APP NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SC SJ HOLDINGS LLC AND FMT SJ LLC,

Petitioners,

v.

PILLSBURY WINTHROP SHAW PITTMAN LLP,

Respondents.

On Application for an Extension of Time
to File Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITIONERS' APPLICATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29.6, Petitioners SC SJ Holdings, LLC and FMT SJ LLC ("Debtors") make the following disclosure:

1) For non-governmental corporations, identification of parent corporations:

FMT SJ Holdings, LLC; ST SJ LLC; Eagle Canyon Capital LLC; Eagle Canyon Partners LLC; Eagle Canyon Holdings LLC; Sotech LLC

2) For non-governmental corporations, a listing of all publicly held companies that hold 10% or more of the party's stock:

None.

To the Honorable Samuel A. Alito, Jr., as Circuit Justice for the United States Court of Appeals for the Third Circuit:

Pursuant to this Court's Rules 13.5, 21.2(c), 21.3, 22, 30.3, and 33.2, Petitioners SC SJ Holdings, LLC and FMT SJ LLC ("Debtors") respectfully request that the time to file their Petition for Writ of Certiorari ("Petition") in this matter be extended for 60 days up to and including August 26, 2024.

The Court of Appeals issued its opinion on March 28, 2024. (Appendix ("App.") A). Absent an extension of time, the Petition for Writ of Certiorari would be due on June 26, 2024. Petitioners are filing this Application more than ten days before that date. See S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

The reason for the extension is this Court's forthcoming decision in *Harrington v. Perdue Pharma L.P.*, Docket No. 23-124, will materially–if not definitively–impact the case. Absent an extension, the Petition will not include briefing regarding *Harrington*. Thus, an extension is necessary to ensure *Harrington* is issued before the Petition is filed and to enable the Parties adequate time to review, understand, and brief issues related to *Harrington*'s impact on the present case.

Background

I. Debtors Acquire the Fairmont Hotel in San Jose, California Shortly Before COVID Restrictions Devastate the Economy.

Debtors bought the Fairmont Hotel in San Jose, California in 2018 for about $250 million. Debtors obtained a $160 million loan to help finance the purchase. The hotel has 800 rooms, caters to large conventions and groups, and is the largest

convention hotel in Silicon Valley. In March 2020, the COVID-19 pandemic swept through the United States, eviscerating the hotel's business and revenues.

By July 2020, Debtor's principal, Sam Hirbod, sought legal advice from Pillsbury Winthrop Shaw Pittman, LLP ("Pillsbury") about Debtors' options to survive, including obtaining new capital and restructuring the loan. The hotel was burdened by a Hotel Management Agreement ("HMA") with Accor Management US Inc. (f/k/a Fairmont Hotels & Resorts (U.S.) Inc.) ("Fairmont"). The HMA required the hotel to be a Fairmont-branded property, however potential investors conditioned investment on changing the Hotel to another "flag" such as Hilton or Hyatt.

Pillsbury advised that Chapter 11 bankruptcy in Delaware was best way to eliminate the HMA and restructure the loan (which had increased to $175 million). Pillsbury did not inform Debtors that California law, which governed the HMA, clearly allowed Debtors to terminate the HMA without filing bankruptcy through a "breach termination." *Woolley v. Embassy Suites*, 227 Cal. App. 3d 1520 (1991). Also, the HMA contained an arbitration provision, requiring arbitration be completed in 120 days. Third Circuit law, which governed procedural issues, clearly enforced such arbitration provisions, but Pillsbury nonetheless advised Chapter 11 was the best way to terminate the HMA, avoid arbitration, and restructure the debt.

Pillsbury also advised Debtors – incorrectly – that a Chapter 11 bankruptcy would be quick (only about 100 days), cheap (about $1.5 million for professional fees), and would obviate the need for arbitration over the HMA because the Bankruptcy Court would estimate Fairmont's damages "for all purposes" at roughly $2 million

based on a liquidated damages provision in the HMA. Indeed, Pillsbury advised Debtors that Fairmont's "sole remedy at law" if Debtors terminated the HMA was the HMA's liquidated damages provision.

Based on Pillsbury's advice, Debtors terminated the HMA. Before Pillsbury could file bankruptcy, however, Fairmont filed arbitration asserting breach of contract and the covenant of good faith and fair dealing. Nevertheless, Pillsbury pressed ahead with the Chapter 11 actions, moved to reject the HMA, and negotiated with Hilton to become the Hotel's new "flag" or brand.

Consistent with clear Third Circuit precedent, the Bankruptcy Court enforced the arbitration provision, which created expensive, parallel proceedings and triggered—according to Pillsbury—a need for Debtors' principal, Mr. Hirbod, to promise in open court that Debtors would pay whatever the value of Fairmont's unsecured claim turned out to be. Pillsbury was then advising Mr. Hirbod that Debtors' maximum exposure for breach of the HMA was $2 million.

II. Pillsbury Drafts a Bankruptcy Plan That Releases Itself from Malpractice Claims Without Informing or Advising Debtors.

Months before arbitration would ultimately set Fairmont's damages, i.e., before Debtors could know what they would have to pay Fairmont, Pillsbury drafted the bankruptcy plan (the "Plan"). The Plan included releases that spanned over five pages in all capital letters, which made it difficult to identify defined terms without cross-referencing each word against the 179 defined terms, many of which cross reference one another ("Release Provisions").

Pillsbury—as Debtors' counsel—never explained to Debtors that the Release Provisions included third-party releases that released non-parties to the bankruptcy, most critically Pillsbury itself. The third-party releases rendered Pillsbury immune from liability. Pillsbury did not advise Debtors that the Plan, once approved, would exculpate Pillsbury and enjoin Debtors from suing Pillsbury for malpractice. Pillsbury did not advise Debtors that they should seek independent counsel regarding the scope of the Release Provisions or, more specifically, that the Release Provisions operated as a prospective waiver of any malpractice claims against Pillsbury.

Pillsbury submitted the final version of the Plan on August 13, 2021. The Court entered an Order confirming the Plan on August 18, 2021. The Debtors, on Pillsbury's advice, selected an Effective Date of November 8, 2021. At that point, Debtors had no idea they might have a legal malpractice claim against Pillsbury.

The six-day arbitration hearing concluded on October 16, 2021. The arbitration panel transmitted the Final Arbitration Award (the "Final Award") on November 9, 2021–one day after the Plan's Effective Date—because the arbitration required that the award be issued no later than November 9, 2021. Thus, the irrevocable Release Provisions became "effective" the day before the Arbitration Award. The Final Award included approximately $13 million in damages for Fairmont–$11 million more than what Pillsbury claimed was possible under Fairmont's alleged "sole remedy at law" of $2 million in liquidated damages.

Pillsbury's financially ruinous advice to Debtors was wrong on almost all counts. Chapter 11 was not the most efficient way to terminate the HMA with

Fairmont because, under California law, Debtors could have terminated the HMA with Fairmont at any time simply by giving notice. Chapter 11 did not obviate the need for arbitration because Third Circuit law mandated it. Chapter 11 did not cost about $1.5 million in attorney fees and costs; Pillsbury sought more than $6 million in attorney fees, and Debtors incurred another $7 million in other professional fees. Pillsbury told Debtors that their exposure to Fairmont for terminating the HMA would be about $2 million in liquidated damages, but, instead the arbitration award was for $13 million plus prejudgment interest.

Reasons For Granting An Extension Of Time

This case will be materially impacted by the Court's forthcoming decision in *Harrington v. Perdue Pharma L.P.*, Docket No. 23-124. In *Harrington*, the Court is considering whether third-party releases in a bankruptcy plan which render non-parties to the bankruptcy immune from future liability are enforceable. The issues in the present case are similar to those in *Harrington*. Further, the present case involves the question of whether attorneys representing debtors in bankruptcy can enforce prospective releases of malpractice despite clear ethical rules barring prospective releases. To ensure *Harrington* is issued before the Petition is filed and to enable the Parties sufficient time to understand and brief *Harrington's* impact on this case, the deadline to file the Petition should be extended by 60 days.

WHEREFORE, For the foregoing reasons, Petitioners respectfully request that the time to file the Petition for a Writ of Certiorari in this matter be extended 60 days, up to and including August 26, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

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