UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
Caption in Compliance with D.N.J. LBR 9004-1(b)

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In re: **LTL MANAGEMENT, LLC,** Debtor.	Chapter 11 Case No.: 21-30589(MBK) Honorable Michael B. Kaplan

TCC I'S (I) SUPPLEMENTAL OBJECTION TO DEBTOR'S APPLICATIONS FOR AUTHORITY TO RETAIN CERTAIN LAW FIRMS, AND (II) OBJECTION TO ORRICK'S RETENTION

The Official Committee of Talc Claimants I ("TCC I"), by and through its counsel, respectfully submits this Supplemental Objection to final approval of the (i) *Application for Retention of Jones Day, Effective as of October 14, 2021*, dated November 23, 2021 [Docket No. 541]; and (ii) *Application for Retention of Skadden, Arps, Slate, Meagher & Flom LLP as Special Counsel, Effective as of October 14, 2021*, dated December 15, 2021 [Docket No. 832]. TCC I also hereby objects to the *Application for Retention of Orrick, Herrington & Sutcliffe LLP as Special Talc Litigation Appellate Counsel, Effective as of October 14, 2021*, dated February 10, 2022 [Docket No. 1456]. In support hereof, and of its prior Objections (all of which are incorporated herein by reference),[1] TCC I respectfully states as follows:

PRELIMINARY STATEMENT

1. As the Court knows, various parties-in-interest – including the United States Trustee, the original Official Committee of Talc Claimants, and counsel to thousands of individual talc claimants – objected to the Jones Day, Skadden Arps, and Weil Gotshal Applications [See Docket. Nos. 750, 753, 758, 955, 957, 961, and 1228]. This Court scheduled a January 25th hearing

[1] See Docket Nos. 750, 955, and 1228.

to consider final approval of those Applications. Prior to the hearing, TCC I wrote a letter to the Court [Docket. No. 1252], suggesting that the hearing be adjourned to the March 8, 2022 omnibus hearing date, and that the January 25th hearing instead be used as a status conference. The Debtor objected to that request, and the suggestion was argued at the commencement of the January 25th hearing. Shortly thereafter, an accommodation was reached: (i) the final approval hearing would be moved to March 8th, and (ii) the three law firms (Jones Day, Skadden Arps, and Weil Gotshal) would not face risk of fee disgorgement for work performed between January 25th and March 8th. See Docket Nos. 1270, 1293, 1294, 1378.

2. A primary reason for this outcome was the Court's stated desire to first receive evidence and argument at the Motion to Dismiss trial (February 15th through 18th), which information might have bearing on final approval of those particular Applications:

> Certainly, the Court shouldn't be deprived of access to that information that will be coming into the record, engaging the potential – the spectrum of a conflict, whether it's simply an appearance, whether it's potential, whether it is closer to actual. And the Court would benefit from much of the argument and testimony and evidence that will be forthcoming within 30 days.

See Jan. 25, 2022 Hr'g Tr. at 15:4-10.

3. Herein, TCC I supplements the record of this contested matter with (i) citations to testimony heard by the Court in connection with the Motion to Dismiss, (ii) certain information added to the general case docket since the prior objections were filed, and (iii) grounds for denying the Orrick Herrington Application. For the reasons discussed herein, as supplemental to arguments advanced in the prior objection papers, TCC I respectfully asks this Court to deny final approval of all of the Applications.

APPLICABLE LEGAL PRINCIPLES

I. The Debtor And Its Counsel Bear All Burdens Of Proof And Persuasion Respecting The Applications.

4. Bankruptcy jurisprudence clearly allocates all burdens of proof and persuasion on the Debtor and its proposed counsel. In re BH&P, Inc., 949 F.2d 1300, 1317 (3d Cir. 1991) (affirming disqualification of trustee counsel; "It is not ... the obligation of the bankruptcy court to search the record for possible conflicts of interest. That obligation belongs to the party who seeks employment by the estate"); In re Big Mac Marine, Inc., 326 B.R. 150, 154 (8th Cir. B.A.P. 2005) ("The burden of proof was on [applicant] to establish that he was both disinterested and did not represent an interest adverse to the estate."); In re Caesars Entertainment Operating Co., Inc., 561 B.R. 420, 431 (Bankr. N.D. Ill. 2015) ("The burden of proving that section 327(a) has been satisfied rests with the applicant seeking to retain a professional, as does the initial burden of going forward at any hearing."); In re Running Horse, L.L.C., 371 B.R. 446, 451 (Bankr. E.D. Cal. 2007) ("The debtor has the burden of proof to show that the proposed employment is proper.").

II. Section 327(a) Principles.

A. A Debtor's General Bankruptcy Counsel, Retained Per Section 327(a), Must Be "Like Caesar's Wife: Above Suspicion".

5. Section 327(a) affords a debtor, with Court permission, the opportunity to retain general bankruptcy counsel, but only if two tests are met: (1) the firm does "not hold or represent an interest adverse to the estate;" and (2) the firm is a "disinterested person." 11 U.S.C. § 327(a).

6. As for the first test, a law firm is free of "adverse interests" if that firm does not have a "competing economic interest tending to diminish estate value or … creat[ing] a potential or actual dispute in which the estate is a rival claimant." In re First Jersey Securities, Inc., 180 F.3d 504, 509 (3d Cir. 1999) (citation omitted). As for the second test, a law firm is a "disinterested

person" if it "does not have an interest materially adverse to the interest of the estate or of any class of creditors." 11 U.S.C. § 101(14)(C).

7. These tests create an overarching expectation of counsel independence and fiduciary integrity, and that expectation is phrased in varying ways in the bankruptcy jurisprudence. The case law holds, for example, that Section 327(a) imposes the same fiduciary standards on debtor's counsel as the Bankruptcy Code imposes on the debtor itself. See, e.g., Brown v. Gerdes, 321 U.S. 178 (1944) (counsel in bankruptcy cases are held to fiduciary standards); ICM Notes, Ltd. v. Andrews & Kurth, L.L.P., 278 B.R. 117, 126 (S.D. Tex. 2002), aff'd, 324 F.3d 768 (5th Cir. 2003); In re Taxman Clothing Co., 49 F.3d 310 (7th Cir. 1995); In re Perez, 30 F.3d 1209 (9th Cir. 1994); In re JLM Inc., 210 B.R. 1926 (2d Cir. B.A.P. 1997); In re Schepps Food Stores, Inc., 160 B.R. 792, 797-98 (Bankr. S.D. Tex. 1993).

8. From there, it naturally follows that Section 327(a) counsel is held to the same standard as a Chapter 11 trustee. Thus, if a lawyer at the firm in question is not sufficiently independent as to qualify for trustee appointment, his firm cannot serve as Section 327(a) counsel. See 3 Collier on Bankruptcy ¶ 327.04[2][a][ii] (16th ed. rev. 2010) ("The Code requires the same degree of disinterestedness on the part of an attorney … that is required of the trustee in a reorganization case…. It would be anomalous to require a trustee to be aloof from all connection with the debtor or its management, yet permit the trustee's attorney … to have a close relationship with the debtor, its management or associates."); see also In re Marvel Entertainment Group., Inc., 140 F.3d 463, 478 (3d Cir. 1998) ("[s]auce for the goose" must be "sauce for the gander"); BH&P, 949 F.2d at 1316 ("[W]e… affirm that the conflict of interest principles which we have adopted regarding disqualification of trustees apply with equal force in those situations involving employment of professionals.").

9. This was succinctly summed up by S.D.N.Y. Bankruptcy Judge Stuart Bernstein as follows: "[L]ike Caesar's wife, [debtor's] counsel must be above suspicion. Bankruptcy is concerned as much with appearances as with reality…. No matter how thoroughly or fairly [counsel] conducted the investigation, the question will always linger whether it held back, or failed to bite the hand that feeds it quite as hard as the circumstances warranted." In re Granite Partners, L.P., 219 B.R. 22, 38 (Bankr. S.D.N.Y. 1998).

B. The *Marvel* Rule.

10. "Section 327(a) presents a *per se* bar to the appointment of a law firm with an *actual* conflict, and gives the [bankruptcy] court wide discretion in deciding whether to approve the appointment of a law firm with a *potential* conflict." In re Marvel Entertainment Group., Inc., 140 F.3d 463, 477 (3d Cir. 1998) (emphasis added).

11. When does proposed counsel have an "actual" (and thus *per se* disqualifying) conflict of interest? A "conflict is actual, and hence *per se* disqualifying, if it is likely that a professional will be placed in a position permitting him to favor one interest over an impermissibly conflicting interest." In re Pillowtex, Inc., 304 F.3d 246, 251 (3d Cir. 2002).

12. Such "divided loyalty" can take different forms. First, if a "facially plausible" estate claim has been asserted against proposed counsel, the firm has an actual conflict of interest and is *per se* disqualified. See id. at 255 ("[W]hen there has been a facially plausible claim of a substantial preference, the … bankruptcy court cannot avoid the clear mandate of the statute by the mere expedient of approving retention conditional on a later determination of the preference issue.").

13. Second, a law firm's simultaneous representation of the debtor and its controlling shareholder (or affiliated companies) can be an "actual" conflict, depending on the underlying

circumstances. See In re Jade Management Services, 386 Fed. Appx. 145, 149 (3d Cir. 2010) ("Simultaneous representation of a debtor corporation and the controlling shareholders, although not a disqualifying conflict *per se*, becomes a basis to disqualify counsel when adverse interests either exist or are likely to develop.").

14. Third, an "actual" conflict may exist if the underlying case circumstances question overall process integrity. See BH&P, 949 F.2d at 1316 (discerning whether an "actual" conflict exists, "will require the bankruptcy courts to analyze the factors present in any given case in order to determine whether … efficiency and economy … must yield to competing concerns affecting fairness to all parties involved and protection of the integrity of the bankruptcy process.").

C. Section 327(a) Counsel Cannot Evade The Rule Against *Concurrent* Representations Simply By Pointing To An Engagement Letter With The Debtor; The Law Will Look At The Substance Of The Relationship To See If Counsel Also Concurrently Represents Non-Debtor Affiliates, Thus Creating A Conflict Of Interest.

15. The ethics rule reads as follows: "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." See Model Rule 1.7(a); NJRPC 1.7(a); NYRPC 1.7(a); TXRPC 1.06(b); In re 7677 East Berry Ave. Assocs., L.P., 419 B.R. 833, 840 (Bankr. D. Colo. 2009) (generally, "debtors should be free to select counsel of their choice"; but this "general [principle] is tempered by ethical restraints placed upon attorneys by the [Model] Rules and the Code.").

16. Comment 24 to the rule provides further color: "A conflict of interest exists … if there is a significant risk that a lawyer's action on behalf of one client will materially limit the

lawyer's effectiveness in representing another client in a different case." See also In re Mercury, 280 B.R. 35, 53-54 (S.D.N.Y. 2002) ("the ethical requirement that an attorney be free of conflicting interests in representing a client … is central to Section 327 of the Code governing retention of professionals to represent a debtor's estate"; "Having to divide one's allegiance between two clients is what Section 327 attempts to prevent.").

17. The question – *Is There An Inappropriate Concurrent Engagement?* – gets very tricky with affiliated corporate entities. A law firm may have a concurrent representation – and a conflicting one at that – by *effectively* representing multiple entities in a conglomerate, regardless of scope limitations contained in the engagement letter. Comment 34 to Rule 1.7 states as follows:

> Whether [an] affiliate should [also] be considered a client [for purposes of Rule 1.7] will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates…. Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

See also GSI Commerce Solutions, Inc. v. BabyCenter, LLC, 618 F.3d 204, 210-11 (2d Cir. 2010) (in determining whether attorney-client relationship extends to corporate affiliate, courts focus on: "(i) the degree of operational commonality between affiliated entities, and (ii) the extent to which one depends financially on the other." The first prong focuses on the "extent to which the affiliated entities rely on or otherwise share common personnel such as managers, officers, and directors"; the second prong focuses on the "extent to which an adverse outcome in the matter at issue would result in substantial and measurable loss to the client or its affiliate.") (citations omitted); Dr. Falk Pharma GmbH v. GeneriCo, LLC, 916 F.3d 975 (2019) (applying GSI under New Jersey law).

18. Where corporate affiliates are closely related – *e.g.*, shared officers and directors, shared overhead and corporate services, liabilities of one entity impacts liabilities of another – the attorney-client relationship for one affiliate extends to such other affiliate within the corporate

umbrella. See, e.g., Discotrade, Ltd. v. Wyeth–Ayerst Int. Inc., 200 F.Supp.2d 355 (S.D.N.Y. 2002) (law firm disqualified from representing party in litigation as a result of defendant corporation being deemed client of firm due to being within same corporate umbrella of corporate affiliate client of firm, sharing common officers and directors, sharing corporate overhead and services); Stratagem Development Corp. v. Heron International N.V., 756 F.Supp. 789, 792 (S.D.N.Y. 1991) (where "the liabilities of a [wholly owned] subsidiary corporation directly affect the bottom line of the corporate parent," law firm could not simultaneously represent both in adverse actions); see also Carlyle Towers Condominium Association, Inc. v. Crossland Savings, FSB, 944 F.Supp. 341, 346 (D.N.J. 1996) ("there is sufficient case law which supports the proposition that, for conflict purposes, representation of a subsidiary corporation is equivalent to representation of its parent, and vice-versa").

19. In disqualifying a law firm from representing two affiliated debtors due to conflicts between the affiliates, Judge Gambardella observed:

> As a general principle, professional persons employed by the trustee should be free of any conflicting interest which might in the view of the trustee or the bankruptcy court effect the performance of their services or which might impair the high degree of impartiality and detached judgment expected of them during the administration of the case.

In re Star Broad., Inc., 81 B.R. 835, 840 (Bankr. D.N.J. 1988) (Gambardella, J.) (quoting Roger J. Au & Son, Inc. v. Aetna Ins. Co., 64 B.R. 600, 604 (N.D. Ohio 1986)).

D. Counsel Cannot Be Retained Under Section 327(a) If The Nucleus Of Operative Fact Involves A Transaction In Which Counsel Advised And Represented A *Former* Client.

20. The ethics rule reads as follows: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless

the former client gives informed consent, confirmed in writing." See Model Rule 1.9(a)-(c); NJRPC 1.9(a)-(c); NYRPC 1.9(a)-(c); TXPRC 1.09(a).

21. Comment 2 to the rule explains further: "The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited."

22. Thus, if proposed Section 327(a) counsel historically worked on a transaction (*e.g.*, a "Texas Two Step") for one client (e.g., the parent company) and then jumps to a second client (e.g., a subsidiary created through that transaction), he is ethically barred – by continuing obligations owed to the prior client (e.g., the parent company) – from raising any contest over the transaction. See, e.g., Star Broadcasting, 81 B.R. at 844 (disqualifying counsel from representing both debtor and corporate owner, who also filed for bankruptcy, notwithstanding overlapping claims pools and purported waiver of claims by debtor's owner, because one estate held claims against the other, creating conflicting interests); In re Straughn, 428 B.R. 618 (Bankr. W.D. Pa. 2010) (same); In re Decade S.A.C., LLC, No. 19-50095, 2022 WL 486592 (Bankr. D. Del. Feb. 17, 2022) (Sontchi, J.) (disqualifying counsel from representing trustee, notwithstanding prior approval pursuant to stipulation between trustee and third party that was represented by same counsel, because of conflict that emerged between estate and third party respecting third party's settlement veto rights under stipulation).

23. That is precisely the kind of "divided loyalty" situation constituting an actual, *per se* disqualifying conflict under Pillowtex. See 304 F.3d at 251 (again, a "conflict is actual, and

hence *per se* disqualifying, if it is likely that a professional will be placed in a position permitting him to favor one interest over an impermissibly conflicting interest.").

E. Counsel Cannot Be Retained Under Section 327(a) If The Nucleus Of Operative Fact Involves A Transaction That Would Require Counsel To Contravene The "Attorney-Witness" Rule.

24. The ethics rule reads as follows: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." See Model Rule 3.7; NJRPC 3.7; NYRPC 3.7; TXPRC 3.08.

25. It naturally follows that, where (i) the bankruptcy is part of the design and intention of a pre-petition transaction, *e.g.*, a "Texas Two Step," (ii) proposed Section 327(a) counsel lead the development and implementation of that transaction, *e.g.*, lead counsel for the "Texas Two Step," (iii) creditors have repeatedly/consistently indicated their intention to challenge that transaction, *e.g.*, as a fraudulent transfer, and (iv) the transaction is a vital attribute of the debtor's entire Chapter 11 story and strategy, it is functionally impossible for counsel to avoid being a primary witness in the facts undergirding the entire Chapter 11 case.

26. The conflict of interest becomes even more pronounced when (a) as mentioned above, counsel likely will be a defendant in estate litigation over that transaction, and (b) the transaction in question is innovative, controversial, and a new kind of practice "franchise" for the firm. Under these circumstances, counsel's testimony is naturally defensive, self-interested, and infused with the kind of "divided loyalty" that Pillowtex demands *per se* disqualification.

III. Section 327(e) Principles.

27. Section 327(e) allows for limited, targeted representation (i.e., for a "specified special purpose"). Section 327(e) counsel must "stay in its lane". Counsel is not allowed to move freely out of the category of assigned tasks and into the more generalized work of Section 327(a) counsel. See In re Congoleum Corp., 426 F.3d 675 (3d Cir. 2005) (reversing retention order respecting counsel whose role was "far too expansive" for Section 327(e) appointment); In re Woodworkers Warehouse, Inc., 323 B.R. 403 (D. Del. 2005) (Section 327(e) authorizes retention of counsel "for a specific purpose," not generalized bankruptcy work). If that were allowed, it would deconstruct the more stringent conflicts requirements of Section 327(a) and effectively nullify the distinctions between Section 327(a) and Section 327(e).

THE EVIDENTIARY RECORD ESTABLISHES THAT THE APPLICATIONS SHOULD BE DENIED

I. Jones Day Holds Or Represents Adverse Interests, Is Not Disinterested, And Is Burdened By Conflicts Of Interest Disabling Section 327(a) Retention As Counsel For The Debtor.

A. The Record Clearly Reflects Jones Day's Concurrent Representation Of LTL And Non-Debtor Affiliates, Creating A Disabling Conflict Of Interest.

28. Jones Day concedes that it represented J&J with respect to the prepetition divisive merger, and continues to represent J&J to this day (purportedly in non-bankruptcy matters). See *Debtor's Reply in Support of Its Application to Retain Jones Day as Chapter 11 Counsel* [Docket No. 1190] ("Debtor's Reply"),¶ 5; Gordon Supplemental Certification [Docket No. 1190-1], ¶ 5, Exhs. A and B; Haas Certification [Docket No. 1190-5], ¶ 3.

29. Jones Day claims that it terminated its prepetition bankruptcy engagement with J&J and that, respecting bankruptcy matters, it works solely for LTL. But, that is not what the evidence to date shows.

30. There is ample evidence that LTL is not a corporate being with any functional independence from J&J and JJCI. LTL is, rather, utterly subservient to J&J and JJCI. It does not have a single director, employee, or representative that does not work for, draw a salary from or owe 100% fealty to J&J and/or JJCI. See e.g., Kim First Day Decl. [Docket No. 5], ¶ 29; Venue Transfer Order [Docket No. 416], at 2; Feb 14, 2022 Hr'g Tr. at 96:18-99:9. And, given that it is a special purpose "shell" vehicle that does not participate in the commercial world, LTL does not have any operational footprint establishing business independence from J&J and JJCI. Advice that Jones Day purportedly delivers to LTL is actually delivered to J&J and JJCI through "seconded" employees.

31. Take, for example, the testimony of Robert Wuesthoff, a long-time J&J executive and LTL's President and board member.

- Mr. Wuesthoff testified that LTL was created with one purpose: to assume the J&J conglomerate's talc liabilities. See Feb 14, 2022 Hr'g Tr. at 134:25-135:13.
- Mr. Wuesthoff was approached about becoming LTL's president a mere two weeks before LTL's formation, despite having no professional or other experience with bankruptcy, talc litigation (or litigation of any kind), or the concept of fiduciary duties. See Feb 14, 2022 Hr'g Tr. at 103:9-104:10; 107:23-108:19; 127:14-128:9.
- At the time of his appointment, Mr. Wuesthoff had no idea of the scope or magnitude of LTL's talc liability or its asset base. See Feb 14, 2022 Hr'g Tr. at 06:8-107:1; 107:10-22.
- Two days after his appointment as LTL president, Mr. Wuesthoff presided over a 90-minute board meeting (the first for LTL), at the conclusion of which Mr. Wuesthoff voted to put LTL in bankruptcy. See Feb 14, 2022 Hr'g Tr. at 128:24-129:16. All attendees at that meeting, and all directors and officers of LTL, are long-standing J&J employees. See Feb 14, 2022 Hr'g Tr. at 97:7-10.
- As of the time of this vote, Mr. Wuesthoff had not received, let alone reviewed, any written analysis regarding whether LTL should file for bankruptcy; reviewed no documents regarding LTL's business or conducted any independent research of same; had no information regarding what LTL's talc exposure was; and had no idea what the value of LTL's assets were. See Feb 14, 2022 Hr'g Tr. at 117:17-118:3; 128:24-129:16; 142:3-143:17; 149:2-14; 150:20-23.

- And, regarding LTL's "most important asset" (the funding agreement), Mr. Wuesthoff testified that LTL did not negotiate a single word of the agreement, nor have any idea of its underlying value. See Feb 14, 2022 Hr'g Tr. at 142:13-144:24; 146:8-147:21; 153:12-15.

32. Next, consider the testimony of Michelle Goodridge, the President of Old JJCI at the time of the divisive merger, and New JJCI thereafter.

- Despite being the President of Old JJCI, Mr. Goodridge was not even aware of the divisive merger until October 1, 2021 (days before its consummation), when she met with and was advised by J&J lawyers. See Feb 14, 2022 Hr'g Tr. at 202:8-11; 213:3-13.

- Ms. Goodridge did not participate in a single business discussion regarding the intent or purpose of the divisive merger, and did not request, receive, or review a single financial statement for the entities involved in the transaction. See Feb 14, 2022 Hr'g Tr. at 223:2-25.

- Ms. Goodridge did not perform any diligence on any of the contractual arrangements or assets involved in the restructuring, other than conversations with J&J inhouse lawyers. 252:15-259:17.

- Although Ms. Goodridge executed all of the operative restructuring documents, she, like Mr. Wuesthoff, was not involved in a single negotiation regarding the documents, nor did she change a single word. See Feb 14, 2022 Hr'g Tr. at 202:15-203:12. Rather, Ms. Goodridge conferred primarily with J&J inhouse lawyers and executed the operative documents based on advice from J&J lawyers. See Feb 14, 2022 Hr'g Tr. at 208:7-18; 218:3-9; 221:3-20.

- Notwithstanding that Ms. Goodridge ostensibly represented both the payor (Old JJCI) and payee (LTL) under the funding agreement, she did not participate in the negotiation or formulation of the agreement (and did not know who did), and provided no input in the agreement before signing it. Rather, Ms. Goodridge met with and was advised exclusively by J&J inhouse lawyers. See Feb 14, 2022 Hr'g Tr. at 234:22-236:13. Ms. Goodridge had no sense of the value undergirding the funding agreement, and candidly acknowledged that she would not describe the funding agreement as an "arm's length negotiation." See Feb 14, 2022 Hr'g Tr. at 236:22-25; 248:7-249:19.

- Ms. Goodridge had no knowledge of the financial obligations of any talc settlements, or the aggregate magnitude of the talc liabilities being assigned to LTL. See Feb 14, 2022 Hr'g Tr. at 226:15-18; 227:8-24; 262:1-9.

- Ms. Goodridge ostensibly appointed all of LTL's officers, yet she did not know or speak with a single one beforehand; rather, the appointments were, as she described, a function of the underlying agreements. See Feb 14, 2022 Hr'g Tr. at 263:16-264:24.

33. Finally, consider the testimony of John Kim, a long-standing member of J&J's inhouse counsel team, the J&J attorney responsible for managing all talc litigation, and now the Chief Legal Officer of LTL.

- Mr. Kim has been in J&J's general counsel office for over 20 years, and led its products liability group (including mass tort litigation) for over a decade. See Feb. 15, 2022 Hr'g Tr. at 81:19-25; 83:5-10. Indeed, Mr. Kim is J&J's most experienced and longstanding lawyer on talc-related issues. See Feb. 15, 2022 Hr'g Tr. at 190:1-13.

- Mr. Kim testified that the purpose of LTL was to assume "all the talc liability" of the J&J conglomerate, file for bankruptcy, and use LTL's filing to stay all talc-related litigation against J&J. See Feb. 15, 2022 Hr'g Tr. at 194:6-9; 196:1-16;199:15-23.

- Mr. Kim confirmed that the LTL board was not provided with estimates of aggregate talc liability before approving LTL's bankruptcy, or detailed information regarding prior settlements. See Feb. 16, 2022 Hr'g Tr. at 23:6-10; 27:7-11. Mr. Kim further acknowledged that the LTL board had no valuation materials or analysis respecting the value undergirding the funding agreement at the time of approval (notwithstanding that J&J had recently completed a fair market value assessment of such assets). See Feb. 16, 2022 Hr'g Tr. at 9:21-24; 13:3-14. Regarding the QSF funding, Mr. Kim acknowledged that J&J lawyers (Erik Haas and Andrew White) led those efforts. See Feb. 15, 2022 Hr'g Tr. at 190:14-191:15.

- Mr. Kim testified that J&J's general counsel office "represent[s] all parts of the business" and that he and J&J's inhouse counsel were "all still part of the Johnson & Johnson family of companies." See Feb. 16, 2022 Hr'g Tr. at 31:3-4; 33:25-34:4. Indeed, "the law department is basically a shared service at the company," with "all the lawyers [being] hired by Johnson & Johnson". See Feb. 15, 2022 Hr'g Tr. at 85:1-2.

- Finally, Mr. Kim acknowledged that the initial case pleadings (e.g., the lengthy "informational brief" filed at the outset of this case) were prepared by *J&J's* outside counsel, at the direction of Mr. Kim in his capacity as head of *J&J's* talc litigation. See Feb. 16, 2022 Hr'g Tr. at 86:21-87:3.

34. That Jones Day continues to functionally work for J&J and JJCI is not a hidden fact. Mr. Kim testified: "*Because, you know, the way that this transaction works, we're all – we're all part of the same company. And the fact that I had a – that I was a Johnson & Johnson employee didn't take away the fact that I'm a lawyer representing all my clients and trying to be fair*." See Feb. 15, 2022 Hr'g Tr. at 192:12-16. During the Motion to Dismiss trial, it was repeatedly observed that LTL counsel did not confer with Mr. Kim; they conferred with J&J senior

executive Eric Haas. See, e.g., Feb. 18, 2022 Hr'g Tr. at 58:21-60:15; Feb. 16, 2022 Hr'g Tr. at 193:20-21; Feb. 17, 2022 PM Hr'g Tr. at 10:13-19.

35. And, one need look only at the fee statements filed in the case to see even more evidence that Jones Day is functionally working for non-Debtor affiliates. Sample entries from Jones Day's first monthly fee statement [Docket No. 925] show direct reporting from Jones Day to J&J officials, especially Erik Haas. Sample entries include:

- October 15, 2021: "Telephone conference with Haas, Kim, White, Lauria, Berkovich, Tsekerides, Holtzer, Prieto and Erens regarding first day hearing". Docket No. 925-2, at 19.
- October 15, 2021: "telephone conference with Haas, Kim, White, Lauria, Berkovich, Tsekerides, Holtzer, Prieto and Erens regarding stay violations". Id. at 12.
- October 15, 2021: "Review and respond to emails from White, Haas and Kim regarding press release issues." Id. at 28.
- October 18, 2021: "Telephone conference with Kim, Haas, White and Lauria regarding work in process." Id. at 5.
- October 20, 2021: "Telephone conference with Haas, White, Berkovich, Lauria, Kim, Rayburn, Miller, Jones, Rasmussen, Rush, Prieto and Jones regarding injunction complaint and related papers". Id. at 32.
- October 20, 2021: "telephone conferences with Haas, White, Berkovich and Lauria regarding [hearing]". Id. at 22.
- October 22, 2021: "telephone conference with Kim, Haas, White, Lauria, Fournier, Prieto, Jones, Rayburn and Hamilton regarding outcome of hearing and next steps". Id. at 24.
- October 23, 2021: "Call with Gordon, Prieto, Jones, White, Haas, Lauria and Kim regarding preparation for preliminary injunction hearing". Id. at 25.
- October 25, 2021: "Telephone conference with Kim, Van Dillen, Seeger, White, Haas, Lauria and Tersigni regarding stay issues related to pending lawsuit". Id. at 18.
- October 25, 2021: "Telephone conference with Kim, White, Haas, Jones, Lauria, Rasmussen and others regarding status of work in process in connection with request for preliminary injunction". Id. at 37.

- October 27, 2021: "draft email to Kim and Haas regarding information responsive to discovery requests". Id. at 41.

- October 27, 2021: "Attend preliminary injunction work in process call with Prieto, Haas, White, Jones, Lauria". Id. at 41.

- October 28, 2021: "calls with Lisman, Prieto, Haas, White, Kim, regarding documents to produce for discovery and preparation for testimony". Id. at 43

- October 29, 2021: "telephone conference with Kim, Jones, Rasmussen, Lauria, Kim, White and Haas regarding work in process in connection with preliminary injunction request". Id. at 45.

36. Other Debtor professional fee statements confirm J&J's control over this case, including the establishment of "WIP calls", typically multiple times per week, with senior J&J executives. See, e.g., King and Spalding Monthly Fee Statement [Docket No. 1550]:

- October 19, 2021: "Join call with E. Haas and A. White (JJ) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others to discuss first day hearing strategy and open data points or evidence needed for same".

- October 25, 2021: "Attend meeting E. Haas and A. White (JJ) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others, to review document collection efforts relative to various entity issues and discovery requests more broadly (1.0); locate materials for production (.9)".

- October 27, 2021: "Attend WIP calls with E. Haas and A. White (JJ) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others, related to work on preliminary injunction briefing, deposition preparation and document collection efforts".

- October 28, 2021: "Attend WIP call with members of client team [including E. Haas and A. White (JJ) and J. Kim (LTL)], members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others to address issues related to preliminary injunction work and priorities for day".

- October 29, 2021: "Attend WIP call with E. Haas and A. White (J&J) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others to discuss preliminary injunction work and deposition preparation".

- October 30, 2021: "Participate in WIP call with E. Haas and A. White (JJ) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others to review day's depositions and prepare for additional depositions".

- November 2, 2021: "Attend WIP call with E. Haas and A. White (J&J) and J. Kim (LTL), members of LTL bankruptcy team (including D. Prieto and M. Rasmussen (Jones Day), JJ bankruptcy team including J. Lauria (White & Case), among others, for planning purposes in advance of preliminary injunction hearing".

- November 11, 2021: "Status call with E. Haas and A. White (J&J) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others and discuss counsel options".

- November 29, 2021: "Join status update and WIP meeting with E. Haas and A. White (J&J) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others, and report on module work".

- December 2, 2021: "Attend WIP call with E. Haas and A. White (J&J) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others, for motion to dismiss and preliminary injunction work.

- December 6, 2021: "Weekly WIP call with E. Haas and A. White (JJ) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others, concerning work streams for various LTL issues".

- December 9, 2021: "Participate in WIP call with E. Haas and A. White (J&J) and J. Kim (LTL), members of LTL bankruptcy team [(including D. Prieto and M. Rasmussen (Jones Day)], JJ bankruptcy team [including J. Lauria (White & Case)], among others, to discuss work on motion to dismiss and related issues".

- December 13, 2021: "Participate in bi-weekly work in progress call with E. Haas, A. White (J&J) and J. Kim (LTL), Jones Day (D. Prieto, M. Rasmussen, B. Erens) working on preliminary injunction, discovery and motion to dismiss work streams".

B. Jones Day Is Ethically Prohibited From Contesting Any Aspect Of The "Texas Two Step" And That Creates A Second Disabling Conflict Of Interest.

37. Bluntly stated, Jones Day is on both sides of the "v." respecting the divisive merger.

- The firm formulated, documented, and implemented the "Texas Two Step" strategy. See Gordon Certification [Docket No. 541-2], at 3-4; Debtor's Reply ¶ 6; Gordon Supplemental Certification ¶¶ 5-6; Haas Certification ¶ 3.

- Only after LTL's creation via the Two Step did the firm purport to "move" its engagement to LTL and terminate its prior engagement of J&J respecting the divisive merger. See Gordon Supplemental Certification ¶ 5, Exhs. A and B; Debtor's Reply ¶ 5; Haas Certification ¶ 3.

- LTL proclaims that it will not contest the transaction at all, and Jones Day is ethically prohibited from advising LTL differently. See Debtor's Reply ¶ 43 ("The Debtor clearly would never 'investigate' the matter as a possible fraudulent transfer….").

38. It is beyond dispute that the divisive merger is, per J&J and JJCI's intention, the nucleus of fact defining many (if not most) attributes of this Chapter 11 case. From the perspective of every single creditor of this estate, the divisive merger is the crux of this bankruptcy. That Jones Day cannot ethically question or have independent views respecting one of the most vital attributes of the case renders it unavailable for Section 327(a) appointment. Given the firm's direct involvement in that transaction, no member of Jones Day could ever be considered Chapter 11 trustee for the estate, and that is dispositive under the law. See BH&P, 949 F.2d at 1316.

C. Jones Day Is A Substantial Target For Estate Litigation, Creating Yet A Third Disabling Conflict Of Interest.

39. The divisive merger will assuredly be the subject of future litigation in this Chapter 11 case. See, e.g., In re DBMP LLC, Case No. 20-30080 (Docket No. 1197) (Bankr. W.D.N.C. Nov. 3, 2021) (granting committee standing to pursue fraudulent transfer claims relating to comparable divisive merger); Plastronics Socket Partners, Ltd. v. Dong Weon Hwang, No. 20-

1739, Docket No. 76 (Fed. Cir. Jan. 12, 2022) (divisive merger statute cannot be exploited to harm creditors).

40. The MTD opinion references this reality, and the TCCs have long stated their intent to seek derivative standing in this respect. See, e.g., Initial TCC Statement, dated November 19, 2021 [Docket No. 495, ¶ 39]; Aylstock Objection to Jones Day Retention, dated December 8, 2021 [Docket No. 753, ¶ 17]; TCC's Objection to Jones Day's Retention, dated December 8, 2021 [Docket No. 750, ¶ 1] (incorporating Initial TCC Statement by reference).

41. More to the point, and as the TCCs have repeatedly indicated, Jones Day is a substantial target for estate litigation, pursuant to Banco Popular No. Am. v. Gandi, 876 A.2d 253 (N.J. 2005) (lawyer who counseled the debtor in connection with a fraudulent transfer bore equal liability for the transfer).

42. Pillowtex does not allow this Court to view this as merely a "potential" conflict of interest, pending eventual adjudication of a derivative standing motion. In Pillowtex, the Third Circuit clearly stated that, if a party-in-interest asserts (*e.g.*, in an objection to the retention application) a "facially plausible" estate claim against proposed Section 327(a) counsel, the Court is not then at liberty to give final approval of the application. The Court must await a merits trial before allowing the retention to go forward. See Pillowtex, 304 F.3d at 248. That is the case circumstance; that is the outcome demanded by precedent binding on this Court.

D. Jones Day Is Ethically Prohibited From Being An Attorney and Witness Respecting Any Aspect Of The "Texas Two Step," Creating Yet A Fourth Disabling Conflict Of Interest.

43. Jones Day's role in orchestrating the divisive merger is the nucleus of fact undergirding much of this Chapter 11 case. Ethics rules strictly prohibited Jones Day from acting as counsel in a matter in which it is likely to be a material fact witness. Model Rule 3.7; NJRPC

3.7; NYRPC 3.7; TXPRC 3.08. Jones Day cannot provide independent counsel and advocacy respecting major facets of this case and, thus, cannot be retained as Section 327(a) counsel.

II. Even Though It Is Proposed Section 327(e) Counsel, Skadden Arps Has Taken On The Role Of Section 327(a) Co-Counsel, And Its Conflict Position Disables Final Approval Of Its Application.

44. Skadden Arps suffers from many of the same conflict issues that beset Jones Day, given its current and long-standing role as J&J's lead litigation counsel in talc cases. Skadden Arps' application, however, is infirm for an additional reason. The Skadden Arps application seeks retention of the firm under Section 327(e). The "specified special purpose" described in the application is confined to talc-related litigation matters. Specifically, the scope of Skadden Arps' proposed retention is supposed to be limited to the following:

> "(a) assist the Debtor in connection with any issues or proceedings implicating the factual and scientific basis supporting the defense of the underlying talc-related mesothelioma and ovarian cancer claims; (b) assist the Debtor with discovery relating to mesothelioma and ovarian cancer claims; (c) assist the Debtor in connection with any estimation proceeding for the Debtor's talc-related claims; (d) assist the Debtor in any issues or proceedings related to the stay or other matters relating to talc-related claims in non-bankruptcy forums; and (e) provide such other specific services as may be requested by the Debtor from time to time relating to the defense, estimation, or resolution of the Debtor's talc-related claims in the Chapter 11 Case."

45. Skadden Arps' advocacy to date has far exceeded this narrow scope. Indeed, Skadden Arps led LTL's defense at the MTD trial, including prepping and defending all depositions, examining and cross-examining all fact witnesses, and arguing in summation as to the evidence adduced. There is no construal of the foregoing "specified special purpose" in the retention application that would include spearheading LTL's defense at the MTD trial. And, even if there were, such purpose would fall far outside the confines of a legitimate Section 327(e) special retention. Defending the debtor at a trial regarding dismissal of the bankruptcy case unquestionably falls within the category of Section 327(a) general bankruptcy work and, thus,

outside the ambit of Section 327(e). Skadden Arps' proposed retention as "special counsel" must be denied.[2]

III. Orrick's Proposed Retention As Special Appellate Counsel Must Be Denied.

46. LTL's latest proposed retention of legacy J&J counsel, Orrick as purportedly special appellate counsel, should likewise be denied. Orrick is J&J's historical appellate and trial counsel in talc-related litigation. See Orrick Application at 2-3; Loeb Certification (annexed to the Orrick Application), at 3-4. Orrick's talc-related advocacy for J&J dates back to at least 2017,[3] and includes such notable cases Ingham (where Orrick served as both trial and appellate counsel).

47. Over that span, Orrick represented J&J (and, before J&J terminated its existence, Old JJCI) in no fewer than sixteen (16) talc-related appeals, and provided J&J with "appellate oversight" for what it describes as "numerous talc-related trials." See Orrick Application at 3. Orrick's prepetition representation of J&J extended to bankruptcy matters, as Orrick represented J&J/Old JJCI in the Imerys bankruptcy case.

48. Importantly, Orrick continues to serve as J&J's lead appellate counsel (and one of its lead trial counsel) to this day. See Orrick Application at 2-3 ("Orrick continues to represent J&J in certain talc-related litigation, as it did prior to the Petition Date."); Loeb Certification at 4 (same). Orrick's current (and prepetition) representation of J&J in precisely the same matters that

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[2] Weil Gotshal's proposed retention similarly falls outside the scope of a Section 327(e) retention and raises obvious conflict issues. In a supplemental certification to Weil Gotshal's application, Ms. Berkovich acknowledged that, since the LTL filing, J&J would "on occasion" seek Weil Gotshal's "views on issues that are related to the Debtor's Chapter 11 Case". [Docket No. 782, ¶ 16]. And, the various time entries cited herein (see ¶ 35 *supra*) show Weil Gotshal's participation in more generalized bankruptcy work that exceeds the confines of Imerys-related matters.

[3] See *Client Johnson & Johnson Wins Defense Verdict in Major Product Liability Trial*, dated November 17, 2017, available at: https://www.orrick.com/en/News/2017/11/Client-Johnson-and-Johnson-Wins-Defense-Verdict-in-Major-Product-Liability-Trial.

it seeks to represent the Debtor creates an irremediable conflict and precludes Orrick's engagement in this case.

49. First, Orrick's historical and current representation of J&J (and Old JJCI) on talc-related issues precludes its retention by the Debtor here. See Jade Management, 386 Fed. Appx. at 149. The interests of J&J and the Debtor's estate are not aligned as it relates to talc liability; rather, J&J's interest lies in foisting all talc liability (including its own direct liability) onto the Debtor's estate. As laid out in the Official Committee's Initial Statement, the estates likely have contribution/indemnity claims against J&J and other non-Debtor affiliates respecting talc-related liabilities. See, e.g., In re NNN 400 Capitol Center 16 LLC, 632 B.R. 243, 260–61 (D. Del. 2021) (affirming decision to disqualify counsel retained under Section 327(e) for holding interest adverse to estate). Moreover, Orrick's current representation of J&J on talc issues creates, at best, divided loyalties that run afoul of a litany of ethical principles. See, e.g., Model Rule 1.7(a); NJRPC 1.7(a); NYRPC 1.7(a); TXRPC 1.06(b); Model Rule 1.9(a)-(c); NJRPC 1.9(a)-(c); NYRPC 1.9(a)-(c); TXPRC 1.09(a).

50. Second, in the context of this case, Orrick's proposed retention is too broad to qualify for Section 327(e) status. The Debtor proposes to retain Orrick as appellate and trial counsel for talc claims. Given that the Debtor's only liability is talc claims, the scope of Orrick's engagement falls squarely within the ambit of a Section 327(a) retention (and, thus, requires "disinterestedness," which, Orrick cannot satisfy). See, e.g., In re Congoleum Corp., 426 F.3d 675 (3d Cir. 2005) (reversing retention order respecting counsel whose role was "far too expansive" for Section 327(e) appointment); In re Woodworkers Warehouse, Inc., 323 B.R. 403 (D. Del. 2005) (Section 327(e) authorizes retention of counsel "for a specific purpose," not generalized

bankruptcy work). Moreover, we have seen that J&J's other historical talc-related counsel has consistently acted outside the scope of its Section 327(e) engagement.

51. Third, Orrick has a long history representing J&J (and Old JJCI), but it has no prepetition history representing LTL. The Debtor's claim that Orrick's prepetition retention by Old JJCI was "allocated" to the Debtor does not satisfy Section 327(e). See, e.g., Meespierson Inc. v. Strategic Telecom Inc., 202 B.R. 845 (D. Del. 1996); see also In re M&M Marketing LLC, 397 F. App'x 258 (8th Cir. 2010).

52. Fourth, all talc-related litigation is presently stayed as against the Debtor. Orrick's retention at this time is, therefore, unripe, not in the best interest of the estate, and should not be considered in light of the Court's ruling regarding the preliminary injunction. See, e.g., In re Roper and Twardowsky, LLC, 566 B.R. 734 (Bankr. D.N.J. 2017) (denying Section 327(e) retention as not in best interests of estate). Indeed, Orrick concedes that, given the stay, it "expects to provide limited or no services".

CONCLUSION

For these reasons and those stated in previous and concurrent objections, the Applications should be denied.

Respectfully submitted,

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