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3M's Bankruptcy: Pausing The Largest Mass Tort Litigation In Federal District Court History

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3M's Bankruptcy:

Pausing The Largest Mass Tort Litigation In Federal District Court History

By

John Thomas

Drew Roberson

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Introduction

In 2022, 3M and its subsidiary Aearo found themselves facing the largest Multidistrict Litigation (MDL) in history. In an effort to resolve their pending litigation with a bankruptcy sanctioned settlement trust, Aearo Technologies LLC and six other affiliated subsidiaries agreed to indemnify 3M before petitioning for chapter 11 relief in the Southern District of Indiana on July 26, 2022.

This paper explores the strategies employed by 3M and Aearo to resolve their overhanging liabilities and the plaintiffs' attorneys' counter strategies to maximize the value of their claims and get Aearo out of bankruptcy. Aearo's highly publicized bankruptcy case was ultimately dismissed, possibly marking the end of the "Texas Two-Step" as a viable option for resolving mass tort liabilities.

This paper details the Chapter 11 Bankruptcy process and tells the story of an unsuccessful attempt to resolve mass tort liabilities through chapter 11 reorganization.

THESIS

The "Texas Two-Step" strategy in which companies divest themselves of mass tort liabilities and resolve those claims in bankruptcy failed to serve 3M and may no longer serve any company that cannot evince signs of real and imminent economic distress.

Cast of Characters

Parent Corporation

3M Company

Subsidiary Companies, The Debtors

Aearo Technologies LLC (Named Debtor)

Representation
- Disinterested Directors
  - *Roger Meltzer* & *Jeffrey Stein*
- Chief Restructuring Officer
  - *John R. Castellan*

Counsel
- Kirkland & Ellis LLP
  - *George W. Hicks, Jr.*
- Ice Miller LLP
  - *Jeffrey A. Hokanson*
- Clement & Murphy, PLLC
  - *Paul D. Clement*
- McDonald Hopkins LLC

Aearo LLC
Aearo Intermediate LLC
Aearo Holding LLC
Aearo Mexico Holding Corp.
Aearo Mexico Holding Corp.
3M Occupational Safety LLC

Bankruptcy Judge

Honorable Jeffrey J. Graham
- Sitting judge for the bankruptcy case in the Southern District of Indiana

***Qui Tam* Whistleblower**

Moldex-Metric, Inc:
- California-based competitor that filed a whistleblower *qui tam* lawsuit against 3M claiming that 3M had been selling defective earplugs to the government.

Multidistrict Litigation

Honorable M. Casey Rodgers
- Sitting judge for the MDL in the Northern District of Florida

John Ciacco
- Filed initial motion to Judicial Panel on Multidistrict Litigation to consolidate Combat Arms Earplug claims.

Pascal Hamery and *Armand Dancer*

- Two expert scientists at the French-German Institute de St. Louise that worked on developing new earplugs technology.

Multidistrict Litigation

Defendants' Counsel

- Dechert LLP
  - *Kimberly Branscome*
- Kirkland & Ellis LLP.
  - *Mike Brock*
  -

Plaintiffs' Lead Counsel

- Aylstock, Witkin, Kreis & Overholtz, PLLC
  - *Bryan F. Aylstock*

Plaintiff's Co-Lead Counsel

- Clark, Love & Hutson, PLLC
  - *Shelley V. Hutson*
- Seeger Weiss LLP
  - *Christopher A. Seeger*

Official Committee of Unsecured Creditors

Tort Claimants - CAE Committee

Members of the Committee:

- Aylstock, Witkin, Kreis and Overholtz, PLC; The Gori Law Firm; Rawlings & Associates PLLC; Laminack, Pirtle & Martines; Lieff Cabraser Heimann & Bernstein LLP; Seeger Weiss LLP; Parafinczuk Wolf, P.A; Paul LLP; and Weitz and Luxenberg, PC

Hired Counsel:

- Rubin & Levin, P.C
  - *Meredith R. Theisen*
  - *Deborah J. Caruso*
- Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.
- Otterbourg P.C.
  - *Melanie L. Cyganowski*
  - *Adam C. Silverstein*
  - *Jennifer S. Feeney*
- Brown Rudnick LLP
- Caplin & Drysdale
- KTBS Law LLP
- Pfister & Saso, LLP

Tort Claimants - Respirator Committee

Members of Committee:

- Jeremy Webb, Josh Morgan, and Charlene Hoskins (Administratrix of Estate of Ricky Hoskins)

Hired Counsel:

- Mattingly Burke Cohen & Biederman LLP
  - *Curt D. Hochbein*
- Mike Martin and Rhonda Harshbarger Law Firm
  - *Martin Walton*
  - *Ronhda Harshbarger*
- Rochelle McCullough, LLP
  - *Kevin Dale McCullough*
  - *Eric Policastro*
  - *Shannon Thomas*

Other Councel Representing Plaintiffs

- Bailey & Glasser, LLP and Pulaski Kherkher, PLLC
  - *Kevin W. Barrett*

Trustees

Nancy J. Gargula: United States Trustee
Ronald J. Moore: Assistant U.S. Trustee
Laura A DuVall: On staff as a Trial Attorney
Harrison Edward Strauss: On staff as a Trial Attorney

Claims & Noticing Agent, Soliciting Agent

Kroll Restructuring Administration LLC

3M's Story

A Rocky Start

At the turn of the 20th century, five entrepreneurs in Minnesota acquired what they imagined was a corundum mine.[1] Corundum is a uniquely tough mineral that would serve as an excellent abrasive for grinding wheels.[2] Capitalizing on their good fortune, each of the five founders invested $1,000 and incorporated the Minnesota Mining and Manufacturing Company, later known as 3M.[3] 3M was incorporated for the purpose of mining corundum and selling the mineral to grinding wheel manufacturers.[4] Unfortunately for these founding partners, they had not been mining corundum at all, rather they had found anorthosite, a much softer material, inferior to corundum for their intended use.[5] Sales suffered as a result of their low quality minerals, and in 1904 3M shifted from supplying raw materials to manufacturing finished goods.[6]

The company entered the grinding wheel business, but a year later, after seeing a dearth of profits, 3M called another audible and abandoned grinding wheel manufacturing to produce sandpaper.[7] At the time, 3M was drowning in debt and in desperate need of financing.[8] Lucius Ordway, a young affluent investor, poured money into the enterprise and took over as 3M's president.[9] Under Ordway's leadership, the company found a quality source of corundum and began competing in the sandpaper market.[10]

3M finally tasted success in 1914, when they introduced their first profitable product, Three-M-ite cloth.[11] Three-M-ite cloth was a sandpaper that utilized a synthetic abrasive material, designed in response

---

[1] 3M INNOVATION, A CENTURY OF INNOVATION: THE 3M STORY 2 (3M CO. 2002).

[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] *Id*. at 3.

[6] *Id*.

[7] *Id*.

[8] *Id*. at 4.

[9] *Id*.

[10] *Id*. at 5.

[11] *Id*. at 10.

to Carborundum's artificial abrasive cloth.[12] "Thanks to Three-M-ite cloth and a boost in business from World War I, 3M finally posted substantial profits and declared its first dividend… in the last quarter of 1916."[13]

Rise to Prominence

In 1921 3M debuted the world's first waterproof sandpaper, "Wetordry."[14] This invention gave 3M an important introduction to the automotive market and set 3M on a new trajectory.[15] In the same year, 3M expanded its vision and began servicing an international market by joining eight other North American companies to create the joint venture named "Durex."[16] Durex was a joint venture created to manufacture and sell abrasives overseas.[17] After enjoying some success from these new developments, 3M doubled down on its innovation and invested liberally in their R&D department.[18] 3M continued to invent an indescribably broad array of products (including Scotch transparent tape, Colorquartz roofing granules, rubber cement, Scotchlite reflective tape, and many more) and even implemented a policy encouraging its technical employees to devote 15% of their working hours to independent projects.[19] By the early 1940s, 3M was a pillar of manufacturing and its products were widely used by the Allies in World War II.[20]

Following the war, 3M grew beyond the bounds of a closely held corporation and became a publicly owned company through their initial public offering on the New York Stock Exchange in 1946.[21] 3M hit the ground running as a newly public company by acquiring five companies in 1947 and ramping up their focus on international markets.[22] In 1950, the Truman administration took a stance against monopolies, and

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[12] *Id*. at 9–10.

[13] *Id*. at 11.

[14] *Id*. at 14.

[15] *Id*. at 15.

[16] *Id*.

[17] *Id*. at 139.

[18] *Id*. at 16–17.

[19] *Id*. at 21–22.

[20] *Id*. at 25.

[21] *Id*. at 129.

[22] *Id*.

the US Justice Department challenged Durex for violating the Sherman Antitrust Act.[23] Durex was found in violation of the new antitrust law and the joint venture was dissolved in 1951.[24] When Durex was dissolved, 3M inherited more than their fair share of factories, distributor networks, and top managers around the world, according to Clarence Sampair, 3M's former President of Manufacturing.[25] The dissolution of Durex was a pivotal moment in the life of 3M and international sales reached $20 million in the first year thereafter.[26]

In the 1950s and 60s, 3M initiated subsidiary operations in over 30 nations.[27] These international divisions bought out their distributors as soon as possible, and by 1962 3M had either acquired all of its European distributors or gone into business on its own.[28] By the end of the 60s, 3M was an international powerhouse with factories, warehouses, and distribution networks all over the world.[29] 3M capitalized on their international presence by doubling down and expanding to 30 more nations in the next 30 years.[30]

3M Today

3M's product offerings may have expanded even more rapidly and continuously than its geographic expansion. Currently, 3M has 4 main divisions: Safety & Industrial, Transportation & Electronics, Health Care, and Consumer; and these divisions manufacture a nearly unimaginable variety of products.[31] 3M has worked to make its own products obsolete before its competition can, and 3M has been quick to acquire competition when it may strengthen a core business.[32] 3M has made 58 acquisitions across sectors such as Enterprise Tech, Healthcare IT, Enterprise Software, and others.[33] Many of these acquisitions have furthered 3M's success and expansion, but 3M unwittingly acquired an unimaginably costly liability when they purchased Aearo Technologies.

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[23] *Id*. at 141.

[24] *Id*. at 141.

[25] *Id*. at 140–41.

[26] *Id*. at 142.

[27] *Id*.

[28] *Id*.

[29] *Id*. at 144.

[30] *Id*. at 157.

[31] 3M SCIENCE APPLIED TO LIFE, (last visited Apr. 11, 2024), https://www.3m.com/#.

[32] A CENTURY OF INNOVATION: THE 3M STORY, *supra* note 2, at 200.

[33] *Acquisitions by 3M*, TRACXN (Apr. 8, 2024), https://tracxn.com/d/acquisitions/acquisitions-by-3m/__KWn6-d_3Dri_ENZsHy8BaFxczp0TEdtGqKAq7tK0j4s.

History of Aearo

The seeds of the company that eventually became Aearo Technologies were planted in the mid-1960s at the National Research Corporation ("NRC").[34] After releasing a string of new inventions, the NRC was purchased by Norton Co., expanded the NRC's focus to a variety of new industries and assigned a young chemist, Ross Gardner, the task of exploring a new generation of joint sealants.[35] In 1967, Gardner discovered the unusual energy-absorbing qualities of the materials he was working with.[36] Subsequently, he redirected his efforts to developing energy-absorbing-resins, which was given the acronym EAR.[37] In the course of his research, Gardner invented the modern ear plug.[38] Soon after this development, a company called Cabot acquired the NRC from Norton.[39] Johnson continued to perfect the ear plug and in 1972 sold the first pair of ear plugs from the newly created EAR Corporation, a subsidiary of Cabot.[40]

The Birth of Aearo

EAR Corporation steadily grew over the next 20 years and obtained a significant market share in the hearing protection industry.[41] In 1990, Cabot acquired the safety products division of American Optical Corp and merged it with EAR Corporation to create the Cabot Safety Corporation, which later changed its name to Aearo Company (known as Aearo Technologies).[42] This asset purchase and merger begat the promising company, Aearo Technologies,[43] but because Cabot agreed to assume certain liabilities arising out of the use of American Optical respiratory products, Aearo was born under the threat of litigation.[44] Regardless of any looming liabilities, Aearo Technologies combined the personal protection products

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[34] *See generally* Elliott H. Berger, *History and Development of the EAR Foam Earplug*, Canadian Hearing Report | Revenue Canadienne D'Audition, V(5)1, 28 (2010), https://multimedia.3m.com/mws/media/927838O/foam-earplug -history.pdf?fn=12%20form%20earplug%20history.pdf.

[35] *Id*. at 29.

[36] *Id*.

[37] *Id*.

[38] *Id*. at 29–31.

[39] *Id*. at 29.

[40] *Id*. at 30.

[41] *Id*. at 34.

[42] *Id*.

[43] *Id*.

[44] Cabot Co., Quarterly Report (Form 10-Q) at 12, (Dec. 31, 2002).

offered by their two precursor entities and built a valuable business. Over time, Aearo expanded their offering to include manufacturing and selling in various industries some of which are aerospace, agriculture, construction, electronics, power generation, and commercial and specialty vehicles.[45]

Aearo Was Thrown Around and Started Producing Earplugs

In 1995, Cabot decided to divest Aearo Technologies, and Aearo Technologies underwent its first acquisition in a string of private equity buyouts.[46] This string of buyouts began with Vestar Capital partners in 1995.[47] While in the keeping of Vestar Capital, Aearo Technologies collaborated with the Institute de St. Louis ("ISL") to create earplugs in which low-level sounds, like oral instructions, can pass through the filter, but sharp "impulse" noises, like gunfire, are diminished.[48]

A representative from the United States Army Research Laboratory determined that this new invention was a promising option for military ear protection, but the military also needed standard ear protection that diminished all types of noise.[49] Accordingly, Aearo and ISL designed a two-ended ear plug that offered both styles of protection.[50] In 1997, Dr. Doug Ohlin, the manager of the Army's Hearing Conservation Program and chair of the Defense Department's Hearing Conservation Working Group, indicated his interest in the two-ended earplug design, so Aearo and ISL developed and manufactured samples for testing.[51] Dr. Ohlin determined that these samples were too long to fit in a standard issue earplug carrier, so he cut down the samples to shorten them.[52] In April of 1999, Aearo offered a new shortened version of the product, which received Dr. Ohlin's approval.[53] Aearo entered into a contract to supply the

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[45] AEARO TECHNOLOGIES, https://www.aearotechnologies.com/ (last visited Apr. 14, 2024).

[46] *See* Berger, *supra* note 34.

[47] *Vestar Capital Partners Acquires Aearo Technologies*, MERGR, (last visited Apr. 11, 2024), https://mergr.com / vestar-capital-partners-acquires-aearo-technologies.

[48] Debtors Complaint for Declaratory and Injunctive Relief (I) Confirming That the Automatic Stay Applies to Certain Actions Against A Non-Debtor; (II) Preliminarily Enjoining Certain Actions a Non-Debtor: And (III) Granting A Temporary Restraining Order Pending An Order on the Preliminary Injunction at 6–7, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Debtors' Adversary Complaint] (page numbers will follow pdf's numbering).

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id*.

Department of Defense's Joint Readiness Clinical Advisory Board with these new earplugs that would be known as the Combat Arms Earplug ("CAE").[54]

In 2004, Vestar sold Aearo to Irving Place Capital (formerly known as Bear Stearns Merchant Bank).[55] Irving Place Capital quickly passed the corporation on to Permira in 2006 for $765 million before Primera finally sold Aearo in a stock purchase to the strategic buyer, 3M, in 2008 for $1.2 billion.[56] Aearo maintained their CAE contract through all these transactions until the contract was transferred to 3M in 2010 as a part of the "Upstream Transfer", in which all of Aearo's Head, Eye, Ear, Hearing and Face Safety business was assigned to 3M.[57] The Combat Arms Earplugs version 2 ("Combat Arms Earplugs") were standard issue to military service members between 2003 and 2015,[58] at which point 3M ceased marketing and selling the Combat Arms Earplugs.[59] This double sided design of the Combat Arms Earplug is illustrated below[60]:

Dual-Ended Combat Arms v2

[54] *Id*. at 7.

[55] Declaration of John R. Castellano in Support of the Debtors' Chapter 11 Petitions and First Day Motions, 9, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Castellano's Declaration].

[56] *Id*. at 9–10.

[57] *Id*. at 11.

[58] Mari Gaines, *3M Earplug Lawsuit Settled: Everything You Need to Know*, FORBES ADVISOR (Oct 18, 2023, 1:09pm), https://www.forbes.com/advisor/legal/product-liability/3m-earplug-lawsuit/. In many of the filing, these earplugs are referred to as CAEv2, but for the purpose of this paper, they are referred to as "Combat Arms Earplugs."

[59] Castellano's Declaration, *supra* note 55, at 4.

[60] *See* First Day Hearing Presentation, *In re* Aearo Techs., LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

Why Did 3M Seek Refuge in the Bankruptcy Court?

The FCA Claim

In 2016, Moldex-Metric, Inc. (“Moldex”), a California-based competitor to 3M, filed a *qui tam* FCA lawsuit on behalf of the government, alleging that 3M’s Combat Arms Earplugs were defective and accusing 3M of knowingly selling defective earplugs to the US military.[61] The False Claims Act (“FCA”) allows the government to recover monetary damages from any person who knowingly presents fraudulent claims to receive payment from the government.[62] The *qui tam* provision of the FCA allows private persons to file suit for an FCA violation on behalf of the government, as Moldex did,[63] and receive a portion of any damages awarded.[64] Moldex suggested that the Combat Arms Earplugs were too short to work effectively and that 3M/Aearo swept this major shortcoming under the rug to receive payment from the government.[65]

These earplugs were designed to dampen loud “impulse” sounds while permitting the user to hear low-level noises when the yellow end was inserted into their ear. Alternatively, the olive end could be inserted to block out all sounds, similar to conventional earplugs.[66] As illustrated above, the ear plugs have three layers on each end called flanges.[67] Moldex maintained that when either end of the Combat Arms Earplug was inserted sufficiently deep into a user’s ear, the third flange on the opposite side of the ear plug forced the earplug out of the user’s ear, loosening the seal because the earplug is too short.[68] According to Moldex, this movement was imperceptible to both the user and any audiologist observing the user.[69]

Moldex claimed that Aearo was aware of this defect and used this knowledge to their advantage while testing the ear plugs to produce desirable results.[70] According to Moldex, in or around January of

---

[61] Gaines, *supra* note 58.

[62] The False Claims Act: A Primer, 1–2, U.S. DEP’T OF JUST. (last visited Apr. 12, 2024).

[63] Moldex-Metric Inc. Complaint Against 3M Company, 1–2, *Moldex Metric, Inc. v. 3M Co.*, No. 14-1821 (JNE/FLN), 2016 U.S. Dist. LEXIS 28197, (D. Minn. 2016) (No. 3:16-1533) [hereinafter Moldex Complaint].

[64] *Id*.

[65] Moldex Complaint, *supra* note 63, at 5–6.

[66] *Id*. at 5.

[67] *Id*. at 11.

[68] *Id*.

[69] *Id*.

[70] *Id*. at 9.

2000, Aearo tested the yellow side of the earplugs by simply inserting the earplugs into the subject's ear and leaving the flanges in their natural position.[71] Moldex claimed that Aearo was able to conclude that almost all low level noises passed through the ear plugs without obstruction because the seal was broken due to pressure from the opposite end's flanges.[72] Moldex's complaint continued to allege that on the other hand, when Aearo tested the olive end, the yellow flanges were folded back to prevent unwanted interference that might loosen the seal.[73] Finally, Moldex faulted Aearo for failing to recommend this fold back technique in the Combat Arms Earplug instructions,[74] and assigned all liability to 3M because 3M acquired Aearo and hired the same employees that developed and tested the allegedly defective earplugs.[75]

According to the U.S. Department of Veterans Affairs (VA), hearing loss is the No. 1 service-related disability among American veterans.[76] With such widespread alleged damages, Moldex presented the combined cost of all covered hearing loss treatment plus the value of all Combat Arms Earplugs purchased by the US Government to justify a request for extensive compensable damages.[77] In 2018, roughly two years after Moldex filed its complaint on behalf of the U.S. Government, 3M settled the case by agreeing to pay $9.1 million to the Department of Justice.[78] This resolved the allegations without 3M's admission of liability, but this settlement opened the floodgates for individual claimants, overwhelming 3M in the largest Multidistrict Litigation in history.[79]

The Emergence of Individual Claims and the MDL

CAE personal injury claims against 3M began rolling in soon after 3M's settlement with the Department of Justice. On January 25 of 2019, Plaintiff John Ciacco filed a motion with the Judicial Panel on Multidistrict Litigation ("JPML") requesting to transfer his claim and seven related actions to a

[71] *Id*. at 6.

[72] *Id*. at 10.

[73] *Id*. at 11.

[74] *Id*. at 13.

[75] *Id*. at 5.

[76] *Id*.; *VA research on Hearing Loss*, VA U.S. DEPARTMENT OF VETERAN AFFAIRS (last visited Apr. 12, 2024), https://www. research.va.gov/topics/hearing.cfm.

[77] Moldex Complaint, *supra* note 63, at 20–21.

[78] Gaines, *supra* note 58.

[79] *Id*.

Multidistrict Litigation Court in the District of Minnesota.[80] This was the first formal request to consolidate the CAE claims in Multidistrict Litigation ("MDL").

What is an MDL?

An MDL is a legal device that brings civil actions in different district courts under the authority of a single district court for pretrial proceedings.[81] MDLs are used to reduce the burden on federal district courts by consolidating the pretrial proceedings for any number of cases involving common questions of fact.[82] MDLs only consolidate the early stages of a lawsuit and after discovery and pretrial proceedings, each case will be transferred back to its original jurisdiction for trial unless the cases are resolved by a pretrial dismissal, summary judgment, or global settlement.[83] In an effort to encourage a global settlement, a transferee judge may select individual cases from the MDL to send to trial.[84] These are called "bellwether" trials.[85] Theoretically, the results from the bellwether trials will give the rest of the parties involved an idea of how their case might be adjudicated if they were to continue to trial themselves, which is thought to promote settlements.[86] Unfortunately, jury verdicts can be unpredictable by nature, so bellwether trials may fail their intended purpose if they yield wildly different results.

3M, along with a massive wave of new litigants, supported John Ciacco's request for consolidation.[87] Following John Ciacco's request to consolidate 8 related cases in the District of Minnesota, the JPML was notified of 635 related federal actions and received suggestions for 17 other districts to house the rapidly growing MDL.[88] On March 29, 2019, the JPML ordered all related actions to be transferred to

---

[80] Motion for Transfer of Related Actions to the District of Minnesota Pursuant to 28 U.S.C. § 1407 for Coordinated Pretrial Proceedings, 1–2, *In re* 3M Combat Arms Earplug Products Liability Litigation, (J.P.M.L.) (filed Jan. 25, 2019).

[81] *Multidistrict Litigation*, CORNELL LAW SCHOOL (last visited Apr. 12, 2024), https://www.law.cornell.edu/wex/multidistrict_litigation.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id*.

[87] Transfer Order, 1, In *re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885, (J.P.M.L. Jan. 25, 2019).

[88] *Id*.

the Northern District of Florida, and assigned the newly formed MDL to the Honorable M. Casey Rodgers ("Judge Rodgers") for "coordinated or consolidated pretrial proceedings."[89]

The Unprecedented Size of the MDL

Onslaught of Advertising and No Vetting

The Combat Arms MDL quickly became a unique and historic case, in large part because of its sheer size. The number of plaintiffs joining the MDL rapidly snowballed into the hundreds of thousands.[90] This is likely attributable in part to the all but unprecedented marketing campaign employed by the plaintiffs' attorneys.[91] Plaintiffs' lawyers reportedly spent nearly $25 million on television advertising alone from January 2019 to May 2022.[92] This resulted in over 120,000 commercials airing during national and local TV broadcasts.[93] In addition to television ads, lawyers spent untold millions on radio spots, direct emails, and targeted social media campaigns aimed at service members and veterans.[94] Websites, podcasts, infomercials, and online videos further extended the reach of their advertising efforts.[95]

The plaintiff attorneys' marketing blitz worked in tandem with Judge Rodgers's unusually lenient initial census form obligations for claimants. Typically, MDLs use fact sheets as a mechanism for obtaining individual discovery in large mass-tort MDLs at the outset of the case. These fact sheets can be used to vet claims before adding them to the MDL.[96] Initially, the Combat Arms MDL court followed this standard procedure.[97] Plaintiffs were required to answer a set of initial census questions and provide certain personnel and medical records under penalty of perjury.[98] After only a month, Judge Rodgers suspended most entry

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[89] Consent of Transferee Court, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019).

[90] Informational Brief of Aearo Technologies LLC, 29, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890).

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Id*.

[95] *Id*.

[96] Bolch Jud. Inst., *Guidelines and Best Practices for Large and Mass-Tort MDLs*, 20, (2d ed. Sep. 2018).

[97] Pretrial Order No. 18 Order Governing Initial Census Requirements for Filed Cases, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019) (page number will follow pdf's numbering).

[98] *Id*.

obligations for the MDL, allowing a majority of plaintiffs to enter without having to provide any information about their claims.[99] Judge Rodgers reasoned this was due to "the difficulty in obtaining records from the military."[100] As the court wrestled with this issue, initial census form obligations remained suspended for nearly two years until the court reinstated some initial census form obligations in July 2021.[101] However, this was a limited fix because the court removed the requirement that the initial census questions be answered under penalty of perjury.[102] Further, the requirement to produce basic medical records was never reinstated, and the vast majority–more than ninety-nine percent–of plaintiffs in the MDL remain under no obligation to produce any medical records.[103]

Actual Vetting: The Discovery Process

The environment created by the lax census form requirements and marketing blitz invited claimants to pour in on an unprecedented scale, and the merits of a significant portion of these claims was soon brought into question. At its peak the MDL consisted of 290,000 pending cases, making it the largest in history.[104] As of June 15, 2022, the Combat Arms Earplug MDL more than doubled all the claims involved in all 191 other pending MDLs combined.[105] The MDL court ordered three "waves" of 500 plaintiffs to begin the discovery process, providing data for a sample of the plaintiffs that may represent the broader class of claimants.[106] More than a quarter of the plaintiffs (126 of 500) in "Wave 1" were either unable or unwilling to provide discovery, and their claims were voluntarily dismissed or transferred to another wave.[107]

Further analysis of the data revealed that fewer and fewer of the remaining claimants should have ever been let in the MDL. As administered by the Hearing Conservation Program, the military conducts frequent audiograms which monitor and assess soldiers' hearing.[108] The program records the results of a

[99] Case Management Order No. 6, 1, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019).

[100] Informational Brief of Aearo Technologies LLC, *supra* note 90, at 36.

[101] *Id*.

[102] *Id*.

[103] *Id*. at 33.

[104] Brendan Pierson, *How 3M Earplug Litigation got to be Biggest MDL in History*, REUTERS (Apr. 2, 2022 11:31 PM), https://www.reuters.com/article/idUSKBN2BP1BP/; MDL Statistics Report, J.P.M.L. at 1 (June 15, 2022).

[105] *Id*.

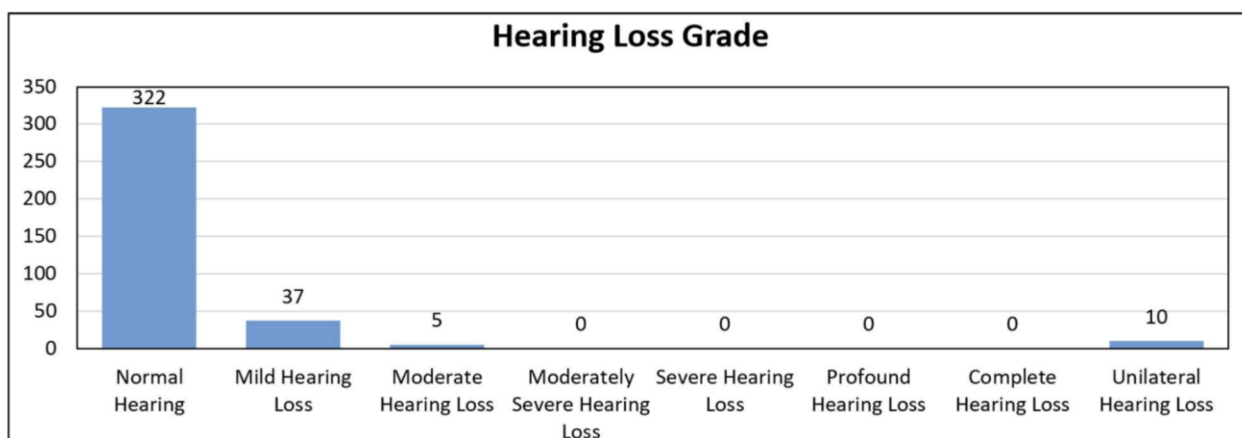
[106] Informational Brief of Aearo Technologies LLC, *supra* note 90, at 35.

[107] *Id*.

[108] *Id*. at 37.

service member's first military audiogram and the hearing protection that he will use.[109] The program then conducts and documents follow up audiograms retesting the soldier's hearing and updating the record of ear protection used throughout his career. The examiner even provides a list of all the hearing protection options the military offers to ensure accurate answers.[110] When the discovery process commenced, nearly three quarters of Wave 1 plaintiffs had no record of ever using any version of the Combat Arms Earplug, including more than 65 percent of plaintiffs who affirmatively reported using different hearing protection.[111] Additionally, some of the plaintiffs' claims were impossible as the base they were stationed at either never issued or had very little exposure to Combat Arms Earplugs.[112] Incredibly, it was revealed during Wave 1 discovery that a majority of plaintiffs claiming hearing loss as their primary injury, had normal hearing by accepted clinical standards.[113]

The chart below illustrates that 85% of Wave 1 plaintiffs had normal hearing[114]:



The aforementioned statistics are of course only preliminary criteria, and the remaining plaintiffs would still have to prove at trial that Combat Arms Earplugs caused their injuries. Regardless of the merits of the remaining claims, the results of Wave 1 discovery certainly seem to indicate that the meager filing requirements along with the plaintiff attorneys' marketing blitz cultivated just the right conditions to create the most bloated MDL to date.

[109] DD Form 2215, Reference Audiogram, January 2000, Executive Services Directorate (2000).

[110] DD Form 2216, Hearing Conservation Data, January 2000, Executive Services Directorate (2000).

[111] Informational Brief of Aearo Technologies LLC, *supra* note 90, at 38.

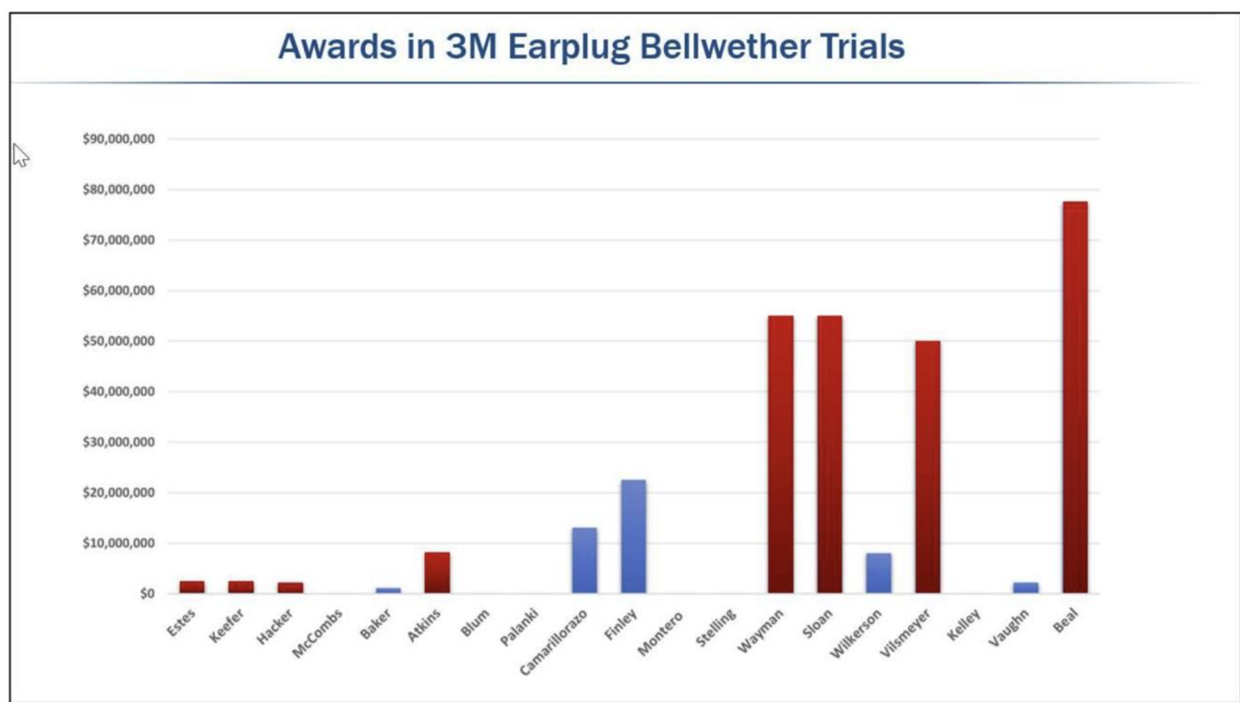
[112] *Id.*

[113] *Id.* at 39.

[114] These results are based on the World Health Organization's standardized grading system and hearing loss test, the Pure Tone Audiometry Test. Informational Brief of Aearo Technologies LLC, *supra* note 90, at 40.

The Bellwether Trials

On January 25, 2021, the MDL court set a date for the first Bellwether trial, March 29, 2021.[115] The first trial consolidated 3 cases, and would be the first of 16 bellwether trials meant to provide a basis for settlement negotiations.[116] All 16 of the bellwether trials were fast tracked and conducted within one year.[117] Unfortunately, these trials produced wildly varying results and failed in furthering settlement prospects. Six of the sixteen bellwether trials resulted in complete defense verdicts and the other 10 trials resulted in judgments that ranged from $1,054,000 to $77,500,000 in damages.[118] The verdicts from all 16 bellwether trials are illustrated in graph form below[119]:



These results failed to accomplish their primary purpose in the MDL by leaving the remaining parties with little middle ground for compromise. Further, 3M was unwilling to accept several of the MDL court's pretrial decisions as it attempted to appeal many of them.

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[115] *See* Order Setting Trial and Pretrial Schedule, 1, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019).

[116] *Id.*

[117] Informational Brief of Aearo Technologies LLC, *supra* note 90, at 9.

[118] *Id*; Baker v. 3M Co., No. 7:20cv39-MCR-GRJ, 2021 U.S. Dist. LEXIS 143983 (N.D. Fla. July 19, 2021); Beal v. 3M Co., No. 7:20CV00006, (N.D. Fla. May 20, 2022).

[119] Informational Brief of Aearo Technologies LLC, *supra* note 90, at 19.

MDL Court Crippling 3M's Ability to Defend

A critical argument put forward by the plaintiffs' attorneys echoed one of Moldex's allegations in the 2016 FCA claim. The allegation was that Aearo manipulated the test results of the Combat Arms Earplugs by using improper testing procedures, then using those results to market the earplugs to the US military.[120] Plaintiffs claimed that 3M could never receive such favorable results again without rigging the test.[121] 3M's silver bullet defense to this accusation rested on the results found in a test conducted on behalf of their competitor Moldex.[122] In 2012, Moldex hired the nationally accredited Michael & Associates Lab to test the Combat Arms Earplug for evidence in a patent dispute.[123] Even though Moldex had initiated these tests, the lab found that the Combat Arms Earplugs worked better than advertised.[124] Although the MDL court initially viewed this fact as "very probative" evidence, Judge Rodgers eventually deemed it "inadmissible hearsay" based on the fact that neither of the laboratory employees involved in the testing were deposed during the MDL litigation.[125] The court first limited and later eliminated the lab report entirely from the bellwether trials.[126]

Furthermore, the MDL court ordered that the key depositions of Hamery and Dancer's be postponed until after the conclusion of the bellwether trials and denied 3M's objection.[127] Hamery and Dancer were two key ISL scientists, based out of France, that helped develop the Combat Arms Earplugs.[128] 3M sought to depose these two scientists long before the first bellwether trial, but were not granted authorization until October 2021–several months after the first bellwether trial commenced–due to administrative delays with the French Ministry of Justice.[129] Despite finding that Aearo's efforts to depose Hamery and Dancer were diligent, the MDL court reasoned that they would unfairly prejudice Plaintiffs by potentially requiring extensive modifications to their trial work product.[130] The court ordered that the

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[120] *Id*. at 25.

[121] *Id*. at 51.

[122] *Id*.

[123] *Id*. at 22.

[124] *Id*.

[125] Order, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019).

[126] Informational Brief of Aearo Technologies LLC, *supra* note 90, at 51.

[127] *Id*. at 52.

[128] *Id*.

[129] *Id*. *See* Order Setting Trial and Pretrial Schedule, supra note 115.

[130] Informational Brief of Aearo Technologies LLC, *supra* note 90, at 52.

depositions would have to happen after the bellwether trials.[131] Without their depositions, plaintiffs' attorneys were free to diminish ISL's role in designing the two-ended earplugs stem.[132] Further, the plaintiffs' attorneys framed ISL as being critical of the Combat Arms Earplug design.[133] Without their depositions, 3M was stuck without any admissible evidence to refute these claims.[134]

3M's strongest contested objection was to the MDL court's order granting plaintiffs' counter-motion barring Aearo's government contractor defense.[135] The government contractor defense bars certain lawsuits against manufacturers if the government made an informed, discretionary decision about a design or the warnings associated with it.[136] The defense requires a three-part test:

1. the government approved "reasonably precise specifications" for the equipment,
2. the equipment "conformed to those specifications," and
3. the supplier warned the government about known dangers or risks with the equipment.[137]

3M presented this affirmative defense in a motion to dismiss all plaintiffs' claims, and the plaintiffs filed a countermotion to preclude Aearo from arguing this defense at trial. Judge Rodgers granted the plaintiffs' countermotion on July 24, 2020, explaining:

> Because no aspect of the design for the [Combat Arms Earplug] was ever the subject of a procurement contract with the Army, the design defect claims in this litigation do not implicate a uniquely federal interest. However, even if the Army's interest in the [Combat Arms Earplug]'s design was "uniquely federal," there is no evidence that the Army "actually participated in discretionary design decisions, either by designing [the Combat Arms Earplugs] itself or approving specifications prepared by" Aearo.[138]

3M appealed this ruling, but because "interlocutory rulings generally are not subject to immediate appeal, the trial judge presiding over [the] MDL lack[ed] any meaningful appellate supervision."[139] In the spring of 2022, 3M could see the clock ticking. They were either going to have to litigate thousands of

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131 *Id*.

132 *Id*.

133 *Id*.

134 *Id*.

135 *Id*. at 53.

136 *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506–07 (1988).

137 *Id*. at 501.

138 Order, 26, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019).

139 Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1646 (2011).

individual cases simultaneously across the country or settle for an unthinkable number because their appeals would not be heard in time.

Looking for the Pause Button: The Bankruptcy Court

3M found themselves frustrated with the MDL court, hopelessly awaiting decisions on appeal, and facing hundreds of thousands of federal claims on the verge of being remanded to their respective districts across the United States. In May 2022, Plaintiffs' counsel Bryan Aylstock estimated that the total Combat Arms Earplug MDL liability could be as much as $1 trillion, not to mention the other 2,000 Combat Arms Earplug cases pending in Minnesota state court and an estimated $41 million exposure to respirator-related liabilities still lingering from American Optical's Safety and Products Division (a precursor to Aearo Technologies).[140] 3M was backed into a corner and eager for a solution, which it devised in the summer of 2022.

On July 25, 2022, 3M and a select group of its subsidiaries: 3M Occupational Safety LLC, Aearo Holding LLC; Aearo Intermediate LLC; Aearo LLC; Aearo Technologies LLC; Cabot Safety Intermediate LLC; Aearo Mexico Holding Corporation (collectively the "Aearo Entities") executed a funding agreement (the "Funding Agreement") that laid the foundation for a plan to resolve this mess once and for all.[141] The Funding Agreement served to transfer all liabilities related to the Combat Arms Earplug and Respirator claims from 3M and its affiliates to the Aearo Entities.[142] The Funding Agreement enabled 3M to isolate its most threatening liabilities to one branch of its corporate family and push that branch into bankruptcy, where a settlement trust could be created to finance and administer the recovery process for current and future claims relating to Combat Arms Earplug and Respirator injuries (the "Settlement Trust)."[143] 3M would rely upon the bankruptcy court's general equitable powers under 11 U.S.C. section 105(a), empowering "[t]he court [to] issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" in order to secure a channeling injunction that would force all claims to be asserted against a bankruptcy sanctioned settlement trust that would oversee the recovery process in place of the MDL court.[144]

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[140] Matt Hosen & Bryan Aylstock, *How A Document Found By A QE Second Year Associate Led To The Largest Mass Tort Litigation In History*, DISRUPTED, (May 11 2022), https://law-disrupted.fm/how-a-document-found-by- a-quinn-emanuel-second-year-associate-led-to-the-largest-mass-tort-litigation-in-history/.; Debtors' Adversary Complaint, *supra* note 48, at 6; Castellano's Declaration, *supra* note 55, at 19–20.

[141] *Id*. at 67.

[142] *Id*. at 21.

[143] Adam Paul et al., Resolving Mass Tort Liability Through Bankruptcy, 37TH ANNUAL SOUTHEASTERN BANKRUPTCY LAW INSTITUTE, at 8, (Apr. 14–16, 2011).

[144] 11 U.S.C. § 105(a).

Bankruptcy Courts Have Previously Dealt with Mass Tort Litigation

Although this certainly was a bold plan, using the bankruptcy court to resolve a mass tort liability was hardly a novel idea. This strategy was born in the 1980s when "[Johns-Manville Corporation] filed for bankruptcy not because of a 'present inability to meet debts but rather the anticipation of massive personal injury liability' [arising out of asbestos related claims]."[145]

This historic case was the first time a corporation used the bankruptcy court as a forum to address mass torts liability.[146] The maneuver requires the creation of a settlement trust, together with the issuance of an injunction that bars the filing of related personal injury claims against any other entities.[147] This effectively channels all related claims to the trust, the assets of which comprise the only source of recovery for the claimants.[148] Ultimately, the maneuver enables the company to operate post-reorganization free from the specter of future liability.[149]

The Bankruptcy Code and Rules offer defendants unique advantages in mass tort resolution that are unavailable elsewhere.[150] Section 362 of the code stays prepetition litigation, granting debtors time to strategize and reorganize.[151] Debtors may use the bankruptcy court as a forum to estimate mass tort liabilities, converting uncertain litigation outcomes into fixed liabilities.[152] Debtors may also address future claims, even if unknown at the time of bankruptcy.[153] This strategy caught on quickly with over 70 corporations utilizing bankruptcy to manage asbestos liabilities since 1982.[154] Congress even codified this concept in section 524(g) of the Bankruptcy Code, empowering bankruptcy courts to issue channeling injunctions to protect debtors and their reorganization plans in cases involving asbestos-related liabilities.[155]

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[145] Paul, *supra* note 143.

[146] *Id*.

[147] *Id*.

[148] *Id*.

[149] *Id*.

[150] *Id*. at 9.

[151] *Id*.

[152] *Id*.

[153] *Id*. at 10.

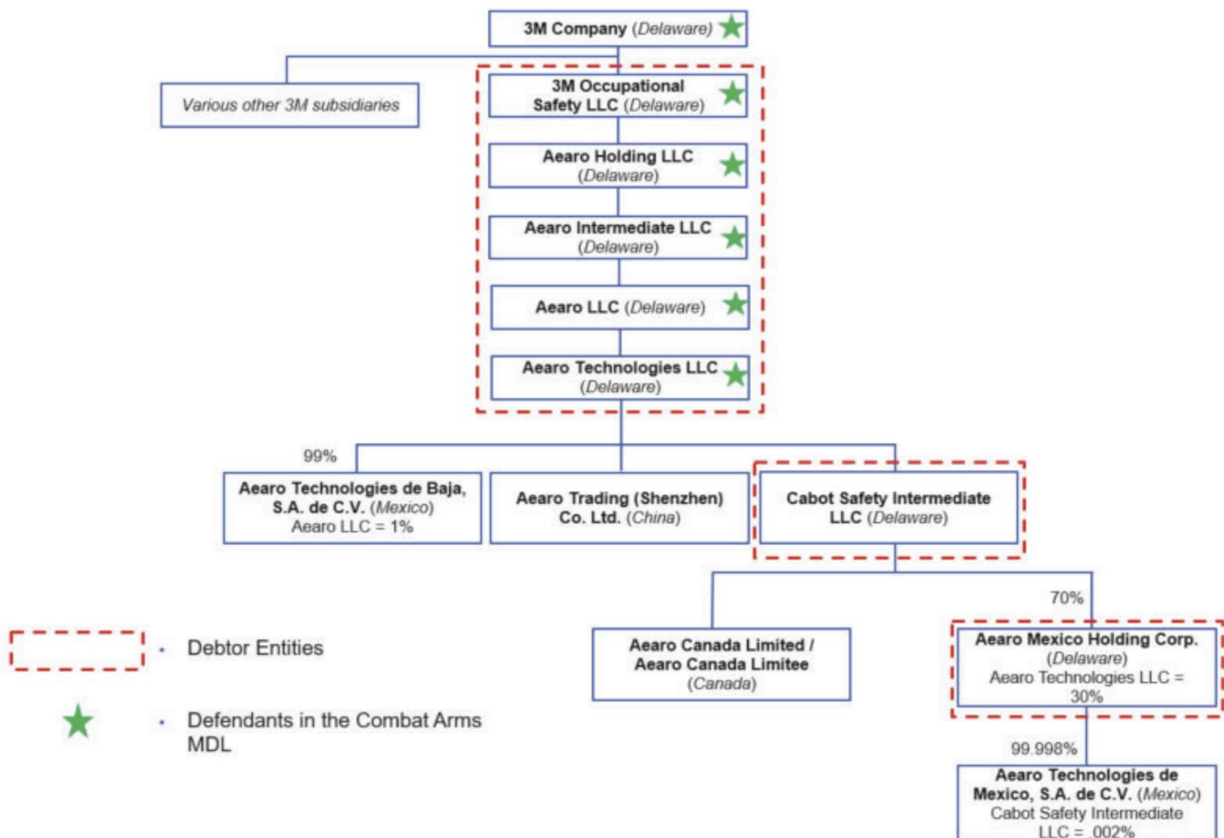
[154] *Id*.

[155] *Id*. at 9.

Although the bankruptcy court has a special relationship with asbestos liabilities, it has served as a forum for several other mass tort liabilities since Manville's bankruptcy, including A.H. Robins Company's Dalkon Shield disaster and Dow Corning's silicone gel-filled breast implants fallout.[156]

3M's Plan for Bankruptcy

3M planned to follow this tried and true method with a unique twist. Instead of 3M filing for bankruptcy itself, it would shift its liability to the Aearo Entities, and they would declare bankruptcy. In June 2022, 3M appointed 2 disinterested directors, Roger Meltzer and Jeffrey Stein to the board of all Aearo Entities.[157] Meltzer and Stein, represented by the McDonald Hopkins LLC law firm, led the Aearo Entities in funding agreement negotiations with 3M, represented by White & Case LLP.[158] Up to this time, 3M and Aearo had been regarded as somewhat interchangeable names in the Combat Arms Earplug cases, but 3M was determined to correct that confusion. Below is a chart illustrating 3M's organizational structure[159]:



[156] *Id*. at 19–24.

[157] Castellano's Declaration, *supra* note 55, at 11.

[158] *Id*. at 20–21.

[159] *Id*. at 12.

3M's Plan in Bankruptcy Hinged on the Funding Agreement

3M intended that the Aearo Entities: 3M Occupational Safety LLC; Aearo Holding LLC; Aearo Intermediate LLC; Aearo LLC; Aearo Technologies LLC; Cabot Safety Intermediate LLC; Aearo Mexico Holding Corporation (the "Debtors") would file for protection under Chapter 11 of the bankruptcy code. By the end of July, terms for The Funding Agreement for the Debtors had been reached, and 3M agreed to:

1. provide an upfront cash payment of $5 million for the Debtors' operations and chapter 11 cases, and to fulfill excess funding requests for "Permitted Funding Uses";
2. continue to provide Shared Services[160] to the Debtors with no expectation of payment during the chapter 11 cases; and
3. commit $1.24 billion to fund a settlement trust for Combat Arms Earplug and Respirator claimants, including $1 billion for one or more Trusts and $240 million for administering the chapter 11 cases, and committing to fund any Permitted Funding Use, even if it exceeded the foregoing commitments.[161]

In return, the Aearo Entities agreed to "indemnify 3M and its Payor Affiliates for all Earplug Liabilities and Respirator Liabilities."[162] This deal enabled the Aearo Entities to legally assume complete responsibility for the Combat Arms Earplugs and Respirator Liabilities before filing for bankruptcy, while still requiring 3M to finance everything, down to the last administrative expense. The effect of The Funding Agreement is illustrated below: [163]

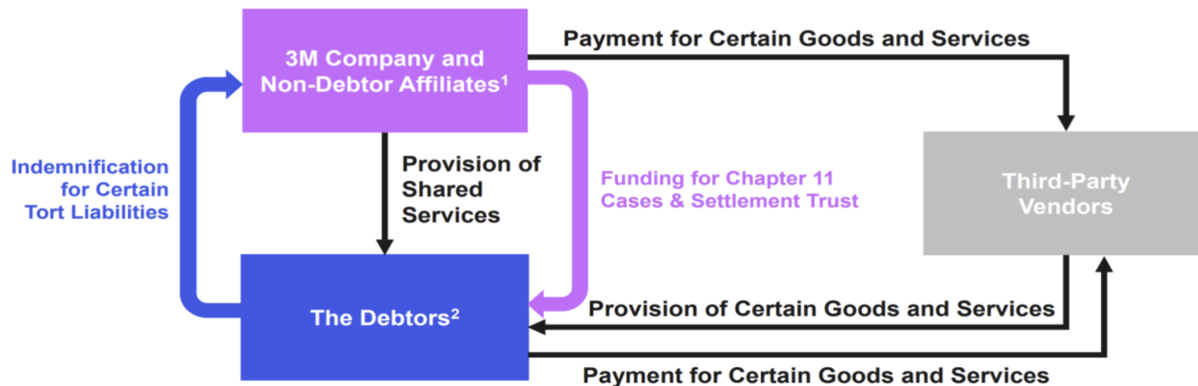
[160] "Shared Services" included services contemplated under the Support Services Agreement (non-Debtor 3M and other Non-Debtor Affiliates provided a wide range of services to the Debtors across functional areas including purchasing and sourcing, finance and treasury, inventory management, engineering, and many other functions, historically costing on average approximately $12 million per year or $1 million monthly, paid by non-Debtor 3M), the Intellectual Property Agreement (non-Debtor 3M and other Non-Debtor Affiliates permitted the Debtors to use various intellectual property and non-Debtor 3M did not allocate or charge to the Debtors the costs they incurred, such as an approximately seven percent of Net Selling Value although though non-Debtor 3M was entitled to do so), and any other services customarily provided in the ordinary course of business between the parties thereto as of the date the Funding Agreement was executed. *See* Castellano's Declaration, *supra* note 55.

[161] *Id*. at 21–22.

[162] *Id*.

[163] First Day Hearing Presentation, *supra* note 60, at 29.

Intercompany Relationships Under the Funding Agreement



3M claimed that it was more than capable of funding this agreement, touting its $6.8 billion dollar pre-tax income in 2020 followed by $7.2 billion dollars in 2021.[164] Additionally, 3M purported that the Combat Arms Earplug claims were covered by the "Aearo Legacy Program" insurance policy with approximately $500 million in coverage, and the "3M Program" policy with an aggregate limit of more than $1.05 billion.[165] The real crux of this plan would be whether the Aearo Entities could convince the bankruptcy court to extend the section 362 automatic stay to Combat Arms Earplug proceedings against 3M and other non-Debtor defendants. The Aearo Entities made this very request when they filed for bankruptcy on July 26, 2022 ("Petition Date") in the Southern District of Indiana, the day after they executed The Funding Agreement.[166]

Keeping Normal Operation Running: First Day Motions

On July 26, 2022, the seven Aearo Entities from the Funding Agreement ("Debtors") petitioned for relief under chapter 11 of the Bankruptcy Code, submitting eleven first day motions to steer the bankruptcy to their desired ends and facilitate an efficient restructuring process. These motions varied in importance, but on the whole, the court's approval of the Debtors' first day motions was crucial for the Debtors' success with their legal maneuvers ahead.

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[164] *Id*. at 6.

[165] *Id*. at 16–17.

[166] *See* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Aearo Techs., LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022). There were seven total voluntary petitions filed, but per the Joint Administration Motion, Aearo Technologies became the named debtor.

In Chapter 11 bankruptcy, the first day motions are the debtor's requests that require expedited consideration by the court, and they are generally filed alongside the petition for relief or shortly thereafter.[167] These motions, governed by §§ 6001 and 4001 of the Federal Rules of Bankruptcy Procedure of the Bankruptcy Code, seek court approval for actions critical to the debtor's survival. Section 6001 requires 21 days' notice before the court may grant certain relief, and Section 4000 requires a minimum of 14 days to pass after service prior to a final hearing on such motions. Despite these mandated waiting periods, the court may grant relief before these time windows close "to the extent that relief is necessary to avoid immediate and irreparable harm."[168]

Due to their urgent nature and the fact that relief is often at least arguably "necessary to avoid immediate and irreparable harm," first day motions are often heard on the day of filing or soon after, and the courts regularly approve them, sometimes after modifying the relief that the Debtors seek.[169] The court's initial approval is frequently given on an interim basis for the court to reconsider again at a later hearing.[170] This enables the court to preserve the debtor's interests until potentially adverse parties can prepare counterarguments, which the judge will weigh when determining a final order granting or denying the motions.[171] The goal of first day motions is to minimize disruption to the debtor's business and provide a foundation for a successful reorganization.

Administrative Motions

Joint Administration Motion

Given the integrated nature of the Debtors' restructuring efforts, the Debtors requested joint administration, which is an order "directing procedural, not substantive, consolidation and joint administration of [the] chapter 11 cases."[172] Joint administration consolidates related cases under one court caption, eliminating the need to file seven duplicative documents for each Debtor entity. Court approval of this request would prevent "unnecessary and expensive duplication caused by preparing (and serving) the same motion with different captions multiple times for each debtor."[173] Joint administration does not

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[167] *See* Trey Monsour, *First Day Filings*, LexisNexis (Updated June 17, 2023), https://plusai.lexis.com/api/permalink /e246f8e3-e670-417b-a426-e90ab2fb534d/?context=1545874.

[168] MICHAEL BERNSTEIN & GEORGE KUNEY, BANKRUPTCY IN PRACTICE 255 (6th ed. 2022); 18 U.S.C.S. § 6003.

[169] *Id*.

[170] *Id.*

[171] *Id*.

[172] Castellano's Declaration, *supra* note 55, at 30.

[173] Sanford R. Landress, *First-Day Motions: Perils And Possible Pitfalls an Overview of First-Day Motions*, 4 (2010).

substantively consolidate the bankruptcy as the assets and liabilities of each debtor remain separate, so joint administration would not adversely affect any of the Debtors' respective constituencies.[174]

As a legal basis for their request, the Debtors pointed to Bankruptcy Rule 1015(b), which gives the court the power to order a joint administration of estates when the estates are affiliates and are pending in the same court, and the Debtors highlighted Local Rule B-1015-1, which allows the jointly administered cases to be docketed under the case number of the lead case.[175] Additionally, the Debtors listed a string of cases that used joint administration to demonstrate that it is a routine practice where there are multiple related cases.[176]

Honorable Judge Jeffrey Graham ("Judge Graham") approved this request and entered an order granting joint administration the same day that it was requested.[177]

Case Management Motion

The Debtors requested entry of an order establishing certain notice, case management, and administrative procedures. This motion requested that the court (i) limit the requirement for serving notice to a shortened mailing list of creditors and creditors that specifically requested such notice; (ii) allow electronic service of all documents (except complaints and summonses); and (iii) hold regularly scheduled omnibus hearings.[178] The number of affected creditors and other interested parties in this case reached into the hundreds of thousands and an unlimited mailing list would have imposed heavy administrative costs on the debtor, the bankruptcy court, and the clerk's office.[179] The Debtors sought to avoid this burden by limiting the mailing list to a manageable group and posting all pleadings to a publicly available case website maintained by Kroll Restructuring Administration LLC.[180] Additionally, the Debtors' request for advance scheduling of periodic omnibus hearings that would enable all parties in interest to better plan for and

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[174] Castellano's Declaration, *supra* note 55, at 31.

[175] Debtors' First Day Motion for Entry of an Order (I) Directing Joint Administration of Chapter 11 Cases and (II) Granting Related Relief, 6, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[176] *Id*. at 6–7.

[177] Notice of Jointly Administered Cases, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[178] Castellano's Declaration, *supra* note 55, at 31.

[179] *Id*.

[180] *Id*. at 32.

schedule attendance at hearings.[181] This system would reduce the need for emergency hearings and requests for expedited relief, and would foster consensual resolution of important matters.[182]

The Debtors bolstered their arguments by citing Bankruptcy Rules 2002(a) and (m) regarding notice procedures, as well as Bankruptcy Rule 9007, which grants flexibility in notice methods.[183] They also invoked 11 U.S.C. § 105(a), which gives bankruptcy courts wide latitude to ensure adherence to the Bankruptcy Code.[184] Additionally, they pointed to Local Rule B-5005-4, which facilitates electronic service, and the Court's CM/ECF policy for electronic filing and service consent.[185]

On July 29, 2022, the Court found that the Debtors' proposed procedures were consistent with the Bankruptcy Code and that the proposal would benefit the administration of the cases, so Judge Graham approved the Debtors' motion for an order establishing certain notice, case management, and administrative procedures.[186]

Kroll Retention Application

In the same vein as the motion for case management, the Debtors sought an order "authorizing… the Debtors to employ and retain Kroll Restructuring Administration LLC" ("Kroll") to serve as the "claims, noticing, and solicitation agent" in the Debtors' chapter 11 proceedings.[187] Kroll would handle creditor notices, claim processing, and other administrative tasks in the Debtors' Chapter 11 bankruptcy cases.[188] "The Debtors submit[ted] that the appointment of a claims, noticing, and solicitation agent [would] (a) provide the most effective and efficient means of noticing, administering claims, and soliciting and tabulating votes, (b) relieve the Debtors and/or the Office of the Clerk of the Bankruptcy Court for the Southern District of Indiana (the "Clerk") of this administrative burden, and (c) is in the best interests of

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[181] Castellano's Declaration, *supra* note 55, at 31. An omnibus hearing is a pretrial hearing in a bankruptcy case where the court addresses multiple matters related to the case at once. *Glossary of Bankruptcy Terms*, BANKRUPTCY DATA (last visited Apr. 12, 2024), https://www.bankruptcydata.com/glossary-of-bankruptcy-terms.

[182] *Id.*

[183] Debtors' First Day Motion for Entry of an Order (I) Establishing Certain Notice, Case Management, and Administrative Procedures and (II) Granting Related Relief, 7, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[184] *Id.* at 8.

[185] *Id.* at 9.

[186] Order (I) Establishing Certain Notice, Case Management, and Administrative Procedures and (II) Granting Related Relief, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[187] Castellano's Declaration, *supra* note 55, at 62.

[188] Motion to Retain Noticing, Balloting, or Claims Agents (Kroll), 4, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

both the Debtors' estates and their creditors."[189] Outsourcing these administrative tasks to a third party seemed necessary for administering a bankruptcy proceeding with hundreds of thousands of interested claimants.

As their basis for relief, the Debtors cited Section 156(c) of Title 28 of the United States Code which authorizes the court to use "facilities" or "services" other than the Clerk's office for the administration of bankruptcy cases.[190] Further, the Debtors' motion requested a waiver of Bankruptcy Rule 6004(a) notice requirements and the 14-day stay period outlined in Rule 6004(h) to expedite the use, sale, or lease of property because it was necessary for implementing the requested relief.[191] Lastly, the Debtors stated they had previously discussed this arrangement with the United States Trustee ("Trustee") and the Clerk of the Court with no objection to the proposed terms and conditions.[192] The bankruptcy court approved the Debtors' motion and entered an order authorizing Aearo to employ Kroll Restructuring Administration as its Claims and Noticing Agent on July 28, 2022.[193]

Schedules Extension Motion

Rule 1007(c) of the Federal Rules of Bankruptcy Procedure requires debtors to file schedules of assets and liabilities, schedules of current income and expenditures, schedules of executory contracts and unexpired leases, and schedules of financial affairs (collectively, the "Schedules and Statements") within 14 days of filing their petition for relief.[194] The Aearo entities had over 230,000 pending lawsuits at the time they petitioned for relief, and collection of the necessary information required a significant expenditure of time and effort. Accordingly, the Debtors requested an order extending the deadline for providing the Schedules and Statements by twenty days for a total of thirty-four days from the Petition Date.[195]

The Debtors cited Bankruptcy Rules 1007(c) and 9006(b), which authorize the Court to extend the filing "for cause," and referred to Local Rule B1007-1(c)(2) which provides that the Trustee is deemed to

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[189] Castellano's Declaration, *supra* note 55, at 62.

[190] 28 U.S.C. § 156.

[191] Castellano's Declaration, *supra* note 55, at 12.

[192] *Id*. at 12.

[193] Order Granting Debtors' Application of Entry of An Order Authorizing Employment of Kroll Restructuring Administration LLC As Claims, Noticing, and Solicitation Agent, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[194] 18 U.S.C.S. § 1007(c).

[195] Castellano's Declaration, *supra* note 55, at 62.

have no objection to this extension if that request is not more than thirty days.[196] On July 29, 2022, the court granted the requested relief and entered an order extending the current deadline by twenty days.[197]

Creditor Matrix Motion

The Debtors claimed that they would pay every creditor in full, and they had a practically unlimited funding agreement in place to back this claim. Accordingly, the Debtors' more classic creditors were not adverse parties in this case. The 230,000 tort claimants constituted the class of creditors that most needed representation by a creditors' committee, and virtually all of them held unliquidated claims. This made it impossible for the Debtors to determine which litigants held the largest unsecured claims for purposes of filing the Top Counsel List pursuant to section 1007(d).[198] Additionally, the Debtors wanted to avoid submitting a creditor matrix (or any other documents) listing every tort claimant's home address because of the liability that would come along with publicly posting that kind of information for over 230,000 individuals.[199]

To solve these problem, the Debtors requested to file one list consisting of the Top Counsel List and to implement a notice procedure by which the Debtors' Claims and Noticing Agent will send required notices, mailings, and other communications to the counsel of record for the Tort Claimants in the Creditor Matrix Motion.[200] In response to the Debtors request, the Trustee filed a limited objection on the same day, July 26, 2022.[201] The Trustee requested that the Debtor be made to submit three lists consisting of (1) the top 20 CAE plaintiff firms, (2) the top 20 Respirator claims plaintiff firms, and (3) the top 20 largest trade creditors; for the Trustee's reference in assembling creditors' committees.[202] Upon weighing these requests,

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[196] Financial Affairs, and (II) Granting Related Relief, 5–6, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[197] Order (I) Extending Time to File (A) Schedules of Assets and Liabilities, (B) Schedules of Current Income and Expenditures, (C) Schedules of Executory Contracts and Unexpired Leases, (D) Statements of Financial Affairs, and (II) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[198] Castellano's Declaration, *supra* note 55, at 64.

[199] *Id*.

[200] *Id*. at 64–65.

[201] United States Trustee's Limited Objection To Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to File One List of the Top Law Firms Representing the Largest Numbers of Tort Plaintiffs Asserting Claims Against the Debtors, (II) Authorizing The Debtors to File One Consolidated Creditor Matrix, (III) Authorizing the Listing of Addresses of Counsel For Tort Claimants in the Creditor Matrix in Lieu of Claimants' Addresses, (IV) Authorizing the Debtors to Redact Personally Identifiable Information, (V) Approving Certain Notice Procedures for Tort Claimants, (VI) Approving the Form and Manner of Notice of the Commencement of these Chapter 11 Cases, and (VII) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

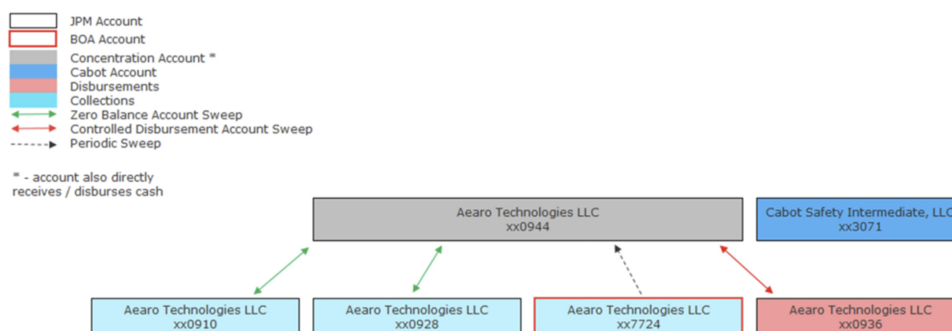
[202] *Id*.

the Court determined that this decision was within the jurisdiction of the court and that a modified creditor matrix was reasonable under the circumstances.[203] On July 28, 2022, the Court entered an order authorizing the Debtors' requests, as modified by the Trustee's objection, and ordering the Debtors to file the approved forms of notice within five days of the order being entered.[204]

Operational Motions

Cash Management Motion

Operating guidelines for most Chapter 11 cases require the debtor to close pre-petition bank accounts, establish new Debtor in Possession (DIP) accounts, and maintain separate DIP bank accounts for cash collateral and tax obligations.[205] When the Debtors declared bankruptcy, they had been maintaining a centralized cash management system of 6 bank accounts owned by the Debtors.[206] This cash management system is illustrated below:[207]



[203] Order (I) Authorizing the Debtors to File One List of the Top Law Firms Representing the Largest Numbers of Tort Plaintiffs Asserting Claims Against the Debtors, (II) Authorizing The Debtors to File One Consolidated Creditor Matrix, (III) Authorizing the Listing of Addresses of Counsel For Tort Claimants in the Creditor Matrix in Lieu of Claimants' Addresses, (IV) Authorizing the Debtors to Redact Personally Identifiable Information, (V) Approving Certain Notice Procedures for Tort Claimants, (VI) Approving the Form and Manner of Notice of the Commencement of these Chapter 11 Cases, and (VII) Granting Related Relief, 1–4, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[204] *Id*. at 3.

[205] Landress, *supra* note 173, at 6.

[206] Castellano's Declaration, *supra* note 55, at 64.

[207] Debtors' First Day Motion For Entry of Interim And Final Orders (I) Authorizing The Debtors to (A) Continue to Operate Their Cash Management System, (B) Maintain Existing Business Forms and Books and Records, And (C) Perform Postpetition Intercompany Transactions, (II) Granting Administrative Expense Status To Postpetition Intercompany Claims Among The Debtors, and (III) Granting Relief, 45, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Debtors' Cash Management Motion].

This system was used to manage all deposits and disbursements among the Debtors as well as facilitate transactions with Non-Debtor Affiliates.[208] The Debtors claimed that the preservation of this system was necessary to smoothly continue operations and for facilitating the terms of the Funding Agreement that would ensure full satisfaction of the creditors' claims.[209]

The Debtors cited Section 363(c), 503(b) and 105(a) of the Bankruptcy Code in support of their request.[210] Section 363(c) empowers the bankruptcy court to authorize the Debtor to continue using, acquiring, or disposing of cash collateral.[211] Section 503(b) grants administrative expense status to post petition intercompany claims among the Debtors, and importantly, section 105(a) of the Bankruptcy Code gives the court the authority to grant such relief pursuant to its equitable powers.[212]

The Trustee sought to modify this request and filed a limited objection on July 26, 2022.[213] The Trustee opposed the Debtors' Cash Management motion unless the court prescribed some parameters requiring the debtor to (1) transfer their funds to a new account with "an authorized depository" and (2) prove their ability to properly trace all deposits and disbursements to and from the shared accounts.[214]

On July 28, 2022, the Court entered an Interim Order approving the Debtors' motion, allowing them to continue operating their cash management system, maintain existing business forms and books and records, and perform postpetition intercompany transactions, as long as they continued to track all deposits and disbursements.[215] Additionally, the court granted administrative expense status to post petition

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[208] *Id*. 32–36.

[209] *See id*.

[210] Debtors' First Day Motion For Entry of Interim And Final Orders (I) Authorizing The Debtors to (A) Continue to Operate Their Cash Management System, (B) Maintain Existing Business Forms and Books and Records, And (C) Perform Postpetition Intercompany Transactions, (II) Granting Administrative Expense Status To PostPetition Intercompany Claims Among The Debtors, and (III) Granting Relief, 20, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[211] 11 U.S.C. § 363.

[212] Debtors' Cash Management Motion, *supra* note 207, at 26, 28–30.

[213] United States Trustee's Objection to Debtors' First Day Motion for Entry of (I) Authorizing The Debtors to (A) Continue to Operate Their Cash Management System, (B) Maintain Existing Business Forms and Books and Records, And (C) Perform Postpetition Intercompany Transactions, (II) Granting Administrative Expense Status To Postpetition Intercompany Claims Among The Debtors, and (III) Granting Relief, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[214] *Id*. at 8.

[215] Interim Order (I) Authorizing The Debtors to (A) Continue to Operate Their Cash Management System, (B) Maintain Existing Business Forms and Books and Records, And (C) Perform Postpetition Intercompany

intercompany claims among the Debtors.[216] Then on September 14, 2022, the Court issued a final order, permanently granting the Debtor's request to retain their cash management system.[217]

Trade Claimants Motion

In the Debtors' Trade Claimants Motion, they requested an interim and final order authorizing them to pay prepetition claims of 503(b)(9) Claimants,[218] Lien Claimants, Foreign Claimants, and Critical Vendors (collectively, the "Specified Trade Claimants") with administrative expense priority for all undisputed obligations.[219]

At the time of filing for bankruptcy, the Debtors primary business was developing and manufacturing custom noise, vibration, thermal, and shock protection in four main industries: commercial vehicle, aerospace, electronics, and general industrial.[220] For many of these products, the Debtors used "just-in-time" and "line-sequencing" supply chain models.[221] The just-in-time model begins with a customer's purchase order, which prompts the manufacturer to order the necessary raw materials and initiate the production process.[222] This system minimizes inventory costs, but requires highly choreographed design, purchasing, shipping, and manufacturing operations.[223] Similarly, products manufactured using the line-sequencing model are assembled from materials that are purchased and

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Transactions, (II) Granting Administrative Expense Status To Postpetition Intercompany Claims Among The Debtors, and (III) Granting Relief, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[216] *Id*. at 6.

[217] Final Order (I) Authorizing The Debtors to (A) Continue to Operate Their Cash Management System, (B) Maintain Existing Business Forms and Books and Records, And (C) Perform Postpetition Intercompany Transactions, (II) Granting Administrative Expense Status To Postpetition Intercompany Claims Among The Debtors, and (III) Granting Relief, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[218] 503(b)(9) claimants are suppliers that provided goods to the Debtors that were received within twenty days before the Petition Date. *See infra* note 219.

[219] Debtors' First Day Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Pay Prepetition Claims of Specified Trade Claimants, (II) Granting Administrative Expense Priority to All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[220] Castellano's Declaration, *supra* note 55, at 16.

[221] *Id*. at 45.

[222] *Id*.

[223] *Id*. at 46.

delivered in the order they are needed rather than from stored materials that have been purchased in bulk.[224] Accordingly, the Debtors relied on frequent shipments of materials from the Specified Trade Claimants to keep their manufacturing facilities operating.[225] The Debtors requested to pay their prepetition obligations to the Specified Trade Claimants to prevent disruptions to their supply chain, which could have catastrophic effects on the Debtors' ability to fulfill purchase orders and generate revenue.[226]

The Trustee objected to this motion on July 26, 2022, on the basis that the Debtors failed to provide enough information to (1) stipulate who the Specified Trade Claimants are or (2) justify the need to pay their prepetition claims.[227] For the reasons provided, the Trustee requested that the court "deny the Critical Vendors Motion, or at a minimum, defer entry of an order authorizing any payments until other creditors" had the opportunity to consider the motion.[228]

On July 29, 2022, the Court entered an Interim Order authorizing the Debtors to satisfy prepetition 503(b)(9) claims of up to $480,000 as they became due and payable in the ordinary course of business.[229] As part of the courts authorized preference for 503(b)(9) Claimants, these claimants were instructed that accepting payment for any 503(b)(9) Claims came with the caveat that they implicitly agreed to continue to supply goods to the Debtors on terms at least as favorable as those in place twelve months prior to the Petition Date.[230]

On September 14, 2022, the Court issued a Final Order authorizing the Debtors to pay prepetition 503(b)(9) Claims of up to $1,100,000 and prepetition Critical Vendor Claims of up to $61,385.[231]

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[224] *Id.*

[225] *Id.* at 15.

[226] *Id.*

[227] *See* United States Trustee's Objection to Debtors' First Day Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Pay Prepetition Claims of Specified Trade Claimants, (II) Granting Administrative Expense Priority to All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Trustee's Objection to Wages Motion].

[228] *Id.* at 11.

[229] Interim Order (I) Authorizing the Debtors to Pay Prepetition Claims of 503(B)(9) Claimants, (II) Granting Administrative Expense Priority to All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief, 1–3, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[230] *Id.* at 4–5.

[231] Final Order (I) Authorizing the Debtors to Pay Prepetition Claims of 503(B)(9) Claimants and Critical Vendors, (II) Granting Administrative Expense Priority to All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

Additionally, the court granted administrative expense priority to all undisputed obligations related to outstanding orders.[232] This order enabled the Debtors to safeguard their fragile supply-chain and maintain smooth and efficient operations.

Wages Motion

When the Debtors petitioned for bankruptcy, they employed 330 individuals on a full-time basis. Along with their petition, the Debtors filed a motion requesting authorization to (1) pay their employees' prepetition wages and to (2) continue funding their employee compensation and benefit programs.[233]

The Debtors emphasized the importance of retaining their highly trained and specialized employees for continued business operations and successful reorganization efforts. Additionally, the Debtors sought to minimize the personal hardships their employees would suffer if the court declined to authorize payment of prepetition wages.[234]

In support of their request, the Debtors referred to Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code, which entitles Employee Compensation and Benefits to priority treatment (to the extent such payments do not exceed $15,150 for each individual).[235] Additionally, certain state laws required the Debtors to maintain the Workers' Compensation Program, and Sections 363(b) and 105(a) of the Bankruptcy Code warrant the payment of employee compensation and benefits in chapter 11 bankruptcy.[236]

The Trustee was unsatisfied with the Debtors' self-assessment and objected to the Debtors' Wages Motion, suggesting that the court limit payments of pre petition wages and benefits to employees to the statutory cap set forth in Sections 507(a)(4) and (5).[237]

On July 29, 2022, the court entered an Interim Order granting the debtors requests and scheduling a Final Hearing for further review on August 18, 2022.[238] Following the Final Hearing, the court issued a

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[232] *Id*. at 4.

[233] Debtors' First Day Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Compensation, and Benefit Obligations and (B) Continue Employee Compensation and Benefits Programs, and (II) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Debtors' Wages Motion].

[234] Castellano's Declaration, *supra* note 55, at 54–56.

[235] Debtors' Wages Motion, *supra* note 233, at 30.

[236] *Id*. at 32.

[237] Trustee's Objection to Wages Motion, *supra* note 227, at 5.

[238] Interim Order (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Compensation, and Benefit Obligations and (B) Continue Employee Compensation and Benefits Programs, and (II) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

Final Order on September 15, 2022 authorizing the Debtors to continue to administer their employee compensation and benefit plans and honor any prepetition obligations, subject to the statutory limits set forth in sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code.[239]

Insurance Motion

At the time of filing, the Debtors were covered by a complex and interconnected web of insurance policies, both issued directly to the Debtors (the Aearo Legacy Program) and issued to Non-debtor Affiliate, listing the Debtors as named insureds (the 3M Program).[240] It was critical that the Debtors maintain these policies because their payouts would eventually fund the Settlement Trust that the Debtors were working to create in this bankruptcy. The Debtors suggested that if appropriate insurance wasn't in place, it would cause a substantial loss to the estate and the court may be required to convert or dismiss the case per section 1112(b)(4)(C) of the Bankruptcy Code.[241] The Debtors expressed that paying prepetition insurance-related obligations was necessary to preserve the value of the estate and falls within the court's power conferred by sections 105(a) and 363(b) of the Bankruptcy Code.[242]

The Court entered an Interim Order granting the Debtors' motion on July 29, 2022, and after a final hearing granted the Debtors' motion in a Final Order on September 14, 2022.[243]

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[239] Final Order (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Compensation, and Benefit Obligations and (B) Continue Employee Compensation and Benefits Programs, and (II) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[240] Debtors' First Day Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Maintain Their Prepetition Insurance Coverage and Satisfy Prepetition Obligations Related Thereto, (B) Continue to Pay Certain Brokerage Fees, and (C) Renew, Supplement, Modify, or Purchase Insurance and Reinsurance Coverage, (II) Approving Continuation of their Surety Bond Program, and (III) Granting Related Relief, 10–11, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[241] *Id*.

[242] *Id*. at 12.

[243] Interim Order (I) Authorizing the Debtors to (A) Maintain Their Prepetition Insurance Coverage and Satisfy Prepetition Obligations Related Thereto, (B) Continue to Pay Certain Brokerage Fees, and (C) Renew, Supplement, Modify, or Purchase Insurance and Reinsurance Coverage, (II) Approving Continuation of Their Surety Bond Program, and (III) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022); Final Order (I) Authorizing the Debtors to (A) Maintain Their Prepetition Insurance Coverage and Satisfy Prepetition Obligations Related Thereto, (B) Continue to Pay Certain Brokerage Fees, and (C) Renew, Supplement, Modify, or Purchase Insurance and Reinsurance Coverage, (II) Approving Continuation of Their Surety Bond Program, and (III) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

Utilities Motion

Along with their other first day motions, the Debtors filed a motion seeking entry of an order (1) approving proposed adequate assurances of payment for future utility services, (2) approving proposed procedures for resolving adequate assurance requests, and (3) prohibiting utility providers from altering or discontinuing services.[244] In the operation of their business, the Debtors obtained electricity, natural gas, water and sewage, waste management, chemical disposal, telecommunications, and other similar services (collectively, the "Utility Services") from a number of utility providers (collectively, the "Utility Providers"), and the Debtors wanted to preserve a stable relationship with these Utility Providers throughout the course of their bankruptcy proceedings.[245]

Uninterrupted Utility Services were essential for both the Debtors' operations and a successful reorganization.[246] Section 366 of the Bankruptcy Code protects debtors against the immediate termination or alteration of utility services after the Petition Date as long as the debtor provides "adequate assurance" of payment for postpetition services.[247] Here the Debtors contend that the Funding Agreement and regular cash flows provide more than enough adequate assurance to satisfy the Utility Providers.[248] The Debtors went on to propose a procedure for any objecting Utilities Providers to follow if they found the proposed adequate assurance unsatisfactory. These procedures would facilitate a mutually agreed upon resolution between the parties without the court's involvement. If mutually agreeable terms could not be met, then the objection would be brought back to the court.[249]

The court found these requests reasonable, and on July 29, 2022, Judge Graham issued an Interim Order approving these requests and scheduling a final hearing to consider approving this motion on a final

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[244] Debtors' First Day Motion for Entry of Interim and Final Orders (I) Approving the Debtors' Proposed Adequate Assurance of Payment for Future Utility Services, (II)Approving the Debtors' Proposed Procedures for Resolving Additional Assurance Requests, (III) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Services, and (IV) Granting Related Relief, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Debtors' Utility Motion].

[245] Castellano's Declaration, *supra* note 55, at 59.

[246] *See id*.

[247] Debtors' Utility Motion, *supra* note 240, at 9.

[248] *Id*. at 5.

[249] *Id*. at 7.

basis for August 18, 2022.[250] Following the final hearing, the court granted this motion on a final basis on September 14, 2022.[251]

Taxes Motion

"In the ordinary course of business, the Debtors incur[red] taxes and fees in various jurisdictions related to: (a) income taxes; (b) property and other taxes and fees; and (c) sales and use taxes (collectively, the "Taxes and Fees")."[252] Historically, the standard procedure was for Non-debtor Affiliates to pay these Taxes and Fees and rebill them to the Debtors for reimbursement.[253] The Debtors' parent company, 3M, agreed to continue this practice without expectation of reimbursement when they executed the Funding Agreement on July 25, 2022, and therefore the Debtors expect that any such amounts will be satisfied without any action on the Debtors' part.[254]

In an abundance of caution, the Debtors filed a motion requesting the authority pay any Taxes and Fees left unpaid by 3M, under the terms of the Funding Agreement.[255] The motion explicitly disclaimed any right to reimburse 3M for Taxes and Fees paid, and only requested permission to pay those fees otherwise left unpaid.[256] The Debtors supported their request by purporting that any Taxes and Fees owed at the time they petitioned may not belong to the estate to begin with because the amount owed for Taxes and Fees would constitute property held in trust for another, and under Section 541(d) of the Bankruptcy Code, property held in trust for another at the time of filing does not belong to the estate.[257] Additionally,

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[250] Interim Order (I) Approving the Debtors' Proposed Adequate Assurance of Payment for Future Utility Services, (II) Approving the Debtors' Proposed Procedures for Resolving Additional Assurance Requests, (III) Prohibiting Utility Providers From Altering, Refusing, or Discontinuing Services, and (IV) Granting Related Relief, 1–3, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[251] Final Order (I) Approving the Debtors' Proposed Adequate Assurance of Payment for Future Utility Services, (II) Approving the Debtors' Proposed Procedures for Resolving Additional Assurance Requests, (III) Prohibiting Utility Providers From Altering, Refusing, or Discontinuing Services, and (IV) Granting Related Relief, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[252] Debtors' First Day Motion for Entry of Interim and Final Orders (I) Authorizing the Payment of Certain Taxes and Fees and (II) Granting Related Relief, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[253] *Id*. at 4–5.

[254] *Id*. at 5.

[255] *See id*.

[256] *Id*. at 5, 8–9.

[257] *Id*. at 10.

some portion of any Taxes and Fees owed may already receive priority under 11 U.S.C. § 507(a)(8) or 11 U.S.C. § 507(a)(8)(G), which describe relevant claims entitled to priority treatment.[258]

The court promptly granted this request with an interim order issued on July 29, 2022, adding the explicit instruction that "[f]or the avoidance of doubt, the Debtors shall not pay the Non-Debtor Affiliates on account of claims related to the Taxes and Fees."[259] After a final hearing on the matter, the court issued a final order issuing essentially the same instructions on September 14, 2022.[260]

The Crux of 3M's Plan: The Adversary Complaint

An issue may arise in a bankruptcy case relating to the bankruptcy that has to be handled separately.[261] This is known as an adversary proceeding.[262] "An adversary proceeding is a 'case within a case'" in that it functions as a separate lawsuit within the bankruptcy case.[263] A party to the bankruptcy may file a complaint to initiate an adversary proceeding for contested topics that require "full-bore litigation treatment" like a request to obtain an injunction or other equitable relief.[264] This is exactly what the Debtors did on July 26, 2022 when they filed an adversary complaint against all plaintiffs and potential plaintiffs with Combat Arms Earplug claims against Debtors or Non-debtor Affiliates (the "Stay Defendants").

Along with the first day motions, the Debtors filed a complaint seeking a court order (i) confirming that the Debtors' automatic stay would be extended to 3M and related CAE defendants; (ii) preliminarily enjoining CAE actions against Non-debtor Affiliates; and (iii) granting a temporary restraining order pending an order on the preliminary injunction.[265]

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[258] *Id*. at 10–11.

[259] Interim Order (I) Authorizing the Payment of Certain Taxes and Fees and (II) Granting Related Relief, 1–4, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[260] Final Order (I) Authorizing the Payment of Certain Taxes and Fees and (II) Granting Related Relief, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[261] *Adversary Proceedings During the Bankruptcy Legal Process*, JUSTIA (last visited Apr. 12, 2024), https://www.justia.com/bankruptcy/bankruptcy-procedures/adversary-proceedings/.

[262] *Id*.

[263] MICHAEL BERNSTEIN & GEORGE KUNEY, BANKRUPTCY IN PRACTICE 55, 68 (6th ed. 2022).

[264] *Id*. at 67–68.

[265] Debtors' Adversary Complaint, *supra* note 90, at 3.

Extending the Stay

Many of the pending CAE actions named both Debtor Entities and 3M, along with other Non-debtor Affiliates, as defendants, and the Funding Agreement required the Debtor Entities to indemnify 3M and its Non-debtor Affiliates regardless of the Debtors' status as a named defendant.[266] The moment a debtor files for bankruptcy, 11 U.S.C. § 362(a)(1) imposes an "automatic stay," suspending all civil actions against the debtor for any claims that arose before bankruptcy.[267] Accordingly, on July 26, 2022, the automatic stay immediately required the CAE claimants to suspend their actions against the Debtors, but the CAE plaintiffs continued their crusade against 3M. Most of the CAE claims sought to hold 3M and Aearo jointly and severally liable, meaning that either party could be made to pay the entirety of the awarded damages. Therefore, if the automatic stay was only interpreted to protect the Debtors as named defendants, the plaintiffs could continue pursuing their claims in the MDL court by specifically targeting 3M and other Non-debtor Affiliates.

Accordingly, the Debtors' first request in the Adversary Complaint was for the court to issue an order confirming that the automatic stay extended to 3M and other Non-debtor Affiliates for all CAE actions. The Seventh Circuit has established governing precedent allowing the court to extend the automatic stay to parties defending actions for which the debtor is the "real-party defendant."[268] The Debtors suggested that they were necessarily the real-party defendants in these proceedings because they had agreed to indemnify the Non-debtor Affiliates facing the CAE claims. Furthermore, the Debtors were being held as jointly and severally liable co-defendants, so a judgment against 3M would constitute a judgment against the Debtors.[269] Additionally, the Debtors and Non-debtor Affiliates shared insurance policies that may be depleted by any judgments against Non-debtor affiliates, reducing the coverage available to the Debtors' estates.[270] The Debtors contended that their right to insurance coverage is property of the estate and therefore protected by 11 U.S.C. § 362(a)(3), which prohibits any act to obtain property of the debtor's estate during bankruptcy.[271] Accordingly, the Debtors' believed that the automatic stay naturally included CAE litigation against 3M and requested an order from the bankruptcy court confirming that Aearo's automatic stay extended to 3M and other Non-debtor Affiliates regarding all CAE claims.

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[266] Order Denying Plaintiffs' Motion for Preliminary Injunction, 5, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[267] 11 U.S.C. § 362(a)(1).

[268] Debtors' Adversary Complaint, *supra* note 90, at 18.

[269] *Id*.

[270] *Id*. at 19.

[271] *Id*.

Preliminary Injunctive Relief

The Aearo Entities initiated the bankruptcy process with a specific goal in mind, "to permanently, fully, equitably, and efficiently resolve current and future Combat Arms Earplug Claims through the establishment of a [settlement] trust."[272] To realize this goal, the Debtors would need a permanent injunction from the bankruptcy court prohibiting CAE claimants from seeking relief outside of the confines of the bankruptcy sanctioned Settlement Trust. The financing and administration of the Settlement Trust would be determined during the course of the bankruptcy proceedings, but a channeling injunction would be absolutely necessary for 3M and Aearo to permanently resolve the Combat Arms Earplug claims.

Accordingly, the Debtors' second request in the Adversary Complaint was for the court to issue a preliminary injunction preventing plaintiffs from continuing or commencing CAE actions against Non-debtor Affiliates while the Chapter 11 Cases remain pending.[273] The Debtors depended on the issuance of this preliminary injunction to suspend CAE litigation until a settlement trust could be established in bankruptcy court and to serve as a template for the permanent injunction the Debtors would need to consummate their reorganization plan.

Bankruptcy courts have used the broad powers granted by 11 U.S.C. section 105(a) to enjoin plaintiffs from pursuing actions against non-debtor parents and affiliates in mass-tort bankruptcies on countless occasions.[274] The established standard for obtaining such "an injunction under section 105(a), [requires] the Debtors [to] show: (1) the third-party litigation would defeat or impair the bankruptcy court's jurisdiction over the cases before it, (2) there is a likelihood of success on the merits, which means a likelihood of a successful reorganization, and (3) the injunction would serve the public interest."[275]

The Debtors purported that without an injunction, the CAE claimants would prosecute the same Combat Arms Earplug claims that exist against the Debtors in the Chapter 11 Cases through increasingly piecemeal litigation against 3M outside of bankruptcy.[276] They reasoned that allowing plaintiffs to litigate claims against the Debtors (through actions against an indemnified 3M) would prevent the Debtors from

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[272] *Id*. at 21.

[273] Debtors' 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 a Non-Debtor: And (III) Granting A Temporary Restraining Order Pending An Order on the Preliminary Injunction, 10, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Debtors' Motion in Adversary Proceeding] (page numbers will follow pdf's number).

[274] *Id*.

[275] Debtors' Motion in Adversary Proceeding, *supra* note 273, at 20; *see also Caesars Entm't Operating Co. v. BOKF, N.A.* (*In re* Caesars Entm't Operating Co.), 533 B.R. 714 (Bankr. N.D. Ill. 2015).

[276] Debtors' Motion in Adversary Proceeding, *supra* note 273, at 34.

realizing their plan for reorganization, undermining the bankruptcy court's jurisdiction.[277] Furthermore, the Debtors asserted that, with the requested injunction, they had a high likelihood of successfully reorganizing because of their fully financed Funding Agreement and plan to pay all creditors in full. Finally, the Debtors contended that the injunction would serve the public interest by aiding in the efficient, global, uniform, and equitable resolution of hundreds of thousands of claims.[278] Consequently, the Debtors claimed that an injunction barring the CAE plaintiffs from prosecuting 3M was both appropriate and necessary to the orderly and effective administration of the Debtors' estates.[279]

Temporary Restraining Order (TRO)

The Debtors understood that Judge Graham would need to hold a hearing on their request for injunctive relief and that a final decision would take time. To effectuate the requested relief in the meantime, the Debtors also sought a temporary restraining order ("TRO"), entered on shortened notice, to stay active litigants from pursuing their claims against 3M until the court could rule on the Debtors' request for a preliminary injunction.[280] The Debtors argued that without the TRO, they may suffer immediate and irreversible harm.[281] Thus, the Debtors requested immediate entry of a TRO imposing the same restrictions as their requested preliminary injunction until Judge Graham issued a final ruling on the preliminary injunction.[282]

Order for Expedited Hearing

Pursuant to the Debtors' complaint, Judge Graham issued a court order scheduling an emergency hearing on the following day, July 27, 2022, to consider the Debtors' request for a TRO.[283]

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[277] *Id*. at 37–43.

[278] *Id*. at 45–47.

[279] *Id*. at 43–45.

[280] *Id*. at 48–49.

[281] Debtors' Motion in Adversary Proceeding, *supra* note 273, at 47–49.

[282] *Id*.

[283] Order Granting Ex Parte Motion to Shorten Notice And Setting Expedited Hearing on Debtors'/Plaintiffs' Request For A Temporary Restraining Order, 1–2, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

Objection to Requested TRO

The Stay Defendants wasted no time in responding to the Debtors' adversary complaint, and on July 27, 2022, Robert J. Pfister of KTBS Law LLP filed an objection to the Debtors' request for a TRO on behalf of the Aylstock, Witkin, Kreis & Overholtz, PLLC ("AWKO"), the lead plaintiffs' counsel in the MDL.[284] Pfister vehemently scrutinized the Debtors' declaration of bankruptcy, accusing 3M of exploiting the legal system by "seeking to avail itself of all the benefits of bankruptcy without subjecting itself to any of the burdens of bankruptcy."[285] He framed the maneuver as a ploy "to opt out of the civil justice system" and contended that 3M should have declared bankruptcy itself if it wanted to stay the CAE litigation against it.[286] Pfister went on to describe preliminary injunctive relief as "'an extraordinary and drastic remedy' that is 'never awarded as of right,'" and he presented a four factor test from *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) requiring the complainant to establish:[287]

> (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.[288]

Pfister homed in on the irreparable harm factor and averred that the CAE claims failed to pose a sufficiently imminent danger to the Debtors.[289] Accordingly, Pfister requested that the court "deny the TRO and set the Injunction Motion for hearing on an appropriate schedule."[290] On the same day, Deborah J. Caruso of Rubin & Levin, P.C., on behalf of Seeger Weiss LLP ("Seeger Weiss"),[291] joined in Pfister's objection by filing a response in support of his motion.[292]

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[284] Objection of Aylstock, Witkin, Kreis & Overholtz Pllc to Debtors' Request for a Temporary Restraining Order, 1–2, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter TRO Objection].

[285] *Id*. at 2.

[286] *Id*. at 4.

[287] *Id*. at 5; *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008).

[288] TRO Objection, *supra* note 284, at 5.; *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

[289] TRO Objection, *supra* note 284, at 5.

[290] *Id*. at 8.

[291] Is the Co-lead plaintiffs' counsel in the MDL.

[292] *See* Joinder of Seeger Weiss LLP in Objection of Alystok, Witkin, Kreis & Overholz PLLC to Debtor's Request for a Temporary Restraining Order [DKT. NO. 16], 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

Agreed Entry Resolving Debtors' Request for TRO

Before the court issued a ruling on any substantial component of the Adversary Complaint, the Debtors came to an agreement with AWKO and Seeger Weiss resolving the Debtors' request for a TRO. On August 2, 2022,[293] the parties agreed that the final hearing on the preliminary injunction motion would be held on August 15, 2022, and in the meantime, they would pursue continuations for the MDL proceedings in the MDL court.[294] The parties agreed to jointly request (1) a continuation for all depositions scheduled for the next three weeks and (2) a three week continuation for any discovery deadlines, but (3) 3M and the MDL plaintiffs would comply with the current MDL deadlines for briefing on Wave 1 Summary Judgement and *Daubert* Response or Venue Disputes.[295] On August 5, 2022, the court entered an order approving the parties' agreed entry.[296]

The Next Phase: Permanently Pausing Litigation

Immediate Opposition: The Trustee's Objection

As the August 15 final hearing was quickly approaching, the United States Trustee (the "UST") was working to assemble the official creditors' committees.[297] 11 U.S.C. § 1102 directs the UST to "appoint a committee of creditors holding unsecured claims."[298] The UST is free to create one or multiple committees for the purpose of representing a larger class of similarly situated unsecured creditors throughout the

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[293] The agreement was reached August 1, 2022, but and amended version was entered August 2, 2022. *See* Amended Agreed Entry Resolving Debtors' Request for a Temporary Restraining Order, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[294] *See* Agreed Entry Resolving Debtors' Request for a Temporary Restraining Order, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[295] *Id*. at 3–4.

[296] Order Approving Amended Agreement Entry Resolving Debtors' Request for a Temporary Restraining Order, 1–2, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[297] United States Trustee Objection to Debtors' 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 a Non-Debtor: And (III) Granting A Temporary Restraining Order Pending An Order on the Preliminary Injunction, 4, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Trustee's Objection to Debtors' Motion].

[298] MICHAEL BERNSTEIN & GEORGE KUNEY, BANKRUPTCY IN PRACTICE 20 (6th ed. 2022); 11 U.S.C. § 1102.

bankruptcy process.[299] The creditors committee is entitled to employ attorneys, accountants, and other necessary professionals at the debtor's expense, and they can play an important role in litigating disputed issues.[300]

On August 11, 2022, just four days before the final hearing, the UST submitted an objection to the Debtors' complaint, requesting that Judge Graham limit the scope and duration of any injunction issued by the court.[301] The UST began by reporting on the status of the creditors' committee selection process and explained that the creditors' committees would not be appointed until after the final hearing.[302] To protect the creditors' committees' interests, the UST requested that the court limit the duration of any preliminary injunction and set a date for a final trial on the merits, providing the future creditors' committees with enough time to investigate the relevant facts.[303] Moreover, the UST objected to the sweeping protection that 3M and Non-debtor Affiliates would enjoy if the court enjoined "any prosecution of a Combat Arms Earplug Claim."[304] Rather the Trustee proposed that the court limit the scope of the injunction to "claims for which the Debtors have demonstrated a legal basis for such relief."[305] Furthermore, the Trustee requested that the court limit the scope of its findings to only what is necessary and reserve the right for other parties to challenge the Debtors' good faith and their relationship with 3M.[306]

The Onslaught of Objections

In the absence of a creditors' committee advocating for the CAE claimants, individual plaintiffs' law firms bore the burden of opposing the Debtors' adversary complaint. Accordingly, three more objections were filed on August 11, 2022. Kevin W. Barrett submitted an objection on behalf of Bailey & Glasser, LLP and Pulaski Kherkher, PLLC, lamenting 3M's and the Debtors' "unclean hands" and generally echoing Pfister's objection on July 27, 2022.[307] Similarly, Syed Ali Saeed of Saeed & Little LLP submitted

[299] Exhibit D Information Sheet Official Committee of Unsecured Creditors, 1, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[300] *Id*.

[301] Trustee's Objection to Debtors' Motion, *supra* note 297, at 9.

[302] *Id*. at 5–6.

[303] *Id*. at 6.

[304] *Id*.

[305] *Id*. at 9.

[306] *Id*. at 8–9.

[307] *See* The Bailey Glasser and Pulaski Kherkher Plaintiffs' Objections to the Debtors' Motion for Declaratory and Injunctive Relief, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Glasser and Kherkher Objection].

an objection on behalf of Paul LLP in the same vein, emphasizing the claimants' "rights to a jury trial on all issues."[308]

The "Claimants'" Objection

The most notable of the slew of objections entered on August 11, 2022, was the "Claimants' Objection" filed by Robert J. Pfister on behalf of the bellwether plaintiffs and eight CAE plaintiffs' law firms.[309] This particular objection mounted a comprehensive critique of the Debtors' adversary complaint and represented a unified front from the Stay Defendants (who were still waiting on the appointment of a creditors' committee). The objection sought to contradict each of the Debtors' bases for relief and began by purporting that continued CAE litigation would not defeat or impair the bankruptcy court's jurisdiction.[310]

In this motion, Pfister suggested that the answer to whether continued CAE litigation would impair or defeat the bankruptcy court's jurisdiction hinged on whether the non-bankruptcy litigation would diminish the value of the estate or the distribution of property among creditors.[311] He asserted that the uncapped funding agreement ensured that the value of the estate would continue to enjoy funding, at least until all of the creditors were paid in full.[312] He further reasoned that 3M and Aearo's shared insurance did not pose a problem because every dollar paid by their insurers would reduce the Debtors' liability dollar for dollar.[313] Hence, Pfister concluded that allowing the CAE litigation to carry on uninterrupted would not impair the bankruptcy court's jurisdiction in any way.[314]

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[308] Objection of Paul LLP to Debtors Request for Declaratory Relief and Motion for Preliminary Injunction, 2, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Paul Objection].

[309] Glasser and Kherkher Objection, *supra* note 307, at 1–2. The eight law firms: Aylstock, Witkin, Kreis & Overholtz, PLLC; Seeger Weiss LLP; Clark, Love & Hutson, PLLC; Cory Watson, P.C.; Heninger Garrison Davis, LLC; The Gori Law Firm, P.C.; Tracey Fox King & Walters; The Johnson Law Group, and Weitz & Luxenberg, PC. *Id*.

[310] Claimants' Objection to Debtors' Motion for Declaratory and Injunctive Relief, 11, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Claimants' Objection].

[311] *Id*.

[312] *Id*. at 13–14.

[313] *Id*. at 19.

[314] *See id*.

Pfister went on to rebut the Debtors' contention that they have a high likelihood of successful reorganization as conclusory and unsupported by evidence.[315] Perhaps the Claimants' most spirited argument was that such an injunction would violate rather than serve the public interest.[316] Pfister harped on the rights of a jury trial for the "hundreds of thousands of military veterans and service members injured during their service to our country," and protested the prospect of resolving these cases in bankruptcy.[317] Finally, Pfister again invoked the uncapped nature of the funding agreement to contend that continued litigation could not diminish the Debtors' estates and therefore there was no need to extend the automatic stay to 3M or any other Non-debtor Affiliates.[318]

3M Strengthens Position for Injunctive Relief

While the Stay Defendants mounted their attack on the Adversary Complaint on August 11, 2022, the Debtors' bolstered their own argument with a Supplemental Submission for Injunctive Relief.[319] Without an automatic stay suspending the claims in the MDL court, a lot was happening outside of bankruptcy, and the Debtors sought to update Judge Graham on exactly what was going on and how it might "jeopardize [his] Court's jurisdiction."[320] The Debtors provided something like a timeline covering the two week time period between their initial petition and their filing of the Supplemental Submission.[321]

Beginning on July 26, 2022, the day the petition was filed, Keller Postman, a law firm involved with the MDL proceedings, filed a notice of potential tag-along action before the JPML suggesting that these entire chapter 11 cases should be transferred to the MDL court.[322] If granted, this request would send the bankruptcy proceedings to the MDL court, depriving the bankruptcy court of its jurisdiction.[323] On the following day, July 27, 2022, the MDL court held a "show cause hearing regarding deposition cancellations" in which "Keller Postman filed a motion for a TRO… to enjoin 3M from taking any steps outside of the MDL to enjoin lawsuits against 3M, including to enjoin 3M from providing services to the

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[315] *Id*. at 32.

[316] *Id*. at 35.

[317] *Id*.

[318] *Id*. at 38–39.

[319] *See* Debtors' Supplemental Submission in Advance of the August 15, 2022 Hearing on Their Motion for Declaratory and Injunctive Relief (I) Confirming That the Automatic Stay Applies to Certain Actions a Non-Debtor; and (II) Preliminarily Enjoining Certain Actions Against a Non-Debtor,3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Debtors' Supplemental Support for Hearing] (page numbers will follow pdf's numbering).

[320] *Id*. at 4.

[321] *Id*.

[322] *Id*. at 7.

[323] *Id*.

Debtors."[324] At the same time, the bankruptcy court was conducting the TRO hearing for the Adversary Complaint, and AWKO's counsel "assured the Court and the Debtors that his client was 'not going to file anything,' and was 'not going to run into another court' before this Court could hold the preliminary injunction hearing."[325] In reliance on these assurances, the Debtors agreed to a consensual resolution to the TRO motion in the Adversary Complaint until it could be further deliberated on the August 15, 2022 hearing.[326] On July 28, 2022, the MDL court denied Keller Postman's TRO motion to enjoin 3M, but Keller Postman continued its assault by filing another transfer notice with the JPML the next day, July 29, 2022.[327] This time the request was to transfer the Adversary Proceeding to the MDL.[328] In the meantime, the parties to the Agreed Entry Resolving Debtors' Request for TRO submitted a proposal to the MDL court to pause certain discovery matters, in accordance with the terms of the agreement.[329]

The next week, on August 2, 2022, the MDL court issued a *sua sponte* order, "stating that '[t]here is presently no stay as to 3M Company,'" and Keller Postman filed another tag along notice seeking to transfer the Bankruptcy Cases, this time listing the parties more specifically.[330] On August 3, 2022, Keller Postman filed a motion with the MDL court, seeking to enjoin 3M from (1) relitigating matters in Bankruptcy Court and from (2) supporting any injunction against CAE plaintiffs.[331] If granted, this injunction would have hamstrung the Bankruptcy Court by forbidding them from reconsidering any prior controversies in the CAE cases and by disallowing 3M to continue providing their Shared Services to the Debtors as outlined in the Funding Agreement.[332] By the end of the day, the MDL court set an expedited hearing on the motion for August 11, 2022, four days before the Bankruptcy Court's preliminary injunction hearing.[333]

On August 4, 2022, Quinn Emanuel, another law firm representing Combat Arms Earplug Plaintiffs, filed a motion with the MDL court seeking an advisory ruling on whether 3M was estopped from

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[324] *Id*.

[325] *Id*. at 8.

[326] *Id*. at 8–9.

[327] *Id*. at 9–10.

[328] *Id*. at 10.

[329] *Id*.

[330] *Id*. at 10, 84.

[331] Debtors' Supplemental Support for Hearing, *supra* note 319, at 10.

[332] *Id*.

[333] *Id*. at 11.

asserting or had waived their successor liability defense.[334] If granted, that ruling would serve to preemptively endorse their stated plan to dismiss the Debtors from the MDL complaints.[335] Quinn Emanuel was hoping to proceed solely against 3M to undermine the Debtors' motion to enjoin or stay CAE litigation.[336] Quinn Emanuel bolstered their motion with an eight-page declaration drafted by a partner at AWKO, despite AWKO's promise not to "run into another court" before the preliminary injunction hearing.[337] On August 5, 2022, the court agreed to join Quinn Emanuel's hearing to the August 11, 2022 hearing on Keller Postman's motion, and required 3M to address the successor liability issue, outlining the terms of 3M's acquisition of Aearo and the 2010 Upstream Transfer.[338] 3M responded to Keller Postman and Quinn Emanuel's motions three days later, on August 9, 2022.[339] At the hearing on August 11, 2022, AWKO expressed their approval of the motions in controversy and "absolutely endorse[d]" them.[340] In the hours following the MDL's hearing on the motions, the Debtors filed their Supplemental Submission for Injunctive Relief, relating everything that happened in the MDL to the Bankruptcy Court.[341]

In the Debtors' adversary complaint, they contended that they needed a TRO and a preliminary injunction staying all CAE litigation to prevent immediate and irreparable harm to their reorganization efforts,[342] and the Stay Defendants emphatically protested the request, arguing that neither the Debtors nor the Bankruptcy Court's jurisdiction faced imminent danger.[343] The Debtors' Supplemental Submission for Injunctive Relief rebutted that claim by outlining the events mentioned above in a final effort to demonstrate the growing threat to both the Bankruptcy Court's jurisdiction and the Debtors' reorganization efforts.[344]

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[334] *Id*.

[335] *Id*.

[336] *Id*. 11–12.

[337] *Id*. at 12.

[338] *Id*.

[339] *Id*. at 13.

[340] *Id*.

[341] *Id*.

[342] *See id*.

[343] *See* TRO Objection, *supra* note 284; Claimants' Objection, *supra* note 310; Glasser and Kherkher Objection, *supra* note 307; Paul Objection, *supra* note 308.

[344] Debtors' Supplemental Support for Hearing, *supra* note 319, at 13.

3M unable to Shake the MDL: Order Preventing Relitigating

The Preliminary Injunction hearing (the "PI Hearing") commenced on August 15, 2022 and lasted three days.[345] On August 16, 2022, while the parties of interest were deliberating before Judge Graham in the Bankruptcy Court, Judge Rodgers issued her ruling on Keller Postman's August 3, 2022 motion, keeping the MDL proceedings ever relevant to the bankruptcy proceedings.[346] Judge Rodgers denied Keller Postman's request to enjoin 3M from supporting an extension of the Debtors' automatic stay but granted their request to bar 3M and the Debtors from relitigating matters in bankruptcy.[347] The order specifically "prevent[ed] 3M from 'attempting to relitigate the same issues or related issues precluded by the principles of *res judicata* and collateral estoppel in' bankruptcy court," and it enjoined 3M from "supporting, directly or indirectly, financially or otherwise, any collateral attack on this Court's orders by any other parties in any other forum, including Aearo."[348] This order effectively bound the Bankruptcy Court to every evidentiary and pretrial decision made in the MDL process, and threatened 3M with contempt of court if they challenged any of these issues.

The Court Refuses 3M's Plan

A little over a week after the PI Hearing, on August 26, 2022, Judge Graham issued a final order denying the Debtors' request for a preliminary injunction. [349] After summarizing the history of the case, Judge Graham began his discussion by analyzing the Debtors' request to extend the § 362(a)(1) automatic stay to 3M's CAE claims.[350] To start, Judge Graham explained that § 362(a)(1) was created to protect debtors from the creditors' collection attempts and generally only protects the debtor, not non-bankrupt co-

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[345] On August 15, 2022, Keller Postman filed an objection to the Debtors' "motion for entry of an order enforcing the automatic stay and granting related relief." Their objection defended their prior actions in the MDL court and filings with the JPML, outlining justifications for each step they took and why those actions were not violations of the automatic stay. They went on to request that "if somehow [the Bankruptcy] Court construes [the] relief [requested in the Keller Postman's August 11, 2022 MDL motion] as potentially interfering with 3M's ability to satisfy its contractual obligations under the Funding Agreement, Mr. Valle respectfully asks the Court to interpret the relief narrowly." *See* Keller Postman LLC's Objection to Debtors' Motion for Entry of an Order Enforcing the Automatic Stay and Granting Related Relief, 13, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[346] Order, 1–2, *In re* 3M Combat Arms Earplug Products Liability Litigation, MDL No. 2885, (J.P.M.L.) (filed Jan. 25, 2019).

[347] *Id*. at 5, 7–8.

[348] *Id*. at 7–8.

[349] Order Denying Plaintiffs' Motion for Preliminary Injunction, 1–2, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022). 22-02890-11, (Bankr. S.D. Ind. 2022).

[350] *Id*. at 19.

debtors like 3M.[351] He conceded that the Fourth Circuit has identified two exceptions to the general rule,[352] but he went on to insist that the Seventh Circuit has not adopted such exceptions.[353] Judge Graham concluded this portion of the analysis by stating that "[w]ithout more explicit guidance from the Seventh Circuit, the Court declines Aearo's invitation to extend § 362(a)(1) to 3M."[354]

He went on to consider the Debtors' argument that § 362(a)(3) confers automatic stay protection to any co-insured if the actions against them threaten to diminish their shared insurance limits.[355] Section 362(a)(3) extends to property of the estate, and Judge Graham utilized a two-step inquiry to determine whether it should apply to the CAE actions against 3M as a result of their shared insurance policies. First he asked "whether property of the estate [was] at issue," and second, he asked "whether the action in question constitute[d] an action to obtain possession of, or exercise control over, the property in question."[356] The insurance contracts were the property at issue, but the court determined that since "3M [was] fully fund[ing] any liability incurred by Aearo," "tapping the insurance policies… [would] not affect the amount of money Aearo [could] pay its creditors."[357] Accordingly, Judge Graham reasoned that the action in question was not an action to obtain possession of, or exercise control over, the property in question, and § 362(a)(3) did not serve to extend the automatic stay to 3M or any other CAE defendants.[358]

Next, Judge Graham weighed whether or not "the Court should enjoin the Pending Actions pursuant to § 105(a) of the Bankruptcy Code."[359] Bankruptcy Courts have the authority to stay actions in other courts, even actions in which the debtor is not a party, but it is the "burden of the movant… to clearly establish by preponderance of the evidence the necessity for injunctive relief."[360] Furthermore, before the court can issue such an injunction, the Court must determine that the controversy they are enjoining "falls within the

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[351] *Id*.

[352] "(1) where 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, and (2) where the pending litigation, though not brought against the debtor, would cause the debtor irreparable harm." *Id*. at 20.

[353] *Id*. at 20–21.

[354] *Id*. at 22.

[355] *Id*. 22–23.

[356] *Id*. at 23.

[357] *Id*. at 24–26.

[358] *Id*. at 26.

[359] *Id*.

[360] *Id*. at 26–27.

Court's jurisdiction."[361] In this case the parties and the Court agreed that "the Court should focus its… analysis on the Court's 'related to' jurisdiction."[362] "Related to" jurisdiction primarily encompasses "tort, contract, and other legal claims by and against the debtor."[363] These are claims that would be stand-alone lawsuits regardless of whether the defendant petitioned for bankruptcy.[364] The Seventh Circuit has held that "[a] case is 'related' to a bankruptcy when the dispute 'affects the amount of property for distribution… or the allocation of property among creditors.'"[365] At first glance, the Debtors' obligation to indemnify appears to place 3M's CAE litigation squarely in the "related to" box, but Judge Graham declares that "the Court must focus its analysis on the actual economic effect."[366] Moreover, the Court turned to the Funding Agreement to discern the real world effect of the agreement.[367] Although Aearo was technically obligated to repay any indemnity obligations to 3M, "Aearo [wa]s authorized to make a funding request for such indemnification from 3M." Because there were no real prohibitive requirements or conditions for such funding requests, this was effectively a circular arrangement, and the pending litigation posed no real threat to the amount of property that would be available for distribution among creditors.[368] Judge Graham went on to mention that this theory does of course depend on "3M's ability to honor its commitment under the funding agreement," but he chose to accept Aearo's assertion "that 3M was more than able to honor the Funding Agreement."[369]

Based on the foregoing, the Court denied Aearo's requests for extending the automatic stay and for enjoining the Stay Defendants from pursuing their Combat Arms Earplug claims.[370] This ruling did not bode well for 3M and the Debtors, as they would be stuck trying to negotiate a plan of reorganization while continuing to defend themselves in the largest MDL in history.

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361 *Id*. at 27.

362 *Id*. at 28.

363 *Id*. at 29.

364 *Id*.

365 *Id*.

366 *Id*. at 30, 32.

367 *Id*. at 31.

368 *Id*. at 31–32.

369 *Id*. at 33–34.

370 *Id*. at 36–37.

3M Regroups After Defeat

Aearo Begins their Appeal

As a natural response to their current predicament, the Debtors immediately filed an appeal of the order denying their preliminary injunction on August 29, 2022.[371] Additionally and on the same day, the Debtors filed a motion requesting Judge Graham certify their appeal for direct review by the Seventh Circuit Court of Appeals.[372]

Finally Creditors' Committees Are Appointed

Four days after the court's order denying Aearo's preliminary injunction the UST, Nancy J. Gargula, finally appointed the creditors' committees on August 30, 2022. She created two committees, one to represent the Combat Arms Earplug claimants and one to represent the Respirator claimants. The Official Committee Of Tort Claimants Related To Use of Respirators (the "Respirator Committee") consisted of plaintiffs' attorneys Curt D. Hochbein of Mattingly Burke Cohen & Biederman LLP and Martin Walton of Mike Martin and Rhonda Harshbarger Law Firm.[373] The Official Committee Of Tort Claimants Related To Combat Ear Plugs (the "CAE Committee") consisted of plaintiffs' attorneys from nine law firms: Aylstock, Witkin, Kreis and Overholtz, PLC; The Gori Law Firm; Rawlings & Associates PLLC; Laminack, Pirtle & Martines; Lieff Cabraser Heimann & Bernstein LLP; Seeger Weiss LLP; Parafinczuk Wolf, P.A; Paul LLP; and Weitz and Luxenberg, PC.[374]

Objections to Debtors' Motion for Direct Appeal

The CAE Committee quickly got to work, and on September 12, 2022, they filed a motion requesting to intervene in adversary proceedings through their proposed counsel, Meredith R. Theisen of Rubin & Levin, P.C.[375] Additionally, they filed an objection to the Debtors' request for Judge Graham to

[371] Notice of Appeal filed by Jeffrey A Hokanson on behalf of Plaintiffs 3M Occupational Safety LLC, Aearo Holding LLC, Aearo Intermediate LLC, Aearo LLC, Aearo Technologies LLC, 1–2, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[372] Debtors' Motion to Certify the Court's August 26 Order for Direct Appeal in The Court of Appeals, 1–2, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[373] *See* Notice of Appointment of Additional Committee- Tort Claimants Related to Respirators, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[374] *See* Notice of Appointment of Committee- Tort Claimants Related to Combat Arms Earplugs, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[375] Agreed Motion for the Official Committee of Tort Claimants Related to Combat Ear Plugs to Intervene in Adversary Proceedings, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

certify their appeal directly to the Seventh Circuit,[376] and they filed a response to the Debtors' motion, thoroughly refuting their right to direct appeal to the Seventh Circuit.[377]

The CAE Committee clearly wanted to join the fight, and the Bankruptcy Court granted that wish on September 13, 2022, when Judge Graham approved their request to intervene in the adversary proceedings.[378]

Court of Appeals Accepts the Appeal

On October 12, 2022, the fight changed venues one more time when the Seventh Circuit Court of Appeals agreed to an expedited review of 3M's appeal.[379]

MDL Hits 3M Again: Plaintiff's Capitalize & Build Momentum

MDL Sanctions 3M

While the Seventh Circuit was conducting the appeal of the adversary proceeding, Judge Rodgers sanctioned 3M in the MDL court in a bold move that would entirely undermine the Debtors' bankruptcy strategy. On December 22, 2022, Judge Rodgers officially sanctioned 3M for "bad faith conduct that abuse[d] the judicial process."[380] The order outlined the history of the MDL and rebuked 3M for contending

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[376] On the same day, Patricia B. Tomasco also filed an objection to the debtors request to certify their appeal on behalf of two bellwether plaintiffs, echoing the CAE Committee's same argument. *See* Response to Certify the Court's August 26 Order for Direct Appeal in the Court of Appeals, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[377] *See* Objection of the Official CAE Committee to the Debtors' Motion to Certify the Court's August 26 Order for Direct Appeal in the Court of Appeals, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022);

Corrected Response to Debtors' Motion to Certify the Court's August 26 Order for Direct Appeal in the Court of Appeals, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[378] Order Granting Agreed Motion for the Official Committee of Tort Claimant Related to Combat Earplugs to Intervene in Adversary Proceeding, 1–2, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[379] Order, 2, Aearo Technologies LLC, et al. v. Those Parties Listed on Appendix A to the Complaint, et al., Docket No. 22-02606 (7th Cir. Sept. 13, 2022).

[380] Order, 16, *In re* 3M Combat Arms Earplug Products Liability Litigation, MDL No. 2885, (J.P.M.L.) (filed Jan. 25, 2019) [hereinafter MDL Sanction Order].

"that it ha[d] neither independent nor successor liability for any alleged [Combat Arms Earplug]-related injuries" after having "deliberately established itself as the defendant with exclusive responsibility."[381]

In 2018, 3M, rather than Aearo, settled the FCA claim, and both Aearo and 3M were regularly included as named defendants in the early individual complaints.[382] In early June 2019 at the parties' Rule 26 conference, MDL plaintiffs "explicitly asked 3M whether there would be any dispute as to which company—3M or Aearo—had responsibility for [Combat Arms Earplug]-related liabilities" and 3M "responded that 'no argument would be raised.'"[383] 3M failed to raise this defense for the nearly four year stretch between the commencement of the MDL and Aearo's petition for bankruptcy, and they affirmatively argued that 3M and their subsidiary defendants shared "single vicarious liability" in an effort to prevent state "noneconomic damages caps" from being multiplied by the number of named defendants in a bellwether trial in early spring of 2022.[384]

Of course, before the Debtors entered bankruptcy, they executed the Funding Agreement, indemnifying 3M and assuming total liability for the CAE claims. Regardless, Judge Rodgers was outraged by 3M's late successor liability defense, and found the timing unseemly, considering 3M's support for the MDL's formation and their recent judgments in the bellwether trials. Judge Rodgers resented 3M and Aearo's bankruptcy maneuver and deemed it nothing more than "good old-fashioned forum shopping" and "a brazen abuse of the litigation process."[385] Accordingly, Judge Rodgers sanctioned 3M, ordering that they bear full and independent liability for Combat Arms Earplug-related injuries in the MDL and precluding 3M from "attempting to avoid any portion of its alleged liability… by shifting blame to the Aearo defendants."[386] This order was the kiss of death to the Debtors' chapter 11 strategy because the Debtors were legally severed from the very claims that they were seeking to address in bankruptcy. Without another option, 3M immediately appealed Judge Rodgers' sanction to the Eleventh Circuit which stayed the MDL proceedings until the court of appeals made a ruling.[387]

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[381] *Id*. at 9, 12.

[382] Joint Motion to Dismiss the Debtors' Bankruptcy Cases Pursuant to Bankruptcy Code Section 1112(b), 8, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) [hereinafter Joint Motion to Dismiss]; *see also* Master Short Form Complaint and Jury Trial Demand, *In re* 3M Combat Arms Earplug Products Liability Litigation, MDL No. 2885, (J.P.M.L. Jan. 25, 2019).

[383] MDL Sanction Order, *supra* note 380, at 10.

[384] *Id*. at 14.

[385] *Id*. at 7, 10.

[386] *Id*. at 21.

[387] *See* 3M Company v. Christopher Aaby, NO. 23-90001 (11th Cir. Jan. 3, 2023); Plaintiff's-Respondents' Response to Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(B), *3M Company v. Christopher Aaby, Muhammad Aadam, et al.*, NO. 23-90001, (11th Cir. Jan. 3, 2023).

Plaintiffs Wanting out of the Bankruptcy Court

With the Seventh circuit considering Aearo's denied preliminary injunction and the Eleventh Circuit reviewing the MDL's sanctions, both the Bankruptcy Court and the MDL court found themselves at an impasse. The parties were left to fight it out at the appellate level and negotiate a global settlement. In reality, both sides likely knew that a settlement was inevitable (whether in chapter 11 reorganization or not), and their legal maneuvers along the way would only determine the strength of each side's bargaining position. If 3M's bankruptcy plan had succeeded, it would have shifted the balance of power in their favor, but the Plaintiffs' attorneys held the advantage while they were securing large judgments in bellwether trials or other lawsuits. Each side would continue to fight for every advantage, but neither party wanted to stress 3M to the point of collapse. The threat of a distressed 3M being forced into its own bankruptcy was enough to make both sides shudder and allow cooler heads to prevail. Accordingly, each side had a vested interest in coming to agreeable terms, but not until the plaintiffs' attorneys took one final measure to get the edge on 3M.

The Motions to Dismiss

On February 2, 2023, the CEA Committee, along with over 200,000 other CAE claimants, filed a joint motion to dismiss the Debtors' bankruptcies.[388] The motion, submitted by Meredith R. Theisen, drew strong parallels between Aearo's and LTL Management's ("LTL") bankruptcies.[389] LTL, a subsidiary of Johnson & Johnson ("J&J"), indemnified J&J for pending product liability litigation before declaring bankruptcy with hopes of resolving the claims in a chapter 11 reorganization.[390] Before petitioning for bankruptcy in October of 2021, LTL entered into a funding agreement with J&J, which 3M used as a model for drafting their own agreement with the Aearo Entities.[391]

LTL's bankruptcy initially looked promising for the debtor, but the lower court rulings were reversed on appeal and remanded with instructions to dismiss the case.[392] Theisen used the Third Circuit's decision to extract a two pronged test for determining whether a case should be dismissed for lack of good faith.[393] The test asks two distinct questions: (1) "Whether the petition serves a valid bankruptcy purpose, which requires that the debtor is in some degree of 'financial distress'; and (2) Whether the bankruptcy was 'filed merely to obtain a tactical litigation advantage.'"[394] A case can be dismissed for failing either prong.

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[388] Joint Motion to Dismiss, *supra* note 382, at 1.

[389] *Id*. at 2.

[390] Evan Ochsner, *J&J Unit's Failed 'Two-Step' Talc Bankruptcies Cost $178 Million*, BLOOMBERG LAW (Oct. 4, 2023, 5:00 AM).

[391] Joint Motion to Dismiss, *supra* note 382, at 2.

[392] *Id*. at 3.

[393] *Id*. at 16–17.

[394] *Id*. at 17.

The Third Circuit dismissed LTL's bankruptcy, concluding that LTL had "no valid bankruptcy purpose," obviating the "need to ask whether it… filed 'merely to obtain a tactical litigation advantage.'"[395] Theisen referenced the Third Circuit's opinion holding that LTL was a solvent subsidiary with an uncapped, non-recourse funding commitment from its solvent parent company, and was dismissed for having no valid bankruptcy purpose accordingly.[396] Theisen urged Judge Graham to apply the same reasoning as a basis for dismissing the Aearo Entities' bankruptcies.[397]

Furthermore, Theisen argued that the two factors are related, but that if Judge Graham declined to dismiss on account of the first prong, he should still dismiss on account of the second.[398] Theisen cited the MDL court's order sanctioning 3M, quoting Judge Rodger's description of Aearo's bankruptcy filing as "forum shopping… designed to evade dissatisfactory legal rulings in the MDL."[399] Theisen viewed Aearo's filing as a misuse of the Court's jurisdiction and insisted that it should be dismissed as such.[400]

On February 24, 2023, soon after the CAE Committee's request, the Respirator Committee filed their own motion through their appointed counsel, Curt D. Hochbein, to appoint a trustee or alternatively dismiss the cases.[401] "When a movant shows that a debtor-in-possession has not acted in the best interest of the creditors or the estate," 11 U.S.C. § 1112(b)(1) authorizes a bankruptcy judge to convert or dismiss the case, but if the court determines that appointment of a trustee would better serve the creditors' interests, then § 1104 (a) empowers the judge to appoint a trustee to take control of the debtor's assets for the benefit of the creditors.[402] Hochbein shared the CAE Committee's frustration with 3M, accusing them of using the Debtors' bankruptcies as a bad faith means of forum shopping.[403] Dissimilarly, the Respirator Committee's preferred solution was for Judge Graham to appoint a trustee over the Debtors' estates.[404] Hochbein suggested that appointing a trustee would get the most amount of money to the creditors in the shortest amount of time, arguing that the Funding Agreement already ensured the creditors' claims in full and a

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395 *Id*. at 6.

396 *Id*. at 3.

397 *Id*. at 22.

398 *Id*.

399 *Id*. at 23.

400 *Id*. at 24.

401 The Official Committee of Unsecured Creditors for Tort Claimants – Related to Use of Respirators Motion to Appoint a Trustee Under 1112(B)(1), or Alternatively for Dismissal, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

402 *Id*. at 2, 7.

403 *Id*. at 5.

404 *Id*. at 7.

trustee could quickly confirm a reorganization plan distributing those funds to their constituent claimants.[405] Hochbein complained that while the Debtors were dragging their feet in bankruptcy, respirator plaintiffs were dying, uncompensated and still awaiting trial.[406] In the Respirator Committee's view, time was of the essence, and in keeping with that view, they requested appointment of a trustee to quickly reorganize the Debtors' estates or in the alternative, dismissal of the bankruptcies so the claimants could get on with litigation.[407]

On the same day that the Respirator Committee filed their motion to appoint a trustee or dismiss the case, the UST filed a motion to dismiss, comparing the Aearo Entities' bankruptcies with LTL's and generally echoing the CAE Committee's motion.[408]

Debtors' Opposition to Dismissal

Still hoping to win the adversary proceeding on appeal and salvage their bankruptcy strategy, the Debtors filed an omnibus objection to the motions to dismiss on March 17, 2023, through Jeffrey A. Hokanson of Ice Miller LLP, the Debtors' local bankruptcy counsel.[409]

The Debtors brought three main arguments defending their right to continue chapter 11 proceedings.[410] First, the Debtors rebutted the CAE, Respirator, and Trustee movants (the "Movants") proposed dismissal standard.[411] Although the Debtors conceded that most courts agree that a lack of good faith provides sufficient grounds for dismissal, they argued that "circuit courts disagree on the appropriate standard for bad faith dismissal."[412] Hokanson pointed out that "the Supreme Court has yet to resolve these conflicting standards" leaving each circuit to apply the rules developed in their own jurisdiction.[413] In the Movants' motions to dismiss, they applied the "financial distress" standard used in the recent LTL ruling from the Third Circuit, but the Debtors insisted that the Seventh Circuit, along with the majority of other circuit courts, employs a "totality of the circumstances test."[414] The Debtors contended that the Seventh

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[405] *Id*. at 8.

[406] *Id*. at 9.

[407] *Id*. 12–13.

[408] *See* United States Trustee's Amended Motion to Dismiss Pursuant to 11 U.S.C. § 1112(b), *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[409] Debtors' Omnibus Objection to Motions to Dismiss Chapter 11 Cases, 1, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (page numbers will follow pdf's number).

[410] *Id*. at 30.

[411] *Id*.

[412] *Id*. at 31.

[413] *Id*.

[414] *Id*. at 31.

Circuit "has not established a hard-and-fast rule or rigid standard for good faith and has never recognized lack of financial distress as cause for dismissal under the Bankruptcy Code."[415] Rather, they have considered the totality of the circumstances, with a particular focus on "the debtor's likelihood of fulfilling a proper reorganizational purpose."[416] Hokanson went on to endorse the Seventh Circuit's interpretation of bad faith by outlining the history of the "bad faith dismissal" doctrine and specifically emphasizing Congress's elimination of the insolvency standard when they enacted the Bankruptcy Code in1978.[417] Applying the totality of the circumstances standard, Hokanson concluded that " the Debtors filed these cases for an appropriate and achievable reorganizational purpose under any Seventh Circuit standard" and that the cases should be preserved accordingly.[418]

Second, the Debtors distinguished their case from LTL's and argued that the Movants failed to establish "bad faith" even under the Third Circuit's new standard.[419] The Debtors claimed that they were dealing with more threatening and complex litigation, with a smaller financial backstop than LTL.[420] "[T]he attorneys that signed the CAE Motion [to Dismiss] ha[d] collectively asserted over $4 trillion in damages" and brought almost six times as many claims as those against J&J and LTL.[421] At the same time, J&J had current assets worth $54 billion while 3M's current assets were valued at around $14.5 billion.[422] Additionally, the Aearo Entities had been been operating as "a real business with real employees" for over forty years, while LTL was a "'shell company formed' via a divisive merger and allocated 'a collection of bare rights to streams of payments cobbled together on the eve of bankruptcy.'"[423] Accordingly, the Debtors contended that "while LTL's 'potential liquidation' might not 'amount to financial distress' in the eyes of the Third Circuit,… a potential liquidation of Aearo's valuable business certainly would."[424] The Debors argued that the Funding Agreement would be capped by 3M's ability to pay and that unlike in LTL's case, the threat of continued litigation under the circumstances "justif[ied] resort to chapter 11 under any standard."[425]

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[415] *Id*. at 37.

[416] *Id*.

[417] *Id*. at 32–37.

[418] *Id*. at 49.

[419] *Id*. at 30.

[420] *Id*. at 56.

[421] *Id*. at 55.

[422] *Id*. at 55–56.

[423] *Id*. at 58; *In re* LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (*In re* LTL Mgmt., LLC), 58 F.4th 738, 762 (3d Cir. 2023).

[424] *Id*.

[425] *Id*. at 62.

Finally, the Debtors contended that the Movants' motions were untimely and should have been barred by the doctrine of laches, which precludes a party's relief for claims that they unreasonably delayed asserting.[426] Hokanson explained that the Movants waited over 191 days to challenge the Debtors' filings, and offered no excuse for the delay.[427] He continued to apply the following three-factor laches test, derived from *In re Energy Future Holdings Corp,*: "(1) delay in assertion of a claim; (2) the delay is inexcusable; and (3) undue prejudice results from the delay."[428] The Debtors considered the six month gap between the Petition Date and the Movants' first motion to dismiss, a sufficient delay to satisfy the first factor of the test.[429] Furthermore, the Debtors asserted that "courts have made clear that requests to dismiss for bad faith filing should be asserted early in a bankruptcy case," and the Movants waited for over half a year despite being well represented and facing the same set of facts and circumstances since the Petition Date.[430] After characterizing the Movants' delay as inexcusable, Hokanson outlined how the Debtors and the Bankruptcy Court were prejudiced by the delay.[431] Reminding Judge Graham of the 14 hearings, three different mediators, 21 retained professionals, $43 million in professional fees, and six months of deliberation; Hokanson insisted that the Movants unduly prejudiced countless parties by waiting six months to suggest dismissing the cases wholesale.[432] Accordingly, the Debtors argued that the Movants' motions to dismiss should be denied pursuant to both their substantive shortcomings and the procedural doctrine of laches.[433]

Regarding Appointment of a Trustee

Moreover, the Debtors explained that "appointment of a trustee is an even more extraordinary remedy than dismissal or conversion," further reasoning that granting the Respirator Committee's request as such would be wildly inappropriate under the circumstances.[434] When a court considers appointing a chapter 11 trustee, they should seek to determine whether "such appointment would better achieve the goal of producing a confirmable chapter 11 plan."[435] Here the Debtors advised the court that appointment of a chapter 11 trustee "would be massively disruptive to the Debtors' operations" and would prove disastrous

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[426] *Id*. at 30.

[427] *Id*. at 62.

[428] *Id*. at 63.

[429] *Id*.

[430] *Id*.

[431] *Id*. at 64.

[432] *Id*.

[433] *Id*.

[434] *Id*. at 65.

[435] *Id*. at 67.

for the creditors.[436] Hokanson argued that appointing a trustee would further delay successful reorganization, as the trustee would still have fiduciary duties requiring her to fairly determine the validity and value of each claim, and she would inevitably have to spend a material stretch of time developing a thorough understanding of the complex mass tort litigations against the Debtors before negotiating any kind of global resolution.[437] Furthermore, 3M's obligation to fund a plan of reorganization was contingent upon the Debtors' Boards' approval of such plan, and appointing a chapter 11 trustee would displace the Debtors' Boards, stripping the creditors access to immense value.[438]

Court Throws 3M Out

After three months of deliberation and a five day evidentiary hearing on the Movants' motions to dismiss, on June 9, 2022, Judge Graham issued an order Dismissing the Aearo Entities' cases.[439] Judge Graham's order began by providing a reasonably detailed account of the relevant facts and circumstances, reaching as far back as the late 1990s, addressing: Aearo's design of the Combat Arms Earplugs, 3M's acquisition of Aearo, 3M and Aearo's saga of Combat Arms and Respirator litigation, 3M and Aearo's financial condition, and an up to date recap of the bankruptcy proceedings.[440] After providing the necessary context, Judge Graham went on to address "the Movants assert[ion] that 'cause' exist[ed] to dismiss the Aearo Entities' cases under § 1112(b)," Aearo's rejection of that assertion, and the Respirator Committee's request for a chapter 11 trustee.[441]

First the Court considered the authority of the Movants' "cause" for dismissal.[442] Judge Graham quickly concluded that a case should be dismissed if it is not filed in good faith, but he went on to wrestle with what constitutes a bad faith filing.[443] Judge Graham recognized that there is no universal definition for good faith in the bankruptcy context and that it is particularly unclear "whether it is bad faith for a

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[436] *Id*. On March 20, 2023, Roger Meltzer and Jeffrey S. Stein (the "Disinterested Directors"), represented by McDonald Hopkins LLC, filed an omnibus response in opposition to the motions to dismiss or appoint a chapter 11 trustee, submitted by Jeffrey A. Hokanson. The Disinterested Directors provided a concise account of their role leading up to and throughout the chapter 11 process, demonstrating their constant efforts "to maximize value for all stakeholders, including their creditors and equityholders" in accordance with their fiduciary duties, distinct from 3M's interests. *See* The Disinterested Directors' Omnibus Response in Opposition to Motions to Dismiss (ECF NOS. 1068, 1197, AND 1198), *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890).

[437] *Id*. at 68–69.

[438] *Id.*

[439] Order Dismissing Bankruptcy Cases, 3, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-028090, 22-2291, 22-2292, 22-2293, 22-2294, 22-2295, 22-2296).

[440] *Id*. at 4–18.

[441] *Id*. at 18.

[442] *Id*. at 19.

[443] *Id*. at 21–22.

financially healthy debtor to seek Chapter 11 relief."[444] Without a clear standard, Judge Graham explored a broad set of caselaw to extract a workable definition.[445] Starting with a trio of Seventh Circuit decisions, Judge Graham determined that a debtor may file for bankruptcy in good faith if they are experiencing "cash flow problems" or if there is evidence that they are "unable to continue operating as a going concern" regardless of whether the debtor is insolvent or not.[446]

This conclusion left the Court to determine "how close to insolvency a debtor must be, if at all, to be acting in good faith," prompting Judge Graham to broaden his search and examine caselaw within his Circuit.[447] With the additional guidance of several in Circuit holdings, Judge Graham resolved to apply "a valid reorganizational purpose" test, with a particular focus on the Debtors' "'need' for relief under… Chapter 11."[448] In weighing whether or not the Debtors had a valid reorganizational purpose, the Court asked whether their bankruptcy "would preserve or create some value to the [D]ebtor and/or the estate that would be lost outside of bankruptcy" and whether the problems the Debtors were facing were "within the range of difficulties envisioned by Congress."[449] The Court concluded that Aearo's bankruptcy failed to preserve or create any value for the creditors because Aearo was a healthy company with a funding agreement that guaranteed the creditor's claims in full, whether inside or outside of bankruptcy.[450] Moreover, the Court determined that "Aearo [wa]s not presently suffering financial problems of the type that warrants Chapter 11 relief" and dismissed Aearo's bankruptcy cases accordingly.[451]

Second, Judge Graham addressed the Debtors' objection on the basis of laches.[452] The Court applied the Debtors' proposed standard for the doctrine of laches,[453] but determined that the Movants' delay in seeking dismissal was excusable.[454] Judge Graham explained that the Movants had been constantly engaged in contested hearings and coordinated mediation throughout the course of the bankruptcy, and on

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[444] *Id*. at 22.

[445] *Id*.

[446] *Id*. at 22–24.

[447] *Id*. at 24.

[448] *Id*. at 30.

[449] *Id*. at 32, 38.

[450] *Id*. at 40.

[451] *Id*. at 44–45.

[452] *Id*. at 45.

[453] The doctrine of laches: (1) delay in the assertion of a claim; (2) the delay is inexcusable; and (3) undue prejudice results from the delay. *Id*.

[454] *Id*.

that basis he found that the Movants' request was reasonable and did not unduly prejudice Aearo.[455] Accordingly, Judge Graham declined Aearo's request to invoke laches.[456]

Third, Judge Graham addressed the Respirator Committee's request for appointment of a chapter 11 trustee.[457] The Court disagreed with the Respirator Committee's view that a trustee would solve their grievances with 3M and Aearo's sluggish mediation process and instead promoted a consensual resolution outside of bankruptcy.[458] For those reasons, the Court denied the Respirator Committee's request for the appointment of a chapter 11 trustee and granted the motions to dismiss without prejudice, leaving the door open for the Debtors to refile if their circumstances change.[459]

Aearo Appeals Dismissal

In the wake of Judge Graham's order dismissing the Aearo Bankruptcies, 3M and Aearo found themselves on the back foot. The plaintiffs' attorneys' victory would direct 3M's efforts back to the MDL, where they would likely settle. In an effort to revive their bankruptcy strategy, the Aearo Entities appealed Judge Graham's dismissal to the Seventh Circuit on June 12, 2023.[460] Then, two days later, on June 14, 2023, Judge Graham issued a Certification for Direct Appeal, endorsing Aearo's appeal and petitioning the Seventh Circuit to address the important issues involved that lacked controlling authority.[461] On August 28, 2023, the Seventh Circuit Court of Appeals granted Aearo's appeal and consolidated the dismissal order with the Debtor's denied preliminary injunction that was already on appeal.[462]

Parties Come to an Agreement

Largest MDL in History Reaches a Settlement

In the meantime, while the MDL and Bankruptcy courts were inactive, pending their respective appeals, 3M directed its efforts to negotiating a global settlement with the Combat Arms plaintiffs'

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[455] *Id*. at 45–46.

[456] *Id*. at 46.

[457] *Id*. at 46.

[458] *Id*. at 47.

[459] *Id*. at 48–49.

[460] Notice of Appeal, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[461] Certification For Direct Appeal, 1–2, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-028090, 22-2291, 22-2292, 22-2293, 22-2294, 22-2295, 22-2296).

[462] Order, Aearo Technologies LLC v. Those Parties Listed on Appendix A to the Complaint, 22-2606, (7th Cir.) (No. 23-2286, 23-2287, 23-2288, 23-2289, 23-2290, 23-2291, 23-2292).

attorneys. Eventually, on August 29, 2023, the day after the Seventh Circuit granted Aearo's appeal, those efforts paid off, and the two sides came to terms, reaching a settlement agreement.[463]

3M agreed to a Master Settlement Agreement (MSA) in which they would contribute $6 billion of value ($5 billion in cash and $1 billion in 3M common stock)[464] to resolve the Combat Arms Earplug litigation against Aearo and 3M without admitting to any "fault, liability, wrongdoing, or damages whatsoever."[465] The MSA was drafted in three parts, separately addressing (1) plaintiffs who had obtained verdicts against 3M (the "Verdict Cases"), (2) plaintiffs who had already initiated individual discovery (the "Wave Cases"), and (3) the rest of the plaintiffs (the "Non-Wave Cases").[466]

3M agreed to pay a lump sum of "$146,900,000.00 as collective consideration for all Releases and Stipulated Dismissals with Prejudice from all of the Verdict Cases."[467] For the remaining claims, 3M would require the Combat Arms Counsel to submit Identification Orders naming all of their represented plaintiffs, identifying the Eligible Claimants and whether they are Wave Cases.[468] The Non-Wave Case Eligible Claimants would then submit a Registration Form if they elected to participate in the Settlement.[469] In the Registration Form, the claimants would indicate whether they wished to participate in the Expedited Payment Program (a smaller total payment but received in full sooner) or the Deferred Payment Program (a smaller initial payment with a larger deferred payout), and they would provide the information necessary to participate in their preferred plan.[470] Similarly, the Wave Case Claimants would be required to submit a Wave Case Registration Form including a full and final release and a stipulated Dismissal with Prejudice.[471] Both classes of claimants forfeited their right to any future claims arising out of the Combat Arms liability

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[463] Combat Arms Settlement Agreement, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019) [hereinafter Settlement I].

[464] 3M would later decide to pay the total $6 billion in cash rather than common stock. Ronald Miller, 3M Earplug Lawsuit Update, Lawsuit Information Center (Apr. 1, 2024), https://www.lawsuit-information-center.com/13-million-3m-earplug-verdict.html.

[465] 3M Announces Combat Arms Settlement, 3M SCIENCE APPLIED TO LIFE (Aug 29, 2023 6:33 AM), https://investors.3m.com/news-events/press-releases/detail/1797/3m-announces-combat-arms-settlement; Settlement I, *supra* note 463, at 2.

[466] *Id.* at 6–7.

[467] Combat Arms Settlement Agreement for Verdict Cases Master Settlement Agreement, 2 *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019) [hereinafter Settlement II].

[468] Settlement I, *supra* note 463, at 7; Settlement Combat Arms Agreement for Wave Cases Master Settlement Agreement III, 2 *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla. Apr. 3, 2019) [hereinafter Settlement III].

[469] Settlement I, *supra* note 463, at 10.

[470] *Id.* at 11

[471] Settlement III, *supra* note 468, at 4.

as soon as they submitted their Registration Form, and they could not avoid that forfeiture unless the Defendants chose to exercise their "Walkaway Right" terminating the Settlement.[472]

The Defendants would determine the participation level of the Wave Case Claimants and Non Wave Case Claimants by calculating the percentage of Eligible Claimants in each class that opted to submit a Registration Form.[473] The Defendants reserved the right to "Walkaway," or terminate the Settlement with that class of claimants, if the participation levels failed to reach a certain level.[474] The participation rate threshold was kept confidential for the Wave Case Claimants and set at 98% for the Non Wave Case Claimants.[475] The Defendants agreed to a tiered pay scale that would increase with participation levels for the Non Wave Claimants and a $253,100,000.00 lump sum payment for the Wave Case Claimants.[476]

Additionally, the MSA imposed a set of obligations on participating CAE Counsel, requiring them to recommend the Settlement to 100% of the Eligible Claimants under their representation and to desist from all involvement in Combat Arms litigation outside of the scope of the MSA.[477] As a final condition to the global Combat Arms settlement, 3M agreed to forfeit the releases granted by the MSA in the event that 3M avoided the agreement in bankruptcy, and Aearo agreed to return to the Southern District of Indiana if they refiled for bankruptcy.[478]

Wrapping Things Up

With a settlement in place, Aearo and 3M were finally ready to table their bankruptcy strategy, and on September 12, 2023, the Debtors and the CAE Committee jointly requested that the Seventh Circuit "hold the appeals in abeyance."[479] This order, which the Seventh Circuit granted the following day, would suspend the appellate proceedings until the parties eventually moved to dismiss or continue the appeals.[480]

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[472] *Id.*; Settlement I, supra note 463, at 11.

[473] *Id.* at 17; and Settlement III, *supra* note 468, at 8.

[474] Settlement I, *supra* note 463, at 17; Settlement III, *supra* note 468, at 10.

[475] *Id.*

[476] Settlement I, *supra* note 463, at 26–30; Settlement III, *supra* note 468, at 10.

[477] Settlement I, *supra* note 463, at 20.

[478] *Id.* at 34.

[479] Joint Motion to Hold Appeals in Abeyance, 1–2, Aearo Technologies LLC v. Those Parties Listed on Appendix A to the Complaint, 22-2606, (7th Cir.) (No. No. 22-2606).

[480] *Aearo Technologies LLC v. Those Parties Listed on Appendix A to the Complaint (22-2606)*, COURT LISTENER at 16, (last visited Apr. 15, 2024).

A negotiated settlement agreement on the heels of Aearo's dismissal from bankruptcy may seem to indicate that their time in bankruptcy was merely a delay of the inevitable, but the bankruptcy's influence on the ultimate outcome was incalculable. On the other hand, the direct cost to the Debtors' estates is calculable, and by the time everything was said and done, the Aearo Entities ran up a bill of over $80 million in professional fees.

Professional	Role	Fees	Expenses	Total
Kirkland & Ellis LLP[481]	Debtors' Counsel	$38,996,353.52	$1,008,307.57	$40,004,661.09
Clement & Murphy, PLLC[482]	Debtors' Appellate Counsel	$249,238.50	$3,600.64	$252,839.14
KTBS Law LLP[483]	Co-Lead Counsel to the CAE Committee	$6,032,870.75	$85,845.07	$6,118,715.82
Rubin & Levin, P.C.[484]	Indiana Counsel to the CAE Committee	$380,660.60	$21,971.77	$402,632.37
Houlihan Lokey Capital, Inc.[485]	Investment Banker to the CAE Committee	$1,762,500.00	$20,885.76	$1,783,385.76
Province, LLC[486]	Financial Advisor	$3,480,991.50	$7,329.69	$3,488,321.19

[481] Order Granting Fourth Interim Fee and Final Fee Application of Kirkland & Ellis LLP and Kirkland & Ellis International LLP, Attorneys for the Debtors and Debtors in Possession, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[482] Order Granting the Third Interim and Final Fee Application of Clement & Murphy, PLLC, Appellate Counsel for the Debtors and Debtors in Possession, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[483] Order Granting Fourth Interim and Final Application of KTBS Law LLP As Co-Lead Counsel to The Committee Of Unsecured Creditors For Tort Claimants – Related To Use Of Combat Arms Version 2 Ear Plugs, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[484] Order Granting Fourth Interim and Final Fee Application of Rubin & Levin, P.C. For Compensation for Services Rendered and Reimbursement of Expenses Incurred as Indiana Counsel to The Committee of Unsecured Creditors for Tort Claimants, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[485] Order Granting Fourth Interim and Final Fee Application of Houlihan Lokey Capital, Inc. For Compensation for Services Rendered and Reimbursement of Expenses Incurred as Investment Banker to The Committee of Unsecured Creditors for Tort Claimants, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[486] Order Granting Fourth Interim and Final Fee Application of Province, LLC For Compensation for Services Rendered and Reimbursement of Expenses Incurred as Financial Advisor to The Committee of Unsecured Creditors For Tort Claimants, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

	to the CAE Committee			
Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.[487]	Special Appellate Counsel to the CAE Committee	$1,924,002.50	$30,028.66	$1,954,031.16
Caplin & Drysdale, Chartered[488]	Special Mass Tort and Negotiation Counsel to the CAE Committee	$3,800,557.75	$207,589.48	$4,008,147.23
Bates White, LLC[489]	Claims Valuation Consultants for the Debtors	$6,071,697.00	$7,281.71	$6,078,978.71
Ice Miller LLP[490]	Co-Counsel for the Debtors	$728,073.50	$16,369.26	$744,442.76
GlassRatner Advisory & Capital Group, LLC[491]	Financial Advisor to the Respirator Committee	$597,099.00	$3,210.63	$600,309.63
Rochelle McCullough, LLP[492]	Counsel to the Respirator Committee	$2,793,909.00	$219,549.87	$3,013,458.87

[487] Order Granting Third Interim And Final Fee Application Of Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. For Compensation for Services Rendered and Reimbursement Of Expenses Incurred As Special Appellate Counsel To The Committee Of Unsecured Creditors, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[488] Order Granting Amended Fourth Interim and Final Fee Application Of Caplin & Drysdale, Chartered As Special Mass Tort And Negotiation Counsel To The Official Committee Of Unsecured Creditors For Tort Claimants, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[489] Order Granting Fourth Interim and Final Fee Application of Bates White, LLC, Claims Valuation Consultants For The Debtors And Debtors In Possession, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[490] Order Granting Fourth Interim and Final Fee Application of Ice Miller LLP, Co-Counsel For The Debtors And Debtors In Possession, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[491] Order Granting Third Interim and Final Fee Application of Glassratner Advisory & Capital Group, LLC D/B/A B. Riley Advisory Services as Financial Advisor to The Respirator Committee, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[492] Order Granting Fourth and Final Fee Application of Rochelle McCullough, LLP For Compensation for Services Rendered and Reimbursement of Expenses Incurred as Counsel To The Official Respirator Committee, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

Otterbourg P.C.[493]	Co-Lead Counsel to the CAE Committee	$4,838,331.50	$140,142.75	$4,978,474.25
Mattingly Burke Cohen & Biederman LLP[494]	Indiana Counsel to the Respirator Committee	$348,269.50	$5,530.40	$353,799.90
Proteus Discovery Group, LLC[495]	eDiscovery Service Provider to the Respirator Committee	$39,675.00	$3,603.06	$43,278.06
The Messina Group[496]	Claims Noticing Expert to the Respirator Committee	$113,585.00	$0.00	$113,585.00
McDonald Hopkins LLC[497]	Attorneys for the Debtors	$735,187.88	$22,331.56	$757,519.44
Brown Rudnick LLP[498]	Special Litigation Counsel to the CAE Committee	$5,447,736.80	$273,380.07	$5,721,116.87
Judy Wolf	Independent Fee Examiner	$134,150.00	$32,065.00	$166,215.00

[493] Order Granting Fourth Interim and Final Fee Application of Otterbourg P.C. For Compensation For Services Rendered And Reimbursement Of Expenses Incurred As Co-Lead Counsel To The Committee Of Unsecured Creditors For Tort Claimants, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[494] Amended Order Granting Fourth Interim and Final Fee Application of Mattingly Burke Cohen & Biederman LLP for Compensation for Services Rendered And Reimbursement Of Expenses Incurred As Indiana Counsel To The Additional Official Committee, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[495] Order Granting Second Interim and Final Fee Application of Proteus Discovery Group, LLC For Compensation for Services Rendered And Reimbursement Of Expenses Incurred As Ediscovery Service Provider, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[496] Order Granting Second Interim and Final Fee Application of The Messina Group as Claims Noticing Expert To The Additional Official Committee Of Unsecured Creditors For Tort Claimants — Related To Use Of Respirators, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[497] Order Granting Fourth Interim and Final Fee Application of McDonald Hopkins LLC, Special Counsel to The Debtors And Debtors In Possession, At The Sole Direction Of The Disinterested Directors Of The Boards Of Directors Of The Debtors, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[498] Order Granting Fourth Interim and Final Fee Application of Brown Rudnick LLP For Compensation For Services Rendered And Reimbursement Of Expenses Incurred As Special Litigation Counsel To The Committee Of Unsecured Creditors For Tort Claimants, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

Weiker[499]				
Diana G. Adams[500]	Fee Reviewer for the Independent Fee Examiner	$59,120.00	$114.00	$59,234.00
Sharon F. Manewitz[501]	Fee Reviewer for the Independent Fee Examiner	$9,840.00	$0.00	$9,840.00
Lori Lapin Jones[502]	Fee Reviewer for the Independent Fee Examiner	$100,320.00	$0.00	$100,320.00
Jacobson Hile Kight LLC[503]	Counsel for the Independent Fee Examiner	$55,890.00	$355.30	$56,245.30
Totals		$78,700,059.30	$2,109,492.25	$80,809,551.55

[499] Order Granting Final Fee Application of Judy Wolf Weiker, As The Independent Fee Examiner, For Compensation For Services Rendered And Reimbursement Of Actual And Necessary Expenses Incurred For The Period December 21, 2022 Through November 17, 2023, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[500] Order Granting Final Fee Application of Diana G. Adams for Compensation For Services Rendered As Fee Reviewer For The Independent Fee Examiner For The Period December 21, 2022 Through November 7, 2023, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[501] Order Granting Final Fee Application of Sharon F. Manewitz for Compensation for Services Rendered as Fee Reviewer for the Independent Fee Examiner, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[502] Order Granting Final Fee Application of Lori Lapin Jones for Compensation for Services Rendered as Fee Reviewer, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

[503] Order Granting Final Fee Application of Jacobson Hile Kight LLC for Compensation for Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred as Counsel for the Independent Fee Examiner, *In re Aearo Techs., LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).