No. 22-2606

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: AEARO TECHNOLOGIES, LLC, et al.

AEARO TECHNOLOGIES, LLC, et al.,

Petitioners,

v.

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

Respondents.

On Petition from the United States Bankruptcy Court
for the Southern District of Indiana, Indianapolis Division
No. 22-2890, Adv. No. 22-50059

PETITION FOR AUTHORIZATION OF DIRECT APPEAL UNDER 28 U.S.C. §158(d)(2)

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September 23, 2022

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:

Aearo Technologies LLC, Aearo Holding LLC, Aearo Intermediate LLC, Aearo LLC, and 3M Occupational Safety LLC.

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

Kirkland & Ellis LLP; Ice Miller LLP; McDonald Hopkins LLC.

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

3M Company.

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.

September 23, 2022

s/George W. Hicks, Jr.
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INTRODUCTION

Pursuant to 28 U.S.C. §158(d)(2), Petitioners Aearo Technologies LLC, Aearo Holding LLC, Aearo Intermediate LLC, Aearo LLC, and 3M Occupational Safety LLC request that this Court authorize direct appeal of the bankruptcy court's August 26, 2022 Order denying Petitioners' *Motion for Declaratory and Injunctive Relief (I) Confirming that the Automatic Stay Applies to Certain Actions Against a Non-Debtor; (II) Preliminarily Enjoining Certain Actions Against a Non-Debtor; and (III) Granting a Temporary Restraining Order Pending an Order on the Preliminary Injunction*. *See* Ex.A. Petitioners timely appealed the Order on August 29, 2022, and the bankruptcy court certified the Order for direct review on September 13, 2022. *See* Ex.B. Petitioners timely filed this petition for authorization within thirty days of certification. *See* Fed. R. Bankr. P. 8006(g).

This is a paradigmatic case for direct appeal. This closely-watched bankruptcy proceeding relates to the largest multi-district litigation in history, will affect the interests of hundreds of thousands of MDL parties, and involves important, recurring questions of bankruptcy law that will inevitably need to be decided by this Court. Petitioners filed for Chapter 11 relief and moved to stay or enjoin ongoing litigation against non-debtor 3M Company based on 11 U.S.C. §362(a) and §105(a). Although numerous courts have barred continued litigation against non-debtors under those provisions, the bankruptcy court denied Petitioners' request on legal

grounds, holding, *inter alia*, that this Court has not "explicit[ly]" authorized using §362(a) to stay litigation against a non-debtor, and that this Court has adopted a "constrained" approach to bankruptcy jurisdiction that precludes §105(a) relief absent an "actual economic effect" on the estate. Lamenting the lack of guidance and recognizing the public importance of this case, however, the bankruptcy court promptly certified its Order for direct review.

This Court should accept the appeal, as the Order plainly meets the standards for direct review. The Order involves significant questions of bankruptcy law that require this Court's prompt and definitive resolution and will affect hundreds of thousands of individuals. Deferring this Court's review will only delay the development of much-needed appellate precedent, foster lingering uncertainty that undermines Petitioners' successful reorganization and impedes resolution of the broader MDL, and create unnecessary inefficiencies as the parties litigate and the district court decides an appeal certain to be re-litigated in this Court. In short, this is precisely the sort of appeal for which Congress enacted the direct-review statute. Because it cries out for this Court's review now rather than later, the Court should authorize the appeal.

STATEMENT OF THE CASE

A. Legal Background

The filing of a Chapter 11 petition "has certain immediate consequences." *City of Chicago v. Fulton*, 141 S.Ct. 585, 589 (2021). First, it "creates an estate" comprising "all legal or equitable interests of the debtor in property as of the commencement of the case," "wherever located and by whomever held." *Id.* (quoting 11 U.S.C. §541(a)(1)). The Code defines estate property "very broadly," *In re Newman*, 903 F.2d 1150, 1152 (7th Cir. 1990), "pulling virtually all the debtor's property interests into the bankruptcy estate," *In re Prince*, 85 F.3d 314, 322 (7th Cir. 1996); *see also* 28 U.S.C. §1334(e) (granting court "exclusive jurisdiction … of all the property, wherever located, of the debtor").

Second, under 11 U.S.C. §362(a), a Chapter 11 petition triggers a stay that "automatically halts efforts to collect prepetition debts from the bankrupt debtor." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582, 589 (2020). The automatic stay bars "the commencement or continuation … of a judicial, administrative, or other action or proceeding against the debtor." 11 U.S.C. §362(a)(1). It also prohibits "any act" to "obtain possession of property of the estate or of property from the estate," or "exercise control over property of the estate." *Id.* §362(a)(3).

The automatic stay "serves the debtor's interests by protecting the estate from dismemberment." *Fulton*, 141 S.Ct. at 589. In particular, it "prevent[s] a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *In re Grede Foundries, Inc.*, 651 F.3d 786, 790 (7th Cir. 2011). For these reasons, courts have recognized that §362(a)(1)'s prohibition on the "commencement or continuation … of a judicial … action or proceeding" can apply to actions against non-debtors if "the debtor may be said to be the real party defendant and … a judgment against the third-party defendant will in effect be a judgment or finding against the debtor," *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986); *accord Reliant Energy Services, Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003); *McCartney v. Integra Nat. Bank N.*, 106 F.3d 506, 509-11 (3d Cir. 1997), or if pending litigation against a non-debtor would "have a significant impact" on the debtor, such as "irreparable harm," *In re N. Star Contracting Corp.*, 125 B.R. 368, 370 (S.D.N.Y. 1991). Similarly, by prohibiting "every effort to 'exercise control over property of the estate,'" §362(a)(3)'s automatic stay "concentrate[s], in a single forum, disputes affecting a debtor's solvency and continuing operations." *Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 708-09 (7th Cir. 1994).

Relatedly, §105(a) of the Bankruptcy Code provides that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry

out the provisions of [the Code]." 11 U.S.C. §105(a). Section 105(a) gives courts "broad" and "extensive equitable powers," including, *inter alia*, the authority to issue an injunction barring continued litigation against a non-debtor if the injunction "is likely to enhance the prospects for a successful resolution of the disputes attending [the debtor's] bankruptcy." *In re Caesars Entm't Operating Co., Inc.*, 808 F.3d 1186, 1188-89 (7th Cir. 2015).

B. Factual Background

Petitioners manufacture and sell products that control noise, shock, and thermal conditions. Order.3. Petitioners are headquartered in Indianapolis and have operated for over forty years. *Id.* Since April 2019, Petitioners and 3M, which purchased Petitioners in 2008, have been co-defendants in a multi-district litigation proceeding in the Northern District of Florida involving claims that Petitioners designed, manufactured, and distributed (along with 3M) faulty hearing protection devices known as Combat Arms Earplugs, version 2 ("CAEv2" devices). *Id.* By July 2022, the MDL had ballooned to more than *290,000* claims against Petitioners and 3M. *Id.* The litigation is "the largest MDL in history," representing "a staggering 30% of cases currently pending in the federal courts." Order.5-6. "[M]ost … of the claims filed" assert that Petitioners and 3M are jointly and severally liable for CAEv2 claims. Order.5.

By July 2022, MDL bellwether trials had produced mixed results, ranging from complete defense verdicts to a verdict against Petitioners and 3M awarding $77 million to a single plaintiff. Order.6. Another eight bellwether cases were voluntarily dismissed before proceeding to trial. *Id.* Furthermore, thousands of cases were set to be remanded for trials, with thousands more to follow. *Id.* Given the lack of clarity provided by the bellwether process, as well as the significant burden, uncertainty, and anticipated duration of the hundreds of thousands of remaining cases, Petitioners—who designed, manufactured, and sold about 80% of the devices before 3M acquired Petitioners—concluded that continued litigation could not bring an efficient, equitable, or expeditious resolution to the claims asserted against them, and they filed for Chapter 11 protection on July 26, 2022. Order.3, 5.

To obtain financing to fund the Chapter 11 process, Petitioners negotiated and executed an agreement with 3M (the "Funding Agreement") shortly before filing their Chapter 11 petitions. Order.7-9. Under the Funding Agreement, 3M agreed, upon Petitioners' exhaustion of assets, to fund Petitioners' operating and legal administrative costs during the Chapter 11 process and, upon confirmation of a reorganization plan, to contribute to a trust to fund payments to claimants. Order.9. In exchange, Petitioners agreed to indemnify 3M for liabilities related to the devices. *Id.* 3M also provides legal, accounting, and other back-office functions to

Petitioners pursuant to a 2008 Support Services Agreement. Order.4-5. Furthermore, Petitioners and 3M are named insureds on the same set of insurance policies providing over $1 billion in coverage. Order.12.

C. Procedural Background

On the same day they sought Chapter 11 protection, Petitioners filed in the bankruptcy court a complaint and motion seeking (1) confirmation that the automatic stay of 11 U.S.C. §362(a) applies to CAEv2 claims against 3M; and (2) a preliminary injunction under 11 U.S.C. §105(a) enjoining continued prosecution of CAEv2 claims against 3M. Adv.Pro.Dkt.2.[1] Petitioners argued, *inter alia*, that §362(a)(1) applies to the CAEv2 claims given the identity of interests between Petitioners and 3M; §362(a)(3) applies to the CAEv2 claims given Petitioners' and 3M's shared insurance policies; and §105(a) relief is warranted to protect Petitioners' estates, allow for the orderly estimation and resolution of CAEv2 claims, and facilitate Petitioners' reorganization. *Id.* Numerous law firms representing MDL plaintiffs objected. Adv.Pro.Dkt.100-103, 108. The bankruptcy court held an evidentiary hearing from August 15-17, 2022. Order.2.

[1] "Adv.Pro.Dkt." 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 bankruptcy court denied Petitioners' motion on August 26, 2022. At the outset, the court noted that Petitioners "are appropriate debtors with cognizable liabilities under the Bankruptcy Code." Order.17. Petitioners have "operat[ed] in Indiana" both "currently" and "historically," the court observed, and they had been "named as defendants in most, if not nearly all, of the Pending Actions for their role in designing, manufacturing and selling the CAEv2 both prior to and after their purchase by 3M." Order.16-17.

Nonetheless, the court rejected Petitioners' request for §362(a)(1), §362(a)(3), and §105(a) relief. The court first held that it lacked "sufficient statutory authority" under §362(a)(1) to stay the CAEv2 actions against 3M because §362(a)(1) does not have "any direct applicability—at least within governing Seventh Circuit law—to non-debtors." Order.19-20. The court acknowledged that there was "ample case law holding otherwise," and it cited numerous decisions concluding as a matter of law that §362(a)(1) can apply to non-debtors if (1) "there is such identity between the debtor and third-party defendant where a judgment against the third-party defendant will in effect be a judgment against the debtor"; or (2) "the pending litigation, though not brought against the debtor, would cause the debtor irreparable harm." Order.20-21. In the court's view, however, this Court has not yet adopted that approach. Order.21. And "[w]ithout more explicit guidance from the Seventh

Circuit," the court declined to adopt that approach itself. Order.22. On that basis alone, it refused to extend the automatic stay of §362(a)(1) to claims against 3M. *Id.*

The bankruptcy court next denied Petitioners' request to extend the automatic stay under §362(a)(3), which covers "any act … to exercise control over the property of the estate." The court determined that the stay did not apply because, although the insurance policies that Petitioners share with 3M are property of Petitioners' bankruptcy estate and would be affected by judgments against 3M, the relevant legal question, according to the court, is "whether a third party's effort has a pecuniary effect on the estate." Order.25. Applying that standard, the court held that "tapping" Petitioners' insurance policies to cover 3M's liabilities in the CAEv2 actions had no "pecuniary effect" on Petitioners' estate because the Funding Agreement "operates as a complete, uncapped backstop to the insurance policies." Order.25-26.

As for §105(a) injunctive relief, the bankruptcy court determined that it lacked jurisdiction to enjoin CAEv2 claims against 3M. Under 28 U.S.C. §1334(b), a court has jurisdiction over actions "related to" a bankruptcy case. As the bankruptcy court acknowledged, nine federal courts of appeals have held that "related to" jurisdiction encompasses any action that "could conceivably have any effect" on the bankruptcy estate. Order.29. In the court's view, however, this Court has adopted a "more constrained approach" to "related to" jurisdiction that requires an "*actual* economic effect" on the estate. Order.30, 32 (emphasis in original). According to the court,

because 3M contracted to fund Petitioners' liabilities on an uncapped basis, continued litigation against 3M would not "affect the amount of property for distribution or the allocation of property among creditors," and so the court lacked "related to" jurisdiction. Order.32. The court conceded that "[a] number of other courts have extended the stay notwithstanding the existence of an uncapped funding agreement," but it concluded it could not "follow suit" given what it viewed as this Court's uniquely restrictive approach to "related to" jurisdiction. *Id*. Because the court concluded it lacked jurisdiction, it found "no need to discuss" the other requirements for §105(a) relief. Order.35 n.17.

On August 29, Petitioners requested that the bankruptcy court certify the Order for direct review by this Court under 28 U.S.C. §158(d)(2). Adv.Pro.Dkt.146. Two objections were filed. Adv.Pro.Dkt.167, 179. On September 13, the bankruptcy court certified the Order for direct review, concluding that (1) the Order involves "questions of law for which there is no controlling decision from" this Court or the Supreme Court; (2) the Order involves "a matter of public importance"; and (3) direct appeal to this Court "may materially advance the progress of the proceeding … and its related bankruptcy case." Ex.B.

QUESTIONS PRESENTED WARRANTING DIRECT APPEAL

1. Whether, as the Third, Fourth, and Fifth Circuits and other courts have held, the automatic stay of §362(a)(1) can apply to actions against a non-debtor when (1) there is such identity between the non-debtor and the debtor that a judgment against the non-debtor would in effect be a judgment against the debtor, or (2) the pending litigation against the non-debtor would cause the debtor irreparable harm.

2. Whether the automatic stay of §362(a)(3) applies to actions against a non-debtor that exercise control over or diminish estate property, including proceeds of an insurance policy that the debtor shares with the non-debtor or assets of the debtor implicated by the debtor's indemnification obligations to the non-debtor.

3. Whether this Court, contrary to nine other courts of appeals, holds that a bankruptcy court lacks "related to" jurisdiction to enjoin a pending action unless the debtor shows that the action will have an "actual economic effect" on the estate.

REASONS FOR PERMITTING DIRECT APPEAL

Recognizing the need to "expedite appeals in significant cases" and "to generate binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy," Congress enacted 28 U.S.C. §158(d)(2) to provide for direct review by the courts of appeals in appropriate bankruptcy appeals. *In re Pac. Lumber Co.*, 584 F.3d 229, 241-42 (5th Cir. 2009). Under §158(d)(2), a bankruptcy court "shall" certify an appeal for direct review by the court of appeals if the court

"determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph A exists." Those circumstances are:

- the order "involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States";
- the order "involves a question of law requiring resolution of conflicting decisions";
- the order "involves a matter of public importance"; or
- an immediate appeal "may materially advance the progress of the case or proceeding."

28 U.S.C. §158(d)(2) (A)(i)-(iii), (B)(i). Certification is required when "any one" of these factors exists, in order to allow a "broader range" of bankruptcy court decisions "to make their way to the courts of appeals." *Bullard v. Blue Hills Bank*, 575 U.S. 496, 508 (2015).

Once the bankruptcy court certifies its order, an appellant must obtain authorization from the court of appeals to proceed. *See* 28 U.S.C. §158(d)(2)(A). In determining whether to permit a direct appeal, this Court looks to the same disjunctive factors governing the bankruptcy court's certification. *See, e.g.*, *In re Pajian*, 785 F.3d 1161, 1162-63 (7th Cir. 2015); *In re River East Plaza, LLC*, 669 F.3d 826, 828 (7th Cir. 2012); *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 701 (7th Cir. 2009).

Direct appeal is plainly warranted here. The bankruptcy court recognized that multiple statutory criteria are satisfied, although only one need be. The Order is a

critical decision in the early stages of a significant bankruptcy proceeding and implicates unsettled legal issues and conflicting decisions. It cries out for expeditious and definitive review by this Court.

I. The Order Involves A Question of Law As To Which There Is No Controlling Decision.

The bankruptcy court concluded that the Order "involves a question of law as to which there is no controlling decision" by this Court. 28 U.S.C. §158(d)(2)(A)(i). In contending that the automatic stay of §362(a)(1) applies to CAEv2 claims against 3M, Petitioners argued that this Court has recognized two exceptions to the general rule that §362(a)(1) does not apply to non-debtors: (1) "where there is a sufficient 'identity of interest' between the debtor and non-debtor such 'that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor'"; or (2) "where pending litigation," though not against the debtor, "would cause the debtor … irreparable harm." Adv.Pro.Dkt.2, at 22-23 (citing *In re Fernstrom Storage & Van Co.*, 938 F.2d 731, 736 (7th Cir. 1991), and *Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of Fox Masonry*, 140 F.3d 661, 666 (7th Cir. 1998)). Petitioners then contended that they satisfied these two exceptions based on the evidence. Adv.Pro.Dkt.2, at 24-29.

The bankruptcy court declined to recognize those exceptions, however, based on its view that this Court "has not, to date, expansively discussed or formally

adopted" them. Order.21. The court pointedly refused to extend the automatic stay to a non-debtor "[w]ithout more explicit guidance from the Seventh Circuit." Order.22. And throughout the evidentiary hearing, the court remarked that "there's really no binding case" that controls, Ex.C.266:1, because this Court has not "told" the court "what [it] [is] supposed to do" when presented with the §362(a)(1) exceptions, Ex.D.130:1-14. For this reason alone, the court refused to extend §362(a)(1)'s automatic stay to the CAEv2 claims against 3M. Order.22.

As articulated by the bankruptcy court, therefore, the Order "involves a question of law as to which there is no controlling decision of the court of appeals" or of the Supreme Court. 28 U.S.C. §158(d)(2)(i). To be clear, in Petitioners' view, this Court *has* approved the §362(a)(1) exceptions as a matter of law. *See In re Fernstrom*, 938 F.2d at 736; *Fox Valley*, 140 F.3d at 666; *see also B&B Golf Carts, Inc. v. GRC Golf Products, LLC*, 2017 WL 2255601, at *3 (S.D. Ill. May 23, 2017) (citing *Fernstrom* in observing that "[t]he Seventh Circuit recognizes two exceptions to [§362(a)(1)'s] general rule"). But the bankruptcy court disagreed, citing a lack of "explicit guidance" from this Court and pointing to several lower-court decisions stating that this Court has not yet recognized the exceptions. Order.21-22.

This is the precise context, accordingly, for which Congress created the direct-review mechanism: "to generate binding appellate precedent in bankruptcy" and eliminate "indeterminacy" in bankruptcy law. *In re Pac. Lumber*, 584 F.3d at 241-

42. Indeed, the Third Circuit recently accepted direct appeal of a bankruptcy-court decision applying the §362(a)(1) exceptions to stay tort claims against a non-debtor, after claimants there—represented by the same law firms representing claimants here—contended that the absence of a controlling decision regarding §362(a)(1) exceptions justified direct review. *See In re LTL Mgmt. LLC*, 638 B.R. 291, 303-07 (Bankr. D.N.J. 2022); Official Committee of Talc Claimant I's Petition for Authorization of Direct Appeal, at 21, No. 22-8015 (3d Cir. Apr. 5, 2022) ("Talc I Petition"). Direct review of the Order here is thus justified on this basis alone. *See, e.g.*, *In re River East*, 669 F.3d at 828 (authorizing direct review where "the order appealed from involves a question of law that has not been definitively resolved"); *In re Pajian*, 785 F.3d at 1162 (authorizing direct review where appeal "raises a legal question that requires this court to break new ground"); *In re Howard*, 597 F.3d at 853 (authorizing direct review where appeal involved "an issue that is new in this court").

II. The Order Involves A Question Of Law Requiring Resolution Of Conflicting Decisions.

The Order also "involves a question of law requiring resolution of conflicting decisions"—two such questions, in fact. 28 U.S.C. §158(d)(2)(A)(ii). *First*, on the §362(a)(1) issue, as the bankruptcy court acknowledged, there is "ample case law" recognizing that the automatic stay can apply to non-debtors based on the §362(a)(1) exceptions Petitioners invoked. That caselaw includes decisions from at least three

other courts of appeals, *see Robins*, 788 F.2d 994 (4th Cir. 1986); *Reliant Energy*, 349 F.3d at 825; *McCartney*, 106 F.3d at 509-11, and numerous lower-court decisions, *see, e.g.*, *In re Aldrich Pump LLC*, 2021 WL 3729335, at *31 (Bankr. W.D.N.C. Aug. 23, 2021), including cases involving similar facts, *see In re LTL Mgmt.*, 638 B.R. at 303-07.

To be sure, the bankruptcy court cited decisions within this Circuit declining to recognize the §362(a)(1) exceptions. *See* Order.21 (citing *Harley-Davidson Credit Corp. v. JHD Holdings, Inc.*, 2020 WL 7078828 (W.D. Wisc. Dec. 3, 2020), and *In re Caesars Entm't Operating Co., Inc.*, 540 B.R. 637 (Bankr. N.D. Ill. 2015)). But other courts within this Circuit *have* recognized those exceptions. *See, e.g.*, *B&B Golf Carts*, 2017 WL 2255601, at *3 (citing *Fernstrom*); *Hamilton v. Am. Corrective Counseling Services, Inc.*, 2009 WL 973447, at *2-3 (N.D. Ind. Apr. 8, 2009) (citing *Robins* and concluding that the "facts make out a colorable claim under the 'identity of interest' exception for an extension of the automatic stay under §362(a) to these non-debtor defendants"); *Lee v. RCN Corp.*, 2004 WL 2108577, at *1 (N.D. Ill. Sept. 20, 2004); *555 M Mfg., Inc. v. Calvin Klein, Inc.*, 13 F.Supp.2d 719, 722 (N.D. Ill. 1998). Given the "conflicting decisions" concerning this legal issue—both within this Circuit and beyond—direct review is warranted. *In re Pajian*, 785 F.3d at 1162.

Second, the bankruptcy court's §105(a) ruling "involves a question of law requiring resolution of conflicting decisions." The court noted that "many circuits"

have adopted a rule that "related to" jurisdiction under 28 U.S.C. §1334(b) extends to circumstances where "the outcome of the proceeding 'could conceivably have any effect' upon the bankruptcy estate." Order.29. But it stated that this Court has "adopted a more constrained approach" under which a court "must focus its analysis on the *actual* economic effect" of a claim on the estate. Order.30, 32. Applying that standard to Petitioners' evidence, the court held that Petitioners did not establish "related to" jurisdiction. Order.31-32. The court's view of the legal standard was integral to its holding: It acknowledged that "[a] number of other courts have extended the stay notwithstanding the existence of an uncapped funding agreement," but it declined to "follow suit" based on its belief that, under this Court's caselaw, it had to examine the "*actual* economic effect" that the CAEv2 litigation would have on Petitioners' estate. Order.32.

The decisions the bankruptcy court invoked, however, conflict with more recent decisions indicating that this Court has now aligned itself with its sister circuits regarding "related to" jurisdiction, such that an "*actual* economic effect" on the estate is not required. Most notably, in *In re Bush*, 939 F.3d 839 (7th Cir. 2019), this Court observed that the Supreme Court "favorably quoted a rule … that a matter comes within the related-to jurisdiction if it 'could conceivably have any effect on the estate being administered in bankruptcy.'" *Id.* at 846 (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995)). The Court then held that "related to" jurisdiction is

not evaluated according to the "actual effect" of a claim "at the case's end." *Id.* Rather, it "must be assessed at the outset of the dispute" and "is satisfied" when the resolution of a claim "has a *potential effect* on other creditors." *Id.* (emphasis added). The Court also explained why the "different" standard supposedly adopted in older cases like *In re Xonics, Inc.*, 813 F.2d 127 (7th Cir. 1987), *Home Insurance Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746 (7th Cir. 1989), and *In re FedPak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996)—three cases the bankruptcy court cited—is inapposite to determining "related to" jurisdiction. 939 F.3d at 846.

Courts within this Circuit have cited *Bush* in recognizing that this Court is now "align[ed] ... with the view widely held by" the other circuits regarding "related to" jurisdiction. *In re Collazo*, 613 B.R. 650, 659 (N.D. Ill. 2020); *see also In re Chellino*, 2022 WL 1180621, at *3 (Bankr. N.D. Ill. Apr. 13, 2022) (explaining that, in *Bush*, this Court held, "consistent with nine other Courts of Appeals," that "a 'related to' analysis should proceed from an *ex ante* perspective" and "is satisfied when the resolution has a potential effect on other creditors"). Direct review is thus warranted to resolve any lingering conflict between the pre-*Bush* decisions cited by the Order for the "more constrained" view of "related to" jurisdiction demanding that a claim have an "actual effect" on an estate, and decisions like *Bush* and *Collazo*

holding that "related to" jurisdiction is satisfied when resolution of a claim "has a potential effect" on other creditors.[2]

III. The Order Involves A Matter Of Public Importance.

Next, as the bankruptcy court concluded, the Order "involves a matter of public importance." 28 U.S.C. §158(d)(2)(A)(i). The bankruptcy court repeatedly noted the "import," "enormity," and "magnitude of this case" and "the issues involved." Ex.D.288:16-17, 290:13-22. And Respondents conceded below that they "do not question the 'import,' 'enormity,' and the 'magnitude of this case.'" Adv.Pro.Dkt.179, at 11. These observations are well-taken. The Order concerns whether to stay or enjoin claims in "the largest MDL in history," thereby affecting hundreds of thousands of individuals in the MDL and implicating billions of dollars. Order.5. Courts have recognized that these considerations support direct review. *See In re Wright*, 492 F.3d 829, 831-32 (7th Cir. 2007) (authorizing direct review in

[2] If Respondents disclaim a conflict between *Bush* and the pre-*Bush* decisions, it is hard to see how they could defend the bankruptcy court's jurisdictional ruling. At a minimum, though, that argument would suggest that the jurisdictional issue is another "question of law as to which there is no controlling decision" by this Court, likewise justifying direct review. And while the bankruptcy court stated that it "would reach the same conclusion" even if it found "related to" jurisdiction, that dictum was still based on the court's "focus … on the actual economic effect" of the claims on the estate—the very legal question at issue. Order.35. The court also explicitly stated that it would "not reach" the other factors underlying §105(a) relief given its jurisdictional holding, and thus could not (and did not) issue an alternative holding. Order.35 n.17.

appeal potentially affecting "thousands" of non-parties to bankruptcy case); *In re Pac. Lumber*, 584 F.3d at 242 (affirming public importance of direct appeal given "prominence of this case" to non-parties); *In re Nortel Networks Inc.*, 2016 WL 2899225, at *4 (D. Del. May 17, 2016) (recognizing that a "tremendous amount of money" can, "standing alone," render an issue "a matter of vital public importance").

But even beyond the hundreds of thousands of MDL parties and the billions of dollars at stake, the issues that the Order addresses—including the reach of 11 U.S.C. §362(a)(1), §362(a)(3), §105(a), and "related to" jurisdiction, all ultimately directed toward whether claims against a non-debtor may be stayed or enjoined to facilitate a restructuring—have broad importance to the administration of Chapter 11 cases. These issues arise frequently in the lower courts and the courts of appeals, particularly in the context of mass-tort litigation, *see* pp.13-19, *supra*; *see also Robins*, 788 F.2d at 1001-02 (citing cases employing §362(a)(3) to stay actions against parties "who may be entitled to indemnification" or "who qualify as additional insureds"); accordingly, they "transcend[] the litigants" here, *In re Am. Home Mortg. Inv. Corp.*, 408 B.R. 42, 44 (D. Del. 2009). Indeed, similar issues are being litigated in the Chapter 11 proceedings involving talc claims against Johnson & Johnson, where the bankruptcy court reached different conclusions from the bankruptcy court here. *See In re LTL Mgmt.*, 638 B.R. at 300-03. The *LTL* bankruptcy court certified its decision for direct appeal, which the Third Circuit

accepted, based on arguments by the same law firms representing Respondents here that the case's "public importance" warranted direct review.[3] In short, the Order is precisely the sort of significant decision implicating important, recurring issues that should be promptly and definitively resolved by this Court.

IV. Direct Review Of The Order Will Materially Advance The Progress Of The Proceeding.

Finally, direct review of the Order "may materially advance the progress of the case or proceeding," as the bankruptcy court determined. 28 U.S.C. §158(d)(2)(A)(iii). This adversary proceeding turns on whether 11 U.S.C. §362(a) or §105(a) enjoins CAEv2 litigation against 3M. When that question is answered, the adversary proceeding will be essentially complete. Accordingly, this Court's direct review not only "may" but *will* "materially advance the progress of" this proceeding. *See Ritzen*, 140 S.Ct. at 587 (distinguishing between bankruptcy "cases" and "proceedings"). District court review would merely delay the inevitable appeal to this Court by the non-prevailing party, increasing the burden on the judicial

[3] *See, e.g.*, Pet. of Aylstock, Witkin, Kreis & Overholtz, PPLC for Direct Appeal of Bankruptcy Court Orders, at 3, No. 22-8021 (3d Cir. Apr. 12, 2022) (arguing that the case "impacts decisions and restructurings or potential restructurings well beyond even the tens of thousands of litigants directly affected and the billions of dollars directly at issue"); Talc I Petition at 13 (asserting that the case "will have a broad impact, far beyond the confines of this case and its litigants," by "affect[ing] … bankruptcy jurisprudence and law" and "how current and future tort victims may pursue relief").

system and unnecessarily prolonging the time to resolution by this Court—which would employ the same standards of review as the district court. *See In re Smith*, 582 F.3d 767, 777 (7th Cir. 2009). When there is "little doubt that appellate review by" the court of appeals will occur, "having such review sooner rather than later" justifies direct review. *Extraction Oil & Gas, Inc.*, 2021 WL 3722229, at *6 (D. Del. Aug. 23, 2021). Or, as Respondents' counsel explained in obtaining direct review in *LTL*, "[W]here, as here, it is clear the litigants will continue to exercise their appellate rights," direct appeal will "achiev[e] certainty earlier." Talc I Petition 20.

Moreover, direct review would materially advance the progress of not just the adversary proceeding but the Chapter 11 case as whole. The sooner this Court resolves whether the CAEv2 litigation against 3M can continue, the sooner all parties will have greater clarity regarding Petitioners' restructuring. That clarity will in turn facilitate settlement and a consensual plan of reorganization utilizing the tools available in Chapter 11. Direct review also benefits the MDL parties, who will otherwise be engaged in costly and potentially fruitless litigation while a lengthy, multi-stage appeals process unfolds in this case.

In sum, direct appeal would avoid needless expenditure of time and resources, and bring the adversary proceeding, the broader Chapter 11 case, and even the MDL itself materially closer to final resolution. For this reason as well, the Court's immediate review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

s/ George W. Hicks, Jr.

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September 23, 2022

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I hereby certify that on September 23, 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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