

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

BMI OLDSCO INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 23-90794 (MI)

(Jointly Administered)

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO DISMISS THE CHAPTER 11 CASES PURSUANT
TO 11 U.S.C. § 1112(b) OR, IN THE ALTERNATIVE, TO TERMINATE
THE DEBTORS' EXCLUSIVE PERIOD PURSUANT TO 11 U.S.C. § 1121(d)(1)**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING. REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

The Official Committee of Unsecured Creditors (the “Committee”), by and through its counsel, respectfully submits this motion (the “Motion”) seeking entry of an order, substantially in the form attached hereto as Exhibit A, dismissing the above-captioned chapter 11 cases (the “Chapter 11 Cases”) pursuant to section 1112(b) of the Bankruptcy Code or, in the alternative,

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: BMI Oldco Inc. (f/k/a Barretts Minerals Inc.) (8715) (“BMI”) and Barretts Ventures Texas LLC (0787) (“BVT”). The Debtors’ address is 5605 North MacArthur Boulevard, Suite 1000, PMB 139, Irving, Texas 75038. The Debtors’ ultimate parent is Minerals Technologies Inc. (“MTI”). Debtor Barretts Minerals Inc. (“BMI”) is a wholly owned subsidiary of Specialty Minerals Inc. (“SMI”).

terminating the Debtors’ exclusive period pursuant to section 1121(d) of the Bankruptcy Code to allow the Committee to file and prosecute a chapter 11 plan. In support of this Motion, the Committee respectfully states as follows.

PRELIMINARY STATEMENT

1. All that the Debtors could realistically hope to accomplish in these cases has now occurred. Following the sale of their talc business, the Debtors no longer have a business to rehabilitate. The Debtors no longer hold any assets with value to maximize in these cases.

2. The Debtors have no path to confirm a plan that includes a section 524(g) injunction or releases for MTI’s benefit, which has been their stated objective from day one of these cases.² Nonetheless, the Debtors continue to incur additional debt with no benefit to their estates or their creditors and are about to become administratively insolvent.

3. The only reason the Debtors remain in bankruptcy is to pursue protections for their non-debtor affiliates—MTI and SMI—from talc liability. But seeking to benefit solvent—indeed, wealthy—non-debtors is not a legitimate bankruptcy purpose.

4. Bankruptcy is not a refuge for companies who are not in financial distress. *See Truck Ins. Exch. v. Kaiser Gypsum Co.*, 144 S. Ct. 1414, 1420-21 (2024) (“Bankruptcy offers individuals and businesses in financial distress a fresh start to reorganize.”). Accordingly, the Debtors’ Chapter 11 Cases are ripe for dismissal for cause under section 1112(b) of the Bankruptcy Code for lack of good faith, for an inability to confirm a plan within a reasonable time, and for continued diminution of the estates with no meaningful chance of rehabilitation.

² See Decl. of David Gordon, Dkt. No. 13 at ¶ 5 (“The Debtors intend to achieve this goal by continuing to negotiate—and ultimately confirming—a plan of reorganization pursuant to sections 524(g) and 1129 of the Bankruptcy Code that creates a section 524(g) trust vested with substantial assets for the benefit of current and future talc claimants and provides for a channeling injunction prohibiting claimants from asserting claims arising from BMI’s talc prior to its emergence from the Chapter 11 Cases against the Debtors or *any Non-Debtor Affiliate*”) (emphasis added).

5. In the alternative, the Court should terminate the Debtors' exclusive period for filing a plan and permit the Committee to move these cases to conclusion through filing and prosecuting the confirmation of a creditor plan. Ample cause exists here for the Court to terminate the Debtors' exclusive period to file a plan pursuant to section 1121(d) of the Bankruptcy Code.

6. The Debtors have no ongoing operations. The Debtors have not made meaningful progress in negotiations with stakeholders, *i.e.*, the talc claimants. The talc claimants are entitled to return to the tort system with their rights against non-financially distressed non-debtors like MTI fully intact. The Debtors have no viable prospect of confirming MTI's desired plan. The Debtors do not and will not have the votes to confirm a plan that includes a section 524(g) injunction protecting MTI and other non-debtor affiliates.

7. If the Chapter 11 Cases are not dismissed, allowing the Committee to file its plan will move these cases forward and avoid the unnecessary delay this Court expressly warned against back in December of 2023. *See* Dec. 1, 2023 Hr'g Tr. 116:01-05. Terminating exclusivity will not prejudice the Debtors, as they will retain their right to file a plan. The parties are still in mediation. But terminating exclusivity will introduce competition and force a resolution of these cases in the near term.

8. Either way, the Committee asks the Court to move these cases toward a conclusion. Many talc victims suffer from terminal illnesses caused by exposure to asbestos. Some have died while these cases have been pending. The legacy of those victims should not be that tortfeasors can use bankruptcy to create undue delay and deprive victims and their families of their rights through strategic delay and weaponization of the bankruptcy process. Time is a scarce resource that once wasted can never be recovered. The point of this Motion is to resolve these cases and

preserve what rapidly dwindling time the victims have left to exercise their legal, equitable, and Constitutional rights.

LEGAL AND FACTUAL BACKGROUND

9. The Committee views these Chapter 11 Cases with a “creditor-centric perspective,” while the Debtors and MTI have taken an “MTI-centric perspective”; only the former is appropriate and consistent with the purposes of the Bankruptcy Code. The purpose of the Bankruptcy Code is **not** to permit solvent non-debtors like MTI, who do not themselves shoulder the obligations of bankruptcy, to benefit from the Code’s protections.³ Rather, the central purpose of chapter 11 is to allow a distressed business to “preserv[e] going concerns” and to maximize value for creditors.⁴ Given this, the Debtors’ and MTI’s objectives should be rejected and the relief sought here should follow as a matter of course.

A Creditor-Centric Perspective

10. For many years, BMI operated a talc mining and processing business centered in Barretts, Montana. In its natural form, some talc contains asbestos, a substance that causes dangerous lung conditions, including mesothelioma, asbestosis, and lung cancer.⁵

11. [REDACTED]

[REDACTED]

³ See 11 U.S.C. § 524(e) (providing that a discharge in bankruptcy generally “does not affect the liability of any” non-debtor for that debt).

⁴ *Bank Am. Nat’l Tr. & Sav. Ass’n v. 203 N LaSalle St. P’ship*, 526 U.S. 434, 453 (1999).

⁵ Am. Cancer Soc., *Talcum Powder and Cancer*, CANCER.ORG (Dec. 6, 2022), <https://www.cancer.org/cancer/risk-prevention/chemicals/talcum-powder-and-cancer.html>. See also Ronald Gordon, *Asbestos in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women*, 20 INT’L J. OCCUPATIONAL ENVTL. HEALTH 318, 318 (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4164883/> (“[Talc] ore specimens taken directly from . . . mines have repeatedly been tested and shown to contain asbestos, most often anthophyllite and tremolite but also serpentine chrysotile asbestos.”)

[REDACTED]

[REDACTED]

[REDACTED]

12. [REDACTED]. There is no safe level of asbestos exposure. Talc from Montana mines contains asbestos. It cannot be removed no matter how exacting the testing and beneficiation protocol may be and it can cause individuals to develop fatal and excruciating forms of cancer like mesothelioma. [REDACTED]

[REDACTED] The sale of talc from the Barretts mine caused asbestos to be incorporated into industrial and consumer products, resulting in serious injuries and death.

13. Those exposed to and made ill by asbestos in BMI-mined talc make up the vast majority of creditors in these Chapter 11 Cases, many of whom have pending tort cases against BMI. A creditor-centric approach would focus on maximizing value of the Debtors' assets for the benefit of these creditors: an appropriate use for bankruptcy.

14. After filing for bankruptcy, the Debtors asked the Court to approve bid and sale procedures for a sale of the Debtors' talc business, including all their operating assets, on a "free and clear" basis.⁷ Given the Barretts mine's history and the pending lawsuits, the ability to sell the Debtors' assets on a "free and clear" basis under section 363 of the Bankruptcy Code and thereby avoid potential responsibility for BMI's historical asbestos liability had the potential to attract more potential buyers and a higher sale price.

⁶ [REDACTED]

⁷ See Debtors' Motion for Bidding Procedures and Sale of Substantially All or Any Portion of the Debtors' Assets, Dkt. No. 128.

15. However, after the Debtors undertook a lengthy marketing process, only two potential buyers were found and the prevailing buyer, Elevation NewCo, LLC, only paid \$32 million for the assets. The sale order explicitly provided that the buyer is not liable for claims asserted against the Debtors.⁸ The Debtors received the proceeds of the sale upon its closing on April 29, 2024.⁹

16. The sale proceeds were less than the Debtors had hoped, but they should not have been surprised given the risks associated with operating a talc mine in Barretts, Montana. Juries continue to rule in favor of plaintiffs who have died from diseases caused by exposure to asbestos in talc products comprising talc from mines like BMI's in southwest Montana.¹⁰ And talc mined elsewhere does no better. On June 3, 2024, Johnson & Johnson was ordered to pay \$260 million to an Oregon woman who contracted mesothelioma from exposure to the company's talc powder.¹¹ Further, a study published in May 2024 in the *Journal of Clinical Oncology* involving 50,884 women found that exposure to talc products may increase the risk of ovarian cancer.¹²

⁸ See Order Authorizing the Sale of the Debtors' Assets, Dkt. No. 776, at ¶¶ 9, 25.

⁹ See Notice of Sale Closing and Assignment of Contracts and Leases in Connection with Sale, Dkt. No. 862.

¹⁰ See, e.g., "Jury Awards Woman \$13M for Exposure to Asbestos in Talcum", Associated Press, updated April 29, 2015, available at <https://apnews.com/general-news-2ffffb0190144091a38d3a9be9c5ca95> (jury determining that plaintiff developed mesothelioma from asbestos in Colgate-Palmolive's Cashmere Bouquet talcum powder, which was mined in Montana); "California Jury Awards Woman \$52.1 Million in Mesothelioma Case Against Avon", PR Newswire, updated December 19, 2022 (jury determining Avon Products, Inc. and its cosmetic talc products (which was mined in Montana) to be 90% at fault in causing plaintiff's mesothelioma and awarding \$40 million in noneconomic damages and \$10.3 million in punitive damages).

¹¹ Brendan Pierson, *J&J must pay \$260 million in latest talc trial, Oregon jury says*, Reuters, June 4, 2024, <https://www.reuters.com/legal/jj-must-pay-260-million-latest-talc-trial-oregon-jury-says-2024-06-04/>.

¹² Katie M O'Brien et al., *Intimate Care Products and Incidence of Hormone-Related Cancers: A Quantitative Bias Analysis*, J. of Clinical Oncology, May 2024.

17. Accordingly, the Committee and other parties objected to the sale and argued that the Barretts mine should be permanently closed so that no more victims are exposed to asbestos in talc from the Barretts mine.¹³ The sale was approved over this objection.

18. Regardless, with the sale complete and the Debtors' operational assets sold, the Debtors' need for continued bankruptcy proceedings for an appropriate, creditor-centric perspective is questionable at best. The Debtors' workforce is now employed by the buyer. The Debtors' remaining assets are their passive interests in real property located in San Angelo, Texas (which is subject to a triple net-lease with *Whataburger*) and San Antonio, Texas (which is subject to a triple net-lease with *McDonalds*),¹⁴ and certain indemnity rights against Pfizer.¹⁵ These are not "operating assets"—the Debtors play no role in the management of any restaurants or any other business.

19. Moreover, the value of these remaining assets will not be maximized in bankruptcy. The Debtors' real estate holdings were acquired on the eve of bankruptcy and can be liquidated inside or outside of a bankruptcy proceeding. There are no known talc issues related to these properties, or other liability issues that require a bankruptcy to complete a sale transaction.

20. The Debtors' indemnity rights against Pfizer can be resolved inside or outside of bankruptcy. For example, they could be assigned to a trust under a chapter 11 plan, and the trust

¹³ See The Official Committee of Unsecured Creditors' Objection to the Debtors' Proposed Sale of Assets, Dkt. No. 714.

¹⁴ Mr. Gordon, the Debtors' CRO, was the CEO of The Flintkote Company during its bankruptcy. See Dkt. No. 13 at ¶ 1. Flintkote managed the leasing of six "quick service restaurant properties" under its plan so it could claim to future revenue and argue that it satisfied section 524(g)(2)(B)(i)(II) (trust must be funded by the obligation of the debtor "to make future payments"). See *In re Flintkote Co.*, 486 B.R. 99, 109 (Bankr. D. Del. 2012).

¹⁵ Pfizer is no stranger to asbestos litigation and, upon information and belief, knew about the risks associated with the Barretts mine at the time of the 1992 spin off. This is likely the reason why the indemnity was drafted so that Pfizer is on the hook for product liability claims where the alleged damage or injury arises from talc sold prior to 1992.

could then sue Pfizer,¹⁶ or the Debtors could retain them and assert claims against Pfizer alongside MTI. Either way, this litigation will be contested (as evidenced by Pfizer's recent motion seeking stay relief to pursue claims against MTI, *see* Dkt. No. 923) and could take years to resolve.

21. But that risk and delay should not be visited on the creditors, as the resolution of these issues is **not** central to the tort claimants' claims. MTI and Pfizer are both solvent and can satisfy current and future talc claims. The tort claimants do not need for MTI, BMI, and Pfizer to resolve allocation issues among themselves before tort claimants can pursue their claims against some or all of them. The talc claimants' objective is to return to the tort system and continue to seek compensation consistent with the rights afforded to them by the United States Constitution and our civil justice system.

22. Further, the Debtors are—or will be imminently—administratively insolvent. The Debtors have gone through virtually all their sale proceeds. The passive income from their real estate interests (their only source of income) is insufficient to keep up with the Debtors' operating and administrative expenses, of which the lions' share of the latter (nearly 70%) are the Debtors' professional fees and expenses.

23. The Committee anticipates the Debtors will point to the recent liquidity extended by MTI,¹⁷ but this additional financing is only layering on substantial additional debt without a corresponding benefit to the estates. Remaining in bankruptcy is diminishing the value of the Debtors. The only possible beneficiary of sustained bankruptcy proceedings is MTI, who can continue to leverage the bankruptcy protections extended to it in its quest to secure releases from talc claimants for its own tortious conduct.

¹⁶ See 11 U.S.C. § 1123(a)(5)(B); *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 359 (3d Cir. 2012).

¹⁷ See Order Authorizing Debtors to Enter Post-Petition Financing Agreement, Dkt. No. 917.

24. Adopting the appropriate, creditor-centric perspective means that these cases should now end. Despite their efforts to mediate and reach a global settlement with the plaintiffs, no such settlement has been reached. And, as described below, there is no path here to the confirmation of a plan that includes a channeling injunction or releases that protect MTI and SMI.

The MTI-Centric Perspective

25. The Debtors, in contrast, are focusing on MTI and what MTI is inappropriately trying to achieve through them. MTI is a wealthy, solvent company that has sufficient financial resources to pay current and future talc claims in full and as they arise. But MTI prefers a solution under which its talc liability is capped or ring-fenced. MTI wants the equivalent of a discharge without taking on the obligations of being a debtor-in-possession. MTI wrongly thinks this can be accomplished through these Chapter 11 Cases, in which BMI and BVT are the only debtors and, thus, MTI is spared from the burdens and obligations of bankruptcy.

26. MTI is not and has never been a passive owner of BMI. BMI has never been operated as a standalone business but has always been operated as an integrated division of MTI. BMI and MTI routinely disregarded corporate formalities. BMI does not have a separate headquarters. The leadership of the companies has always been integrated.

27. [REDACTED]

[REDACTED] As a

¹⁸ Prior to the 1992 spin off, the analytical services group was part of Pfizer. Pfizer is no stranger to asbestos litigation. By 1992, Pfizer knew or had reason to know that its talc mines posed a significant litigation risk and could give rise to lawsuits brought by individuals who contracted talc-related diseases like mesothelioma.

¹⁹ [REDACTED]

consequence of BMI's and MTI's conduct, BMI faces direct liability to claimants injured or killed by exposure to asbestos in BMI-mined talc; MTI faces derivative liability to such claimants on account of, among other things, its role in managing BMI as a subsidiary; and MTI faces direct liability to such claimants on account of, at least, its own inadequate testing.

28. MTI's objective in placing BMI into bankruptcy was to use a chapter 11 proceeding to relieve MTI of all its talc liability: both direct and derivative. But MTI did not want to file, and has not filed, for bankruptcy.²⁰ Like other solvent tortfeasors that want to enjoy the benefits but not the burdens of bankruptcy, MTI devised this bankruptcy filing for its subsidiaries as a tort liability management tool for itself.

29. To further this, on the eve of bankruptcy, MTI caused BMI to enter into a new indemnity whereby BMI is obligated to indemnify MTI for talc claims.²¹ BMI was taken off MTI's credit facility so that BMI's bankruptcy would not trigger an event of default. And MTI created and incorporated debtor BVT in Texas and then used a substantial portion of BMI's limited cash to purchase interests in real properties located in San Angelo, Texas, and San Antonio, Texas.

30. After completing these transactions, the Debtors filed for bankruptcy to achieve MTI's goal of capping and resolving its own talc liability. Furthering this goal, one of the Debtors' first actions in bankruptcy was to initiate an adversary proceeding in which the Debtors sought to extend their protections under the automatic stay to enjoin all talc-related cases against their non-debtor affiliates, including MTI. The animating purpose of these Chapter 11 Cases has always been for MTI to seek a discharge (or its equivalent) for its own talc liability. Now that the Debtors have completed their sale pursuing this inappropriate goal is the only purpose of these cases.

²⁰ MTI—a wealthy, solvent company—would not be eligible to file for bankruptcy.

²¹ See Decl. of David Gordon, Dkt. No. 13, at ¶¶ 63-64.

The MTI-Centric Approach Was Doomed to Failure from the Start

31. Not only is the continued prosecution of these Chapter 11 Cases to secure bankruptcy relief for MTI inappropriate, but it also has no chance of succeeding. It never did.

32. **First**, Fifth Circuit case law dating back over 30 years holds that a non-debtor is not entitled to a discharge under section 524(e), which provides that the “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” 11 U.S.C. § 524(e).²² The Fifth Circuit is, thus, a hostile jurisdiction to parties seeking nonconsensual third-party releases. If BMI had filed for bankruptcy in Montana, the result would have been the same. The Ninth Circuit is also hostile to nonconsensual third-party releases.²³

33. **Second**, Fifth Circuit case law is also hostile to attempts to use bankruptcy to gain a litigation advantage. *See Matter of Little Creek Dev. Co.*, 779 F.2d 1068 (5th Cir. 1986). Courts in the Fifth Circuit have routinely rejected attempts to use bankruptcy to gain control over and settle derivative claims asserted against a debtor’s insiders and affiliates.²⁴ If MTI were to argue that veil piercing and alter ego doctrines give rise to derivative claims that BMI can assert and settle against MTI, this bankruptcy would look on its face like nothing more than a litigation tactic. MTI cannot use a bankruptcy proceeding to gain control over tort claims asserted against it and then orchestrate a settlement of those claims, with MTI acting as both the plaintiff and defendant in that settlement. This is not a legitimate use of a chapter 11 proceeding.

²² *See Bank of N.Y. Tr. Co. v. 9 Official Unsecured Creditors’ Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009); *In re Coho Resources, Inc.*, 345 F.3d 338, 342 (5th Cir. 2003); *Hall v. Nat’l Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997); *Feld v. Zale Corp.*, 62 F.3d 746 (5th Cir. 1995); *Matter of Edgeworth*, 993 F.2d 51, 53–54 (5th Cir. 1993).

²³ *See, e.g., In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995); *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 626 (9th Cir. 1989); *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985).

²⁴ *See In re Brazos Emergency Physicians Ass’n*, 471 Fed. Appx. 393, 394 (5th Cir. June 22, 2012); *In re Antelope Techs., Inc.*, 431 Fed. Appx. 272, 275 (5th Cir. June 24, 2011); *Investors Group, LLC v. Pottorff*, 518 B.R. 380, 384 (Bankr. N.D. Tex. 2014).

34. **Third**, the application of section 524(g) itself is problematic when the principal tortfeasor does not file for bankruptcy but seeks an injunction through a shell company or a made-for-bankruptcy entity. Section 524(g) was designed to permit a company with asbestos liability to file for bankruptcy and address current and future asbestos personal injury claims.²⁵

35. The statute presumes that the company with the asbestos liability will submit itself and its assets to the jurisdiction of the Bankruptcy Court. The statute does not seal off an entire corporate enterprise from liability where, as here, only a subsidiary (or a part of the corporate enterprise that has tort liability) files for bankruptcy and becomes a debtor-in-possession.²⁶

36. Indeed, section 524(g)(4)(A)(ii)—which is the part of section 524(g) that authorizes a Court to enjoin asbestos claims against non-debtor third parties—provides that the third party must be “alleged to be directly or indirectly liable for the *conduct of, claims against, or demands on the debtor*,” and the “alleged liability of such third party” must “arise by reason of” one of the reasons enumerated in subsections (I) through (IV). *Id.* (emphasis added).²⁷

37. Courts have interpreted the phrase “claims against[] or demands on the debtor” to mean that the non-debtor third-party’s liability must be derivative of the debtor’s liability and not independent of the debtor’s liability.²⁸ When non-debtor parties—including those within the

²⁵ See H.R. Rep. No. 27692 at § 111 (1994) (“This section adds a new subsection (g) to section 524 of the Code, establishing procedures for dealing in a chapter 11 reorganization case with future personal injury claims against the debtor based on exposure to asbestos-containing products.”).

²⁶ Section 524(g) is modeled after the trust/injunction in the *Johns-Manville* case where the trust was funded, in part, with 80% of the reorganized debtor’s common stock. See H.R. Rep. No. 27692 at § 111. The value of the trust’s assets depended on the market’s belief that the reorganized debtor was shielded from liability for future claims. Uncertainty on this issue suppressed the value of the stock, which in turn harmed the trust. This dynamic is upended when the parent tries to structure the bankruptcy so that 100% of its stock is **not** contributed to a trust while, at the same, time 100% of the parent’s independent asbestos liability is channeled.

²⁷ It is also expected that non-debtor third parties who benefit from the injunction will contribute to the trust. See 11 U.S.C. § 524(g)(4)(B)(ii); *In re Quigley Co.*, 676 F.3d 45, 59 (2d Cir. 2012).

²⁸ See *Quigley*, 676 F.3d at 60 (holding claims against non-debtor based on presence of its name and logo on the debtor’s products based on “apparent manufacturer” theory of liability fell outside the scope of

debtor's corporate family—face liability based on their own independent conduct they cannot obtain a discharge of such liability under section 524(g). Section 524(g) has never worked this way. To obtain a discharge of its own independent asbestos liability, a company must commence its own bankruptcy proceeding. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 235 (3d Cir. 2004).

38. Further, all plans require some creditor support for confirmation, but section 524(g) requires, as a condition to the issuance of an injunction, that the debtor obtain the support of 75% of the “class or classes of the claimants whose claims are to be addressed by the trust” under the plan. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). And, for such class of claimants to be an accepting class, claimants who hold “at least two-thirds in amount” of the claims in such class must vote to accept the plan. 11 U.S.C. § 1126(c).

39. Claimant support is essential. Section 524(g) does not contain any cramdown mechanism that permits a debtor to confirm a plan that includes a channeling injunction in the absence of overwhelming claimant support. *See Federal-Mogul*, 684 F.3d at 361 (discussing the absence of a cramdown provision for § 524(g)). Overwhelming claimant support is also required by Courts outside the Fifth Circuit that have confirmed plans that include third-party releases.²⁹

40. Despite its efforts, MTI has been unable to generate claimant support for a plan that includes an injunction of any claims against MTI, or any other non-debtor. Even if MTI could fit its talc liability into the scope of an injunction that can be issued under section 524(g), BMI has

section 524(g)); *Combustion Eng'g*, 391 F.3d at 233 (sections 105(a) and 524(g) do not authorize a channeling injunction over independent, non-derivative third-party actions against non-debtors).

²⁹ *See In re Millennium Lab Holdings II*, 945 F.3d 126, 132 (3d Cir. 2019) (93% acceptance), *cert. denied*, 140 S. Ct. 2805 (2020); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1045 (7th Cir. 1993) (95% acceptance); *Menard-Sandford v. Mabey (In re A.H. Robins Co., Inc.)*, 880 F.2d 694, 702 (4th Cir. 1989) (94% acceptance); *In re AOV Indus.*, 792 F.2d 1140, 1143 (D.C. Cir. 1986) (90% acceptance); *In re Am. Family Enters.*, 256 B.R. 377, 392 (D.N.J. 2000) (99% acceptance); *In re Blitz U.S.A.*, 2014 Bankr. LEXIS 2461, at *15-16 (Bankr. D. Del. Jan. 30, 2014) (95% acceptance); *In re Master Mortgage Inv. Fund*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994) (95% acceptance).

no path to confirming MTI's desired plan. Given Fifth Circuit precedent, MTI cannot obtain a discharge or its equivalent outside a section 524(g) injunction.

41. Given the claimants' views, there does not appear to be a path here to the confirmation of a plan that includes a channeling injunction or a discharge that protects MTI from litigation in the tort system. The claimants do not want to lose their right to litigate against MTI.

42. This reflects their belief that their claims are valid and that they will recover more in the tort system where MTI will face the pressure of litigation and the threat of adverse verdicts if it does not agree to fair and reasonable settlements. Recognizing the present situation for what it is, the Committee submits that there are two paths forward.

43. The **first** path—and the path preferred by the Committee—is dismissal under section 1112(b). The Debtors' estates are or are about to become administratively insolvent. The Debtors do not have a reasonable likelihood of confirming a plan that meets MTI's requirements. Dismissal would return the parties to the tort system where they can litigate their disputes.

44. The **second** path is for the Court to terminate exclusivity and permit the Committee to file a plan. The Committee's plan would terminate all existing injunctions and restore claimants' prepetition rights so that they can return to the tort system and assert their claims against MTI. This return to the tort system would occur immediately upon plan confirmation (if not sooner).

45. The Committee's plan would **not** include releases that protect parties like MTI. While claimants do not support a plan that includes a section 524(g) injunction and a capped trust, they do support a plan that preserves their rights. A plan that enjoys creditor support should be preferred over one that does not. The termination of exclusivity can also be expected to hasten a resolution of these cases given the pressure it will put on the parties. If the Debtors contend that

the Committee's plan is unconfirmable, then all paths and ways of looking at these Chapter 11 Cases may end at the same place and conclusion: it is time to dismiss these Chapter 11 Cases.

JURISDICTION

46. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory predicate for the relief requested herein is section 1112(b) or, in the alternative, section 1121(d) of the Bankruptcy Code.

RELIEF REQUESTED

47. By this Motion, the Committee seeks an order dismissing the Chapter 11 Cases pursuant to section 1112(b) of the Bankruptcy Code or, in the alternative, terminating the Debtors' exclusive period to file a plan pursuant to section 1121(d)(1) of the Bankruptcy Code.

ARGUMENT

I. The Court Should Dismiss the Chapter 11 Cases for Cause

48. Dismissal is the best outcome for creditors. Current and future claimants have little, if anything, to gain from the continuation of these cases. Dismissal would allow claimants to seek immediate recovery from MTI and SMI unobstructed by these Chapter 11 Cases.

49. Section 1112(b)(1) of the Bankruptcy Code provides:

Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for **cause** unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1) (emphasis added); *see also In re Ford Steel, LLC*, 629 B.R. 871, 879 (Bankr. S.D. Tex. 2021) (the "inquiry under § 1112 is case-specific") (quotation omitted).

50. The Bankruptcy Code does not strictly define "cause," but provides a non-exhaustive enumerated list of examples. 11 U.S.C. § 1112(b)(4). Here, three reasons establish

“cause” that requires dismissal: (1) the Debtors’ further prosecution of these cases for the benefit of MTI is a bad faith use of the bankruptcy system; (2), the Debtors cannot effectuate or confirm a plan within a reasonable time (or ever), and (3) the Debtors’ estates are suffering a substantial and continuing loss with no reasonable likelihood of rehabilitation.

A. Prosecuting these Cases Solely to Benefit MTI Constitutes Bad Faith

51. Although not an enumerated “cause” for dismissal under section 1112(b), “a finding of bad faith may serve as cause for dismissal.”³⁰ Dismissal can be warranted notwithstanding whether the petition was initially filed in good faith or whether the debtor previously utilized the bankruptcy case for an appropriate purpose.³¹

52. *Dunes Hotel* is instructive. 1997 WL 33344253. In that case, the debtor filed a chapter 11 petition, and the Bankruptcy Court initially denied motions to dismiss because it concluded that a certain creditor, Aetna, might benefit from the reorganization. *Id.* at *15. After the debtor’s owner bought Aetna’s claim a few years into the bankruptcy, however, the only remaining goal of the debtor was to avoid a lease held by its only other creditor. *Id.*

53. Noting that to use bankruptcy solely to escape a valid contract to the benefit of the debtor or its owners was well-recognized as a litigation tactic, the Bankruptcy Court concluded that continued prosecution of the bankruptcy was in bad faith. *Id.* That alone was sufficient to establish cause for dismissal under section 1112. *Id.* at *16.

³⁰ *In re Honx, Inc.*, No. 22-90035, 2022 WL 17984313, at *1 (Bankr. S.D. Tex. Dec. 28, 2022); *accord Little Creek*, 779 F.2d at 1072.

³¹ *Little Creek*, 779 F.2d at 1071 (“Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings.”); *In re Dunes Hotel Assocs.*, No. C/A 94-75715, 1997 WL 33344253, at *16 (Bankr. D.S.C. Sept. 26, 1997), *aff’d* 245 B.R. 492 (D.S.C. 2000) (dismissing case where debtor’s continued prosecution of the case was solely to terminate a lease for the benefit of its owners).

54. The Supreme Court has instructed that bankruptcy has two “twin objectives[:] ‘preserving going concerns and maximizing property available to satisfy creditors.’” *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 50 (2008) (quoting 203 *North LaSalle*, 526 U.S. at 453 (1999)). Neither objective is served by the continuation of these cases.

55. Here, the Debtors’ business and operating assets have been sold. The Debtors have already spent all the sale proceeds on professional fees and expenses. The Debtors have no employees, no management responsibilities, limited income, and no business prospects beyond the triple-net leases they already have in place on their two real estate parcels. There is no meaningful “going concern” to preserve here.³²

56. Furthermore, the Debtors have no property whose value can be maximized in bankruptcy for the benefit of creditors. The Debtors have no intention of selling their real estate parcels. The Debtors’ real estate holdings were acquired on the eve of bankruptcy and can be liquidated inside or outside of a bankruptcy proceeding. There are no known talc issues related to these properties, or other liability issues that require a bankruptcy to complete a sale transaction. Their value is the same inside or outside of these cases. Likewise, bankruptcy is not needed to maximize the value of BMI’s indemnity rights against Pfizer. To the contrary, the value of those rights will more likely be maximized upon a return to the tort system.

57. The Debtors may argue that the talc claimants’ rights to recover against MTI and other non-debtor affiliates on theories of alter-ego liability or corporate veil piercing constitute

³² See *In re 15375 Mem’l Corp.*, 589 F.3d 605, 619 (3d Cir. 2009) (finding the debtor did not maintain a going concern where it had no employees, office, or business other than the handling of certain litigation); see also *In re Zamora-Quezada*, 622 B.R. 865, 885-86 (Bankr. S.D. Tex. 2017) (debtor ineligible for Chapter 11 where, among other things, debtor’s “few assets,” “virtually no income,” and lack of additional business prospects raised question of “what is Debtor being rehabilitated for”).

“estate causes of action” that are assets the Debtors’ estates can pursue and maximize for creditors under section 541(a). But this argument is flawed.

58. **First**, in the Fifth Circuit, “estate causes of action” include only those that seek redress for an injury to the debtor and that the debtor had standing to assert under applicable state law prior to its bankruptcy.³³ Montana law does not recognize an independent cause of action for alter ego or veil piercing.³⁴ In Montana, and elsewhere, legal doctrines like alter ego and veil piercing are not causes of action but are legal remedies available to creditors that provide a means of imposing liability on a company’s beneficial owner. BMI—which was based in Montana—had no standing to assert claims against itself or claims against MTI based on an alter ego or veil piercing theory of liability under state law prior to its bankruptcy.

³³ See *Matter of Buccaneer Resources, L.L.C.*, 912 F.3d 291, 293-94 (5th Cir. 2019) (personal injury tort claims based on conduct that harmed a plaintiff and did not injure the bankruptcy company are not property of the debtor’s estate); *In the Matter of Educators Group Health Trust v. Wright*, 25 F.3d 1281 (5th Cir. 1994) (holding that if the “cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.”); *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1153 (5th Cir. 1987) (alter ego-based action is property of the estate where the company has the right to bring such action under state law).

³⁴ See *In re Rocky Mountain Recreational Communities, Inc.*, No. 10-61045-7, 2012 WL 5248480 (Bankr. D. Mont. Oct. 23, 2012) (holding that under Montana law alter ego is an “equitable remedy”); *accord Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1250 (9th Cir. 2010) (holding that California law does not recognize an “alter ego claim or cause of action”); *Peacock v. Thomas*, 516 U.S. 349, 866 (1996) (“Piercing the corporate veil is not itself an independent ERISA cause of action, ‘but rather is a means of imposing liability on an underlying cause of action.’”) (quoting 1 C. Keating & G. O’Gradney, FLETCHER CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 41, p. 603 (perm. ed.1990)); *Blair v. Infineon Techs. AG*, 720 F. Supp. 2d 462, 469 n.10 (D. Del. 2010) (“[p]iercing the corporate veil is not itself an independent [] cause of action, but rather is a means of imposing liability on an underlying cause of action.”); *Villnave Constr. Servs., Inc. v. Crossgate Mall Gen. Co. Newco, LLC*, 201 A.D.3d 1183, 1187-88 (N.Y. Sup. Ct. 2022) (“Properly understood, an attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners”); *A.L. Dougherty Real Estate Mgmt. Co., LLC v. Su Chin Tsai*, 98 N.E.3d 504, 515 (Ill. App. Ct. 2017) (“Piercing the corporate veil is not a separate cause of action but instead is a means for imposing liability in an underlying cause of action”); *Gallagher v. Persha*, 891 N.W.2d 647, 654 (Mich. Ct. App. 2016) (piercing the corporate veil is a remedy and not a separate cause of action).

59. **Second**, Courts in the Fifth Circuit have routinely rejected attempts to use bankruptcy to gain control over and settle derivative claims asserted against a debtor's insiders and affiliates as impermissible litigation tactics.³⁵ So even if causes of action—based on particularized injuries and harms suffered by tort victims (and **not** BMI)—to the extent asserted against MTI on an alter ego or veiling piercing theory of liability could ever constitute “estate causes of action” under section 541(a), dismissal would be warranted. *See Little Creek*, 779 F.2d 1068 (use of bankruptcy as litigation tactic warrants dismissal).

60. Permitting BMI (as controlled by MTI) to assert and attempt to settlement such causes of action here would be perverse. MTI would, in substance, function as both plaintiff and defendant in such litigation and would have no incentive to maximize recoveries. MTI's incentive would be precisely the opposite since it would be the defendant in that litigation.³⁶

61. Thus, a world where the tort victims control causes of action based on particularized injuries and harms that they suffered (and continue to suffer) is better than one where MTI can

³⁵ *See Brazos*, 471 Fed. Appx. at 394; *Antelope*, 431 Fed. Appx. at 275; *Pottorff*, 518 B.R. at 384.

³⁶ Even where theories like alter-ego or corporate veil piercing constituted estate-held causes of action, debtors cannot fix and liquidate those causes of action over the objection of creditors who would prefer to pursue these claims themselves in the tort system. Courts have generally denied approval of settlements when, as would happen here, an overwhelming majority of creditors object and are willing to take on the costs and risks of the relevant litigation themselves. *See In re Foster Motg. Corp.*, 63 F.3d 914, 918 (5th Cir. 1995) (reversing approval of settlement for abuse of discretion where bankruptcy court did not adequately consider that creditors opposed settlement and were prepared to assume risks and costs of further litigating relevant cause of action); *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989) (reversing bankruptcy court's approval of a settlement where sole creditor objected to amount of settlement and offered to pay the legal expenses to pursue the claim); *In re Qmect, Inc.*, 359 B.R. 270, 273 (Bankr. N.D. Cal. 2007) (denying motion to approve settlement where creditors unanimously objected and estate would not bear costs of prosecuting litigation); *In re Marshall*, 33 B.R. 42, 45 (Bankr. D. Conn. 1983) (disapproving settlement where creditor with ninety percent interest in the result of the litigation raised objections and was willing to assume the costs of litigation); *In re Wells*, 26 B.R. 150, 152 (Bankr. D.R.I. 1983) (disapproving settlement where objecting creditor with eighty percent interest was willing to advance the costs of litigation).

argue that it controls these causes of action and can attempt to effectuate an insider settlement with itself that MTI could then argue bars victims from asserting their tort claims.³⁷

62. Dismissal will restore all rights and/or ability to invoke legal doctrines and theories of recovery to the plaintiffs as they existed prior to the commencement of the Chapter 11 Cases.³⁸ In a dismissal, claimants will be able to assert all their claims and theories of liability against MTI as they existed prior to the Debtors' bankruptcy free of any argument by MTI that those rights were impaired, settled, or taken from them by operation of the Bankruptcy Code or events that occurred during these cases. This would be an optimal outcome for creditors.

63. But the Debtors' and MTI's reasons for continuing these Chapter 11 Cases is not to help or assist creditors. MTI is an economically rational actor. MTI is seeking to minimize its tort liability and thereby maximize profits that it can distribute to its shareholders. These cases are a liability management tool for MTI. And the liability MTI is seeking to manage are the efforts undertaken by sick and dying cancer victims whose diseases were caused by exposure to minerals mined in Barretts, Montana. These creditors do better when they have access to our civil justice system. If this were not true, there would be no reason for MTI and the Debtors to be here.

64. Creditors—*i.e.*, those who seek justice in accordance with the rights afforded to them by our Constitution, including the right to a jury trial—expect that their recoveries on account

³⁷ The Committee is not suggesting that talc claimants need to make or prevail on alter ego or veil piercing theories to hold MTI responsible for their injuries. Among other direct theories, MTI played a direct role in the testing process and has independent liability. Further, claims for negligent undertaking, while similar in some respects to veil-piercing-type allegations, are also direct causes of action. *See, e.g., In re Port Neches Fuels, LLC*, No. 22-10493, 2024 WL 1298590 (D. Del. Mar. 27, 2024). The point is that dismissal moots any argument as to whether a cause of action is an estate cause of action because there is no longer an estate.

³⁸ Section 349(b)(3) of the Code provides that dismissal of a chapter 11 case “revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under [title 11].” 11 U.S.C. § 349(b)(3). To the extent that section 541(a) divested the claimants of their right to impose liability on MTI based on the doctrines of alter ego or veil piercing for their underlying injuries, dismissal would restore such rights as they existed prior to the petition date.

of their claims following a dismissal will exceed their recoveries in these Chapter 11 Cases. It is only through the Debtors' and MTI's inappropriate MTI-centric perspective—*i.e.*, a perspective that prioritizes the interests of equity over the interests of claimants—that the continuation of these cases makes any sense. It necessarily follows that the continued prosecution of these Chapter 11 Cases is in bad faith.

**B. The Debtors Cannot and Will Not Propose
a Confirmable Plan Within a Reasonable Period of Time**

65. The absence of “a reasonable possibility of a successful reorganization within a reasonable period of time” is also independent cause for dismissal under section 1112(b).³⁹ Such cause exists here because the Debtors apparently only intend to propose a plan that will include a channeling injunction and/or third-party releases protecting MTI from all talc liability. No such plan will be confirmable here in any time period, much less a reasonable one.

66. A channeling injunction for asbestos liability is only available through section 524(g), and BMI does not enjoy the creditor support required for this Court to issue such injunction. Since the claimants will not support a section 524(g) plan that provides a channeling injunction for the benefit of MTI, such a plan is patently unconfirmable. Further, as explained above, MTI cannot resolve its own independent talc liability under section 524(g) (or any plan) even if it had claimant support. *See supra* ¶¶ 31-41. When the sole path to reorganization that a debtor pursues depends on the consent of creditors who have demonstrated unwillingness to compromise on their rights, there is cause for dismissal.⁴⁰

³⁹ *In re Am. Capital Equip., LLC*, 688 F.3d 145, 161 (3d Cir. 2012); *see also In re Timbers of Inwood Forest Associates, Ltd.*, 808 F.2d 363, 371 (5th Cir. 1987) (acknowledging that § 1112(b) provides a remedy of dismissal or conversion where there is no “reasonable possibility of successful reorganization within a reasonable time”), *aff’d*, 484 U.S. 365 (1988).

⁴⁰ *See In re Sacks Weston LLC*, No. 23-12540 (PMM), 2024 WL 2152115, at *6 (Bankr. E.D. Pa. Apr. 25, 2024) (dismissing a case after finding that a creditor would refuse to assent to a plan satisfying the

C. There Is a Continuing Loss to the Debtors’ Estates Without Any Chance of Rehabilitation

67. Finally, the Debtors’ estates are generating expenses that outpace the Debtors’ income without any chance of rehabilitation. This is also “cause” for dismissal under section 1112(b)(4)(A), which provides for dismissal where, as here, there is “substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.” 11 U.S.C. § 1112(b)(4)(A).

68. “The loss may be substantial or continuing; it need not be both.” *Ford Steel*, 629 B.R. at 879. Thus, “[n]egative cash flow alone can be sufficient cause to dismiss or convert under § 1112(b).” *Id.* And where, as here, there is a negative cashflow due to administrative expenses outstripping minimal business operations, Courts have found the requisite continuing loss.⁴¹

69. Whether a debtor’s business can be rehabilitated in the face of such losses requires consideration of “whether the debtor’s business prospects justify continuance of the reorganization effort.”⁴² That is, can the debtor show that it can correct the continuing losses to the estate.

70. To do so, the debtor “must ‘do more than manifest unsubstantiated hopes for a successful reorganization.’”⁴³ A rehabilitation plan “must be realistic with a reasonable probability of success.” *Id.* For example, there must be some prospect that the debtor can “stem the debtor’s

debtor’s goal and that confirmation of such plan was impossible without such assent); *Dunes Hotel*, 1997 WL 33344253, at *13, 18-19 (same).

⁴¹ *In re M.A.R. Designs & Constr., Inc.*, 653 B.R. 843, 856 (Bankr. S.D. Tex. 2023); see *In re Who Dat?, Inc.*, No. 21-10292, 2024 WL 1337453, at *12 (Bankr. E.D. La. Mar. 27, 2024) (holding that cause for dismissal existed where the debtor’s lack of income to cover administrative expenses, including the cost of bankruptcy counsel, led to administrative insolvency).

⁴² *Ford Steel*, 629 B.R. at 880 (quoting 7 *Collier on Bankruptcy* ¶ 1112.04(6)(a)(ii) (16th ed. 2017)).

⁴³ *Id.* (quoting *In re Brown*, 951 F.2d 564, 572 (3d Cir. 1991)).

losses and place the debtor's enterprise back on a solid financial footing within a reasonable amount of time."⁴⁴ Here, there is no such prospect.

71. The Debtors here are suffering a continuing loss to their estates without any reasonable prospect of rehabilitation. The Debtors have sold their talc business and ceased those operations. Their only source of income now is a fixed stream of payments from leasing their real estate parcels, which amounts to approximately \$18,833 per month in income.⁴⁵

72. But such income is swamped by just the Debtors' professional fees and expenses, which in April 2024 totaled \$2,084,884 or **110 times** the Debtors' rental income.⁴⁶

73. The Debtors have no means for rehabilitating their business to account for, much less reverse, these losses. The professional fees and expenses that continue to accrue will do so without any chance of bringing additional value into the Debtors' estates. The Debtors cannot maximize the value of any remaining assets through bankruptcy. There is no immediate prospect of increasing the Debtors' rental income either, as its two leases have terms of 15 and 20 years.⁴⁷ The Committee is unaware of a single business prospect available to the Debtors.

74. The Debtors may be able to pay administrative fees through continued DIP lending from MTI. But ultimately such DIP lending decreases the value of the Debtors' estates as each dollar borrowed creates a claim against the Debtors for that dollar **plus** interest. *See* Dkt. No. 917 at ¶ 6 ("The DIP Loans are being provided on an unsecured basis"). Thus, there is no reasonable likelihood of rehabilitation here and cause for dismissal exists under section 1112(b)(4)(A).⁴⁸

⁴⁴ *Who Dat?*, 2024 WL 1337453, at *12 (citing *In re Costa Bonita Beach Resort, Inc.*, 479 B.R. 14, 42 (Bankr. D.P.R. 2012)).

⁴⁵ *See* Decl. of David Gordon, Dkt. No. 13, ¶¶ 34-35.

⁴⁶ *See* Monthly Operating Report for April 28, 2024, Dkt. No. 935, at p. 3.

⁴⁷ *See* Decl. of David Gordon, Dkt. No. 13, ¶¶ 34-35.

⁴⁸ *See Who Dat?, Inc.*, 2024 WL 1337453, at *12 (dismissing case under section 112(b)(4)(A) where debtor had no reasonable likelihood of rehabilitation where it had "one asset and one method of

II. The Court Should Terminate the Debtors' Exclusive Period for Filing a Plan

75. If this Court will not dismiss these cases, then the Court should terminate exclusivity. Section 1121 of the Bankruptcy Code recognizes that there comes a point in every chapter 11 case at which time the parties should be placed on equal footing.⁴⁹ Specifically, while section 1121(b) grants a debtor the exclusive right to file a plan during the first 120 days following the petition date, section 1121(d)(1) further provides that “the court may for cause reduce or increase” the debtor’s exclusivity periods. 11 U.S.C. § 1121(d)(1) (emphasis added).

76. Here, the time to level the playing field is now. The Debtors have no operations or meaningful business to restructure. A key reason for providing a debtor with exclusive periods—protecting a debtor’s right to direct the reorganization of its business—is, therefore, inapplicable in these cases.⁵⁰

77. The Bankruptcy Code does not define “cause” for modifying the exclusivity period, leaving the decision to the discretion of the Courts on a case-by-case basis.⁵¹ In determining

generating business” without any business prospects); *Zamora-Quezada*, 622 B.R. at 885-86 (dismissing case for cause under, *inter alia*, section 1112(4)(A) after finding debtor had no reasonable likelihood of rehabilitation on account of limited income and lack of business prospects).

⁴⁹ See 11 U.S.C. § 1121; *In re Pub. Serv. Co. of New Hampshire*, 99 B.R. 155, 176 (Bankr. D.N.H. 1989) (noting that a “level playing field is essential in the present circumstances of this case to foster a consensual plan.”).

⁵⁰ See, e.g., *In re GMG Cap. Partners III, L.P.*, 503 B.R. 596, 600-01 (Bankr. S.D.N.Y. 2014) (holding no cause to extend exclusive period where the debtor was a “non-operating company” whose sole business was to manage “portfolio ... of stock in three technology companies,” had “no other assets,” and “no business to restructure.”); *In re Sharon Steel Corp.*, 78 B.R. 762, 766-67 (Bankr. W.D. Pa. 1987) (holding no cause to extend exclusive period where the debtor’s major plant operations were in imminent danger of being shut down).

⁵¹ See *In re Geriatrics Nursing Home, Inc.*, 187 B.R. 128, 132 (D.N.J. 1995) (Section 1121(d)(1) “grants great latitude to the Bankruptcy Judge in deciding, on a case-specific basis, whether to modify the exclusivity period on a showing of ‘cause.’”) (citing *In re Kerns*, 111 B.R. 777, 781 (S.D. Ind. 1990)); see also *In re Adelphia Commc’ns Corp.*, 352 B.R. 578, 586 (Bankr. S.D.N.Y. 2006) (“A decision to extend or terminate exclusivity for cause is within the discretion of the bankruptcy court, and is fact-specific.”); *In re Lehigh Valley Prof’l Sports Club, Inc.*, No. 00-11296, 2000 WL 290187, at *2 (Bankr. E.D. Pa. Mar. 14, 2000) (relief under section 1121(d) is committed to the sound discretion of the

whether cause exists to terminate exclusivity, Courts have identified a variety of factors to consider, including, among others: (1) whether the debtor has made progress in negotiations with stakeholders; (2) whether the debtor has demonstrated the reasonable prospect for the filing of a viable plan; (3) whether terminating exclusivity will move the case forward; and (4) the “principal parties’ acrimonious relations,” and whether stakeholders have lost confidence in the debtor.⁵² Here, each of these factors counsels termination of the Debtors’ exclusive period.

**A. The Debtors Have Failed to Make
Meaningful Progress in Negotiations with Stakeholders**

78. The Debtors have not made meaningful progress in negotiations with stakeholders. The Court appointed Kenneth R. Feinberg to serve as mediator in these cases and to conduct a mediation involving the Debtors, the Committee, the Future Claimants’ Representative, and MTI, on behalf of itself and other non-debtor affiliates. *See* Dkt. No. 538. Even prior to the Debtors’ bankruptcy filing, MTI engaged in settlement discussions with law firms that represent talc claimants. Notwithstanding these discussions and months of mediation, the Debtors have not made meaningful progress toward any consensual resolution of these cases.

79. The reason for this lack of progress is simple: the Debtors only seek to progress toward their singular goal of attaining an injunction or releases to protect MTI and other non-debtor affiliates from their own talc liability. The Committee views it as inappropriate to provide bankruptcy relief to a wealthy, non-distressed, non-debtor tortfeasor like MTI, even assuming such

bankruptcy judge); *Sharon Steel*, 78 B.R. at 763-64 (“Congress has left the meaning of the phrase ‘for cause’ to be determined by the facts and circumstances in each individual case.”).

⁵² *See, e.g., In re Texas Extrusion Corp.*, 68 B.R. 712, 725 (N.D. Tex. 1986), *aff’d sub nom. Matter of Texas Extrusion Corp.*, 836 F.2d 217 (5th Cir. 1988), and *aff’d sub nom. Matter of Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988); *In re Express One Int’l, Inc.*, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (citing *In re Grand Traverse Dev. Co.*, 147 B.R. 418 (Bankr. W.D. Mich. 1992)); *In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987); *In re Wisconsin Barge Line, Inc.*, 78 B.R. 946, 948 (Bankr. E.D. Mo. 1987).

relief is obtainable. Bankruptcy is not a refuge for non-debtors who are not in financial distress. *See Truck*, 144 S.Ct. at 1420-21 (“Bankruptcy offers individuals and businesses in financial distress a fresh start to reorganize.”). The Debtors have failed to make progress in negotiations with creditors because MTI’s objective is not one that is shared by creditors.

80. The main stakeholders here believe that MTI should pay its debts as they become due in the tort system—the same as any other tortfeasor that is not in financial distress—and should not use an engineered bankruptcy proceeding involving an affiliate to obtain a discharge. Any solution that mandates that all current and future claimants to be stripped of their legal, equitable, and Constitutional rights against MTI is unacceptable. The Committee does not see how further negotiations could bridge the divide that exists here.

B. The Debtors Have Not Shown a Reasonable Prospect of Filing a Viable Plan

81. The Debtors have not shown a reasonable prospect of filing a viable plan. As discussed above, the only plan that the Debtors and MTI would apparently consider putting forward is one that fully resolves MTI’s talc liability. But, as discussed above, *supra* at ¶¶ 31 to 41, such a plan is not “viable” in the sense that there does not appear to be any path forward in these Chapter 11 Cases where such a plan can be confirmed.

C. Allowing the Committee to File a Plan Will Move the Cases Forward

82. Allowing the Committee to file a plan will move these cases forward, assuming they are not dismissed. The overriding factor in determining whether to terminate a debtor’s exclusivity is whether doing so would facilitate moving the case forward. *See In re Dow Corning Corp.*, 208 B.R. 661, 664-65, 670 (Bankr. E.D. Mich. 1997) (“[T]he primary consideration should be whether or not [terminating exclusivity] would facilitate moving the case forward.”).

83. The termination of exclusivity means that MTI would no longer have exclusive control of these cases, and a plan could be proposed that has the overwhelming support of the

creditors. If these cases are not dismissed, the result cannot be that the Debtors maintain the exclusive right to file a plan. This would only enable the Debtors, and through them MTI, to achieve additional delay. This can be avoided by terminating exclusivity and permitting the Committee to file its plan and disclosure statement.

D. The Claimants Do Not Have Confidence in the Debtors

84. From the claimants' perspective, the Debtors are nothing more than vehicles through which MTI seeks to engage in settlement discussions while under the protection of an extended automatic stay. So, the claimants have no confidence in the Debtors, who are using their own bankruptcy to obtain a discharge of MTI's talc liability and, thus, prioritize MTI's objectives over the creditors' objectives.

E. Terminating Exclusivity Will Not Prejudice the Debtors

85. Terminating the exclusive period will not prejudice the Debtors because it does not prevent them from proposing their own chapter 11 plan; instead, it simply opens the process for competing proposals and levels the playing field.⁵³ The Debtors would remain free to continue to engage in mediation and attempt to propose a plan that confronts and attempts to address the many challenges identified above. If the Debtors believe that their plan affords claimants with the best possible outcome, then they should welcome the opportunity to prove that their plan is truly the best plan when compared to other alternatives by putting their plan up for a vote by their creditors.

86. Parties who typically oppose terminating exclusivity often allege that doing so will bring chaos to a chapter 11 case. But chaos can be a ladder that leads to solutions to problems that

⁵³ See *In re R.G. Pharm., Inc.*, 374 B.R. 484, 488 (Bankr. D. Conn. 2007) ("The fact that the debtor no longer has the exclusive right to file a plan does not affect its concurrent right to file a plan."); *In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1005 (Bankr. N.D. Ind. 1990) (denial of request for extension of the exclusive period is not "a death knell" for a debtor's reorganization; the debtor "remains free to take as long as it feels appropriate to develop and propose its own plan," though from that point onward, creditors have the same rights).

are not readily apparent in the absence of uncertainty. Further, terminating exclusivity does not mean that the Court will or must confirm any plan. It simply offers the Court a broader array of options for resolving a case and puts pressure on parties to find solutions by creating an environment where the failure to do so can mean that someone else's plan will be confirmed.

F. The Committee Plan Can be Filed in Short Order

87. Since the Court has yet to terminate exclusivity, the Committee cannot file a plan. Sometimes debtors will argue that the fact that a party has not filed a competing plan means that exclusivity should not be terminated. But if the Committee were to file a plan, the Debtors would argue that that act itself is a violation of the Debtors' exclusive right to file a plan. It cannot be the case that a party must risk violating the Code to prove that it can propose a viable plan.

88. The point of seeking relief under section 1121(d)(1) is to gain permission from the Court to file a plan if these Chapter 11 Cases are not dismissed. Once that permission is granted, and exclusivity is terminated, the Committee will file its plan and related plan documents in short order. That plan—which will not treat MTI as if it were a debtor in bankruptcy—would represent the only viable plan option of and, thus, the only means for appropriately concluding these Chapter 11 Cases absent dismissal.

NOTICE

89. Notice of this Motion has been served on: (a) the U.S. Trustee; (b) counsel to the Debtors; and (c) all persons who have formally appeared in these Chapter 11 Cases and requested service pursuant to Bankruptcy Rule 2002. Considering the nature of the relief requested herein, the Committee respectfully submits that no other or further notice need be provided.

NO PRIOR REQUEST

90. No prior request for the relief sought in this Motion has been made to this or any other court in connection with these Chapter 11 Cases.

CONCLUSION

91. **WHEREFORE**, based on the foregoing, the Committee respectfully requests that the Court grant the Motion and grant such other and further relief as the Court deems necessary and appropriate.

Dated: June 25, 2024

Respectfully submitted,

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COMMITTEE OF UNSECURED
CREDITORS**

EXHIBIT A

PROPOSED ORDER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

BMI OLDSCO INC. *et al.*,¹

Debtors.

Chapter 11

Case No. 23-90794 (MI)

(Jointly Administered)

**ORDER [DISMISSING CHAPTER 11 CASES]
[TERMINATING THE DEBTORS' EXCLUSIVE PERIODS]**

This matter, having come before the Court upon the *Motion of the Official Committee of Unsecured Creditors to Dismiss the Chapter 11 Cases Pursuant to 11 U.S.C. § 1112(b) or, in the Alternative, to Terminate the Debtors' Exclusive Period Pursuant to 11 U.S.C. § 1121(d)(1)* (the "Motion")² filed by the Official Committee of Unsecured Creditors; the Court having reviewed the Motion and having heard the statements of counsel and the evidence introduced with respect to the Motion at a hearing before the Court (the "Hearing"); the Court having found that (a) the Court has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; (b) venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b); and (d) cause exists within the meaning of [11 U.S.C. § 1112(b)] [11 U.S.C. § 1121(d)(1)] for [dismissal of the Chapter 11 Cases] [the termination of the Debtors' exclusive periods]; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein;

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: BMI Oldco Inc. (f/k/a Barretts Minerals Inc.) (8715) and Barretts Ventures Texas LLC (0787). The Debtors' address is 5605 North MacArthur Boulevard, Suite 1000, PMB 139, Irving, Texas 75038.

² Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Motion.

IT IS HEREBY ORDERED AS FOLLOWS:

1. [The exclusive periods of section 1121(d) of the Bankruptcy Code are hereby terminated as to the Committee.
2. The Committee may file its plan, disclosure statement and motion to approve the disclosure statement and solicitation procedures.
3. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the interpretation, implementation, or enforcement of this Order.]
4. [Dismissal. These Chapter 11 Cases shall be dismissed pursuant to section 1112(b) of the Bankruptcy Code.
5. Statute of Limitations. Pursuant to sections 105(a) and 108(c) of the Bankruptcy Code, this Order shall toll the expiration of any period under any applicable non-bankruptcy law, any order ordered in a non-bankruptcy proceeding, or any agreement that fixes a period under which a plaintiff is required to commence or continue a civil action in a court other than this Court on any claim asserted against the Debtors and their current or former insiders or affiliates until the later of: (a) the end of such period; or (b) sixty (60) days after notice of this Order.
6. Closing the Chapter 11 Cases. This Court directs that the Clerk of this Court close these Chapter 11 Cases promptly following the filing of a notice by the Committee, with the prior written acknowledgement from the U.S. Trustee, that there is no objection to the closing of the case and confirming the completion of the following conditions: (a) all monthly operating reports of the Debtors have been filed, (b) all fees due and owing in the Chapter 11 Cases to the Clerk of this Court and/or the U.S. Trustee pursuant to 28 U.S.C. § 1930 have been paid in full, (c) notice of the Appeal Exhaustion Date (as defined below) has been filed with this Court, and (d) all amounts requested pursuant to a Final Fee Application (as defined below) or a Post Dismissal Fee

Application (all as defined below) have been paid by the Debtors or, if not paid, determined by this Court not to be allowable. The date that the parties jointly file a notice with the Court indicating that all appellate proceedings, including proceedings for review or otherwise before the U.S. Supreme Court, involving this Order (“Appeals”) are exhausted or resolved, or that the parties will not pursue the Appeals shall hereinafter be referred to as the “Appeal Exhaustion Date.”

7. Procedures for Final Allowance of Fees and Expenses. All professionals retained pursuant to sections 105, 327, 328 or 1103 of the Bankruptcy Code (“Retained Professionals”), seeking compensation pursuant to sections 330 or 331 of the Bankruptcy Code shall file and serve monthly, interim and final fee applications for periods through and including the date of this Order within thirty (30) days of the date of this Order (the “Final Fee Applications”); and shall file and serve any fee applications for periods from the date of this Order through and including the Appeal Exhaustion Date (“Post-Dismissal Fee Applications” and together with the Final Fee Applications, the “Fee Applications”) within thirty (30) days of the Appeal Exhaustion Date. The Fee Applications shall be in accordance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules of this Court, and the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals* [Dkt. No. 297] (the “Compensation Procedures Order”). Any objections to the Fee Applications shall be filed and served on counsel for the Debtor and the entity submitting the application to which an objection is being filed no later than twenty-one (21) days following the filing of such Fee Application. The Court will schedule hearings, at the Court’s convenience, to consider the Fee Applications and issue orders allowing the professional fees and expenses of the Retained Professionals.

8. Compensation Procedures Order; Reimbursement Requests; Post-Dismissal Monthly Fees. The Compensation Procedures Order shall remain in full force and effect through

and including the Appeal Exhaustion Date, including as to requests for reimbursement of expenses incurred by members of the Committee and their representatives (a “Reimbursement Request”) and the submission and payment of monthly fee statements by Retained Professionals. After the Appeal Exhaustion Date, the Compensation Procedures Order shall remain in effect as to the submission and payment of Fee Applications.

9. Limited Continued Existence of the Committee. The Committee shall remain in existence after the date of this Order solely to pursue or defend any Appeals, and its Retained Professionals shall be authorized to continue to perform services on the Committee’s behalf and communicate with its constituents concerning the pursuit or defense of any Appeals. On the Appeal Exhaustion Date, the Committee shall be automatically dissolved, and all members and professionals retained by the Committee shall be discharged from all duties, responsibilities, and obligations arising from, or related to the Committee. Following such dissolution, any attorney-client privilege and similar rights previously held by the Committee shall remain in existence and shall be enforceable by any person or entity that was a member of the Committee as of its dissolution (directly or indirectly through their respective counsel or other representative). Notwithstanding anything contained herein to the contrary, the Committee, Committee members and their representatives and the Committee’s Retained Professionals shall be authorized to seek payment of fees and reimbursement of expenses in accordance with this Order.

10. Services of Stretto, Inc. (“Stretto”). Stretto is authorized to assist the Debtors with service of this Order. On or about thirty (30) days after the entry of this Order, Stretto, as the Debtors’ claims and noticing agent, shall (a) forward to the Clerk of the Court an electronic version of all imaged claims; (b) upload the creditor mailing list into CM/ECF; and (c) docket a combined final claims register containing claims against the Debtors. Stretto shall be discharged from all

duties, responsibilities, and obligations as the Debtors' claims and noticing agent in these Chapter 11 Cases following the conclusion of such services pursuant to this Order and the closing of these Chapter 11 Cases. Stretto shall be entitled to payment and reimbursement of its fees and costs. Stretto is authorized to take all actions necessary and appropriate to effectuate the terms of this Order.

11. Payment of Quarterly Fees. Not later than thirty (30) days after the date of this Order, the Debtors shall pay to the U.S. Trustee any quarterly fees owed through the date of the date of this Order pursuant to 28 U.S.C. § 1930(a)(6). Any disbursements, including but not limited to, the payments of professional fees and expenses by the Debtors between the date of this Order through and including the Appeal Exhaustion Date must be reported on the Debtors' final report and shall subject to the payment of fees owed pursuant to 28 U.S.C. § 1930.

12. Continued Effect of Confidentiality Orders. Notwithstanding any other provision of this Dismissal Order, any obligations arising under confidentiality agreements, joint interest agreements, and protective orders, if any, entered into during the Chapter 11 Cases in connection with the Chapter 11 Cases shall remain in full force and effect in accordance with their terms.

13. Notice. On or before seven (7) days following the date of this Order, the Debtors shall serve notice of this Order (including a copy of this Order) pursuant to Bankruptcy Rules 2002(f)(2) and 2002(k) on the Committee, the U.S. Trustee, the Master Service List, all entities that have requested notice pursuant to Bankruptcy Rule 2002, and such additional persons and entities deemed appropriate by the Debtor.

14. Retained Jurisdiction. Notwithstanding the dismissal of the Chapter 11 Cases, this Court shall retain jurisdiction to hear and determine all matters arising from or related to the Chapter 11 Cases, including without limitation, certification of any appeal of this Order, the

interpretation, implementation, or enforcement of this Order and the Court's prior orders, and to hear and consider any objection to a Fee Application.

15. Immediate Effectiveness. Notwithstanding any provisions in the Bankruptcy Rules to the contrary, this Order shall be immediately effective and enforceable upon its entry.]

Signed: _____, 2024

Honorable Marvin Isgur
United States Bankruptcy Judge