**No. 22-2606**

# United States Court of Appeals for the Seventh Circuit

IN RE AEARO TECHNOLOGIES LLC, *et al.*,

*Debtors*,

AEARO TECHNOLOGIES, LLC, *et al.*,

*Petitioners*,

v.

THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT, *et al.*,

*Respondents*.

On Certified Direct Appeal From the United States Bankruptcy Court for the Southern District of Indiana (Hon. Jeffrey J. Graham, Chief Judge)
Bankruptcy Case No. 22-02890 / Adversary Proceeding No. 22-50059

## ANSWER OF CAE COMMITTEEE IN OPPOSITION TO PETITION FOR DIRECT APPEAL UNDER 28 U.S.C. § 158(d)(2)

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# DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1 and Circuit Rule 26.1, undersigned counsel provides the following information:

1. The full name of every party that the attorney represents in the case:

Official Committee of Unsecured Creditors for Tort Claimants – Related to Use of Combat Arms Version 2 Earplugs

2. The names of all law firms or associates that have appeared for the party in the case (including proceedings in the district court of before an administrative agency) or are expected to appear for the party in this court:

KTBS Law LLP; Otterbourg P.C.; Brown Rudnick LLP; Caplin & Drysdale, Chartered; and Rubin & Levin, P.C.

3. Any parent corporation of a party, or any publicly held company that owns 10% or more of the party's stock:

N/A

4. Debtor information required by Fed. R. App. P. 26.1(c)1 & 2:

Debtors are Aearo Technologies LLC, Aearo Holding LLC, Aearo Intermediate LLC, Aearo LLC, 3M Occupational Safety LLC, Cabot Safety Intermediate LLC, and Aearo Mexico Holding Corp. For all Debtors, 3M Company is a parent corporation or owns 10% or more of the debtor's stock.

*/s/ Robert J. Pfister*
Robert J. Pfister

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Pursuant to the *Order Granting Agreed Motion for the Official Committee of Tort Claimants Related to Combat Earplugs to Intervene in Adversary Proceeding* [Adv. D.I. 180],[1] the United States Bankruptcy Court for the Southern District of Indiana (the "Bankruptcy Court") authorized the Official Committee of Unsecured Creditors for Tort Claimants – Related to Use of Combat Arms Version 2 Earplugs (the "CAE Committee") to intervene as a defendant and appellee, and deemed the CAE Committee to have so intervened, in the Adversary Proceeding for all purposes, including the instant appeal. The CAE Committee respectfully submits this answer in opposition to the *Petition for Authorization of Direct Appeal Under 28 U.S.C. § 158(d)(2)* [D.I. 5] (the "Petition") filed by appellants-debtors ("Petitioners").

## I. INTRODUCTION

The Petition seeks entry of an order certifying for direct review by this Court the Bankruptcy Court's *Order Denying Plaintiffs' Motion for Preliminary Injunction* [Adv. D.I. 143] (the "Order"), in which the Bankruptcy Court denied Petitioners' *Motion for Declaratory and Injunctive Relief (I) Confirming that the Automatic Stay Applies to Certain Actions Against a Non-Debtor;*

[1] "Adv. D.I." refers to the adversary proceeding docket in *Aearo Technologies LLC, et al. v. Parties Listed on Appendix A to the Complaint, et al.*, No. 22-50059 (Bankr. S.D. Ind.) (the "Adversary Proceeding"). "Bankr. D.I." refers to the jointly administered bankruptcy docket in *In re Aearo Technologies LLC, et al.*, No. 22-02890 (Bankr. S.D. Ind.).

*(II) Preliminarily Enjoining Certain Actions Against a Non-Debtor; and (III) Granting a Temporary Restraining Order Pending an Order on the Preliminary Injunction* [Adv. D.I. 2] (the "Injunction Motion").

Petitioners characterize this appeal as "a paradigmatic case for direct appeal." Pet. at 1. That is not so. The paradigmatic case for direct appeal involves a pure issue of law that is subject to conflicting decisions within the circuit, is likely to recur, and involves compelling circumstances warranting the Court of Appeals to deviate from normal appellate procedure to provide needed clarity on an open legal issue of public import. *See, e.g.*, *In re Pajian*, 785 F.3d 1161, 1162–63 (7th Cir. 2015) (certifying direct appeal that "raises a legal question that requires this court to break new ground and resolve conflicting decisions among bankruptcy courts" and "has been a thorn in the side of many … cases"). This appeal asks the Court to change settled circuit law that the Bankruptcy Court faithfully applied to facts developed during a three-day evidentiary hearing, the outcome of which is sufficiently fact-specific that it lacks "public import."

Moreover, this appeal presents no urgency or other compelling circumstances that warrant varying the established bankruptcy appellate process directed by Congress. The Bankruptcy Court's Order below – denying stay protection and injunctive relief that, if granted, would have halted thousands of ongoing federal and state lawsuits against non-debtors – merely preserved the

*status quo*. The pendency of this appeal, as two months of empirical evidence in the bankruptcy cases shows, has not disrupted the administration of Petitioners' bankruptcy cases, the operation of Petitioners' (financially healthy) business, or the efforts of the parties to resolve their underlying disputes consensually through ongoing mediation sessions. Accordingly, the CAE Committee respectfully submits that this Court should exercise its broad discretion to deny the Petition.

## II. BACKGROUND

Petitioners operate an admittedly financially healthy business manufacturing and selling products that control energy, such as noise, shock, and heat, and which annually generates revenues of over $100 million. Order at 3. Petitioners' ultimate parent is 3M Company ("3M"), a public company trading on the Dow Jones Industrial Average, with a market capitalization of nearly $63 billion, that produces some of the most ubiquitous and well-known products in the world, including Scotch® tape and Post-it® notes.

3M and Petitioners are defendants in a multi-district litigation (the "MDL") styled *In re 3M Combat Arms Earplug Product Liability Litigation*, MDL No. 2885, which has been pending since 2019 in the United States District Court for the Northern District of Florida (the "MDL Court"). Order at 5. Similar litigation is pending against 3M and Petitioners in Minnesota state court (the "Minnesota Litigation" and together with the MDL, the "Combat Arms Litigation"). *Id.* The

Combat Arms Litigation involves more than 230,000 claims by active duty service members, veterans, and civilian military contractors who allege personal injuries, including hearing loss and tinnitus, from use of Combat Arms Earplugs Version 2 ("CAEv2 Earplugs") manufactured, marketed, sold, and distributed by 3M. *Id.* at 5–6. The great majority of those claims are pending in the MDL, where the now-complete bellwether trial process has resulted in 13 out of 19 verdicts in favor of plaintiffs. *Id.* at 6; *Stipulated Facts Regarding the MDL and Minnesota Litigation* [Adv. D.I. 122], ¶ 37.

In 2008, 3M acquired Petitioners and integrated the CAEv2 Earplug business into 3M's operations. Order at 4. By 2010, Petitioners' entire Head, Eye, Ear, Hearing and Face Safety business segment (which included the CAEv2 Earplug business) was "upstreamed" to 3M, which then took over all aspects of the business and the product. *Id.* 3M, at all times, has single-handedly controlled the defense, and funded the costs, of the Combat Arms Litigation. *Id.* at 4–5. As of the filing of the bankruptcy cases, 3M paid for, controlled, and received the benefit of all insurance for CAEv2 Earplug liabilities. *Id.* at 12–13. The MDL Court found Petitioners are parties to the MDL "in name only." *Id.* at 16.

On July 26, 2022 (the "Petition Date"), Petitioners filed their bankruptcy cases. *Id.* at 3. Given that Petitioners' business is financially healthy and Petitioners no longer have anything to do with CAEv2 Earplugs, Petitioners admit

that the sole purpose of their bankruptcy cases is to resolve all CAEv2 Earplug liabilities arising from the Combat Arms Litigation, including 3M's liabilities. Aug. 15, 2022 Hr'g Tr. 131:18–22 (CRO Castellano testifying). To that end, on the Petition Date, Petitioners filed the Adversary Proceeding and the Injunction Motion, to permanently enjoin the continued prosecution of the Combat Arms Litigation against 3M and shunt the resolution of all claims arising from the Combat Arms Litigation into the Bankruptcy Court. Order at 13–14.

In anticipation of the bankruptcy filing, one day before the Petition Date, Petitioners and 3M entered into a "Funding Agreement," pursuant to which 3M agreed to fund, among other things, all of Petitioners' costs and liabilities (with no cap or requirement that Petitioners repay 3M) arising from CAEv2 Earplug claims. *Id.* at 7–11. In exchange, Petitioners agreed to "indemnify" 3M for 3M's costs and liabilities arising from CAEv2 Earplug claims (costs and liabilities for which Petitioners had not previously borne responsibility) – but 3M's uncapped funding commitment expressly covers such indemnification obligations. *Id.* Consequently, the Bankruptcy Court found that the net effect of these indemnity obligations on Petitioners "is zero." *Id.* at 10. And the net effect of the Funding Agreement in total is that 3M, and not Petitioners, is (as it had been prior to bankruptcy) ultimately responsible for funding Petitioners' liabilities for all CAEv2 Earplug

claims and other claims (including 3M's ostensible, contingent indemnity claims) in full. *Id.* at 7–11.

Plaintiffs in the Combat Arms Litigation (including now members of the CAE Committee) opposed the Injunction Motion. The Bankruptcy Court conducted a three-day, in-person, evidentiary hearing (the "Hearing") at which six witnesses testified and the Bankruptcy Court admitted 41 exhibits. Order at 2; Adv. D.I. 134. In addition, the Bankruptcy Court received 176 stipulated facts and granted one request for judicial notice. Adv. D.I. 122 & 129. Following the close of the Hearing, the Bankruptcy Court heard extensive oral argument and received proposed findings of fact and conclusions of law from the parties. Order at 2.

On August 26, 2022, the Bankruptcy Court entered the Order denying Petitioners' Injunction Motion. The Bankruptcy Court concluded, after considering the vast evidentiary record and the arguments and submissions of the parties, that Petitioners had not met the applicable legal standards for the extraordinary injunctive relief they sought. *Id.* at 36–37.

Specifically, the Bankruptcy Court found that, (i) that "*within governing Seventh Circuit law*" § 362(a)(1) does not apply to a non-debtor like 3M (*id.* at 19 (emphasis added)); (ii) that "*the heart of the Seventh Circuit's analysis* under § 362(a)(3)" dictates that § 362(a)(3) also does not stay the Combat Arms Litigation against 3M (*id.* at 25–26 (emphasis added)); and (iii) that, "[g]iven *the*

*Seventh Circuit's instruction*," Petitioners failed to meet their burden to establish entitlement to a section 105(a) injunction of the Combat Arms Litigation against non-debtor 3M (*id.* at 32, 35 (emphasis added)).

On August 29, 2022, Petitioners filed a notice of appeal from the Order, and a motion requesting that the Bankruptcy Court certify the Order for direct appeal. Adv. D.I. 145 & 146. The Office of the United States Trustee appointed the CAE Committee on August 30, 2022. Bankr. D.I. 393. On September 12, 2022, the CAE Committee opposed Petitioners' request for certification. Adv. D.I. 167. On September 13, 2022, the Bankruptcy Court entered an order, following an agreed motion, authorizing the CAE Committee to intervene as a defendant and appellee, and deemed the CAE Committee to have so intervened, in the Adversary Proceeding for all purposes, including without limitation, in connection with this appeal. Adv. D.I. 180. That same day, the Bankruptcy Court certified the Order for direct appeal. Adv. D.I. 181. The Bankruptcy Court found, without discussion, that the Order "involves a matter of public importance, as well as questions of law for which there is no controlling decision from the Seventh Circuit …." *Id.* The Bankruptcy Court also certified, stating no reasons, that "an immediate appeal from the Order may materially advance the progress of the proceeding . . . and its related bankruptcy case." *Id.* On September 23, 2022, Petitioners filed the Petition with this Court.

## III. ARGUMENT

The general rule is that bankruptcy court orders are reviewed on appeal by the district court to refine the issues and facilitate subsequent review by the court of appeals. 28 U.S.C. § 158(a). Congress created a limited, two-step exception to this appellate sequence. 28 U.S.C. § 158(d)(2). First, the bankruptcy court certifies an order for direct appeal only if (a) the order involves a question of law as to which there is no controlling decision, (b) the order involves a question of law that requires the resolution of conflicting decisions, (c) the appeal involves a matter of public importance, or (d) immediate appeal would materially advance the progress of the case. *Id.* Once certified by the bankruptcy court, this Court may, in its discretion, authorize a direct appeal of the certified order. *Id.*

Congress "explicitly granted [the circuit courts] plenary authority to grant or deny leave to file a direct appeal, notwithstanding the presence of one, two, or all … of the threshold conditions." *Weber v. United States*, 484 F.3d 154, 161 (2d Cir. 2007). Circuit courts will decline to accept petitions for direct appeal under this discretionary standard whenever "percolation through the district court would cast more light on the issue and facilitate a wise and well-informed decision." *Id.*; *see also Davis v. Hildebrand (In re Davis)*, 512 F.3d 856, 858 (6th Cir. 2008). As the legislative history to section 158(d)(2) makes clear, "it is anticipated that this [direct appeal] procedure will rarely be used" to resolve "fact-intensive issues" or

in an effort "to bring to the circuit courts of appeals matters that can appropriately be resolved initially by district court judges." H.R. Rep. No. 109-31(I), at 148–49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 206–07.

Here, the Court should exercise its broad discretion to deny the Petition. The Bankruptcy Court's order was an exercise in the "application of existing controlling law to specific facts," making the case a poor candidate for direct appellate review by this Court. *In re Nortel Networks Corp.*, 2016 WL 2899225, at *1 (D. Del. May 17, 2016). Moreover, although the issues on appeal are undoubtably important to the parties, they involve the application of settled law to specific facts and, thus, lack *public* import. Immediate appellate review by this Court also is unlikely to materially advance progress in this case because the Order below merely preserved the *status quo*; Petitioners are continuing to operate their business and administer their bankruptcy cases and the parties are continuing ongoing mediation efforts despite the appeal.

### A. Certification Is Not Warranted on the Basis of an Absence of Controlling Law or the Existence of Conflicting Decisions

Certification of a direct appeal from a bankruptcy court order is intended to "foster the development of coherent bankruptcy-law precedent" by facilitating "guidance on pure questions of law" from the circuit courts of appeals. *Weber*, 484 F.3d at 158–59. Direct certification is generally reserved for gaps or conflicts in precedent within the relevant circuit. *See, e.g.*, *Bullard v. Blue Hills Bank*, 575

U.S. 496, 508 (2015) (describing section 158(d)(2) as a "safety valve[] for promptly correcting serious errors and addressing important legal questions" like the "pure question of law" at issue there) (citation and quotations omitted). A pure question of law in this regard is "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000).

The Bankruptcy Court's determination of the Injunction Motion did not involve a question of law as to which there is no controlling decision or that requires resolution of conflicting decisions.

**1. Petitioners Have Either Waived or Conceded Arguments for an Absence of Controlling Law**

Petitioners do not argue for, or even claim, an absence of controlling law for their proposed questions regarding "related to" jurisdiction or section 362(a)(3) (indeed, they raise no arguments whatsoever for certification of the latter). Accordingly, such arguments are waived. *Zylstra v. DRV*, LLC, 8 F.4th 597, 609 (7th Cir. 2021).

The only proposed question for which Petitioners claim an absence of controlling law is their first: whether section 362(a)(1) can apply to non-debtors under exceptions set out in the Fourth Circuit's *A.H. Robins* decision.[2] Petitioners

[2] 788 F.2d 994 (4th Cir. 1986).

then concede, however, that they believe controlling law does exist: "To be clear, in Petitioners' view, this Court has approved the [*Robins*] §362(a)(1) exceptions as a matter of law." Pet. at 14. The CAE Committee strongly disagrees with Petitioners' view of what the controlling law is in this Circuit—a disagreement that can be resolved in the ordinary appellate course. But this Court should not certify the proposed questions on the *absence* of controlling law when Petitioners either fail to claim such an absence or expressly argue such controlling law exists.

**2. Neither the Absence of Controlling Law nor Existence of Relevant Conflicting Decisions Is Present Here**

Regardless, Petitioners' argument for an absence of controlling law or a conflict of decisions relates primarily to the application or extension of section 362(a)(1) of the automatic stay to a non0debtor such as 3M. However, the Bankruptcy Court found section 362 inapplicable to non-debtors such as 3M, and applied uncontroverted Seventh Circuit precedent that provides that the "clear language of Section 362(a)(1) … extends the automatic stay provision only to the debtor filing bankruptcy proceedings and not to non-bankrupt co-defendants."[3] *Pitts v. Unarco Indus., Inc.*, 698 F.2d 313, 314 (7th Cir. 1983).

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[3] Petitioners contend that the Bankruptcy Court's refusal to extend the automatic stay was based solely on the fact that this Court has not yet told the Bankruptcy Court what it is supposed to do when presented with the section 362(a)(1) exceptions articulated by the Fourth Circuit in *Robins*. Pet. at 14. That is incorrect. The Bankruptcy Court rejected application of section 362(a)(1) on

*(footnote continued)*

Petitioners claim of a split between this Circuit and others on this issue is unavailing. A purported *inter*-circuit split is not a basis to certify a direct appeal. Rather, certification depends on the existence of an *intra*-circuit split. And Petitioners have not shown an *intra*-circuit split, as their in-Circuit cases all reject application of the *Robins* exceptions. Not surprisingly, the Bankruptcy Court, despite finding all other grounds for direct appeal were present, did ***not*** find that the Order "involves a question of law requiring resolution of conflicting decisions" under section 158(d)(2)(A)(ii).

In addition to the decisions of this Court that Petitioners acknowledge decline to extend the stay to non-debtors,[4] Petitioners cite four district court cases – *B&B Golf Carts, Inc. v. GRC Golf Prods., LLC*, 2017 WL 2255601 (S.D. Ill. May 23, 2017); *Hamilton v. Am. Corrective Counseling Servs., Inc.*, 2009 WL 973447 (N.D. Ind. Apr. 8, 2009); *Lee v. RCN Corp.*, 2004 WL 21208577 (N.D. Ill. Sept. 20, 2004); and *555 M Mfg., Inc. v. Calvin Klein, Inc.*, 13 F. Supp. 2d 719 (N.D. Ill. 1998) – for the proposition that courts within the Circuit have recognized the

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the basis of settled Seventh Circuit law "and the plain language of the Bankruptcy Code." Order at 19–20 (citing, among other authorities, *Pitts*, 698 F.2d at 314). The Bankruptcy Court then went on to discuss the *Robins* exceptions and noted that this Court has cited those exceptions but has not actually extended the stay to a non-debtor under that reasoning. *Id.*

[4] *See, e.g.*, *Fox Valley Constr. Workers Fringe Ben. Funds v. Pride of Fox Masonry & Expert Restorations*, 140 F.3d 661, 666 (7th Cir. 1998); *In re Fernstrom Storage & Van Co.*, 938 F.2d 731, 736 (7th Cir. 1991).

*Robins* exceptions. Pet. at 16. However, as in Petitioners' other cited cases, the district court in each of those cases ***declined*** to extend the stay to the relevant non-debtor. *B&B Golf Carts, Inc.*, 2017 WL 2255601, at *4; *Hamilton*, 2009 WL 973447, at *3; *Lee*, 2004 WL 21208577, at *2; *555 M Mfg., Inc.*, 13 F. Supp. 2d at 722. There are, therefore, no "conflicting decisions" within this circuit on this issue. Similarly, there is no gap in circuit law—as courts within this circuit (at every level) have cited and considered, but not applied, the *Robins* exceptions. Even, assuming *arguendo*, Petitioners were correct, that would only show that the Bankruptcy Court erred in applying the law, which every appellant asserts and, thus, is not grounds for direct appeal.

With respect to the section 105(a) issue of "related to" jurisdiction, Petitioners similarly fail in their attempt to create an issue requiring the interpretation of conflicting decisions. Petitioners argue the Order incorrectly applied Seventh Circuit law by improperly relying on pre-*Bush* decisions that "conflict" with *Bush*'s holding (according to Petitioners) that the Seventh Circuit "has now aligned itself with its sister circuits regarding 'related to' jurisdiction, such that an '*actual* economic effect' on the estate is not required." Pet. at 17 (citing *In re Bush*, 939 F.3d 839 (7th Cir. 2019)). This argument has no merit on at least two accounts. First, those pre-*Bush* decisions do not and cannot conflict with *Bush* because the *Bush* court expressly stated that its holding "does not imply an

overruling or even a modification of circuit precedent." 939 F.3d at 846. Rather, *Bush clarified* that consideration of "related to" jurisdiction must be undertaken from an *ex ante* perspective. *Id.* Second, the Bankruptcy Court explicitly examined "related to" jurisdiction "*ex ante*" "as the Seventh Circuit's decision in *Bush* instructs." Order at 36.

Petitioners cite *In re Chellino*, 2022 WL 1180621 (Bankr. E.D. Ill. Apr. 13, 2022), and *Siragusa v. Collazo (In re Collazo)*, 613 B.R. 650 (N.D. Ill. 2020), in support of their misguided argument. Pet. at 18. As discussed above, neither *Bush* nor cases that apply its holding create any conflicting law in this circuit. *Chellino*, a tax case (like *Bush*), merely cites and applies the *Bush* holding "that a 'related to' analysis should proceed from an *ex ante* perspective," finding that the court lacked jurisdiction because resolving the issue in question would not "affect the amount of property available to creditors." *In re Chellino*, 2022 WL 1180621, at *3. *Collazo* is to the same effect. 613 B.R. at 659. The Bankruptcy Court here applied the requisite *ex ante* perspective and found that the Funding Agreement ensures – from the outset of the case – that all creditors will be paid in full, regardless of the outcome of litigation. Order at 32. Even assuming *arguendo*, that the Bankruptcy Court failed to follow *Bush*, at most, all that would show is that the Bankruptcy Court erred, which, again, is not grounds for direct appeal.

**B. Certification Is Not Warranted on the Basis of Public Importance**

This appeal also does not present a question of law that involves a matter of public importance. That the issue presented on appeal is "unqualifiedly important to the parties" is not alone enough to warrant certification. *In re Millennium Lab Holdings II, LLC*, 543 B.R. 703, 716 (Bankr. D. Del. 2016). Moreover, just like the "sheer size of the MDL" was "insufficient reason for the Bankruptcy Court to conclude that an injunction is necessary" under section 105 (Order at 36), this Court likewise should not conclude that the MDL's magnitude warrants direct appeal.[5]

Courts interpret the "public importance" factor under section 158(d)(2)(A) "narrowly" and with a specific meaning. *See In re Nortel Networks Corp.*, 2010 WL 1172642, at *2 (Bankr. D. Del. Mar. 18, 2010). For an issue on appeal to present a matter of "public importance," it "must transcend the litigants and

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[5] Petitioners cite *In re Wright*, 492 F.3d 829, 831-32 (7th Cir. 2007), and two out of circuit decisions – *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber)*, 584 F.3d 229 (5th Cir. 2009), and *In re Nortel Networks Inc.*, 2016 WL 289925 – for the proposition that the number of parties impacted or the amount of money at stake constitute a matter of public importance. That is not the law in this Circuit. Rather, Petitioners are conflating issues that affect a large number of *parties in the subject appeal* with issues that affect a large number of *cases beyond the subject appeal*. In *Wright*, for example, the reference to "thousands" of parties impacted by the decision was made in the context of this Court's determination that the issue on appeal "arises in a large fraction of all consumer bankruptcy proceedings." *In re Wright*, 492 F.3d at 831.

involve a legal question, the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case." *Id.* (citations omitted); *see also Am. Home Mortg. Inv. Corp. v. Lehman Bros. Inc. (In re Am. Home Mortg. Inv. Corp.)*, 408 B.R. 42 (D. Del. 2009) (citing 1 COLLIER ON BANKRUPTCY ¶ 5.05[a] (15th ed. rev.)); *cf. In re Pajian*, 785 F.3d at 1162–63 (reasoning that an appeal involving only an issue of law "involves a matter of public importance because this issue has been a thorn in the side of many chapter 13 cases involving secured creditors").

Petitioners' assertion that "[s]imilar issues are being litigated in the Chapter 11 proceedings involving talc claims against Johnson & Johnson ('J&J'), where the bankruptcy court reached different conclusions from the bankruptcy court here" (Pet. at 20), misses the mark. In *LTL* (the referenced J&J case), the orders on appeal (i) denied dismissal of the bankruptcy case as a bad faith filing following the use of the controversial (and unreviewed at the appellate level) Texas Two-Step, and (ii) granted a preliminary injunction in favor of over 650 non-debtor defendants, premised, in part, on the denial of the dismissal motion. *In re LTL Mgmt., LLC*, 637 B.R. 396 (Bankr. D.N.J. 2022); *In re LTL Mgmt., LLC*, 638 B.R. 291 (Bankr. D.N.J. 2022). Neither the novelty and controversy surrounding the Texas Two-Step nor dismissal of the bankruptcy are at issue here. Moreover, reliance on direct certification in *LTL* fails to explain how a direct appeal *in this*

*case* would advance the development of the law or impact the public at large. *See Mark IV Indus., Inc. v. New Mexico Env. Dep't*, 452 B.R. 385, 390 (S.D.N.Y. 2011) (rejecting direct appeal because, "[a]side from pointing to … two [other bankruptcy] proceedings, [movant] does not explain how the resolution of the issues would advance the development of the law to an unusual degree, or impact the public at large").

That Petitioners' bankruptcy proceedings may be "closely-watched" and potentially "affect the interests of hundreds of thousands of MDL parties," Pet. at 1, also is insufficient for purposes of section 158(d)(2)(A). It is insufficient that the decision is newsworthy or involves a matter of import to a certain constituency or industry. *In re Gen. Motors*, 409 B.R. 24, 28 (Bankr. S.D.N.Y. 2009) (public importance factor not satisfied even though GM's "*well-being*" is unquestionably a matter of public importance); *Sabine Oil & Gas Corp. v. HPIP Gonzales Holdings, LLC (In re Sabine Oil & Gas Corp.)*, 551 B.R. 132, 141 (Bankr. S.D.N.Y. 2016) (public importance factor not satisfied even though "this dispute has received substantial news coverage or because the oil and gas midstream industry is watching this case closely"); *Carval Invs. UK Ltd. v. Giddens (In re Lehman Bros. Inc.)*, 2013 WL 5272937, at *5 (S.D.N.Y. Sept. 18, 2013) (broad assertions that the decision will have an impact on the "repo and larger securities market" in the United States were insufficient to establish public importance).

Rather, "what the statute requires is that 'the judgment, order, or decree involves a *question of law*'" that has import for the greater public. *In re Gen. Motors*, 409 B.R. at 28 (comparing a question that is "ultimately a matter of statutory interpretation and common law analysis," which may not carry public import, with a question of constitutional law); *Polk 33 Lending LLC v. THL Corp. Fin., Inc. (In re Aerogroup Int'l, Inc.)*, 2020 WL 757892, at *5 (D. Del. Feb. 14, 2020) (collecting cases); *see also Am. Home Mortg.*, 408 B.R. at 44 ("[M]ixed questions that implicate the particular circumstances of this case … are not pure legal questions warranting direct certification."). Here, the Bankruptcy Court's decision involves a mixed question of law and fact, namely, the application of the standard under section 105 to the unique terms of the Funding Agreement between Petitioners and 3M. The Bankruptcy Court's finding that 3M entered into, and is able to honor, an "*uncapped, nonrecourse*" commitment under the Funding Agreement is a factual finding specific to the case that diminishes the Order's import for the public at large. *See* Order at 31–36; *see also Sabine*, 551 B.R. at 141–42 (decision reached after analyzing the specific language of agreements and applying them to the law did "not carry the level of 'public importance' required for a direct appeal"). This fact also makes this case distinguishable from *LTL* in which the funding agreement was capped at the enterprise value of the non-debtor J&J subsidiary. *See LTL Mgmt. Inc.*, 21-30589 (Bankr. D.N.J. Oct. 14, 2021),

[D.I. 5], ¶ 27 ("[The funding agreement] obligates New JJCI and J&J, on a joint and several basis, to provide funding, up to the full value of New JJCI.").[6]

### C. Certification Is Not Warranted to Materially Advance the Progress of the Case

Finally, Petitioners identify no valid reason why "immediate appeal" from the Order is necessary to "materially advance the progress of the case." To obtain certification on this basis, Petitioners must advance some reason beyond the mere time saved by bypassing district court review, otherwise "[a]ny litigant could maintain that skipping district court review in the appeal process may expedite final resolution." *Polk 33 Lending*, 2020 WL 757892, at *4. If the mere "desire to skip one appellate level" could satisfy the material-advancement standard, the exception would swallow the rule, "effectively eliminat[ing] the district court from the bankruptcy review process altogether." *Id.* (internal quotation marks and citation omitted). Petitioners must meet their burden to show there is something "extraordinary or urgent about this situation that recommends departing from the standard appellate process." *Stanziale v. Car-Ber Testing, Inc.* (*In re Conex Holdings, LLC*), 534 B.R. 606, 611 (D. Del. 2015); *see also Western Aircraft, Inc. v. Lisowski (In re Silver State Helicopters, LLC)*, 566 F.3d 1177, 1177 (9th Cir.

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[6] This is not a distinction without a difference. As a result of the uncapped funding agreement here, Petitioners have access to funds far in excess of their own value, which was not the case in *LTL*.

2009) (denying certification where "resolution of the underlying issue … is unlikely to have a substantial impact on the ongoing proceedings").

In fact, there is no urgency that justifies bypassing appellate review by the district court here. Petitioners have already admitted "[t]here were no exigent circumstances" that prompted the filing of these bankruptcy cases, nor was there any looming default, imminent loss of rights, threat to ongoing funding, or any other pressing "specific reason the companies had to file on July 26th." Aug. 17, 2022 Hr'g Tr. 61:22–63:13 (Independent Director Stein Cross-Examination). Petitioners likewise admit that their business operations are healthy, and but for the Combat Arms Litigation (which is already stayed as against Petitioners), Petitioners "wouldn't have any reason to seek bankruptcy protection." Aug. 15, 2022 Hr'g Tr. 154:19–155:11 (CRO Castellano Cross-Examination).

Denial of the Injunction Motion merely preserved the *status quo*. The Combat Arms Litigation can proceed as to non-debtor 3M in the same manner it has been proceeding for the past three years, and 3M will continue to fund the defense of those claims as it has been doing for the past three years. Petitioners are fully protected by the automatic stay, and have conceded that the Combat Arms Litigation does not pose operational distractions for Petitioners. Aug. 15, 2022 Hr'g Tr. 161:25–162:15 (CRO Castellano Cross-Examination). In contrast to the *granting* of stay protection/injunctive relief in *LTL*, which prevented dying

claimants from seeing their day in court, the Order does not change the litigation landscape among the parties in any respect. In that regard, immediate appeal of the Order will not materially advance settlement or other resolution of the disputes.

Petitioners' lackluster argument that direct certification will materially advance the progress of this case because appeal to the Seventh Circuit is "inevitable … by whichever party does not prevail in [the district] court" has been rejected by other courts as insufficient grounds for certification and should be rejected here as well. *See, e.g.*, *Millennium Lab Holdings II*, 543 B.R. at 716–17 ("[C]ase law is clear that even the near certainty that this appeal will ultimately end up before the [Court of Appeals] is not a basis on which to certify the order."). Ultimately, what will materially advance resolution of this dispute is mediation among the parties, and mediation sessions are already underway, pursuant to and in accordance with orders of the MDL Court and the Bankruptcy Court. Indeed, empirical evidence supplied by the first two months of these bankruptcy cases demonstrates that Petitioners have been able to operate their business in bankruptcy and engage in all manner of bankruptcy process without any stay or injunction of the Combat Arms Litigation against 3M. In short, expedited review of this appeal by this Court will not in any manner impact the parties' ability to resolve their disputes in mediation or advance progress in these bankruptcy cases.

## IV. CONCLUSION

The CAE Committee, as intervenor-appellee, respectfully requests that the Petition be denied.

Respectfully submitted, October 3, 2022

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

The undersigned counsel of record certifies the following:

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*/s/ Robert J. Pfister*
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I further certify that copies were sent to the following via U.S. First Class Mail and electronic mail:

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