A) (providing that "[a]fter notice and hearing, *a court that enters an order confirming a plan of reorganization* under chapter 11 *may issue, in connection with such order, an injunction*" (emphasis added)). Contrary to the express intent of Congress as shown through the Bankruptcy Code, the position of Claimant Representatives would effectively eliminate reorganization under chapter 11 as an option for many debtors. Therefore, we reject the Claimant Representatives' argument that the bankruptcy court needed to find that it would likely enter a permanent injunction in order to grant a preliminary injunction.

Further, the Claimant Representatives assert that the preliminary injunction standard requires a "clear showing" that the debtor will be able to reorganize rather than the "realistic possibility" standard applied by the bankruptcy court. Opening Br. 50. But the cases on which the Claimant Representatives rely in support of their argument were decided outside the context of a preliminary injunction in bankruptcy and are thus inapposite. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (holding—outside the context of a § 105(a) injunction—that a party seeking a preliminary injunction must make a clear showing that he or she is entitled to such relief). Moreover, if we required a "clear showing" of a debtor's ability to reorganize before the plan-confirmation stage, chapter 11 proceedings would never get off the ground, as we just noted. For example, the debtor would have to provide significant evidence that it would be able to reorganize before the entry of the preliminary injunction necessary to make such a reorganization possible. *See In re Hillsborough Holdings Corp.*, 123 B.R. 1004, 1015 (Bankr. M.D. Fla. 1990) ("There is nothing in this record to indicate that these Debtors are not viable business entities incapable of achieving a successful reorganization which is fair and equitable to all. Their success is, however, dependent on a speedy, favorable determination of the issues raised by the Debtors in [their] Adversary Proceeding . . . . Thus, until those matters are resolved, it would be premature to conclude at this time that this reorganization process is doomed and that there is no legal justification for granting the injunctive relief sought.").

For all these reasons, we affirm the district court's decision affirming the bankruptcy court's order granting a preliminary injunction.

V.

For the foregoing reasons, we

AFFIRM.

Appendix A

KING, Circuit Judge, dissenting in part:

The Supreme Court has long recognized that Congress's "central purpose" in enacting the Bankruptcy Code was to "provide a procedure by which certain *insolvent debtors* can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort." *See Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) (emphasis added). Put differently, the nation's bankruptcy laws "must be construed . . . to give *the bankrupt* a fresh start." *See Burlingham v. Crouse*, 228 U.S. 459, 473, 33 S. Ct. 564, 57 L. Ed. 920 (1913) (emphasis added); *see also Williford v. Armstrong World Indus.*, 715 F.2d 124, 126 (4th Cir. 1983) (explaining that the relief afforded by Chapter 11's automatic stay "belongs exclusively to the 'debtor' in bankruptcy"). Yet in recent years, major and fully solvent business corporations have managed to skirt that debtor-centric objective and obtain shelter from sweeping tort litigation without having to file for bankruptcy themselves. It is precisely that sort of manipulation of the Bankruptcy Code — and by extension the Article I bankruptcy courts — that lies at the heart of this important appeal.

Parting ways with my friends in the majority, I would reverse the judgment of the district court and remand for that court to vacate the bankruptcy court's order enjoining asbestos-related lawsuits against New GP.[1] A

1. In keeping with the majority opinion, I refer to Georgia-Pacific as it existed prior to the company's 2017 restructuring as "Old GP," and to the company as it currently exists as "New

non-debtor codefendant of debtor Bestwall, New GP is among the world's largest manufacturing firms, and — by its own account — has every ability to defend against continued asbestos litigation and to satisfy all resulting liabilities. Nevertheless, Old GP, Bestwall, and New GP manufactured the jurisdiction of the bankruptcy court in these proceedings, in an unmistakable effort to gain leverage over future asbestos claims against New GP.

Through their creative use of the so-called "Texas divisional merger" and the creation of unorthodox contractual relationships between Bestwall and New GP, the three Georgia-Pacific entities ran afoul of the foundational principle that parties may not artificially construct a federal court's jurisdiction — especially that of a federal bankruptcy court, which possesses particularly limited jurisdiction. And with that being so, the bankruptcy court below was unable to act under any "related-to" jurisdiction that it could theoretically have been vested with under 28 U.S.C. § 1334(b). Moreover, the bankruptcy court also lacked "arising-in" jurisdiction with which to enjoin the New GP asbestos litigation. For those reasons, and as more fully explained herein, I respectfully dissent from the majority's affirmance of the district court's ratification of the bankruptcy court's injunction.[2]

GP." Meanwhile, "Bestwall" refers simply to Georgia-Pacific's corporate subsidiary that is the debtor in the Chapter 11 bankruptcy proceedings at issue here. Finally, I also adopt the majority's use of "Claimant Representatives" to refer collectively to the Official Committee of Asbestos Claimants and the Future Claimants' Representative.

2. I readily concur in the majority's threshold determination that appellant Sander L. Esserman, in his capacity as the Future

Appendix A

I.

A.

For the most part, I take no issue with the majority's recitation of the relevant facts. I will emphasize, however, some of the more striking and understated details of Georgia-Pacific's history of asbestos litigation and the origins of these bankruptcy proceedings. Owing to its extensive use of asbestos in commercial products such as joint compound and certain industrial plasters, Georgia-Pacific has faced many hundreds of thousands of asbestos-related personal injury lawsuits since at least 1979 — the vast majority of which have been filed by individuals suffering from the scourge of mesothelioma. Georgia-Pacific stands as one of the most frequently sued defendants in this Country's tide of asbestos litigation, having spent more than $2.9 billion defending against such claims. And Georgia-Pacific has acknowledged that thousands of additional asbestos claims will be filed against it each year for decades yet to come.

Those financial strains notwithstanding, Georgia-Pacific has remained a fully solvent, multibillion-dollar business leader in the pulp and paper industry. Indeed, New GP — Georgia-Pacific's current corporate form and the inheritor of the bulk of Old GP's assets — represented to the bankruptcy court in the proceedings below that its

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Claimants' Representative, possesses appellate standing to challenge the bankruptcy court's award of injunctive relief. Accordingly, I am dissenting from the majority opinion in substantial part, though not in full.

assets are fully "sufficient to satisfy" the Old GP asbestos liabilities that have been assigned to Bestwall. *See* J.A. 596.[3] Nevertheless, by reason of the bankruptcy court's injunction, New GP's evidently bountiful assets are now out of reach for any and all asbestos claimants seeking relief through our Nation's tort system, in either state or federal court.

Old GP obtained that protection of its assets by deciding to "undertake a corporate restructuring" on July 31, 2017. *See* J.A. 738. On that day, Old GP — then a Delaware corporation — reorganized under the laws of Texas and promptly made use of the Lone Star State's "divisional merger" statute to carve itself into two new entities — Bestwall and New GP.[4] To Bestwall, Old GP assigned virtually all of its existing asbestos liabilities; Bestwall otherwise received minimal assets and no formal business operations. Meanwhile, New GP was entrusted with the lion's share of Old GP's assets, along with its non-asbestos-related liabilities. With Old GP dissolved, New GP resumed its predecessor's status as a Delaware corporation — where it has continued business operations just as Old GP did — while Bestwall was reorganized in North Carolina. Stunningly, Bestwall and New GP existed as Texas business entities for less than five hours.

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3. Citations herein to "J.A. " refer to the contents of the Joint Appendix filed by the parties to this appeal.

4. As the majority has explained, the validity of Texas's divisional merger statute is not before us in this appeal. *See ante* 5 n.1. And our resolution of that issue is not necessary to determine whether the bankruptcy court possessed jurisdiction to enjoin the New GP asbestos litigation.

Bestwall did not hire any employees, engage in any new business ventures, or do much of anything else following its relocation to the Old North State. Instead, on November 2, 2017 — some three months after its inception — Bestwall filed for Chapter 11 bankruptcy in the Western District of North Carolina, securing safe harbor from its inherited asbestos liabilities by virtue of the bankruptcy court's automatic stay. *See* 11 U.S.C. § 362(a). And later that same day, Bestwall initiated an adversary proceeding in the bankruptcy court, by which it sought the entry of a preliminary injunction to shield none other than its sister corporation — New GP — from any current and future asbestos claims.

At the time of its 2017 corporate restructuring, Old GP was well aware that any successor entity holding its productive assets would face continued asbestos liabilities. It was for that reason that Old GP travelled to Texas in the first instance — to sever its extant liabilities, place them in bankruptcy, and in turn utilize the bankruptcy proceedings to stay future litigation against the remainder of its business operations. New GP, in other words, was designed to receive bankruptcy protection despite its non-debtor status, with no need to submit to the bankruptcy court's oversight or to suffer the burdens appurtenant to a Chapter 11 filing. And that is no conjecture — by its adversary complaint, Bestwall freely admitted to the bankruptcy court that the very purpose of Old GP's 2017 restructuring was "to provide [Bestwall] with the option to seek a resolution of the asbestos claims in [the bankruptcy court] under section 524(g) of the Bankruptcy Code, without subjecting the entire Old GP enterprise

to a chapter 11 reorganization." *See* J.A. 399. Later in the bankruptcy proceedings, Bestwall and New GP clarified that "[Bestwall's] goal" in filing for Chapter 11 protection was, in part, to obtain "an injunction . . . that will permanently protect [Bestwall] *and its affiliates* from any further asbestos claims" related to products manufactured and sold by Old GP. *Id.* at 603 (emphasis added).

Bestwall quickly achieved its goal. After concluding that any asbestos lawsuits pursued against New GP would be sufficiently "related to" Bestwall's bankruptcy estate to bring some "effect" to bear on the estate, the bankruptcy court entered the requested preliminary injunction, thereby shielding "the entire Old GP enterprise" from all civil liability. Today, then, asbestos claimants are left without any ability to seek relief for their afflictions from Georgia-Pacific — or its corporate affiliates — in the tort system. And of course, many of those claimants have and will continue to run out of time, their years cut short by asbestos-related disease while these bankruptcy proceedings grind on.

B.

Importantly, Georgia-Pacific is not alone in utilizing Texas's divisional merger statute to isolate its unwanted asbestos liabilities in bankruptcy without having to subject the whole of the corporate entity to Chapter 11 proceedings. Perhaps most notably, after facing a "torrent of lawsuits" alleging that its signature baby powder contained traces of asbestos, New Jersey-based Johnson &

Johnson went to Texas in 2021 to restructure into two new entities — "LTL Management" and "Johnson & Johnson Consumer." *See In re LTL Mgmt., LLC*, 64 F.4th 84, 92 (3d Cir. 2023). Just like Bestwall, LTL was assigned all of Johnson & Johnson's existing asbestos-related liabilities. And like Bestwall, LTL promptly filed for bankruptcy. Thereafter, the bankruptcy court extended the reach of the automatic stay of claims against LTL to cover various non-debtor entities, including Johnson & Johnson Consumer.

The majority rightly explains that the Third Circuit's 2023 decision in *LTL Management* concerning the propriety of LTL's bankruptcy petition is distinguishable here — the *LTL* case did not consider or discuss the bankruptcy court's jurisdiction to halt tort claims against a non-debtor. *See ante* 20-22. Ultimately, the court of appeals directed that LTL's petition be dismissed, as the company was never truly in financial distress. That is, pursuant to a funding agreement, LTL actually had the ability to cause Johnson & Johnson Consumer to pay it up to that company's full value to satisfy any asbestos-related liabilities. *See* 64 F.4th 106-10. In any event, while the two bankruptcy cases have charted different paths, the Johnson & Johnson proceedings underscore the very point at issue here — a healthy corporation's placement of a liability-laden subsidiary into bankruptcy in order to avoid Chapter 11 reorganization for the balance of the healthy company is not guaranteed to result in smooth sailing.

II.

With the foregoing in mind, I would reverse the judgment below and remand for the district court to vacate the bankruptcy court's order awarding injunctive relief, insofar as the bankruptcy court was not clothed with any jurisdiction permitting the entry of such an order. To the extent that the bankruptcy court was facially vested with "related-to" jurisdiction under 28 U.S.C. § 1334(b) — as that court, the district court, and my good colleagues in the majority have all concluded — that jurisdiction was fabricated by way of Old GP's restructuring in Texas and the imposition of the various contractual obligations between Bestwall and New GP. And because civil claims brought against New GP by private individuals have their genesis outside of Bestwall's bankruptcy proceedings, the bankruptcy court could not have alternatively grounded its order enjoining those claims in "arising-in" jurisdiction under § 1334(b). Accordingly, the injunction as to the New GP asbestos litigation is without any lasting legal weight.[5]

A.

1.

As a general rule, bankruptcy courts — which by federal law are courts of limited jurisdiction — may not

5. Because the bankruptcy court lacked any jurisdiction under 28 U.S.C. § 1334(b) with which to enjoin the asbestos litigation against New GP, I would not reach the question of whether the court applied the correct legal standard in granting Bestwall's request for a preliminary injunction pursuant to 11 U.S.C. § 105(a).

intervene in or otherwise halt civil litigation between non-debtors. *See In re Prescription Home Health Care, Inc.*, 316 F.3d 542, 547 (5th Cir. 2002). In certain situations, however, a bankruptcy court may assert "related-to" jurisdiction over matters outside of a particular debtor's bankruptcy proceedings, where the disposition of those matters may have some conceivable "effect" on the debtor's bankruptcy estate. *See A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986) (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)); *see also* 28 U.S.C. § 1334(b) (affording district — and bankruptcy — courts jurisdiction to hear proceedings "arising in or related to cases under title 11"). As the majority points out, the *Pacor* "effects" test for "related-to" jurisdiction followed in our Court is purposefully broad — and, to be sure, the majority identifies multiple possible ways that asbestos claims brought against New GP could "affect" Bestwall's bankruptcy estate. That matters not, however, if the entire factual basis for invoking the bankruptcy court's "related-to" jurisdiction was contrived.

Pursuant to 28 U.S.C. § 1359, a federal court will lack jurisdiction over any action "in which any party . . . has been improperly or collusively made or joined to invoke the jurisdiction of such court." Congress intended § 1359 to guard against "litigants' attempts to manipulate jurisdiction" where none would otherwise exist. *See In re Samsung Elecs. Co.*, 2 F.4th 1371, 1377 (Fed. Cir. 2021). In other words, § 1359 was "designed to prevent the litigation of claims in federal court by suitors who by sham, pretense, or other fiction acquire a spurious status that would allow them to invoke the limited jurisdiction

of the federal courts." *See Nolan v. Boeing Co.*, 919 F.2d 1058, 1067 (5th Cir. 1990). And while § 1359's prohibition on manufactured subject matter jurisdiction most frequently arises in the arena of diversity jurisdiction cases proceeding under 28 U.S.C. § 1332, today's majority acknowledges that nothing in the text of § 1359 — nor in interpretive case law — specifies that it does not apply with equal force to bankruptcy proceedings carried out under the auspices of § 1334. *See ante* 18 n.15.

In any event, this Court has routinely emphasized the fundamental principle that no actions of the parties can "create subject matter jurisdiction or waive its absence." *See Orquera v. Ashcroft*, 357 F.3d 413, 416 (4th Cir. 2003). And we have specifically admonished that "neither the parties nor the bankruptcy court can create § 1334 jurisdiction" in any bankruptcy proceeding. *See Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 837 (4th Cir. 2007); *accord In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228-29 (3d Cir. 2004) (recognizing that debtors may not create federal bankruptcy jurisdiction over non-debtor third parties by way of plans of reorganization, consent, or otherwise). Put simply, it is elementary that the debtor in bankruptcy "cannot write its own jurisdictional ticket" — and it logically follows that the debtor cannot make out such a "ticket" for a distinct, non-debtor entity either. *See Valley Historic*, 486 F.3d at 837.

Yet that is exactly what Old GP did here — it reformed its corporate existence precisely so that its principal successor entity, New GP, could be afforded bankruptcy relief without ever having to file for bankruptcy. Old GP

carefully structured the relationship between New GP and its planned vehicle for unwanted liabilities, Bestwall, in such a way as to permit the bankruptcy court to spare New GP from the legal headache of continued asbestos litigation by way of an 11 U.S.C. § 105(a) injunction — extending, for all intents and purposes, the reach of the automatic stay of asbestos claims against debtor Bestwall to those pursued against New GP. But for Old GP's assignment of its asbestos liabilities and its productive business assets and operations to separate successor entities — as well as its brokering of contracts between those entities to create the appearance of their corporate relations being inextricably intertwined — there would have been no "effects" for the bankruptcy court to rely on in resolving that it was vested with "related-to" jurisdiction. Again, Bestwall and New GP do not meaningfully dispute this. Both have acknowledged that Old GP's restructuring and Bestwall's bankruptcy were intended to secure "the issuance of an injunction" that would insulate New GP from asbestos litigation "without subjecting the entire Old GP enterprise to a chapter 11 reorganization." *See* J.A. 399, 603.

In concluding that asbestos claims lodged against New GP might "affect" Bestwall's bankruptcy estate, the bankruptcy court looked primarily to the companies' contractual arrangements. As the court explained, Bestwall was saddled with a series of indemnity obligations to New GP, requiring it to reimburse its sister company for, inter alia, any losses attributable to continued asbestos lawsuits. That being so, in the court's view, New GP's defense of any asbestos litigation would indirectly deplete

the assets available to Bestwall in funding its 11 U.S.C § 524(g) trust — making it such that potential asbestos judgments against New GP would be "tantamount to" judgments against Bestwall's bankruptcy estate. *See* J.A. 741. Separately, the court determined that, in the event of New GP having to defend against new asbestos lawsuits, New GP lawyers temporarily assigned to Bestwall under the companies' secondment agreement would likely be recalled by New GP to aid in litigation defense work. Those lawyers would thus be "distracted" from their work overseeing Bestwall's Chapter 11 proceedings, effectively impairing the efficient administration of Bestwall's bankruptcy estate. *Id.* at 740.

That is all well and good, but despite the Claimant Representatives challenging its jurisdiction to reach outside of the Bestwall proceedings and enjoin asbestos litigation against New GP, the bankruptcy court never addressed or resolved whether the agreements between Bestwall and New GP had simply been devised in order to manufacture the court's ability to afford New GP relief.[6] As the party seeking an injunction and asserting

6. In response to my dissenting submission, the majority maintains that the bankruptcy court addressed the Claimant Representatives' assertion that bankruptcy jurisdiction had been fabricated. *See ante* 9 n.8. But the court's consideration of whether the indemnity obligations between Bestwall and New GP were "contrived" went only to its narrow conclusion that the entities' funding agreement "acts only as a backstop" (and it certainly does not, *see infra* note 7). *See* J.A. 741. At no point did the court actually evaluate the purpose of the two agreements, and there was simply no analysis of manufactured subject matter jurisdiction. *See id.* at 736-52.

jurisdiction, Bestwall had (and maintains) the burden of proving that the bankruptcy court was *properly* — not artificially — vested with subject matter jurisdiction. *See United States v. Poole*, 531 F.3d 263, 274 (4th Cir. 2008) ("A court is to presume . . . that a case lies *outside* its limited jurisdiction unless and until jurisdiction has been shown to be proper."). That is, Bestwall was obliged to demonstrate that Old GP's Texas divisional merger and the development of the contractual relationships between itself and New GP were driven by an independent, legitimate business justification, and that those maneuvers were not "pretextual." *See Toste Farm Corp. v. Hadbury, Inc.*, 70 F.3d 640, 643-44 (1st Cir. 1995). Perhaps unsurprisingly, Bestwall has never offered any substantive explanation along those lines. To the contrary, Bestwall concedes that Old GP's restructuring was specifically intended to shield the corporation's assets without the need for a wholesale declaration of bankruptcy. Accordingly, I readily conclude that Old GP, Bestwall, and New GP together "improperly or collusively made" — from whole cloth — the bankruptcy court's jurisdiction. *See* 28 U.S.C. § 1359. And as a result, the court was without any ability to enter an injunction against the New GP asbestos litigation.

2.

Putting aside for the moment the question of jurisdictional manufacturing, the agreements between Bestwall and New GP relied on by the bankruptcy court were arguably not even sufficient to establish the court's "related-to" jurisdiction. As the Claimant Representatives explain in their briefing, Bestwall's

supposed indemnity obligations to New GP are in fact wholly circular, essentially a legal fiction. Pursuant to the entities' funding agreement, Bestwall is entitled to obtain *from* New GP "the funding of any obligations of [Bestwall] owed to [New GP] . . . including, without limitation, any indemnification or other obligations of [Bestwall]." *See* J.A. 337. In other words, to satisfy a claim for indemnity from New GP relating to its defense of asbestos claims, Bestwall would obtain the necessary cash from New GP itself. Any potential asbestos judgments against New GP would therefore not be "tantamount to" judgments against Bestwall — there is no indication that litigation against New GP would impair or otherwise "affect" the valuation of the bankruptcy estate at all. *Id.* at 741.[7]

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7. Bestwall and New GP insist that the funding agreement is not "contrived" or "circular," insofar as, by the agreement's terms, Bestwall's ability to seek funding from New GP for its indemnity obligations only kicks in "to the extent that any cash distributions theretofore received by [Bestwall] from its Subsidiaries are insufficient to pay such . . . obligations." *See* J.A. 377.

True, that is how the funding agreement reads — but the agreement does not actually function as a "backstop" because it likewise requires Bestwall to utilize "cash distributions . . . from its Subsidiaries" in "the normal course of its business" and to cover all "costs of administering the Bankruptcy Case." *See* J.A. 377. And to date, New GP — by its own admission — has "contributed approximately $150 million under the Funding Agreement" to cover those costs, indicating that distributions from Bestwall's subsidiaries (of which there is apparently only one, a company called "PlasterCo" that the majority hails as a booming business concern) are not sufficient to cover its ordinary business and bankruptcy costs — let alone any additional indemnification costs. *See* Br. of Appellees 9. That being so, it is not conceivable on this record that Bestwall's

As to the "effects" of the potential "distraction" of New GP personnel who have been "seconded" to Bestwall, the secondment agreement specifies that "Provider [New GP] shall not remove any of the Seconded Employees from Recipient [Bestwall], unless mutually agreed by Recipient and Provider." *See* J.A. 696. Bestwall would therefore have to assent to any "effects" of New GP lawyers leaving it behind to defend New GP from asbestos lawsuits — fully undercutting the supposed point in seeking from the bankruptcy court an injunction against such lawsuits.

Perhaps recognizing the hazards in relying on the agreements between Bestwall and New GP as a basis for "related-to" jurisdiction, the majority relegates its discussion of the entities' contractual relations to a footnote, resolving that any "effects" on Bestwall's bankruptcy estate brought about by the agreements are simply not necessary to conclude that the bankruptcy court's exercise of jurisdiction was sound. *See ante* 16 n.13. And given its dismissal of the agreements' import, the majority declines to address whether the agreements might reveal the wrongful manufacture of the court's jurisdiction. *See id.* at 22.

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indemnity obligations to New GP would ever impact its bankruptcy estate, as any and all funding for those obligations will necessarily come out of New GP's pockets.

Finally, it bears emphasizing that New GP actually concedes in its briefing that it contributed $150 million to Bestwall under the funding agreement. *See* Br. of Appellees 9. That payment is thus not at all an "unsupported assertion" or "allegation" of an adversary, as the majority contends. *See ante* 16 n.13.

Instead, the majority predicates its jurisdictional determination on the common nature of the tort claims that have been stayed as against Bestwall and those that might be filed against New GP absent an injunction, invoking collateral estoppel and the potential preclusive effect of adverse evidentiary rulings or judgments against New GP. In that sense, the majority explains, actively litigating against New GP the very same asbestos claims pursued against Bestwall prior to its bankruptcy filing could easily impact the value and administration of the bankruptcy estate. As the bankruptcy court put it, sanctioning "piecemeal attempts" to hold New GP liable for Bestwall's asbestos liabilities would defeat the bankruptcy filing's "fundamental purpose" of globally resolving those liabilities in one forum. *See* J.A. 740.

Once again, I do not necessarily disagree with the foregoing explanation for why New GP's asbestos litigation might conceivably "affect" Bestwall's bankruptcy estate. But the problem remains that such "effects" would arise *only* because Old GP ensured that they would. That is, Old GP purposefully created privity between its successor entities such that claims against one (the solvent, productive corporation) would necessarily have some impact on the other (the debtor hampered with old liabilities), thereby allowing the bankruptcy court to intervene on New GP's behalf. To the extent that the "effects" of parallel litigation might have permitted the bankruptcy court — on paper — to suspend claims against the non-debtor entity, "Old GP . . . created this situation by placing most of its operations and assets outside the protection of bankruptcy." *See* Reply Br. of Appellants

19. With that being so, the Claimant Representatives explain, "pleas that [Old GP's] legal successor [now] needs bankruptcy protection ring hollow." *Id.*

The majority largely dodges the fact that its chosen basis for "related-to" jurisdiction was also concocted by Old GP, stating briefly and without support that "Old GP clearly could not and did not manufacture" the effects of identical claims pending against New GP outside of Bestwall's bankruptcy proceedings. *See ante* 22. And the majority's only other defense against the problem of manufactured jurisdiction is that, absent the Texas divisional merger, asbestos claims against New GP would have remained claims against Old GP, such that if Old GP had opted to file for Chapter 11 protection, "the bankruptcy court would have had jurisdiction over those claims as it does over the same claims here." *Id.* at 19. But that misses the point entirely, focusing on jurisdiction over claims instead of parties.

The issue at hand is instead whether the bankruptcy court could properly exercise jurisdiction over civil proceedings initiated against a non-debtor, third-party entity, which would not currently exist had Old GP not undergone its 2017 restructuring. Removing the divisional merger from the jurisdictional equation thus ignores and avoids the question that we have been called upon to resolve. Certainly, it is obvious that if Old GP had never undergone its divisional merger and had instead filed for bankruptcy itself, the bankruptcy court could have stayed any and all asbestos claims then pending against it. But we are now focused on that court's involvement with New

GP. And the majority acknowledges as much, asserting on the one hand that "there is no way to separate the parties from the claims here," but then conceding that "§ 1334(b) requires us to analyze whether the claims *involving New GP* are 'related to' the bankruptcy case." *See ante* 20 (emphasis added). Hypothetical claims against Old GP — now a defunct corporation — simply have no bearing on our jurisdictional inquiry. Put succinctly, if New GP "wished to receive the protections offered by [Chapter 11], it must have filed for bankruptcy." *See Kreisler v. Goldberg*, 478 F.3d 209, 213-14 (4th Cir. 2007).

At bottom, regardless of whether premised on the nature of the agreements between Bestwall and New GP or the impacts of parallel litigation on Bestwall's bankruptcy estate, the bankruptcy court's jurisdiction consistently flows from an orchestrated endeavor to fabricate it. But for Old GP, Bestwall, and New GP's improper efforts in that regard, the court would have lacked any ability to spare New GP from civil liability without a bankruptcy filing. Because — as the majority itself recognizes — "using a strawman, or sham transactions, solely for the creation of otherwise unobtainable jurisdiction . . . is clearly forbidden," the bankruptcy court in this situation could not legitimately claim to exercise "related-to" jurisdiction in issuing an injunction. *See ante* 20 (quoting *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 6 (1st Cir. 1988)).

B.

Had it recognized its inability to exercise "related-to" jurisdiction under § 1334(b), the bankruptcy court could have — but opted not to — turn to § 1334(b)'s "arising-in"

jurisdiction as a basis for its injunction. As our Court has recognized, proceedings "arising in" Chapter 11 are those that "would have no existence outside of the bankruptcy." *See In re A.H. Robins Co.*, 86 F.3d 364, 372 (4th Cir. 1996).

Here, the district court — after concluding that the bankruptcy court possessed "related-to" jurisdiction — passingly suggested in a footnote that the court might have also claimed "arising-in" jurisdiction, insofar as the issuance of an injunction under 11 U.S.C. § 105(a) "arises only in bankruptcy cases [and] would have no existence outside of a bankruptcy." *See* J.A. 919. Bestwall and New GP have decided to run with that contention on appeal, insisting that the bankruptcy court enjoyed "arising-in" jurisdiction (in addition to "related-to" jurisdiction) because relief under § 105(a) can be pursued only in the context of a bankruptcy case. The majority, for its part, has declined to address the "arising-in" argument, being satisfied that the bankruptcy court possessed "related-to" jurisdiction.

Bestwall and New GP's characterization of "arising-in" jurisdiction, however, dramatically and improperly expands the scope of the bankruptcy courts' authority beyond the legitimate bounds that this and other courts of appeals have recognized. Their "arisingin" theory boils down to an assertion that any request for a § 105(a) injunction would confer the relevant bankruptcy court with jurisdiction over whatever proceedings the debtor seeks to intervene in, no matter how tangentially connected they might be to the bankruptcy case. But that is not the law. *See In re W.R. Grace & Co.*, 591 F.3d 164, 170 (3d Cir. 2009) ("While § 105(a) of the Bankruptcy Code

allows a bankruptcy court to issue any order necessary to carry out the provisions of the Code, it does not provide an independent source of federal subject matter jurisdiction."). Section 105(a) is not a magic wand that a debtor can wave to create bankruptcy jurisdiction — to make use of its provisions, a bankruptcy court must have some independent jurisdictional footing.

In any event, it borders on the absurd to suggest that the asbestos litigation Bestwall sought to have enjoined "arose in" its bankruptcy case. Simply stated, personal injury claims brought by private individuals against a distinct, non-debtor corporation cannot and do not "arise" within the confines of another corporate entity's bankruptcy proceedings. By necessity, such third-party litigation will have — at bare minimum — some "existence outside of the bankruptcy," *see A.H. Robins*, 86 F.3d at 372, and "would have existed whether or not the Debtor filed bankruptcy," *see Valley Historic*, 486 F.3d at 836. The bankruptcy court, in other words, rightly passed over § 1334(b)'s provision of "arising-in" jurisdiction, and the court's injunction could not alternatively be affirmed on that jurisdictional basis.

* * *

In sum, I would squarely reject Georgia-Pacific's use of its 2017 restructuring — little more than a corporate shell game — to artificially invoke the jurisdiction of the bankruptcy court and obtain shelter from its substantial asbestos liabilities without ever having to file for bankruptcy. The bankruptcy court's injunction was entered without any legitimate jurisdictional basis,

and its effects run directly counter to the purposes of the Bankruptcy Code. In a pending Seventh Circuit case involving the efforts of a corporate subsidiary in Chapter 11 bankruptcy to spare its parent company from continued product liability litigation, a well-reasoned amicus submission explains that "the Bankruptcy Code has increasingly been manipulated by solvent, blue-chip companies faced with mass tort liability" that, "[t]hrough dubious readings of the Bankruptcy Code that Congress never intended . . . have invented elaborate loopholes enabling them to pick and choose among the debt-discharging benefits of bankruptcy without having to subject themselves to its creditor-protecting burdens." *See In re Aearo Techs., LLC*, No. 22-2606, at 3-4 (7th Cir. Feb. 1, 2023), ECF No. 89. Such is the essence of these proceedings — and the core of the reason why the district court's judgment should be reversed, the bankruptcy court's injunction vacated, and this matter remanded for further proceedings.

III.

Because any jurisdiction that the bankruptcy court was vested with under 28 U.S.C. § 1334(b) was improperly manufactured by the parties before it — and as the court's award of injunctive relief contravened the spirit of the Bankruptcy Code — I would reverse the judgment of the district court and remand for that court to vacate the bankruptcy court's injunction.

With great respect for the competing views of my friends in the majority, I dissent in substantial part.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED JANUARY 6, 2022

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3:20-cv-105-RJC

In re: BESTWALL LLC,

Debtor.

FUTURE CLAIMANTS REPRESENTATIVES, *et al.*,

Appellants,

v.

BESTWALL LLC AND GEORGIA-PACIFIC LLC,

Appellees.

January 6, 2022, Decided
January 6, 2022, Filed

ORDER

Appendix B

THIS MATTER comes before the Court on an appeal of the Bankruptcy Court's Memorandum Opinion and Order Granting the Debtor's Request for Preliminary Injunctive Relief (Doc. No. 1-1); the Bankruptcy Court's Order Granting in Part, Denying in Part Motion of the Official Committee of Asbestos Claimants to Reconsider and Amend the Memorandum Opinion (Doc. No. 1-2) (together the "Bankruptcy Court's Orders" or the "Orders"); Appellants' Motion for Leave to Appeal the Injunction Order (the "Motion for Leave") (Doc. No. 2); and Appellees' Responses to the Motion for Leave to Appeal (Doc. Nos. 3 & 4).[1] The Court has reviewed the record on appeal, briefing, and applicable law. For the reasons stated herein, the Motion for Leave to Appeal the Injunction Order (Doc. No. 2) is **DENIED as moot** and the Bankruptcy Court's Orders are **AFFIRMED**.

I. BACKGROUND

A. The Debtor

The Debtor Bestwall LLC (the "Debtor") was formed on July 31, 2017, as a result of a corporate restructuring of Georgia-Pacific LLC. (Adversary Proceeding No. 17-03105, Doc. No. 104 ¶¶ 31-32). Prior to July 2017, the Debtor's predecessor underwent various corporate changes from its inception in 1927, eventually resulting

1. The Bankruptcy Court's Orders, factual background, and issues are the same for case numbers 3:20-cv-103-RJC and 3:20-cv-105-RJC. Therefore, the Court addresses all arguments for each appeal herein. This Order mirrors the Order entered in case 3:20-cv-103-RJC.

in the Georgia-Pacific LLC, a wholly-owned subsidiary of Georgia-Pacific Holdings, LLC (from its inception in 1927 to July 31, 2017 referred to herein as "Old GP"). (*Id.* ¶ 5).

In 1965, Old GP acquired Bestwall Gypsum Company. (*Id.* ¶ 12). Bestwall Gypsum Company manufactured certain asbestos-containing products, principally joint compound, which Old GP continued to manufacture and sell following the acquisition. (*Id.* ¶¶ 22-23). Old GP had a decades-long history of asbestos litigation derived from its acquisition of Bestwall Gypsum Company and its asbestos-containing products. (*Id.* ¶¶ 22-30).

As a result of the asbestos litigation, on July 31, 2017, Old GP underwent a corporate restructuring in which Old GP ceased to exist and two new entities were created. (*Id.* ¶¶ 31-32). The restructuring occurred by way of a series of transactions that included Old GP converting to a Texas limited liability company. (*Id.* ¶ 14). Then, Old GP effected a divisional merger under a Texas merger statute which allows a single Texas entity to "merge" into two or more entities. *See* Tex. Bus. Org. Code § 1.002(55)(A). The divisional merger was accomplished by way of a Plan of Merger. (*Id.* ¶¶ 6, 14). Pursuant to the Plan of Merger, the Old GP ceased to exist and two new entities were created, each a direct wholly owned subsidiary of Georgia-Pacific Holdings, LLC, as follows:

(1) A limited liability company which ultimately became Bestwall LLC, the Debtor, that received certain assets and liabilities of Old

GP, including (a) Old GP's asbestos liabilities;[2] and (b) certain other assets, including three bank accounts with approximately $32 million in cash, all contracts of Old GP related to its asbestos-related litigation, real estate in Mt. Holly, North Carolina, and all equity interests in a non-debtor projected to generate annual cash flow of $18 million starting in 2019, and valued at approximately $145 million. (*Id.* ¶¶ 14-16).

(2) Georgia-Pacific LLC which received all other assets and liabilities of Old GP (the "New GP"). (*Id.* ¶¶ 14-15).

The Debtor also agreed to indemnify New GP for any losses it suffers relating to the Debtor's asbestos liabilities. (*Id.* ¶ 45).

Relevant here, the Debtor entered into the following additional agreements. The Debtor became payee to a Funding Agreement with New GP, under which the Debtor is entitled, to the extent its assets are insufficient, to funding for all costs and expenses the Debtor incurs in the normal course of its business and the funding of a section 524(g) asbestos trust. (*Id.* ¶ 17). The Debtor and New GP entered into a Services Agreement pursuant to which the Debtor will receive corporate and administrative services

2. With the exception of asbestos liabilities for which the exclusive remedy is provided under a workers' compensation statute or similar law. (Adv. Proc. Doc. No. 104 ¶ 15).

from New GP, including legal, accounting, tax, human resources, information technology, and risk management. (*Id.* ¶ 18). They also entered into a secondment agreement by which New GP assigned to the Debtor on a full-time basis certain of its employees, including the Debtor's Chief Legal Officer. (*Id.* ¶ 19). The seconded employees have institutional and historical knowledge of the litigation stemming from Debtor's asbestos-related liabilities. (*Id.*). Under the secondment agreement, the Debtor pays New GP a percentage of a fee based on the percentage of that employees' time the Debtor needs each month. (*Id.*).

As of September 30, 2017, there were approximately 64,000 asbestos-related claims pending against the Debtor, including approximately 22,000 that were being actively litigated and approximately 13,300 claims pending on inactive dockets, with thousands more anticipated in the future. (*Id.* ¶ 23).

B. The Bankruptcy Case

Thereafter, on November 2, 2017, the Debtor filed a Chapter 11 bankruptcy case in this District for the purpose of resolving the asbestos-related claims against it by way of a trust under section 524(g) of the Bankruptcy Code. (Bankruptcy Case No. 17-31795, Doc. Nos. 1 & 12 at 8). The Bankruptcy Court approved the appointment of an Official Committee of Asbestos Claimants to represent asbestos claimants' interests (the "Committee") and Sander L. Esserman as Legal Representative for future asbestos claimants' interests (the "Future Claimants Representative") (together, the "Appellants"). (Bankr. Doc. Nos. 97 & 278).

C. The Bankruptcy Adversary Proceeding

On the same day the bankruptcy petition was filed, the Debtor filed an adversary proceeding against plaintiffs and prospective plaintiffs in asbestos-related actions against certain affiliated non-debtors (the "Adversary Proceeding"). (Adv. Proc. Doc. No. 1 ¶¶ 12-13). In the Adversary Proceeding, and through a related motion (the "Motion for Injunction"), the Debtor sought to enjoin pursuant to section 105(a) of the Bankruptcy Code, the continuation or commencement of any action seeking to hold the following parties liable for any asbestos-related claims (the "Asbestos-Related Claims"): (1) the Old GP, (b) the New GP, or (c) certain non-debtor affiliates of the New GP and the Debtor (together, the "Non-Debtor Protected Parties"). (Adv. Proc. Doc. Nos. 1 & 2). Alternatively, the Debtor sought a declaration that the automatic stay applied to prohibit the commencement or continuation of asbestos related actions against the Non-Debtor Protected Parties. *Id.* The Appellants opposed the Motion for Injunction and the relief the Debtor sought in the Adversary Proceeding. (Adv. Proc. Doc. Nos. 47, 49, 110, 118). New GP successfully intervened in the Adversary Proceeding. (Adv. Proc. Doc. No. 156). Through a series of agreed orders, the Bankruptcy Court temporarily enjoined the asbestos-related claims pending further ruling on the Motion for Injunction. (Adv. Proc. Doc. Nos. 30, 32-33, 36, 41, 91, 125, 136, 141, 152, 157, 160, & 162).

Following hearings on the Motion for Injunction, the Bankruptcy Court ultimately granted it. (Doc. No. 1-1). The Bankruptcy Court's Memorandum Opinion and Order

Appendix B

Granting the Debtor's Request for Preliminary Injunctive Relief (1) concluded that it had "related to" subject matter jurisdiction under 28 U.S.C. § 1334(b) to issue the injunction; and (2) granted the Motion for Injunction, enjoining pursuant to section 105 of the Bankruptcy Code the Adversary Proceeding Defendants from filing or continuing to prosecute Asbestos-Related Claims against the Non-Debtor Protected Parties (the "Order Granting Injunction"). (Doc. No. 1-1).

The Committee filed a motion to reconsider the Order Granting Injunction asking the Bankruptcy Court to vacate portions of the order addressing the Committee's preemption and due process arguments, and to clarify that the Order did not address whether New GP qualified for relief under section 524(g) of the Bankruptcy Code. (Adv. Proc. Doc. No. 166). In the Bankruptcy Court's Order Granting in Part, Denying in Part Motion of the Official Committee of Asbestos Claimants to Reconsider and Amend the Memorandum Opinion, it denied the request to vacate its conclusions regarding due process and preemption, but clarified that the Order Granting Injunction did not address whether New GP is entitled to relief under section 524(g) of the Bankruptcy Code (the "Reconsideration Order"). (Doc. No. 1-2).

Appellants appealed arguing the Bankruptcy Court did not have jurisdiction to enter the Orders and the Debtor failed to meet its burden establishing the elements necessary for a preliminary injunction. (Doc. No. 6).

II. STANDARD OF REVIEW

This Court has jurisdiction over "final judgments, orders, and decrees . . . and with leave of court, from interlocutory orders and decrees, of bankruptcy judges . . . ." 28 U.S.C. § 158(a). The Fourth Circuit generally applies two standards of review for bankruptcy appeals: "The Bankruptcy Court's conclusions of law are reviewed *de novo* and its findings of fact are reviewed for clear error." *Campbell v. Hanover Ins. Co.*, 457 B.R. 452, 456 (W.D.N.C. 2011); *In re Lee*, 461 Fed. App'x at 231. "Typically, mixed questions of law and fact are also reviewed *de novo*." *Suntrust Bank v. Den-Mark Const., Inc.*, 406 B.R. 683, 686 (E.D.N.C. 2009); *see In re Litton*, 330 F.3d 636, 642 (4th Cir. 2003). The question of whether a bankruptcy court has subject matter jurisdiction is a question of law reviewed *de novo. In re Kirkland*, 600 F.3d 310, 314 (4th Cir. 2010); *In re Celotex Corp.*, 124 F.3d 619, 625 (4th Cir. 1997). A bankruptcy court's decision to grant injunctive relief is reviewed for abuse of discretion. *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1008 (4th Cir. 1986) ("Certainly, the district court did not commit an abuse of discretion in granting the injunction herein."); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013). An abuse of discretion may occur if a court applies the incorrect legal standard, rested its decision on "a clearly erroneous finding of a material fact," or "misapprehended the law with respect to underlying issues in litigation." *Id.*

III. DISCUSSION

A. Appellants' Motion for Leave to Appeal the Bankruptcy Court's Orders is moot.

As an initial matter, Appellants filed a Motion for Leave to Appeal the Bankruptcy Court's Orders, first arguing that the Orders are final, appealable orders, and even if not, asking the Court to exercise discretion to hear the appeal pursuant to 28 U.S.C. § 158(a)(2)-(3). (Doc. No. 2). Appellees do not dispute that the Bankruptcy Court's Orders are final, appealable orders. (Doc. No. 3 at 2; Doc. No. 4 at 1). The Court agrees that the Bankruptcy Court's Preliminary Injunction Orders are final, appealable orders over which this Court has jurisdiction to hear the appeal.

Courts take a pragmatic view of finality in the bankruptcy context, such that "orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." *In re Computer Learning Centers, Inc.*, 407 F.3d 656, 660 (4th Cir. 2005) (citation omitted). Adversary proceedings are considered discrete disputes. *First Owners' Ass'n of Forty Six Hundred v. Gordon Props., LLC*, 470 B.R. 364, 369 (E.D. Va. 2012). An order granting or denying relief from the automatic stay is a final, appealable order. *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586, 205 L. Ed. 2d 419 (2020); *In re Lee*, 461 Fed. App'x 227, 231 (4th Cir. 2012). Similarly, courts have found that other similar injunction orders constitute final, appealable orders. *Fung Retailing Ltd. V. Toys R Us, Inc.*, 593 B.R. 724, 731 (E.D. Va. 2018) (concluding injunction order preventing

party from prosecuting an action in Hong Kong a final, appealable order); *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1092 (9th Cir. 2007) (concluding injunction order which was in effect an extension of the automatic stay was final, appealable order). Where a bankruptcy court issues a preliminary injunction but contemplates no further hearings apart from the outcome of the reorganization then the injunction order is a final, appealable order. *In re Excel Innovations*, 502 F.3d at 1092-93; *In re Ionosphere Clubs, Inc.*, 139 B.R. 772, 778 (S.D.N.Y.1992).

Here, the Debtor filed the Adversary Proceeding seeking to enjoin the commencement or continuation of asbestos-related claims against the Non-Debtor Protected Parties. The Court granted the relief requested by the Debtor. Appellees concede "[t]here is nothing left to adjudicate in that proceeding." Therefore, the Court concludes the Bankruptcy Court's Orders are final, appealable orders and Appellants' Motion for Leave to Appeal the Bankruptcy Court's Orders is moot.

B. Future Claimants Representative has standing to appeal the Bankruptcy Court's Orders.

Next, the Debtor argues the Future Claimants Representative does not have standing to appeal the Bankruptcy Court's Orders because the future claimants do not hold claims enjoined by the Bankruptcy Court's Orders. Standing to appeal an order from a bankruptcy court requires the appellant to be "a person aggrieved by the bankruptcy order" which means the person is "directly and adversely affected pecuniarily." *In re Urban*

Broadcasting Corp., 401 F.3d 236, 243-44 (4th Cir. 2005). "An order that diminishes one's property, increases one's burdens, or detrimentally affects one's rights has a direct and adverse pecuniary effect for bankruptcy standing purposes." *In re Smoky Mountain Country Club Prop. Owners' Association, Inc.*, 622 B.R. 653, 657 (W.D.N.C. 2020). Additionally, standing to appeal as a party aggrieved may arise from a party's official duty to enforce the bankruptcy law in the public interest. *In re Clark*, 927 F.2d 793, 796 (4th Cir. 1991). Courts have also held that committees appointed pursuant to 11 U.S.C. § 1103, serve a "watchdog" function and enjoy unique rights and responsibilities, including the ability to appeal orders that run afoul of those rights and responsibilities. *In re Western Pacific Airlines, Inc.*, 219 B.R. 575, 577-78 (D. Colo. 1998).

Here, the Court concludes the Future Claimants Representative has standing to appeal the Bankruptcy Court's Orders. The Bankruptcy Court's Order broadly defines Bestwall Asbestos Claims as "any asbestos-related claims against the Debtor, including all former claims against [the Old GP] related in any way to asbestos or asbestos-containing materials, except for asbestos-related claims for which the exclusive remedy is provided under workers' compensation statutes and similar laws." (Doc. No. 1-1). The Future Claimants Representative represents the interests of future claimants, which, at the time of the Bankruptcy Courts Orders, were future claimants but, based on the definition of Bestwall Asbestos Claims, may later become claimants during the pendency of the injunction. If so, they will be enjoined from seeking

a remedy for their asbestos-related claims through the usual channels against the Non-Debtor Protected Parties. This is a direct and adverse effect on the future claimants pecuniary interests. While the Future Claimants Representative is not the directly affected party, it represents the interest of the future claimants, which by definition cannot defend their own interests. To conclude the Future Claimants Representative does not have standing to appeal the Bankruptcy Court's Orders would defeat the purpose of the Future Claimants Representative's role. Therefore, the Court concludes the Future Claimants Representative has standing to appeal the Orders.

C. The Bankruptcy Court has subject matter jurisdiction to grant the preliminary injunction.

Pursuant to 28 U.S.C. § 1334, district courts have "original and exclusive" jurisdiction over all cases under the Title 11, and "original but not exclusive" jurisdiction over all civil proceedings arising under, arising in, or related to cases under Title 11. District courts are authorized to refer these cases to bankruptcy judges in their district. 28 U.S.C. § 157(a). In this District, all such cases have been referred to the bankruptcy judges in the District. *See In re Standing Order of Reference re: Title 11*, 3:14-mc-44 (W.D.N.C. Apr. 14, 2014).

A case "arising in" Title 11 is one that is "not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy." *Valley Historic Ltd. Partnership v. Bank of New York*, 486 F.3d

831, 835 (4th Cir. 2007) (quotations omitted). "Therefore, a controversy arises in Title 11 when it would have no practical existence but for the bankruptcy." *Id.* A case is "related to" a case under Title 11 when "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Valley Historic Ltd. Partnership v. Bank of New York*, 486 F.3d 831, 836 (4th Cir. 2007) (citations and quotations omitted); *In re Celotex Corp.*, 124 F.3d 619, 625-26 (4th Cir. 1997). Therefore, "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate. *In re Celotex Corp.*, 124 F.3d 619, 625-26 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). This test does not require with any certainty or likelihood that the proceeding could conceivably have an effect on the bankruptcy estate, the possibility itself is sufficient. *Id.* at 626.

The Bankruptcy Court's Order Granting Injunction concluded it had "related to" jurisdiction under 28 U.S.C. § 1334. The Bankruptcy Court determined that failing to grant the Debtor's requested relief could conceivably have an effect on its bankruptcy estate in the following ways: (1) it would defeat the purpose of section 524(g) and the Debtor's Chapter 11 reorganization which was filed to address in one forum all potential asbestos claims against the Debtor and third parties alleged to be liable for asbestos claims against the Debtor; (2) it would distract the Debtor's personnel and impair the ability of Debtor to pursue a plan of reorganization because the personnel

who play key roles in the Debtor's reorganization efforts, such as its Chief Legal Officer, would also be responsible for managing and directing the activities in defense of lawsuits against the Non-Debtor Protected Parties; and (3) the Debtor has indemnity obligations, contractually and also possibly under common law, that would make judgments against New GP tantamount to judgments against the Debtor and deplete the assets available to fund a section 524(g) trust.

Here, at a minimum, the Bankruptcy Court had related to jurisdiction because determining whether or not to grant the injunctive relief requested in the Adversary Proceeding could conceivably have an effect on the Debtor's bankruptcy estate. The Debtor admits it filed the bankruptcy case to address the overwhelming asbestos litigation in one forum through a section 524(g). A decision on whether to grant an injunction to the Non-Debtor Protected Parties could defeat the entire purpose of the Debtor's reorganization. For example, if an injunction was not granted and litigation continued to be filed in a multitude of different fora against the Non-Debtor Protected Parties for the same asbestos related claims that the Debtor is liable for then the Debtor would be unable to address all the asbestos-related claims in one forum, which could impact the number and amounts of claims addressed through a potential section 524(g) trust. Thus, the decision whether to grant the injunction could conceivably affect the Debtor's assets and liabilities.

Moreover, the Debtor could decide that without the injunction, reorganization would not be possible or

effective and attempt to dismiss or convert its bankruptcy case, which, if granted, could conceivably have an impact on the Debtor's estate. The Appellants argue that exercising jurisdiction here defeats the purpose of a section 524(g) trust because they believe the Non-Debtor Protected Parties should file bankruptcy in order to avail themselves to the protections of the injunctive relief requested. However, this appears to be a more proper argument for addressing the merits of the Adversary Proceeding and/or a section 524(g) rather than the Court's consideration for subject matter jurisdiction which only requires a conceivable effect on Debtor's rights, liabilities, or options.

Additionally, if a preliminary injunction were not granted, Debtor's personnel who are responsible for assisting with its reorganization could be distracted with managing the voluminous litigation against the Non-Debtor Protected Parties in various different forums. Appellants argue that the Debtor's personnel are seconded and therefore New GP can simply "find replacements" for the Debtor "in its over 30,000 employees." (Doc. No. 6 at 30). This argument misses the mark. The fact that the Debtor's personnel could be so consumed with litigation against the Non-Debtor Protected Parties that it would need to find replacement personnel, who then would have to spend time understanding a complicated reorganization, is exactly the type of situation that could conceivably have an effect on the administration of the bankruptcy case.

Last, the Appellants argue there is not subject matter jurisdiction because the indemnity provision was an attempt to impermissibly create jurisdiction and that the

provision is circular because ultimately it requires New GP to fund indemnity payments. Since the Court finds related to subject matter jurisdiction exists for the reasons stated above, the indemnity provision is not necessary for related to subject matter jurisdiction. Nevertheless, the Court will address Appellants' arguments. First, the Court is not convinced the indemnity provision was an attempt to create jurisdiction and Appellants have not pointed to evidence rather than their opinions or assumptions for such a conclusion. Indemnity provisions are common provisions in contractual agreements for a multitude of valid reasons other than to create jurisdiction. Appellants arguments otherwise are unavailing to the Court. Next, the Bankruptcy Court did not err in concluding the Funding Agreement acts only as a backstop and requires New GP to provide funds to an asbestos trust only to the extent the Debtor's own assets are insufficient such that it could impact the bankruptcy estate. The Funding Agreement requires the Debtor to exhaust its own assets before any funding becomes applicable, which could affect the way in which the bankruptcy estate is ultimately administered including how a section 524(g) trust is funded and paid. While the Appellants argue these provisions result in ultimately the same pot of money being pushed around between New GP and the Debtor, the payment of indemnification claims could have real time effects on how the Debtor's bankruptcy estate and how a section 524(g) trust is ultimately funded and administered.[3]

3. The Bankruptcy Court's Order did not consider whether it has "arising in" subject matter jurisdiction; however, Appellees argue the Bankruptcy Court also has arising in jurisdiction.

D. The Bankruptcy Court did not abuse its discretion in granting the preliminary injunction.

The Bankruptcy Court's Orders concluded the Debtor met the requirements necessary to issue an injunction and enjoined the Adversary Proceeding Defendants from filing or continuing to prosecute any Asbestos-Related Claims against the Non-Debtor Protected Parties on any theory. (Doc. No. 1-1). Since the Bankruptcy Court granted the injunction pursuant to section 105 of the Bankruptcy Code, it did not consider the Debtor's alternative request for declaratory relief that the automatic stay extended to the Non-Debtor Protected Parties. (*Id.*).

Pursuant to 11 U.S.C. § 105(a), the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. This section "empowers the bankruptcy

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Since the Court concludes the Bankruptcy Court clearly, at a minimum, had related to jurisdiction it is not necessary for the Court to analyze in depth whether arising in jurisdiction exists. However, the Court notes that courts in this Circuit find arising in jurisdiction exists when considering whether to grant an injunction under section 105(a), because a section 105 injunction arises only in bankruptcy cases, would have no existence outside of bankruptcy, any such injunction only lasts during the pendency of the bankruptcy case, and is available only because of the equitable powers given to the Bankruptcy Court only under the Bankruptcy Code. *In re Brier Creek Corp. Center Associates Ltd.*, 486 B.R. 681, 685 (E.D.N.C. 2013); *In re DBMP LLC*, No. 20-03004, 2021 Bankr. LEXIS 2194, 2021 WL 3552350, at *19 (Bankr. W.D.N.C. Aug. 11, 2021).

court to enjoin parties other than the bankrupt from commencing or continuing litigation" and to stay related third-party litigation against non-debtors. *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1002-03 (4th Cir. 1986) (quotations omitted); *Willis v. Celotex Corp.*, 978 F.2d 146, 149 (4th Cir. 1992); *Kreisler v. Gold*, 478 F.3d 209, 215 (4th Cir. 2007). Under section 105(a), bankruptcy courts may stay an action against a third party "when the court finds 'that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party'" or when it would otherwise "have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan." *Willis*, 978 F.2d at 149 (quoting *Piccinin*, 788 F.2d at 1003).

When considering whether to issue an injunction pursuant to section 105(a), courts in the Fourth Circuit apply the four-part test for preliminary injunctions, tailored as needed for bankruptcy cases. *Piccinin*, 788 F.2d 994 at 1008-09; *In re Chicora Life Center, LC*, 553 B.R. 61, 64 (D.S.C. 2016). Thus, the relevant test for determining whether to grant an injunction pursuant to section 105(a) is: (1) likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) the balance of equities; and (4) whether an injunction is in the public interest. *In re Litchfield Co. of S.C. Ltd. P'ship*, 135 B.R. 797, 805 (W.D.N.C. 1992); *In re Chicora Life Center, LC*, 553 B.R. 61, 64 (D.S.C. 2016). Each part of the test must separately be considered and satisfied in order for courts to issue an injunction. *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013).

Appellants make a host of different arguments as to why Debtor failed to prove each of the four-part test. Appellants largely attempt to ask this Court to replace the Bankruptcy Court's judgment with its own judgment and decide the matter differently, by arguing a variety of reasons why the Bankruptcy Court's reasoning was incorrect. The Bankruptcy Court did not rest its decision on an incorrect legal standard, a clearly erroneous finding of a material fact, or misapprehend the law with respect to underlying issues in litigation. The Court concludes the Bankruptcy Court did not abuse its discretion when analyzing the four-factors and ultimately issuing the injunction.

1. Likelihood of Success on the Merits

In the bankruptcy context, courts interpret the success on the merits factor to require the debtor to show it has a reasonable likelihood of successful reorganization. *Chicora*, 553 B.R. at 66; *Brier Creek*, 486 B.R. at 696; *Litchfield*, 135 B.R. at 807 ("This test is satisfied by showing that there is a probability of successfully effectuating a plan of reorganization."). When concluding the Debtor met this factor, the Bankruptcy Court looked to the Debtor's approximately $145 million in assets, plus the Debtor's ability to draw from the Funding Agreement as needed to fund a section 524(g) trust and pay any administrative costs of the bankruptcy case. First, the Future Claimants Representative argues the Bankruptcy Court applied the incorrect legal standard when evaluating this factor because the Bankruptcy Court stated that the Debtor had a realistic possibility

of reorganization, rather than a reasonable likelihood of a successful reorganization. While the Bankruptcy Court's Order Granting Injunction stated the Debtor has a realistic possibility of reorganization, the Future Claimants Representative parses the Bankruptcy Court's words to argue it applied the incorrect legal standard. The Bankruptcy Court's analysis clearly articulated and applied the correct legal standard when analyzing this factor. When analyzing this factor the Bankruptcy Court looked to the Debtor's assets and resources for a successful reorganization and noted "there is no reason . . . to conclude at this point that the Debtor does not have the ability to fully fund a section 524(g) trust, as well as the administrative costs of its Chapter 11." (Doc. No. 1-1).

Appellants also make various arguments contradicting the Bankruptcy Court's reasoning, which the Court finds unavailing and do not convince the Court that the Bankruptcy Court abused its discretion. Here, the Debtor has significant assets on its own and also has contractual rights under the Funding Agreement by which the Bankruptcy Court reasonably concluded the Debtor has a reasonable likelihood of successful reorganization. The Funding Agreement is not so unreliable or "illusory" that the Court can conclude the Bankruptcy Court, which is intimately familiar with the Debtor's Bankruptcy Case and reorganization efforts, abused its discretion in determining the Debtor has a reasonable likelihood of successful reorganization.

2. Irreparable Harm

The Bankruptcy Court concluded that the failure to enjoin litigation against the Non-Debtor Protected Parties would irreparably harm the Debtor because of its indemnification obligations, diversion of key personnel, concerns with *res judicata* and collateral estoppel, and causing certain evidentiary concerns that the Debtor would be forced to litigate. Appellants argue the Bankruptcy Court was incorrect for various reasons including that the Funding Agreement is circular, Debtor can obtain additional personnel if needed, and New GP has sufficient funds to defend any litigation if an injunction is not granted such that any concerns or effects on the Debtor would be sufficiently addressed by the Non-Debtor Protected Parties. These arguments do not present any grounds sufficient for the Court to conclude the Bankruptcy Court abused its discretion rather than ask the Court to replace the Bankruptcy Court's judgment with its own. Nor do they convince the Court. The Court agrees with the Bankruptcy Court that the Debtor would be irreparably harmed if the injunction was not granted and litigation against the Non-Debtor Parties continued in numerous courts across the country, with potentially lasting consequences on the Debtor's ability to defend itself, its potential liability, and its efforts to effectively reorganize.

3. Balance of the Equities

The Bankruptcy Court concluded the entire purpose of the Debtor's Chapter 11 bankruptcy case would be

defeated if the litigation in other forums continued against the Non-Debtor Protected Parties and a section 524(g) trust will provide all claimants with an efficient means to equitably resolve their claims. The Bankruptcy Court did not abuse its discretion when balancing the equities among the various interests, and Appellants arguments otherwise are unavailing. While the Court is sympathetic to the human needs of the claimants noted by Appellants, there are numerous other relevant factors, which the Bankruptcy Court considered and weighed. The Court agrees, by enjoining the litigation to allow the Debtor an opportunity to successfully reorganize through a section 524(g) trust, if ultimately successful, the claims potentially can be resolved for all current and future claimants.

4. Public Interest

Finally, the Bankruptcy Court did not abuse its discretion in concluding the public interest is served by allowing a successful reorganization. Appellants ask this Court to "look honestly and skeptically at the actions" of the Debtor to the "real public health and societal costs." Again, the Court does not find that the Bankruptcy Court abused its discretion when applying this factor. Allowing for a successful reorganization serves the public interest because it would allow for the resolution of thousands of asbestos-related claims in a fair and efficient manner through a section 524(g) trust. This would ensure claimants, present and future, are treated fair and equitably, result in consistency among claimants, and promote judicial economy. Additionally, while the Appellants downplay the importance of successful reorganizations, the ability for

entities to have the opportunity to successfully reorganize is an important public interest.

IV. CONCLUSION

IT IS, THEREFORE, ORDERED that:

1. Appellant Future Claimants Representative's Motion for Leave to Appeal, (Doc. No. 2), is **DENIED as moot**; and

2. The Bankruptcy Court's Preliminary Injunction Orders are **AFFIRMED**.

3. The Clerk of Court is directed to close this case.

Signed: January 6, 2022

/s/ Robert J. Conrad, Jr.
Robert J. Conrad, Jr.
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED JANUARY 31, 2020

UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Chapter 11
Case No.: 17-31795

In re:

BESTWALL LLC,

Debtor.

Adversary Proceeding
No.: 17-03105

BESTWALL LLC,

Plaintiff,

v.

THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT AND JOHN AND JANE DOES 1-1000,

Defendants.

Appendix C

ORDER GRANTING IN PART AND DENYING IN PART MOTION OF THE OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS TO RECONSIDER AND AMEND THE MEMORANDUM OPINION AND ORDER GRANTING THE DEBTOR'S REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF

THIS MATTER is before the court on the Motion of the Official Committee of Asbestos Claimants to Reconsider and Amend the Memorandum Opinion and Order Granting the Debtor's Request for Preliminary Injunctive Relief (the "Motion"). The Motion asks the court to vacate and amend the rulings in its July 29, 2019 Memorandum Opinion and Order Granting the Debtor's Request for Preliminary Injunctive Relief (the "Memorandum Opinion and Order") with respect to the due process and preemption arguments advanced by the Official Committee of Asbestos Claimants (the "ACC") and also clarify that the Memorandum Opinion and Order did not address whether Georgia-Pacific LLC ("New GP") qualifies for relief under 11 U.S.C. § 524(g). The court held a hearing on the Motion and related filings on October 23, 2019, and continued the hearing to November 20, 2019 for ruling. For the reasons stated herein, the court denies the motion in part and grants the motion in part.

The court previously explained the relevant facts and procedural history in the Memorandum Opinion and Order. *See In re Bestwall LLC*, Adv. Pro. No. 17-03105 (Bankr. W.D.N.C. July 29, 2019). The Memorandum Opinion and Order concluded that New GP is entitled to a

preliminary injunction under 11 U.S.C. § 105(a) prohibiting the Defendants from pursuing Bestwall Asbestos Claims[1] against the Protected Parties.[2]

The Motion seeks relief pursuant to Federal Rules of Civil Procedure 52(b)[3] and 59(e).[4] Rule 52(b) provides that "[o]n a party's motion filed no later than 28 days[5] after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59." "A Rule 52(b) motion to amend findings by the court 'is not intended to allow the parties to relitigate old issues, to advance new theories, or to rehear

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1. For the purposes of this Order, "Bestwall Asbestos Claims" refers to any asbestos-related claims against the Debtor, including all former claims against Old GP related in any way to asbestos or asbestos-containing materials, except for asbestos-related claims for which the exclusive remedy is provided under workers' compensation statutes and similar laws.

2. The Protected Parties include the former Georgia-Pacific LLC, ("Old GP"), New GP, and the non-debtor affiliates of New GP and the Debtor.

3. Federal Rule of Bankruptcy Procedure 7052 makes Federal Rule of Civil Procedure 52 applicable to adversary proceedings related to bankruptcy cases.

4. Federal Rule of Bankruptcy Procedure 9023 makes Federal Rule of Civil Procedure 59 applicable to bankruptcy cases.

5. Federal Rule of Bankruptcy Procedure 7052 requires parties to file motions pursuant to Rule 52(b) within 14 days of the entry of a judgment. The ACC timely filed its motion within 14 days of the entry of the Memorandum Opinion and Order.

the merits of a case'" *Diebitz v. Arreola*, 834 F. Supp. 298, 302 (E.D. Wis. 1993) (quoting *Renfro v. City of Emporia*, 732 F. Supp. 1116, 1117 (D. Kan. 1990)). "Instead, these motions are intended to correct manifest errors of law or fact or to present newly discovered evidence." *Wahler v. Countrywide Home Loans, Inc.*, No. 1:05CV349, 2006 WL 3327074, at *1 (W.D.N.C. Nov. 15, 2006) (quoting *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976)).

Pursuant to Rule 59(e), "[a] motion to alter or amend a judgment must be filed no later than 28 days[6] after the entry of a judgment." The Fourth Circuit has recognized three bases for altering or amending a judgment pursuant to Rule 59(e): "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citing *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 112 (4th Cir. 1997)); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)). Motions pursuant to Rule 59(e) should not "raise arguments which could have been raised prior to the issuance of the judgment," *id.* (citations omitted), and "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly," *id.* (quoting 11 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2810.1 at 124 (2d ed. 1995)).

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6. Federal Rule of Bankruptcy Procedure 9023 requires parties to file motions pursuant to 59(e) within 14 days of the entry of a judgment.

The court concludes the ACC did not offer legitimate grounds under Federal Rule of Civil Procedure 52 or 59 for the court to reconsider the ACC's due process and preemption arguments addressed in the Memorandum Opinion and Order. The ACC argues that reconsideration was warranted because the court misconstrued its arguments on due process and preemption and therefore did not address those arguments. The ACC reasons the court erred because it did not understand these arguments to be made solely in support of their broader argument that New GP is not entitled to relief under 11 U.S.C. § 524(g).

The Motion does not identify any new evidence, change in controlling law, or errors of law in the Memorandum Opinion and Order. The ACC failed to clearly convey that their due process and preemption arguments were only made in support of their overarching argument that New GP is ineligible to obtain relief under 11 U.S.C. § 524(g). It was incumbent upon the ACC to make these arguments in a manner that allowed the court and the parties to understand the scope of these arguments from the outset. Indeed, at the hearing on the Motion, counsel for the ACC acknowledged that, based on its filings in opposition to the preliminary injunction, she understood why the court and opposing counsel interpreted their arguments differently than what the ACC intended to argue. After reviewing the record, the court concludes that its analysis regarding the ACC's due process and preemption arguments is consistent with the manner in which the ACC presented those arguments prior to the court granting injunctive relief. Accordingly, there is no basis under either Rule

52(b) or 59(e) to amend the Memorandum Opinion and Order in the manner requested by the ACC.

However, the court notes that the Memorandum Opinion and Order did not address whether New GP is entitled to 11 U.S.C. § 524(g) relief. Furthermore, the Memorandum Opinion and Order extending the preliminary injunction to New GP does not allow any party to escape any asbestos related liabilities. The court will address whether any of the parties qualify for a § 524(g) channeling injunction in connection with confirmation.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the ACC's request that the court reconsider Memorandum Opinion and Order is **DENIED IN PART** as to the ACC's request that the court vacate and amend its rulings with respect to due process and preemption **AND GRANTED IN PART** to clarify that the court did not address whether or not New GP is entitled to § 524(g) relief.

SO ORDERED.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED JULY 29, 2019

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Chapter 11
Case No. 17-31795,
Adv. Pro. No. 17-03105

IN RE BESTWALL LLC,[1]

Debtor.

BESTWALL LLC,

Plaintiff,

v.

THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT AND JOHN AND JANE DOES 1-1000,

Defendants.[2]

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1. The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 133 Peachtree Street, N.E., Atlanta, GA 30303.

2. The Defendants are all plaintiffs or potential plaintiffs in lawsuits that seek to hold or may seek to hold the Protected Parties

Appendix D

July 29, 2019
Filed and Judgment Entered

Laura T. Beyer,
United States Bankruptcy Judge.

MEMORANDUM OPINION AND ORDER GRANTING THE DEBTOR'S REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF

On November 9, 2018 and January 24, 2019, the Court convened hearings on the *Debtor's Motion for an Order (I) Preliminarily Enjoining Certain Actions Against Non-Debtors, or (II) in the Alternative, Declaring that the Automatic Stay Applies to Such Actions and (III) Granting a Temporary Restraining Order Pending a Full Hearing on the Motion* [Adv. Docket No. 2] (the "*Motion*"). The Motion was filed contemporaneously with the Debtor's *Complaint for Injunctive and Declaratory Relief (I) Preliminarily Enjoining Certain Actions Against Non Debtors, or (II) in the Alternative, Declaring That the Automatic Stay Applies to Such Actions and (III) Granting a Temporary Restraining Order Pending a Full Hearing on the Motion* [Adv. Docket No. 1] (the "*Complaint*"). For the reasons set forth below, the Court grants the Motion.

PROCEDURAL HISTORY

On November 2, 2017 (the "*Petition Date*"), Bestwall

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liable for Bestwall Asbestos Claims, as such terms are defined below. The Defendants, with the exception of the John and Jane Doe Defendants, are listed in *Appendix A* hereto.

LLC ("*Bestwall*" or the "*Debtor*") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "*Bankruptcy Code*") in this district, initiating the above-captioned Chapter 11 case to resolve mass asbestos claims through a section 524(g) trust. Concurrently with its Chapter 11 petition, Bestwall initiated this adversary proceeding by filing the Complaint. In connection with the Complaint, Bestwall also filed the Motion, asking the Court to prohibit and enjoin the Defendants from filing or continuing to prosecute any "Bestwall Asbestos Claims"[3] against the "Protected Parties."[4] On November 8, 2017, the Court entered a temporary restraining order [Adv. Docket No. 18] (the "*TRO*") granting the requested relief pending a further hearing on the Motion.

Shortly after the Petition Date on November 16, 2017, this Court approved the appointment of the Official Committee of Asbestos Claimants (the "*Committee*") to represent the asbestos claimants in the Chapter 11 case and thereafter has approved modifications to the Committee [Docket Nos. 97, 335, 348, 666, and 690]. On February 23, 2018, the Court appointed Sander L.

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3. For purposes of this Memorandum Opinion and Order, "*Bestwall Asbestos Claims*" refers to any asbestos-related claims against the Debtor, including all former claims against the former Georgia-Pacific, LLC ("*Old GP*") related in any way to asbestos or asbestos-containing materials, except for asbestos-related claims for which the exclusive remedy is provided under workers' compensation statutes and similar laws.

4. The "*Protected Parties*" are listed on *Appendix B* hereto. They include Old GP, Georgia-Pacific, LLC ("*New GP*"), and the non-debtor affiliates of New GP and the Debtor.

Esserman as Legal Representative for Future Asbestos Claimants (the "*FCR*") [Docket No. 278].

On December 7, 2017, the Court entered an order agreed upon by the Committee and the Debtor which, among other things, prohibited and enjoined the Defendants from filing or continuing to prosecute any Bestwall Asbestos Claims against the Protected Parties [Adv. Docket No. 30] through and including March 26, 2018.

Subsequently, the Court, by agreement of Bestwall, the Committee, the FCR (once appointed), and New GP (as applicable), entered a series of orders [Adv. Docket Nos. 32, 33, 36, 41, 91, 125, 136, 141, 152, 157, 160, and 162] that continued the injunction against the filing or continued prosecution of Bestwall Asbestos Claims against the Protected Parties through and including July 31, 2019.

On August 15, 2018, the Committee and the FCR each objected to the Motion. Bestwall, New GP,[5] the Committee, and the FCR fully briefed the matter[6] and presented oral arguments at the hearing conducted before this Court on November 9, 2018.

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5. With the approval of the Court, New GP participated in the briefing and oral argument for this matter and moved to intervene in this adversary proceeding, which intervention was approved by an order of the Court dated April 5, 2019 [Adv. Docket No. 156].

6. The parties filed the following briefs in support of or in opposition to the Motion an objection filed by the Committee [Adv. Docket No. 47] (the "*Committee's Objection*"); an objection filed by the FCR [Adv. Docket No. 49] (the "*FCR's Objection*"); a reply filed by Bestwall [Adv. Docket No. 94]; a reply filed by New GP [Adv. Docket No. 97]; a sur-reply filed by the Committee [Adv. Docket No. 109]; and a sur-reply filed by the FCR [Adv. Docket No. 110].

Appendix D

In connection with the Court's consideration of the Motion, the parties stipulated to the admission into evidence of the *Debtor's Submission in Lieu of Live Testimony* [Adv. Docket No. 104] (the "*Submission*"). *See* Submission, pp. 2, 26; *see also Transcript of Proceedings Before the Honorable Laura Turner Beyer, United States Bankruptcy Judge* (November 9, 2018) (the "*November Transcript*"), p. 42. The Debtor also submitted the *Declaration of Gregory M. Gordon* [Adv. Docket No. 95] (the "*Gordon Declaration*") into evidence, and no objections were made to its admission. *See* November Transcript, p. 42.

RELEVANT FACTS

Old GP, the predecessor to Bestwall, had a decades-long history of asbestos litigation that derived from its acquisition of Bestwall Gypsum Co. ("*Old Bestwall*"). Submission at ¶¶ 22-23. Old Bestwall manufactured and sold certain asbestos-containing products, principally joint compound, and Old GP continued to manufacture and sell those products following the acquisition. *Id.* The magnitude and projected continuation of that litigation through at least 2050 ultimately led Old GP to undertake a corporate restructuring on July 31, 2017 (the "*2017 Corporate Restructuring*"). *Id.* at ¶ 13.

The 2017 Corporate Restructuring was effectuated through a Texas divisional merger.[7] As a result of that divisional merger, Old GP ceased to exist and two new companies were formed:[8]

7. *See* Tex. Bus. Orgs. Code § 1.002(55)(A).

8. *See* Gordon Declaration at ¶ 28, Ex. Z.

a) Bestwall (the debtor in this case), which received certain assets and liabilities of Old GP, including (i) Old GP's asbestos liabilities (with the exception of claims made under a workers' compensation statute or similar laws) and (ii) certain assets related to the historical Old Bestwall business; and

b) Georgia-Pacific LLC ("*New GP*"), which received the other businesses, assets, and liabilities of Old GP, most of which are unrelated to Old Bestwall's historical business.

Id. at ¶ 14.

As of September 30, 2017, there were approximately 64,000 asbestos-related claims pending against Bestwall, and Bestwall projected that tens of thousands of additional claims would continue to be filed or asserted against it every year through at least 2050. Submission at ¶¶ 23, 29.

From the 2017 Corporate Restructuring, Bestwall received, among others, the following tangible assets

a) three bank accounts with approximately $32 million in cash at the time of the transaction;

b) all contracts of Old GP related to its asbestos-related litigation;

c) certain real estate in Mt. Holly, North Carolina; and

> d) all equity interests in non-debtor GP Industrial Plasters LLC, a North Carolina limited liability company ("*PlasterCo*"), which owns certain assets of Old Bestwall's historical business, is projected to generate annual cash flow (EBITDA) of $18 million starting in 2019, and whose equity was valued at approximately $145 million prior to the petition date.

Id. at ¶ 15.

As part of the 2017 Corporate Restructuring, Bestwall also became party to a funding agreement with New GP (the "*Funding Agreement*"). *Id.; see* Gordon Declaration at ¶ 7, Ex. A. Without any corresponding repayment obligation by Bestwall, the Funding Agreement requires New GP to provide funding to pay for all costs and expenses of Bestwall incurred in the normal course of its business either (a) in the absence of a bankruptcy case or (b) during the pendency of any Chapter 11 case, including the costs of administering Bestwall's Chapter 11 case, in both cases to the extent that any cash distributions received by the Debtor from its subsidiaries are insufficient to pay such costs and expenses. Submission at ¶ 17.

In addition, and again in the absence of any corresponding repayment obligation by the Debtor, the Funding Agreement requires New GP to fund any amounts necessary or appropriate to satisfy the Debtor's asbestos-related liabilities in the absence of a bankruptcy case and also obligates New GP, in the event of a Chapter

11 filing, to provide the funding for a section 524(g) asbestos trust in the amount required by a confirmed plan of reorganization for the Debtor to the extent that the Debtor's assets are insufficient to provide the requisite trust funding. *Id.*

DISCUSSION

I. Subject Matter Jurisdiction

The Committee and the FCR assert that this Court lacks subject matter jurisdiction to enjoin Bestwall Asbestos Claims against New GP. The Court disagrees. The Fourth Circuit's test for "related to" jurisdiction under 28 U.S.C. § 1334(b) confirms that the Court has authority to issue the requested injunction.

The Fourth Circuit has adopted the *Pacor* test for determining whether a proceeding is sufficiently related to a bankruptcy case for this Court to have jurisdiction under section 1334(b) of title 28 of the United States Code. *See Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984); *see also A.H. Robins Co., Inc. v. Piccinin,* 788 F.2d 994, 1002, n. 11 (4th Cir. 1986) (adopting the *Pacor* test).

The *Pacor* test examines whether the outcome of a proceeding "could conceivably have any effect on the estate being administered in bankruptcy." *Pacor,* 743 F.2d at 994. In the asbestos context, courts have made clear that this standard applies whether any claims against a third party are alleged to be "direct" or "derivative." *See In re Quigley Co., Inc.,* 676 F.3d 45, 56-57 (2d Cir. 2012).

Although evaluating whether a claim is allegedly "direct" or "derivative" may help inform "whether it has the potential to affect the bankruptcy" estate, "the touchstone for bankruptcy jurisdiction remains 'whether its outcome might have any "conceivable effect" on the bankruptcy estate.'" *Id.* at 57 (citations omitted).

Failing to grant the injunction could conceivably have an effect on Bestwall's bankruptcy estate.

(1) Discontinuing the Injunction Would Defeat the Very Purpose of Section 524(g)

Failure to maintain the injunction would defeat the very purpose of section 524(g) and the Debtor's Chapter 11 case. *See* Submission at ¶¶ 42, 44. Section 524(g) allows a debtor to address in one forum all potential asbestos claims against it, both current and future, as well as current and potential future claims against third parties alleged to be liable on account of asbestos claims against the debtor. Piecemeal attempts by plaintiffs to seek to hold New GP liable for Bestwall Asbestos Claims outside of Chapter 11 would defeat that fundamental purpose. *Id.*

(2) Discontinuing the Injunction Would Distract Bestwall's Personnel

If the Defendants are permitted to commence or continue Bestwall Asbestos Claims against the Protected Parties, personnel who play key roles in the Debtor's reorganization efforts, such as Mr. Mercer, who serves as Chief Legal Officer of Bestwall, and his team, will

be called upon to spend substantial time managing and directing all the activities involved in the day-to-day defense of these lawsuits. Submission at ¶ 47. These activities consumed many of the same personnel prior to the Chapter 11 case and, if resumed, would consume them again and, therefore, impair the ability of the Debtor to address tasks necessary to pursue a plan of reorganization pursuant to section 524(g) of the Bankruptcy Code. *Id.*

(3) Bestwall Has Indemnity Obligations That Would Make Judgments Against New GP Tantamount to Judgments Against Bestwall

Failure to enjoin litigation of Bestwall Asbestos Claims against the Protected Parties would affect the Debtor because the Debtor has indemnity obligations that would make judgments against the Protected Parties on the Bestwall Asbestos Claims tantamount to judgments against the Debtor. *See* Submission at ¶ 45. The Committee and the FCR allege that these indemnity obligations are "contrived" and "circular." But the obligations are neither. First, pursuant to the terms of the Plan of Merger (Gordon Declaration, Ex. Z), responsibility for the Bestwall Asbestos Claims was allocated to the Debtor. *Id.* at ¶¶ 14-15. Thus, it makes sense that the Debtor would, and the Debtor has agreed to, indemnify its affiliates against those claims. Second, the Funding Agreement acts only as a backstop and requires New GP to provide funds to an asbestos trust under a plan for the Debtor only to the extent that the Debtor's own assets are insufficient.[9]

9. *See* Funding Agreement, attached as *Exhibit A* to the Gordon Declaration, definition of "Permitted Funding Use."

Submission at ¶ 17. Paying the indemnity claims would deplete the assets the Debtor has available to fund the section 524(g) asbestos trust and, therefore, have an effect on the Debtor's bankruptcy estate.

Even absent a contractual indemnification obligation, the Debtor believes that it is likely the Protected Parties may have common law indemnity claims against the Debtor because any finding that a Protected Party is liable for the Bestwall Asbestos Claims would necessarily allow claimants to hold the Debtor and the applicable Protected Party jointly and severally liable. Submission at ¶ 45; *see Minn. Mining & Mfg. Co. v. Super. Ct.*, 206 Cal. App. 3d 1025, 1028, 253 Cal. Rptr. 908 (Cal. Ct. App. 1988) (recognizing that the application of derivative liability theories such as alter ego creates joint and several liability). Joint and several liability is the touchstone for indemnification obligations under state common law. *See, e.g., Ne. Solite Corp. v. Unicon Concrete, LLC*, 102 F. Supp. 2d 637, 640 (M.D.N.C. 1999) (North Carolina common law recognizes equitable or implied indemnification, which is an equitable right of recovery by a party held vicariously liable for the tort of another).[10]

The Committee and FCR further argue that this Court lacks subject matter jurisdiction to enjoin Bestwall Asbestos Claims against New GP on the basis that New GP is "directly" liable for the Bestwall Asbestos Claims and, thus, it is not clear whether New GP would be

10. The rights of the Committee and the FCR to argue that there is no applicable common law indemnity are reserved.

eligible to be the beneficiary of a channeling injunction under section 524(g). It is not necessary for the Court to conclude whether claims against New GP would be direct or derivative. *See* 11 U.S.C. § 524(g)(4)(A)(ii) (providing that a non-debtor is entitled to protection under section 524(g) if it is "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of" one or more specified circumstances);[11] *see also W.R. Grace & Co. v. Carr,* 900 F.3d 126, 138 (3d Cir. 2018).

Bestwall Asbestos Claims brought against New GP would not be independent, wholly separate, or in any way distinguishable from liability asserted against the Debtor. The liability being asserted against New GP and Bestwall would be identical and co-extensive in every respect. Both sets of claims involve the same plaintiffs, the same asbestos-containing products, the same alleged injuries, the same legal theories and causes of action, the same time periods, the same markets, and the same alleged damages resulting from the same alleged conduct. The Court thus concludes that it has jurisdiction to continue the preliminary injunction.

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11. One of those specified circumstances is the non-debtor's "involvement in a transaction changing the corporate structure" of a predecessor in interest of the debtor. See 11 U.S.C. § 524(g)(4)(A)(ii)(IV). The Debtor contends that any alleged liability of New GP with respect to Bestwall Asbestos Claims would arise entirely out of New GP's involvement in the 2017 Corporate Restructuring and, thus, any alleged liability of New GP arises by reason of this circumstance making New GP entitled to the protection of a channeling injunction based on the explicit language of § 524(g)(4)(A)(ii)(IV). *See* Submission at ¶ 14.

The Court further concludes that (a) this is a core proceeding pursuant to 28 U.S.C. § 157(b); and (b) venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

II. Due Process

The Committee argues that the 2017 Corporate Restructuring violated the due process rights of asbestos claimants and seems to imply, based thereon, that the restructuring should not be respected and New GP should be deemed the entity liable for the Bestwall Asbestos Claims. The Court disagrees.

First, the Court is not aware of any law, and the Committee has not cited any law, that would have required Old GP as the Committee asserts, to have either consulted with the asbestos claimants or solicited their vote before it engaged in the 2017 Corporate Restructuring.

Second, the claimants will be afforded due process in this case as a result of the requirements of the Bankruptcy Code and, in particular, section 524(g). Section 524(g) contemplates the active participation and support of the Committee, requires the affirmative vote of at least 75% of asbestos claimants in connection with confirmation of a plan seeking the benefits of that section (*see* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb)), and calls for approval of the plan of reorganization by both this Court and the District Court (*see* 11 U.S.C. § 524(g)(3)(A)). These claimant protections further support the Court's conclusion that no due process violation occurred.

Appendix D

III. Preemption

The Committee argues that Old GP's use of the Texas divisional merger statute to effectuate the 2017 Corporate Restructuring is "preempted" by section 524(g) of the Bankruptcy Code. The Court disagrees.

Preemption typically falls into three categories express, conflict, and field preemption. There is a "strong presumption against inferring Congressional preemption in the bankruptcy context." *Integrated Sols., Inc. v. Serv. Support Specialties, Inc.,* 124 F.3d 487, 493 (3d Cir. 1997) (citation omitted). And "[t]his presumption is strongest when Congress legislates 'in a field which the States have traditionally occupied'" — such as the field of corporate organization, which is the province of Texas state law. *S. Blasting Servs., Inc. v. Wilkes Cty., NC,* 288 F.3d 584, 590 (4th Cir. 2002) (quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)).

The Committee concedes that express preemption does not apply in this case. Committee's Objection at 21, n. 23. The Court concludes that neither conflict preemption nor field preemption applies here. The Texas statute and section 524(g) concern completely different subjects and work readily in tandem, including in the context of this Chapter 11 case.

A. Conflict Preemption

Conflict preemption occurs "when compliance with both federal and state regulations is a physical

impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *S. Blasting Servs.*, 288 F.3d at 590 (4th Cir. 2002) (quoting *Hillsborough Cty. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 712, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)).

The Committee concedes that "[f]acially there is no conflict between" the Texas divisional merger provision and section 524(g). Committee's Objection at 30. The former — which has been law for nearly 30 years and predates section 524(g) — is simply part of a general law of corporate organization (including the assignment of assets and liabilities as part of a reorganization); it has nothing to do with section 524(g), a provision for discharging and channeling asbestos claims in connection with a Chapter 11 plan.

The Committee nevertheless claims that conflict preemption applies because the Debtor's use of the Texas divisional merger statute enabled Old GP to replace the assets against which asbestos creditors had a claim with a much smaller subset of assets by effecting a restructuring of asbestos-related liabilities outside of section 524(g). The Court disagrees with the Committee's argument for several reasons. First, because of the Funding Agreement, the Debtor's ability to pay valid Bestwall Asbestos Claims after the 2017 Corporate Restructuring is identical to Old GP's ability to pay before the restructuring. Submission at ¶ 16.

Second, Texas has adopted the Uniform Fraudulent Transfer Act (Tex. Bus. & Com. Code §§ 24.001, *et seq.)* and fraudulent transfer law is also a part of the Bankruptcy Code (*see, e.g.,* 11 U.S.C. § 548). If a debtor used the Texas statute to commit a fraudulent transfer — creating the harm that the Committee complains of — such law would be available to address such acts.

Third, regardless of how the Debtor was formed in the 2017 Corporate Restructuring, the Debtor is subject to all of the requirements of section 524(g), and the claimants are correspondingly entitled to all of that section's benefits and protections. The goal of this bankruptcy proceeding is to permanently and globally resolve the Bestwall Asbestos Claims, and the 2017 Corporate Restructuring did not accomplish or determine that resolution. There is no conflict.

B. Field Preemption

Field preemption is rare and requires a showing that Congress has "regulat[ed] so pervasively that there is no room left for the states to supplement federal law," or that "there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject[.]'" *U.S. v. South Carolina,* 720 F.3d 518, 528-29 (4th Cir. 2013) (quoting *Arizona v. U.S.,* 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)); *see also Hillsborough,* 471 U.S. at 713.

Here, there is no ongoing federal regulation of any relevant field. The Committee suggests that a "field of

asbestos-related corporate reorganizations" exists. But section 524(g) of the Bankruptcy Code is the only federal provision that is allegedly filling this field. The Committee has failed to explain how one subsection of one statute can establish a pervasive regime or reflect a dominant federal interest. *See South Carolina,* 720 F.3d at 532.

Moreover, section 524(g) does not regulate corporate organizations or reorganizations at all, as does the Texas statute. Instead, section 524(g) provides the method for obtaining a discharge and channeling injunction of asbestos-related claims as part of a larger Chapter 11 restructuring and, consistent with the Bankruptcy Code more generally, it takes a debtor's corporate structure as it comes under background state law. *See, e.g., In re Blackwell ex rel. Estate of I.G. Servs. Ltd.,* 267 B.R. 732, 740 n. 12 (Bankr. W.D. Tex. 2001) ("As a general rule corporate forms are observed in bankruptcy unless there are clear state law grounds for piercing the corporate veil.") (quoting David B. Young, *Preferences and Fraudulent Transfers*, in 22nd Annual Current Developments in Bankruptcy & Reorganization 2000, at 597 (Practising Law Institute Commercial Law and Practice Course Handbook Series, PLI Order No. A0-004D, 2000)).

In fact, section 524(g) expressly contemplates pre-filing corporate reorganizations — and provides that a channeling injunction may bar actions "directed against a third party" arising by reason of that party's "involvement" in such a transaction changing the corporate structure — without establishing any requirements for these

reorganizations. 11 U.S.C. § 524(g)(4)(A)(ii)(IV) (referring to "a transaction changing the corporate structure, or . . . a loan or other financial transaction affecting the financial condition, of the debtor or a related party"). Thus, that subsection itself contemplates that state corporate law will bear on — not be displaced by — its operation.

Finally, if the Committee's posited field existed, it would not preempt the Texas divisional merger provision. That provision does not specifically concern "asbestos-related" reorganizations but instead creates a process available to any Texas "domestic entity" to modify its corporate structure. Tex. Bus. Orgs. Code Ann. § 10.001(a). Although the Committee concedes that no aspect of the Texas statute by itself is preempted, it argues "that the use of the statute to avoid asbestos liability is impermissible." Committee's Objection at 23. But the Debtor is not seeking to avoid its liability for Bestwall Asbestos Claims. Rather, the Debtor is seeking to resolve the Bestwall Asbestos Claims, current and future, in the bankruptcy proceeding, in accordance with the terms of section 524(g). Submission at ¶ 32.

IV. Preliminary Injunction

Courts considering the propriety of an injunction under section 105(a) of the Bankruptcy Code apply the traditional four-prong test for injunctions, tailored to the unique circumstances of bankruptcy. *See, e.g., Robins,* 788 F.2d at 1008 (noting that the district court had applied the test for a grant of preliminary injunctive relief previously articulated by the Fourth Circuit and upholding the grant

of a preliminary injunction). Accordingly, bankruptcy courts consider

1. The debtor's reasonable likelihood of a successful reorganization;

2. The imminent risk of irreparable harm to the debtor's estate in the absence of an injunction;

3. The balance of harms between the debtor and its creditors; and

4. Whether the public interest weighs in favor of an injunction.

See, e.g., In re Excel Innovations, Inc., 502 F.3d 1086, 1095-1100 (9th Cir. 2007); *In re Lyondell Chem. Co.*, 402 B.R. 571, 588-89 (Bankr. S.D.N.Y. 2009).

Each prong must be satisfied. *See, e.g., Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) ("Before the Supreme Court issued its ruling in *Winter*, this Court used a 'balance-of-hardship-test' that allowed it to disregard some of the preliminary injunction factors if it found that the facts satisfied other factors. However, in light of *Winter*, this [c]ourt recalibrated that test, requiring that each preliminary injunction factor be 'satisfied as articulated.'") (citations and internal quotation marks omitted); *Smith v. Smith*, No. 1 16-cv-00264-MOC-DLH, 2016 U.S. Dist. LEXIS 102600, 2016 WL 4154938, at *2 (W.D.N.C. Aug. 4, 2016) ("Finally, there no longer exists

any flexible interplay between the factors, because all four elements of the test must be satisfied.").

Injunctions of the type requested by the Debtor have previously and uniformly been issued in numerous other asbestos-related cases, including in this jurisdiction.[12] This Court likewise will issue the requested injunction,

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12. *See, e.g.*

- *In re Kaiser Gypsum Co., Inc.,* Case No. 16-31602, Adv. No. 16-03313 (Bankr. W.D.N.C. Oct. 7, 2016);
- *In re Garlock Sealing Techs. LLC,* Case No. 10-31607, Adv. No. 10-03145 (Bankr. W.D.N.C. June 7, 2010);
- *In re Leslie Controls, Inc.,* Case No. 10-12199, Adv. No. 10-51394 (Bankr. D. Del. July 14, 2010);
- *In re Specialty Prods. Holding Corp.,* Case No. 10-11780, Adv. No. 10-51085 (Bankr. D. Del. June 4, 2010);
- *In re Quigley Co., Inc.,* Case No. 04-15739, Adv. No. 04-04262 (Bankr. S.D.N.Y. Dec. 17, 2004);
- *In re Combustion Eng'g, Inc.,* Case No. 03-10495, Adv. No. 03-50839 (Bankr. D. Del. Mar. 7, 2003);
- *In re W.R. Grace & Co.,* Case No. 01-01139, Adv. No. 01-00771 (Bankr. D. Del. May 3, 2001);
- *In re Harbison-Walker Refractories Co.,* Case No. 02-2080, Adv. No. 02-02080 (Bankr. W.D. Pa. Feb. 14, 2002);

as the Debtor meets each of the four requirements as described below.

A. The Debtor has a Realistic Possibility of a Successful Reorganization

In the context of bankruptcy proceedings, "success on the merits is to be evaluated in terms of the likelihood of a successful reorganization." *Sudbury, Inc. v. Escott,* 140 B.R. 461, 466 (Bankr. N.D. Ohio 1992); *see also In re Brier Creek Corp. Ctr. Assocs. Ltd.,* 486 B.R. 681, 696 (Bankr. E.D.N.C. 2013) (noting most courts apply the test of a realistic possibility of reorganization); *In re Chicora Life Ctr., LC,* 553 B.R. 61, 66 (Bankr. D.S.C. 2016) (same).

Establishing that a reorganization is likely to be successful is not intended to be a particularly high standard. *See In re Eagle-Picher Indus., Inc.,* 963 F.2d 855, 860 (6th Cir. 1992) ("In view of the bankruptcy court's protection of [the debtor's] reorganization efforts, it is implicit in its decision that it believed [the debtor] had

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- *In re Mid Valley, Inc.,* Case No. 03-35592-JKF, Adv. No. 03-3296-JKF (Bankr. W.D. Pa. Dec. 17, 2003);

- *In re ACandS, Inc.,* Case No. 02-12687-PJW, Adv. No. 02-5581-PJW (Bankr. D. Del. Sept. 27, 2002);

- *In re G-I Holdings, Inc.,* Case No. 01-30135-RG, Adv. No. 01-3013-RG (Bankr. D.N.J. Feb. 22, 2002); and

- *In re The Babcock & Wilcox Co.,* Case No. 00-10992-JAB, Adv. No. 00-1029-JAB (Bankr. E.D. La. Apr. 17, 2000).

some realistic possibility of successfully reorganizing under Chapter 11."). Indeed, the court "must make at least a rebuttable presumption that the [debtors] have made a good faith filing and are making a good faith effort to reorganize." *In re Gathering Rest., Inc.,* 79 B.R. 992, 1001 (Bankr. N.D. Ind. 1986); *see also In re Hillsborough Holdings Corp.,* 123 B.R. 1004, 1015 (Bankr. M.D. Fla. 1990) (until it can be determined that debtors are not viable business entities incapable of achieving a successful reorganization, "it would be premature to conclude . . . that this reorganization process is doomed and that there is no legal justification for granting the injunctive relief sought"); *In re Lahman Mfg. Co.,* 33 B.R. 681, 685 (Bankr. D.S.D. 1983) (injunction was proper against creditors of non-debtors because a debtor "must be allowed to present a plan" of reorganization).

The Court concludes that the Debtor has a realistic possibility of achieving a successful reorganization. In light of the Funding Agreement, which allows the Debtor to draw from New GP the amount of money necessary to pay the costs of this Chapter 11 case and to fund a section 524(g) trust, to the extent the Debtor's assets are insufficient to do so, there is no reason for the Court to conclude at this point that the Debtor does not have the ability to fully fund a section 524(g) trust, as well as the administrative costs of its Chapter 11 case. The Debtor's assets also include approximately $145 million in equity value in PlasterCo and cash, in addition to its access to funds through the Funding Agreement. *See* Submission at ¶ 14. Any issues and concerns with the Funding Agreement can be addressed in the confirmation process.

B. Failure to Enjoin Litigation of Bestwall Asbestos Claims Would Irreparably Harm the Debtor

The Court finds that the Debtor will be irreparably harmed unless the requested injunction is continued. The Debtor filed its Chapter 11 case to obtain a global and fair determination of all current and future Bestwall Asbestos Claims. *See* Submission at ¶ 32. It would defeat the purpose of the Chapter 11 case if those claims effectively continue to be prosecuted in the tort system notwithstanding the pendency of the Debtor's bankruptcy case. *See id.* at ¶¶ 42, 44.

(1) Indemnification Obligations

As noted, the Debtor has indemnity obligations that would make judgments against the Protected Parties on the Bestwall Asbestos Claims tantamount to judgments against the Debtor. *Id.* at ¶ 45. In particular, the Debtor (a) has a contractual obligation to indemnify New GP in the event that New GP is held liable for any Bestwall Asbestos Claims and (b) may have common-law indemnification obligations to other Protected Parties. *Id.*

Under these circumstances, an injunction is warranted because contractual and common law indemnification obligations would make the Debtor the real party in interest in any suit against New GP or other Protected Parties and effectively eliminate the protections of the automatic stay. *See Robins,* 788 F.2d at 999. Courts have enjoined actions against non-debtors where, as here, the debtor has an obligation to indemnify the non-debtor for

liability deriving from conduct for which the debtor is responsible.[13]

Permitting claimants to indirectly establish claims against the Debtor through actions against third parties with indemnity rights is inconsistent with section 524(g)'s goal of consolidating and collectively resolving all asbestos claims, current and future, in the Chapter 11 case. Absent the requested injunction, Bestwall Asbestos Claims effectively would be liquidated outside of this Court through piecemeal litigation against the Protected Parties in the tort system. *See* Submission at ¶ 45. This state court litigation, if not stayed, would undermine the parties' and the Court's ability to achieve confirmation of a section 524(g) plan that treats all asbestos claimants, both current and future, fairly and equitably.

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13. *See In re W.R. Grace & Co.,* Case No. 01-01139, 2004 Bankr. LEXIS 579, 2004 WL 954772, at *4 (Bankr. D. Del. Apr. 29, 2004) (applying automatic stay to litigation between two non-debtor parties where one of the parties was entitled to contractual indemnity from the debtor on account of such claims and amending preliminary injunction order to include such actions); *In re Lomas Fin. Corp.,* 117 B.R. 64, 68 (S.D.N.Y. 1990) (affirming grant of preliminary injunction and applying automatic stay to suits against officers and directors where corporate charter of debtor required indemnification of such officers and directors); *In re Family Health Servs., Inc.,* 105 B.R. 937, 942-43 (Bankr. C.D. Cal. 1989) (issuing a preliminary injunction pursuant to section 105 of the Bankruptcy Code and applying automatic stay to collection actions against non-debtor members of debtor HMO because judgments against non-debtors would trigger claims for indemnification against the debtor HMO); *see also Queenie, Ltd. v. Nygard Int'l,* 321 F.3d 282, 287-88 (2d Cir. 2003) (identifying indemnification obligations as an example of where extending stay is warranted and citing authority extending the stay because of those obligations).

Appendix D

(2) Binding Effect of Findings and Judgments

If Bestwall Asbestos Claims against the Protected Parties are permitted to proceed, the Debtor faces the additional risk that findings and judgments against the Protected Parties would bind the Debtor, and effectively establish Bestwall Asbestos Claims against it, including under the doctrines of *res judicata* and collateral estoppel. *Id.* at ¶ 46. Accordingly, any rulings or findings regarding Bestwall Asbestos Claims could frustrate the Debtor's efforts to resolve the claims globally and equitably in this Chapter 11 case.

Courts have concluded that the risks of collateral estoppel and *res judicata* warrant a stay of third-party litigation because allowing that litigation to proceed would thwart the purposes of the automatic stay. *Sudbury,* 140 B.R. at 463 (granting injunctive relief after finding that debtor's liability "may be determined on collateral estoppel principles[,]" by fact determinations reached on the same fact issues "in Plaintiffs' actions" against non-debtors); *Matter of Johns-Manville Corp.,* 26 B.R. 420, 426-29 (Bankr. S.D.N.Y. 1983) (concluding that risk of collateral estoppel would irreparably injure estates and thus issuance of a stay was warranted); *In re Am. Film Techs., Inc.,* 175 B.R. 847, 850 (Bankr. D. Del. 1994) (staying claims against debtor's directors and holding that a potential finding of liability against such directors would be based on acts undertaken by directors as agents of the debtor and, thus, would expose the debtor to the risk of being collaterally estopped from denying liability for the directors' actions). The same concerns warrant an injunction in this case.

(3) Evidentiary Prejudice

Litigation of the Bestwall Asbestos Claims against the Protected Parties will create the additional risk that statements, testimony, and other evidence generated in proceedings against the Protected Parties will be used to try to establish Bestwall Asbestos Claims against the Debtor. *See* Submission at ¶ 46. Consequently, the litigation of Bestwall Asbestos Claims could force the Debtor to defend its interest in such litigation, thereby defeating the "breathing spell" intended by the automatic stay.

The burden of protecting against evidentiary prejudice was key to the court's grant of injunctive relief in *Manville. In re Johns-Manville Corp.,* 40 B.R. 219, 225 (S.D.N.Y. 1984); *see also In re W.R. Grace & Co.,* 386 B.R. 17, 34 (Bankr D. Del. 2008) (staying actions against non-debtor railroad asserting liability based on railroad's transportation of asbestos-containing material from the debtors' mining operations because, among other things, the possibility of collateral estoppel and "record taint" in such actions would compel the debtors' participation and impair the reorganization effort). These are consequences the Debtor should not be required to suffer (or be compelled to protect against).

(4) Diversion of Key Personnel

Litigation of the Bestwall Asbestos Claims against the Protected Parties would divert key personnel from the important tasks required to establish a section 524(g) trust.

See Submission at ¶ 47. The Debtor would be compelled to participate in the defense of Bestwall Asbestos Claims, including formulating defense strategies, attending depositions, reviewing and producing documents, preparing witnesses, and engaging in any number of other litigation-related tasks. *Id.* As mentioned, Mr. Mercer and other personnel who play key roles in the Debtor's restructuring would be required to spend substantial time managing and directing all the activities involved in the day-to-day defense of these lawsuits. *Id.* These activities consumed many of the same personnel prior to the Chapter 11 case. *Id.*

C. The Balance of Harms Supports Maintaining the Injunction

The very purpose of the Debtor's Chapter 11 case would be defeated if litigation of the Bestwall Asbestos Claims against the Protected Parties is permitted. This outweighs any potential prejudice to the Defendants.

While certain of the claimants might argue that an injunction will delay their attempts to obtain compensation, that is not necessarily the case. The Debtor has noted that plaintiffs in asbestos-related suits typically name multiple defendants. *See* Submission at ¶ 48. Nothing about maintaining the injunction in this case prohibits the plaintiffs from continuing to proceed against any remaining defendants in state court.

Additionally, a section 524(g) trust will provide all claimants — including future claimants who have yet to

institute litigation — with an efficient means through which to equitably resolve their claims. *See In re Federal-Mogul Global, Inc.*, 684 F.3d 355, 357-62 (3d Cir. 2012) (explaining the background and purpose of section 524(g) as a solution to the inefficient resolution of asbestos claims in the traditional tort system and citing empirical research that suggests section 524(g) trusts are more efficient). And the process and timing to effectuate a section 524(g) trust are, to a large extent, within the control of the parties in this case.

Even if an injunction might cause delay for some Defendants, it is well established that mere delay is insufficient to prevent the issuance of an injunction. *See In re United Health Care Org.*, 210 B.R. 228, 234 (S.D.N.Y. 1997) (finding delay to the enjoined party from pursuing remedies was heavily outweighed by potential harm to reorganization efforts).[14] Further, the harm from any delay applicable to some Defendants is far outweighed by the harm that failure to issue the injunction would cause

14. *See also W.R. Grace & Co.*, 386 B.R. at 35 (finding that delay of compensation for asbestos claimants and potential loss of witness testimony did not outweigh potential harm to reorganization efforts); *In re Lazarus Burman Assocs.*, 161 B.R. 891, 901 (Bankr. E.D.N.Y. 1993) (concluding that delay was not sufficient harm to justify denial of injunction because "[t]he preliminary injunction will not invalidate the rights of [the creditor]" but rather "will merely delay the enforcement of those rights"); *In re Am. Film Techs., Inc.*, 175 B.R. at 849 (defendants are "not being asked to forego [their] prosecution against the individual defendants, only to delay it"); *In re PTI Holding Corp.*, 346 B.R. 820, 831-32 (Bankr. D. Nev. 2006) (holding that delay of pursuit of guaranty did not constitute sufficient harm to justify denial of injunction).

the Debtor. The entire purpose and goal of this proceeding would be defeated absent the requested injunction. Submission at ¶¶ 42, 44.

D. The Public Interest Supports Maintaining the Injunction

The public interest also favors the injunctive relief requested by the Debtor. Courts have consistently recognized the public interest in a successful reorganization. *See, e.g., United States v. Whiting Pools, Inc.,* 462 U.S. 198, 204, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983); *Sudbury,* 140 B.R. at 465. As one bankruptcy judge observed "'[P]romoting a successful reorganization is one of the most important public interests.'" *In re Gander Partners LLC,* 432 B.R. 781, 789 (Bankr. N.D. Ill. 2010) (quoting *In re Integrated Health Servs., Inc.,* 281 B.R. 231, 239 (Bankr. D. Del. 2002)); *see also Manville,* 26 B.R. at 428 ("[T]he goal of removing all obstacles to plan formulation [is] eminently praiseworthy and supports every lawful effort to foster this goal while protecting the due process rights of all constituencies."). A successful reorganization particularly serves the public interest in the asbestos context, where "completing the reorganization process . . . [will] resolv[e] thousands of claims in a uniform and equitable manner." *W.R. Grace & Co.,* 386 B.R. at 36.

Permitting the litigation of Bestwall Asbestos Claims against the Protected Parties would impede the Debtor's ability to confirm a plan of reorganization that will establish a section 524(g) trust to globally and equitably resolve all current and future asbestos claims. *See In re*

Congoleum Corp., 362 B.R. 198, 201 (Bankr. D.N.J. 2007) ("Section 524 was created to provide a comprehensive resolution to asbestos liabilities both present and future."); *see also* Submission ¶¶ 42, 44. Instead, many of the claims effectively would be liquidated through continued litigation in state courts.

Finally, extending the injunction at this point does not allow either Bestwall, New GP, or any other Protected Party to escape any alleged asbestos liabilities, as the Committee and the FCR have argued. Any liabilities will be resolved and channeled only if Bestwall succeeds in confirming a plan of reorganization that contains a channeling injunction that extends to those Protected Parties.

V. Automatic Stay

Because the Court is granting the requested relief for a preliminary injunction under section 105 of the Bankruptcy Code, it need not, and does not, address the Debtor's request for declaratory relief that the protections of the automatic stay under section 362 of the Bankruptcy Code extend to the Protected Parties.

CONCLUSION

For the reasons presented in this Memorandum Opinion and Order, and for the reasons stated in the Court's oral ruling on the record at the January 2019 hearing, it is hereby ORDERED as follows (the "*Order*"):

1. The Debtor's Motion is **GRANTED** as set forth herein.

2. Defendants are prohibited and enjoined, pursuant to section 105 of the Bankruptcy Code, from filing or continuing to prosecute any Bestwall Asbestos Claim against the Protected Parties on any theory for the period this Order is effective pursuant to paragraph 10 below. This injunction includes, without limitation (a) the pursuit of discovery from the Protected Parties or their officers, directors, employees, or agents; (b) the enforcement of any discovery order against the Protected Parties; and (c) further motions practice.

3. This Order is entered without prejudice to Bestwall's right to request, on motion and after notice and an opportunity for a hearing, that this Court extend the relief granted herein to include other entities or persons not previously identified in Appendix A or Appendix B hereto, or to seek relief from any of the provisions of this Order for cause shown.

4. Any Defendant or Defendants may seek relief from any of the provisions of this Order at any time for cause shown.

5. Notwithstanding anything to the contrary in this Order and without leave of court, any party asserting Bestwall Asbestos Claims

(including any party enjoined by this Order from initiating litigation) may take reasonable steps to perpetuate the testimony of any person subject to this Order who is not expected to survive the duration of this Order or who is otherwise expected to be unable to provide testimony if it is not perpetuated during the duration of this Order. Notice shall be provided to Bestwall by notifying Bestwall's bankruptcy counsel of the perpetuation of such testimony. Bestwall shall have the right to object to the notice on any grounds it would have had if it were a party to the underlying proceeding and not subject to the terms of this preliminary injunction, and Bestwall may raise any such objection with this Court. The use of such testimony in any appropriate jurisdiction shall be subject to the applicable procedural and evidentiary rules of such jurisdiction. All parties reserve and do not waive any and all objections with respect to such testimony. Defendants or other individuals asserting Bestwall Asbestos Claims may not seek to perpetuate the testimony of representatives, including directors, officers, and employees, of Bestwall without the consent of Bestwall or an order of the Court.

6. Pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure, Bestwall is relieved from posting any security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

7. This Order shall be immediately effective and enforceable upon its entry.

8. This Order shall toll any applicable nonbankruptcy law, any order entered in a nonbankruptcy proceeding, or any agreement that fixes a period under which an enjoined Defendant is required to commence or continue a civil action in a court other than this Court on any Bestwall Asbestos Claim asserted against Bestwall or any of the Protected Parties until the later of (a) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (b) 30 days after notice of the termination or expiration of the preliminary injunction issued by this Order.

9. Bestwall shall serve a copy of this Memorandum Opinion and Order on counsel for the Defendants and the Bankruptcy Administrator within 3 business days from its entry.

10. This Memorandum Opinion and Order shall be promptly filed in the Clerk's office and entered in the record, and this Order shall remain effective for the period through 30 days after the effective date of a confirmed plan of reorganization that is no longer subject to appeal or discretionary review.

11. This Court retains exclusive jurisdiction over this Order and any and all matters arising from

or relating to the implementation, interpretation, or enforcement of this Order.

SO ORDERED.

United States Bankruptcy Court

/s/ Laura T. Beyer
Laura T. Beyer
United States Bankruptcy Judge

APPENDIX E — EXCERPT OF TRANSCRIPT OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, DATED JANUARY 24, 2019

[1]UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Case No. 17-31795

Chapter 11

AP 17-03105

IN RE:

BESTWALL LLC,

Debtor.

BESTWALL LLC,

Plaintiff,

v.

THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT AND JOHN AND JANE DOES 1-1000,

Defendants.

Appendix E

Charlotte, North Carolina
Thursday, January 24, 2019
9:53 a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE LAURA TURNER BEYER, UNITED STATES BANKRUPTCY JUDGE

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[20]case should be transferred for the convenience of the parties, Bestwall's creditors are spread throughout the country; therefore, the Western District is just as convenient as any jurisdiction. The fact that counsel for the Committee and the FCR are located in Delaware is not determinative of venue. Bestwall's assets are located in this District and New GP's headquarters are located in Atlanta, which is not far down the road, certainly closer to Charlotte than Delaware. And while it's true that the Third Circuit has significant experience with asbestos bankruptcies, this Court also has experience with asbestos cases and is gaining more experience every day and is perfectly well equipped and, arguably, a more convenient forum in which to handle them, given the location of our airport and the ability and willingness, for example, of the Court to set aside monthly hearing dates for each of these asbestos cases.

In short, the Committee has not shown by a preponderance of the evidence that the case should be transferred to either Delaware or Georgia for the convenience of the parties.

Appendix E

I will now turn to the debtor's motion for an order preliminarily enjoining certain actions against nondebtors, or, in the alternative, declaring that the automatic stay applies to such actions. Specifically, the debtor seeks to enjoin litigation against New GP and other non-debtor affiliates of Bestwall. I'll simply refer to them as the Non-Debtor Third [21]Parties.

Following the entry of a temporary restraining order on November 8, 2017, the Court entered an injunction with the consent of the Committee. Pursuant to an order entered December 7, 2017, the injunction has been extended from time to time with the consent of the Committee without prejudice to its right to object to further continuances of the injunction and on August 15, 2018, that's what the Committee did. And the Committee and the FCR filed objections to the continuation of the injunction and that's the matter that's before the Court today.

As Ms. Ramsey noted at the hearing, these issues are complicated and difficult to organize, but I agree that the Court must start by considering whether the Court has subject matter jurisdiction and, specifically, related-to jurisdiction.

The Fourth Circuit has adopted the *Pacor* test for determining whether a proceeding is sufficiently related to a bankruptcy case for this Court to have jurisdiction under Section 1334(b). The *Pacor* test examines whether the outcome of a proceeding could conceivably have any effect on the estate being administered in bankruptcy. A proceeding need not necessarily be against the debtor or

against the debtor's property because an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action, either positively or negatively, and [22]which in any way impacts upon the handling and administration of the bankrupt estate. I conclude that terminating the injunction could, conceivably, have an effect on the debtor's estate and, therefore, that this Court has subject matter jurisdiction to enjoin claims against the Non-Debtor Third Parties.

First, the debtor has indemnity obligations that would make judgments against New GP tantamount to judgments against the debtor. The FCR refers to the indemnity obligations as fully circular and contrived and, therefore, would have no effect on the estate, but that argument ignores the fact that the funding agreement is a backstop and that the debtor's assets must be used first to fund a trust to pay asbestos claims under a confirmed plan. Paying the indemnity claims would deplete the assets the debtor has available to fund the trust and, therefore, have an effect on the debtor's estate.

In addition, the FCR and the Committee contend that this Court lacks jurisdiction to enjoin lawsuits against New GP because they argue New GP is directly liable for the asbestos claims as a successor to Old GP. The debtor, on the other hand, argues that New GP could only have derivative liability because the asbestos liabilities were assigned to Bestwall as part of the corporate restructuring.

In determining jurisdiction it's not necessary for the Court to conclude whether claims against New GP would be direct [23]or derivative for the reasons stated by the debtor. Any alleged liability of New GP would be for the same claims that are being asserted against the debtor. The claims would necessarily have to involve the same set of facts, the same products, the same exposures, the same conduct, and the same diseases because they all derive from Old GP. To permit the claimants to return to the tort system to proceed against New GP on the same claims that the debtor proposes to pay through a 524(g) trust under the debtor's plan of reorganization would have an effect on the debtor's estate and defeat the fundamental purpose of 524(g) and this filing. For example, lifting the injunction would distract the debtor's personnel from working on this chapter 11 reorganization and would require them to spend significant time assisting with, participating in, or monitoring lawsuits against New GP.

So for all these reasons, and others, the Court concludes it has jurisdiction to enjoin the pursuit of claims against the Non-Debtor Third Parties.

I'll next turn to the Committee's due process and preemption arguments. Like the debtor, I conclude that the Committee's due process and preemption arguments fail.

Due process, I'll start there. The Committee argues that the corporate restructuring of Old GP ignored the due process rights of the claimants. I'm not aware of and the Committee has not cited any law, any case law, that it would

[24]have required Old GP to consult with the claimants or the plaintiffs in the tort system or to take their vote before it engaged in the corporate restructuring. The claimants will be afforded due process in the confirmation process, given the confirmation requirements of the Code and Section 524(g). More specifically, the case cannot be confirmed without the active participation and support of the Committee, the consent of 75 percent of the claimants themselves, and the approval of both this Court and the District Court. In addition, the claimants can pursue fraudulent conveyance claims in this case, if they so choose.

Because of these procedures which are available to the claimants and are designed to protect their due process rights, I can't conclude that their due process have been violated.

With respect to preemption, the Committee argues that New GP is independently liable for the Bestwall asbestos claims because the Texas divisional merger statute pursuant to which Old GP undertook the corporate restruction, restructuring is preempted by Section 524(g). I agree with the debtor that the doctrine of preemption, either conflict or field preemption, does not apply in this case because, as the debtor argued, "The Texas statute and 524(g) concern completely different subjects and work readily in tandem, including in the context of this chapter 11 case."

At the hearing the claimants argued that 524(g) is the [25]only way to cleanse a company of asbestos liability

or permanently, globally, and fairly resolve the Bestwall asbestos claims, yet they say the debtor suggests that the Texas divisive merger statute has already accomplished that. I disagree and conclude that that isn't at all what they're saying. What they're saying is that having engaged in this corporate restructuring we are now before the bankruptcy court so it can permanently and globally resolve the asbestos claims. That's the entire purpose behind this bankruptcy proceeding and if Bestwall can't meet its burden of confirming a plan and obtaining a channeling injunction, it won't have cleansed anything. It's for that reason and the other reasons argued by the debtors that the preemption argument fails.

So with respect to conflict preemption, I can't conclude that compliance with the Texas statute and 524 are impossible. That conclusion is also consistent with finding that this case is not objectively futile.

Likewise, there's no field preemption. Corporate restructuring is strict, strictly a matter of state law and 524(g) takes corporations in their form, in their current form, and it provides a tool for addressing mass asbestos liability and obtaining an injunction, assuming that that corporation can meet all the requirements of 524(g) and the other confirmation requirements of the Bankruptcy Code.

Having addressed subject matter jurisdiction and the [26]Committee's due process and preemption arguments, I'll analyze the Fourth Circuit's four-prong test for the issuance of an injunction.

I'll start with likelihood of success on the merits. The debtor satisfies this prong of the four-part test by showing that it has a realistic possibility of a successful reorganization. For all of the same reasons, I concluded that the debtor's filing is not objectively futile.

I can also conclude that the debtor has a realistic possibility of a successful reorganization. As implicitly recognized by both the Committee on Page 42 of its objection to the debtor's motion and the FCR on Page 6 of its surreply to the debtor's motion, I don't have to determine at this point whether the asbestos claims against New GP will ultimately be subject to a channeling injunction. That issue is not before the Court and it's distinct from the issue of whether the debtor is entitled to an injunction under 105. So I'll save that issue for another day.

I conclude that failure to maintain the existing injunction would cause irreparable injury to the debtor. For all the reasons argued by the debtor in its motion, I agree. It would defeat the purpose of this chapter 11 to allow the asbestos claims to continue to be prosecuted in the tort system.

The balance of harm supports maintaining the [27]injunction, again for the reason that the purpose of this chapter 11 filing would be defeated if the litigation of the Bestwall asbestos claims were allowed to proceed against the Non-Debtor Third Parties.

The defendants argue that an injunction will delay their effort to obtain compensation, but, as previously noted, that's not necessarily the case and is, to a large extent, within the control of the parties to this case. If the case proceeds as it should, it should provide both existing and future claimants with an efficient and expedited means by which to address their claims.

In addition, delay, in and of itself, is insufficient to overcome irreparable harm.

Finally, nothing about maintaining the injunction in this case prohibits the defendants from continuing to proceed against any remaining defendants in state court.

Lastly, I'll address public interest and I find that it supports maintaining the injunction because the public interest lies in completing the reorganization process and resolving thousands of claims in a uniform and equitable manner, as noted in the *W. R. Grace & Company* case. Again, allowing the asbestos claims to be litigated in state court against the Non-Debtor Third Parties would defeat the purpose of this case. Extending the injunction at this point does not allow either the debtor or New GP, as was argued, to escape [28]their asbestos liabilities. Their liabilities will be discharged only if the debtor confirms its plan and the channeling injunction is extended to the asbestos claims against New GP.

Having concluded that the debtor satisfies the four-prong test for the issuance of an injunction, I need not reach its alternative request for relief, which was a

determination regarding the issue of whether the actions by plaintiffs to attempt to hold New GP liable for claims against the debtor are stayed pursuant to Section 362 of the Bankruptcy Code.

So the bottom line is, folks, that surviving these motions is only part of the story of this bankruptcy case. I think that result is consistent with the Fourth Circuit's dismissal standard, as was outlined or as is outlined in the *Carolin* case.

So while the debtors have won the war, or won the battle, so to speak, they still have to win the war. And pardon the analogy. As I've said, I don't believe this case should be or needs to be a war, but I think you know what I mean.

Going forward, the debtors will have to work with the Committee and the FCR to confirm a plan and get a channeling injunction and we'll see where we go from here.

I believe that that addresses in some shape, form, or fashion all of the issues that were before the Court on [29]November 9th.

Mr. Gordon, you're not going to like this, but I would ask you to draw an order consistent with my remarks and to incorporate in that order the pertinent sections of your brief. There's no need to address subjective bad faith or the automatic stay in any detail since the Court did not reach those issues. Please, if you would, circulate that order by counsel for New GP, the Committee, FCR

and once you've circulated that order, I would ask that you e-mail it to Mr. Badger and upload it so we can, for the Court's consideration.

And I think that takes us to the conclusion of the hearing unless anybody has anything further.

MS. LABOVITZ: Your Honor, thank you very much for your detailed ruling, which I think does provide helpful guidance to all the parties.

There is one, I would call it a housekeeping matter --

THE COURT: Uh-huh (indicating an affirmative response).

MS. LABOVITZ: -- that remains from the hearing on November 9th, Your Honor, which was that we had made an oral motion to intervene in the adversary proceeding to resolve any questions regarding New GP's standing to participate in that proceeding. I believe you ruled at that time, Your Honor, that you had already read the briefs that were filed pursuant to a

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APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AUGUST 7, 2023

FILED: August 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1127 (L)
(3:20-cv-00103-RJC)
(17-31795)
(17-03105)

IN RE: BESTWALL LLC,

Debtor.

BESTWALL LLC; GEORGIA-PACIFIC LLC,

Plaintiffs-Appellees,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS,

Defendant-Appellant,

and

SANDER L. ESSERMAN, IN HIS CAPACITY AS FUTURE CLAIMS REPRESENTATIVE; THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT; JOHN AND JANE DOES 1-1000,

Defendants.

Appendix F

NORTH CAROLINA; ARIZONA; COLORADO; CONNECTICUT; DELAWARE; ILLINOIS; MAINE; MASSACHUSETTS; MICHIGAN; MINNESOTA; MISSISSIPPI; NEVADA; NEW JERSEY; NEW MEXICO; NEW YORK; NORTH DAKOTA; OREGON; PENNSYLVANIA; VERMONT; WASHINGTON; THE DISTRICT OF COLUMBIA,

Amici Supporting Rehearing Petition,

AMERICAN TORT REFORM ASSOCIATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amici Opposing Rehearing Petition.

ORDER

The court denies the petitions for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc.

Chief Judge Diaz and Judges Wilkinson, Niemeyer, Agee, Harris, Quattlebaum, Rushing, and Heytens voted to deny rehearing en banc. Judges King, Gregory, Wynn, Thacker, and Benjamin voted to grant rehearing en banc. Judge Richardson was recused and did not participate in the poll.

Entered at the direction of Judge Agee.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX G — RELEVANT STATUTORY PROVISIONS

11 U.S.C.A. § 105

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Appendix G

11 U.S.C.A. § 524

§ 524. Effect of discharge

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that--

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization--

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of--

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that--

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan--

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes,

by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan--

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to--

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction

(by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of--

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to--

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means--

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in--

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if--

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph

is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that--

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

Appendix G

28 U.S.C.A. § 1334

§ 1334. Bankruptcy cases and proceedings

Effective: October 17, 2005

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Appendix G

28 U.S.C.A. § 1359

§ 1359. Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.