No. 05-628

IN THE

SUPREME COURT OF THE UNTIED STATES

OCTOBER TERM 2005

IN THE MATTER OF ACME CHEMICAL INDUSTRIAL PRODUCTS, INC., *Debtor*

ACME CHEMICAL INDUSTRIAL PRODUCTS, INC.,
Petitioner,

v.

JEAN TIEN,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team Number 17
Counsel for Petitioner

QUESTIONS PRESENTED

I. WHETHER BANKRUPTCY STATUTES, *GRUPO*, AND MODERN BUSINESS PRACTICES PROVIDE FEDERAL COURTS WITH EQUITABLE POWER TO ORDER THE SUBSTANTIVE CONSOLIDATION OF DEBTOR ESTATES.

II. WHETHER SECTION 363(F) OF THE BANKRUPTCY CODE, EQUITABLE POWERS, AND BANKRUPTCY POLICIES PERMIT A SALE FREE AND CLEAR OF SUCCESSOR LIABILITY CLAIMS.

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v.

JEAN TIEN,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Acme Chemical Industrial Products, Inc.—appellee below—respectfully submits this brief in support of its request that this Court reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit and render judgment for Petitioner.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Kelly was issued on March 14, 2005, and is set forth in the Record at pages 7-8. The unreported opinion of the United States Court of Appeals for the Thirteenth Circuit was issued on October 17, 2005, and is set forth in the Record at pages 14-18.

STATEMENT OF JURISDICTION

The Fourteenth Annual Judge Conrad B. Duberstein National Bankruptcy Moot Court Competition Rules waives a formal statement of jurisdiction.

STATUTORY PROVISIONS

The following United States Code provisions are relevant in this appeal: 11 U.S.C. § 101, 11 U.S.C. § 105, 11 U.S.C. § 363, 11 U.S.C. § 506, 11 U.S.C. § 507, 11 U.S.C. § 541, 11 U.S.C. § 1107, 11 U.S.C. § 1123, 11 U.S.C. § 1141, and Fed. R. Bankr. P. 1015. These federal statutes are set forth in Appendices "A"–"J."

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Defaults domino and lead to bankruptcy.

Acme Chemical Industrial Products, Inc. ("ACME") is the sole distributor of the soda ash produced by subsidiary Trona Ash Products Company, Inc. ("TAPCO") and is the sole distributor of the calcium chloride produced by subsidiary Chemical America Product Company, Inc. ("CAPCO"). (R. at 2-4.) In fact, ACME purchases its subsidiaries' entire output and distributes soda ash and calcium chloride to a global market. (R. at 4.) Both subsidiaries are

wholly-owned, and ACME manages all facets of their production, operates a centralized cash management system, and controls other operational, marketing, and financial matters. *Id*. To oversee these matters, ACME employs TAPCO's and CAPCO's corporate officers, board of directors, and senior management team members. *Id*. As payment for these managerial services, ACME charges both subsidiaries a price that does not always reflect the true value of those services. *Id*. Likewise, the prices ACME pays for products purchased from its subsidiaries do not always reflect current market prices. *Id*.

Due in part to the integration of the three companies' management, operations, and finances, numerous trade creditors do not rely upon the independence of the companies when extending credit. (R. at 8.) Creditors treat the companies as a single unit, believing they are dealing with ACME rather than TAPCO or CAPCO. *Id.*

Two years ago, a dispute arose regarding the conduct and polices of management. (R. at 5.) Respondent Jean Tien and other female employees of CAPCO (collectively "Tien") filed a class action suit against CAPCO under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. and the Equal Pay act of 1963, 29 U.S.C. § 206(d). *Id*. The lawsuit alleged that CAPCO fostered a hostile work environment for female employees and failed to pay females "equal pay" for "equal work." *Id*.

During the past few years, the soda ash market has not been profitable for ACME and TAPCO. *Id*. Even though the calcium chloride market has remained strong, the financial blows from the soda ash market caused ACME to default on its primary credit facility. *Id*. This initial default caused a domino effect resulting in defaults along ACME's other credit lines. (R. at 6.) In turn, these defaults caused all of ACME's credit agreements to be in default and to be accelerated. *Id*. With hopes of restructuring the mounting debt, ACME began negotiations with

creditors. *Id*. After these restructuring negotiations with creditors failed, ACME, TAPCO, and CAPCO turned to the Bankruptcy Court for relief. *Id*.

B. An interested buyer provides relief.

Even after filing bankruptcy, ACME and its subsidiaries continued to suffer losses. (R. at 6.) Due to these continued losses, the companies began vigorously marketing the businesses in an effort to sell them. *Id.* Sousa Industries, Inc. ("SOUSA")—a company also in the soda ash industry—placed the highest bid, offering to purchase all three companies for a price slightly above fair market value. (R. at 8.) SOUSA anticipates favorable market conditions for the soda ash industry and wants to add a calcium chloride operation to its existing product line. *Id.* Also, SOUSA plans to keep a majority of the current employees and to operate the businesses in the same manner ACME operated them. *Id.* To carry out these intentions, SOUSA conditioned the purchase on the following: 1) the assets of all three companies must be sold as a unit, and 2) ACME must obtain a final non-appealable order holding the sale to be free and clear of the discrimination claims. (R. at 8-9.)

In order to meet SOUSA's conditions, ACME filed a motion with the Bankruptcy Court requesting substantive consolidation of ACME's, TAPCO's, and CAPCO's estates; ACME also requested permission to sell substantially all of the consolidated estate's assets. To meet SOUSA's conditions, ACME sought to sell the assets free and clear of all interests, including successor liability claims, pursuant to section 363(f) (R. at 6-7.)

C. Entangled estates result in high administrative costs.

The entanglement of the three companies' estates is largely due to the numerous inter-company loans and transactions that were conducted as part of the companies' daily operations. Although the companies shared a centralized management system, these loans and transactions

were poorly recorded and accounted. (R. at 7.) Also, dealings with outside creditors did not follow corporate formalities. Creditors treated the companies as a single unit in part because ACME customarily guaranteed and paid TAPCO's and CAPCO's trade debt. (R. at 8.) With the state of affairs so entangled, the District Court considered ordering substantive consolidation and permitting substantially all of the consolidated estate's assets to be sold free and clear under section 363(f). (R. at 7.)

Without substantive consolidation and a 363(f) sale, the estates would have to finance the cost of unraveling the inter-corporate dealings and determining the state of affairs of each company. (R. at 8.) The District Court found that this process would be prohibitively expensive and would not yield a result that would apportion sale proceeds in any principled manner. *Id.* Additionally, without substantive consolidation, ACME's general unsecured creditors would recover between 50 and 60 cents on the dollar. (R. at 22.) Similarly situated CAPCO creditors would recover between 65 and 75 cents on the dollar, while TAPCO's similarly situated creditors would only recover seven cents on the dollar. *Id.* Yet, if substantive consolidation of the three estates is ordered, the consolidated estate would provide a 60 cent recovery for all similarly situated unsecured creditors. (R. at 22-23.) Substantive consolidation would pool the assets of all three companies and extinguish any inter-company debt existing among them. *Id.* Moreover, if Tien's claim survives a 363(f) sale, the claim would further reduce proceeds for unsecured creditors.

II. NATURE OF THE PROCEEDINGS

ACME, TAPCO, and CAPCO properly filed petitions under Chapter 11 of the Bankruptcy Code in the District of Kelly. (R. at 6.) The Bankruptcy Court administratively consolidated all three estates. *Id.* ACME moved to substantively consolidate the estates and to

sell its assets under section 363(f) of the Code. (R. at 6-7.) In response, Tien filed a motion to withdraw the reference from the Bankruptcy Court. (R. at 7.) The District Court granted Tien's motion. Then the District Court conducted hearings and arguments regarding ACME's motion. *Id.* The District Court granted ACME's motion to substantively consolidate the estates and granted ACME's section 363(f) motion to sell the assets of the consolidated estate free and clear of all interests, liens, claims, and encumbrances. *Id.*

The Thirteenth Circuit reversed and remanded the District Court decision. In so holding, the Thirteenth Circuit stated that federal courts do not have the equitable power to order substantive consolidation (R. at 16) and that 363(f) sales are not free and clear of successor liability claims. (R. at 18.) ACME petitioned for a writ of certiorari. Shortly thereafter, this Court granted the petition. (R. at 1.)

SUMMARY OF THE ARGUMENT

I.

The Thirteenth Circuit improperly reversed the District Court's order of substantive consolidation of ACME's, TAPCO's, and CAPCO's estates. This ruling is improper for three reasons. First, this Court has the equitable power to order substantive consolidation of the three companies' estates: **a)** section 105(a) advances the purposes of the Bankruptcy Code, **b)** section 1123(a)(5)(C) independently authorizes this remedy, **c)** section 105(a) enforces the meaning of section 1123(a)(5)(C), and **d)** Rule 1015 recognizes the availability of substantive consolidation.

Second, the jurisdictional limit that *Grupo* defines does not embrace bankruptcy's equitable power. Instead, Scalia's opinion cautions against federal courts' roving and

unprecedential expansion of equity. However, in so cautioning, Scalia carves out exceptions for bankruptcy.

Third, this Court's equitable power must evolve to meet modern corporate formalities. ACME's estates, like many modern companies, have conducted business without regard to proper accounting practices. Thus, when these companies enter bankruptcy, federal courts are faced with an entangled estate. Without substantive consolidation, the three companies' estates will have to finance accountants and lawyers to determine the state of affairs of each entity. This would drain the amount available to creditors and unnecessarily delay bankruptcy proceedings.

II.

The Thirteenth Circuit also improperly reversed the District Court's authorization of ACME's section 363(f) motion to sell the assets of the consolidated estate free and clear of all interests, liens, claims, and encumbrances. In dispute is the scope of the term "interests" within section 363(f). The Thirteenth Circuit's ruling reversing the 363(f) sale is incorrect for three reasons. First, statutory construction and judicial tests demand a broad interpretation of the term "interests." This is consistent with this Court's previous interpretation of "interests."

Second, section 105(a) provides federal courts with the equitable power to construe section 363(f) in a broad manner. As such, the term "interests" encompasses Tien's successor liability claims and yet still provides Tien adequate protection.

Third, including Tien's successor liability claim within the broad meaning of "interests" carries out the Bankruptcy Code's priority scheme and maximizes the recovery for all creditors. A contravening interpretation of "interests" would allow Tien to single-handedly drain the estate and usurp the fundamental tenants of bankruptcy.

ARGUMENT AND AUTHORITIES

I. BANKRUPTCY STATUTES, *GRUPO*, AND MODERN BUSINESS PRACTICES PROVIDE THIS COURT WITH EQUITABLE POWER TO ORDER THE SUBSTANTIVE CONSOLIDATION OF ACME'S ESTATE.

The propriety of federal courts' power to order substantive consolidation is a question of law, as are all interpretations of the Bankruptcy Code, and is reviewed de novo. *Sasson v. Sokoloff, M.D. (In re Sasson)*, 424 F.3d 864, 867 (9th Cir. 2005); *Reider v. FDIC (In re Reider)*, 31 F.3d 1102, 1105 (11th Cir. 1994). Additionally, because bankruptcy courts are courts of equity, the standard of review is based on bankruptcy courts' equitable power. *In re Sasson*, 424 F.3d at 867 ("We review the scope of the exercise of equitable power de novo.").

ACME's substantive consolidation is based on a solid foundation in bankruptcy jurisprudence, which is substantiated by the Bankruptcy Code and circuit courts.[1] This Court vowed that it "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990). At this time, there is no indication that Congress wishes to abandon the remedy of substantive consolidation. The remedy has survived enactment of the Bankruptcy Reform Acts of 1978 and 1994, and the recent 2005 changes; excluding the Thirteenth Circuit's decision below, no court has held to the contrary. *See Alexander v. Compton* (*In re Bonham)*, 229 F.3d 750, 765; *In re Owens Corning*, 419 F.3d 195, 209 (3d Cir. 2005). Although the Thirteenth Circuit's decision applies *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999) (5-4

[1] *See, e.g.*, *In re Bonham*, 229 F.3d at 765; *In re Reider*, 31 F.3d at 1105-07; *First Nat'l Bank v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 712, 720 (6th Cir. 1992); *Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.)*, 810 F.2d 270, 276 (D.C. Cir. 1987); *Pension Ben. Guar. Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1092-93 (1st Cir. 1983); *FDIC v. Hogan (In re Gulfco Inv. Corp.)*, 539 F.2d 921, 927-28 (10th Cir. 1979).

decision), to invalidate the continued application of substantive consolidation, the reasoning set forth below demonstrates that *Grupo*, bankruptcy statutes, and modern business practices demand that federal courts maintain the equitable power to order substantive consolidation.

A. Pursuant to the purpose and language therein, sections 105(a) and 1123(a)(5)(C) of the Bankruptcy Code and section 1015 of the Rules of Bankruptcy Procedure authorize this Court to order the substantive consolidation of ACME's estate.

In order to advance the purpose of the Code, bankruptcy statutes independently and collectively grant federal courts the power to order substantive consolidation. "The basic purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction." 2-105 Collier on Bankruptcy P 105.01 (15th ed. rev. 2005) (discussing *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995)); *In re L & S Indus., Inc*. 989 F.2d 929, 932 (7th Cir. 1993). Section 1123(a)(5)(C) authorizes the consolidation of ACME with TAPCO and CAPCO, and the advisory committee's commentary for rule 1015 recognizes that substantive consolidation is a remedy exercised by bankruptcy courts. "These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990). Section 105's independent equitable power to order substantive consolidation, the effect of this power when coupled with section 1123(a)(5)(C), and congressional recognition of substantive consolidation in rule 1015 will be discussed accordingly.

1. Section 105(a) couples with the purposes of the Code to grant this Court the equitable power to order the substantive consolidation of ACME's estate.

This Court has the jurisdiction to order the substantive consolidation of ACME's estate pursuant to the equitable powers granted in section 105(a) and in fulfillment of the purposes of

the Bankruptcy Code. *Simon v. Brentwood Tavern, LLC (In re Brentwood Golf Club, LLC)*, 329 B.R. 802, 811 (Bankr. S.D. Mich. 2005). Stated explicitly, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (2005). This broad grant of authority is tied to the *provisions* of the Code and works to effectuate the underlying *purposes* of the Code. *See* Ryan W. Johnson, *The Preservation of Substantive Consolidation,* 24-AUG AM. BANKR. INST. J. 44, 63 (2005). While section 105 demands that bankruptcy courts act in a manner consistent with the Code's provisions, "the scope of that restriction should not be exaggerated to the point at which bankruptcy courts feel powerless to act unless a party can present a specific textual quotation which identifies the availability of a specific remedy." *Barron v. Tex. Guaranteed Student Loan Corp. (In re Barron)*, 264 B.R. 833, 844 (Bankr. E.D. Tex. 2001).

That the Code's purposes are not explicitly stated therein, does not argue against their significance. As Collier explained, Chapter 11 does not explicitly state that its goal or purpose is reorganization, yet such purpose is conveyed by this Court. 2-105 Collier on Bankruptcy P 105.09 (15th ed. rev. 2005) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Section 105 grants bankruptcy courts broad authority to fill the gaps inherent in the statute and to fashion relief, such as substantive consolidation, in a manner congruent with these implied goals. *See Sears, Roebuck & Co. v. Spivey*, 265 B.R. 357, 371 (E.D.N.Y. 2001) ("Section 105 of the Bankruptcy Code bestows on bankruptcy courts a specific equitable power to act in accordance with principles of justice and fairness. Bankruptcy courts have broad latitude in exercising power."); *see also United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *In re Sasson*, 424 F.3d at 868; *Saxman v. Educ. Credit Mgmt. BJR Corp. (In re Saxman)*, 325 F.3d 1168, 1174 (9th

Cir. 2003). In a recent decision, the Third Circuit aptly summarized this Court's views of the flexibility inherent in bankruptcy's equitable power:

> As the Supreme Court has noted, "[e]quity eschews mechanical rules; it depends on flexibility," *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946), and "there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (quoting *Clark v. Smith*, 13 Pet. (38 U.S.) 195, 203, 10 L.Ed. 123 (1839)).

Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp., 330 F.3d 548, 568 (3d Cir. 2003) (en banc).

This view is also consistent with statutory construction, which endeavors to give meaning to each of Congress' enactments. If section 105(a) is narrowly read to require a strict adherence to another provision of the Code, then 105(a) losses all of its equitable power and becomes redundant and unnecessary. *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). Such limitations contravene this Court's long-held view of bankruptcy courts as courts of equity. *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). ("[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity."). This view has been promulgated throughout the circuits. *Schwartz v. Aquatic Dev. Group, Inc. (In re Aquatic Dev. Group, Inc.)*, 352 F.3d 671, 680 (2d Cir. 2003) ("[B]ankruptcy Courts 'are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process.'"); *see also In re Combustion Engineering*, 391 F.3d 190, 235 (3d Cir. 2005).

At the same time, ACME concedes that section 105(a) does not create substantive rights and cannot be applied to disregard other provisions of the Code. Such a view would make all the other provisions redundant and section 105(a) omnipotent. However, ACME is not asking for a new right to be created. When federal courts order the remedy of substantive consolidation, they are protecting the inherent right of Tien and the other creditors to receive an equitable

distribution. According to section 1123(a)(4), a plan of reorganization must "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. 1123(a)(4) (2005); *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941) ("[T]he theme of the Bankruptcy Act is equality of distribution."). By allowing ACME's substantive consolidation, the equitable treatment of all creditors is ensured. *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 618 (Bankr. D. Del. 2001). The District Court's findings illustrate how substantive consolidation promotes equitable treatment of all creditors: unsecured creditors of TAPCO would only recover seven cents while CAPCO creditors recovered be 65 and 75 cents on the dollar; however, with consolidation, all unsecured creditors of the consolidated estate would receive 60 cents on the dollar. (R. at 22.) Thus, the remedy of substantive consolidation enables the bankruptcy court to disregard the corporate formalities by piercing ACME's veil in order to reach assets of CAPCO and TAPCO for the satisfaction of ACME's debt. *Talcott v. Wharton* (*In re Cont'l Vending Mach. Corp.)*, 517 F.2d 997, 1000 (2d Cir. 1975). Without the remedy of substantive consolidation there would be no adequate way to protect ACME's creditors.

While this should be enough to justify equitable doctrine of substantive consolidation, some courts have held that section 105 should not be used on its own, but rather in conjunction with another section of the code. *Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC),* 423 F.3d 166, 184 (2d Cir. 2005) (quoting *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.),* 351 F.3d 86, 91-92 (2d Cir. 2003)). The Bankruptcy Code also provides a separate and distinct provision, 11 U.S.C. § 1123(a)(5)(C) (2005), which allows for substantive consolidation to be given further acknowledgement.

2. Section 1123(a)(5)(C), independently or coupled with section 105(a), grants this Court the equitable power to order the substantive consolidation of ACME's estate.

Although not explicitly stated therein, the remedy of substantive consolidation is expounded in section 1123(a)(5)(C) of the Bankruptcy Code. *In re Stone & Webster, Inc.*, 286 B.R. 532, 540 (Bankr. D. Del. 2002). This provision is an independent substantiation of this Court's power to order the substantive consolidation of ACME's estate. *In re Worldcom, Inc.*, No. 02-13533, 2003 WL 23861928, *35 (Bankr. S.D.N.Y. Oct. 31, 2003) ("The Bankruptcy Code itself [section 1123(a)(5)(C)] contemplates that substantive consolidation may be used to effectuate a plan of reorganization."); *In re Affiliated Foods, Inc.*, 249 B.R. 770, 775 (Bankr. D. Mo. 2000) (finding statutory authority for substantive consolidation pursuant to section 1123(a)(5)(C)).

Section 1123(a)(5)(C) authorizes "the merger or consolidation of the debtor with one or more persons." 11 U.S.C. § 1123(a)(5)(C) (2005). Because the phrase "one or more persons" includes the debtor, congressional intent was to allow the debtor to merge or consolidate with debtors or entities during the reorganization process. *See In re Stone & Webster, Inc.*, 286 B.R. 532, 541 (Bankr. D. Del. 2002); *see also In re Limited Gaming of Am.*, 228 B.R. 275, 287 (Bankr. D. Okla. 1998) (interpreting 1123(a)(5)(C) as indicia of Congress' intent to allow substantive consolidation).

Therefore, even if section 105(a)'s equitable powers are confined to interpreting provisions of the Code, federal courts still have the equitable power to order substantive consolidation. Section 105(a) provides flexibility to interpret 1123(a)(5)(C) beyond it explicit language to reach section 1123(a)(5)(C) purpose. When coupled with section 1123(a)(5)(C), section 105(a) authorizes bankruptcy courts to fashion such orders as are necessary or

appropriate in furtherance of the substance of section 1123(a)(5)(C). The substance allows for the consolidation of debtors. Following this reasoning, the District Court of Kelly properly ordered the substantive consolidation of debtor ACME with debtors CAPCO and TAPCO.

3. Rule 1015 evinces Congress' tacit approval of this Court's equitable power to order the substantive consolidation of ACME's estate.

While explaining that Bankruptcy Rule 1015 governs a procedural matter, the Advisory Committee sets forth substantive consolidation in terms of intermingled estates. *See* Fed. R. Bankr. P. 1015 (2005). "Consolidation of the estates of separate debtors may sometimes be appropriate, as when the affairs of an individual and a corporation owned or controlled by that individual are so intermingled that the court cannot separate their assets and liabilities." *Id.*; *see also In re Bonham*, 229 F.3d at 753 (explaining that Bankruptcy Rules recognize the validity of substantive consolidation). Moreover, the Advisory Committee's discussion in rule 1015 suggests that they understood that substantive consolidation was available under the Code. *In re Stone & Webster, Inc.,* 286 B.R. at 539; Johnson, 24-AUG AM. BANKR. INST. J. at 64 ("[T]he Advisory Committee opines that substantive consolidation of separate debtor estates may be appropriate.").

B. *Grupo* does not undermine this Court's power to order substantive consolidation.

The Thirteenth Circuit incorrectly relies on *Grupo* for the proposition that this Court does not have the equitable power to order the substantive consolidation of ACME's estate. (R. at 15.) However, *Grupo* does not instruct such a broad interpretation. In *Grupo,* a general creditor claimant sought to enjoin the debtor from use of his property rights even before the suit reached judgment. The Court reasoned that such relief had never been available before and in fact had been rejected by judicial precedent. *Grupo,* 527 U.S. at 322. Substantive consolidation, on the

other hand, has a long judicial history, extending back more than six decades to the *Sampsell* decision. *See Sampsell,* 313 U.S. at 219 (1941). "Moreover, [substantive consolidation's] roots extend to at least as far back as the Bankruptcy Act of 1898, and nothing in the Bankruptcy Code or case law suggests that the remedy is not available today." *In re Stone & Webster, Inc.,* 286 B.R. at 538. Long-standing judicial precedent should not be undermined by *Grupo*, a case that does not even mention substantive consolidation. Johnson, 24-AUG AM. BANKR. INST. J. at 44. In 1941 this Court pronounced: "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete." *Sampsell*, 313 U.S. at 219. Post-*Grupo* courts have continued to exercise their power to order substantive consolidation. *See, e.g., In re Stone & Webster*, 286 B.R. at 541 (Bankr. D. Del. 2002) (ordering substantive consolidation by finding authority in the bankruptcy statutes thereby making the *Grupo* analysis irrelevant); *Official Comm. of Asbestos Claimants v. G-I Holdings, Inc. (In re G-I Holdings, Inc.)*, Nos. 01-30135, 01-3065, 2001 WL 1598178, at *7 (Bankr. D. N.J. 2001) (recognizing the standing of the creditors' committee to move for substantive consolidation and court's authority to order it notwithstanding *Grupo*). "We conclude that due to this statutory grant of power, the bankruptcy court is not confined to traditional equity jurisprudence and therefore, the bankruptcy court's *Grupo Mexicano* analysis was misplaced." *Class Five Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002).

1. The jurisdiction limitations of *Grupo* do not extend to bankruptcy issues.

Grupo held that the equitable power of federal courts is defined by congressional enactments and by the First Judiciary Act, which incorporated all of the equitable remedies that existed in the English Court of Chancery in 1789. *Grupo*, 527 U.S. at 318. In so articulating this

jurisdiction, Justice Scalia carves out a niche for bankruptcy law by noting that bankruptcy courts, not federal courts, would have the jurisdiction to authorize the equitable remedy. Scalia observed that allowing federal courts this jurisdiction would "radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws—including those relating to bankruptcy, fraudulent conveyances, and preferences." *Grupo*, 527 U.S. at 331; *see also In re Owens Corning*, 419 F.3d at 209 (explaining that if Grupo Mexicano had been in bankruptcy, the federal court would have had the equitable power to order the remedy, but outside of bankruptcy it did not).

Not only is the jurisdiction not limited in bankruptcy courts, but Scalia's opinion strongly suggests that bankruptcy law provides remedies beyond those existing in the Court of Chancery: "The law of fraudulent conveyances and bankruptcy was developed to prevent such conduct; an equitable power to restrict a debtor's use of his unencumbered property before judgment was not." *Grupo,* 527 U.S. at 322 (juxtaposing general equity power with the equity within corporate and bankruptcy law).

2. The principles of substantive consolidation are parallel with the guiding principles of *Grupo*.

Even if *Grupo* requires substantive consolidation to be derived from remedies available in the Court of Chancery in 1789, an analogue to substantive consolidation existed at that time. For example, the concept of "piercing the corporate veil" has been recognized by English courts[2] since 1785. Johnson, 24-AUG AM. BANKR. INST. J. at 63. Substantive consolidation "pierce[s] their corporate veils in the usual metaphor, in order to reach assets for the satisfaction of debts of

[2] Cooke, William, The Bankrupt Laws at 1:240 (4th ed. 1799) ("[D]ebts, whether sold or joint, ought to be paid out of the bankrupt's estate, which is comprised of his separate estate, and of his moiety on the joint estate, and therefore [the partnership creditor] should come in pari passu with the separate creditors.") (discussing *Ex parte Haydon*, June 1785, and *Ex parte Hodgson*, 2 Brown Chancery Cases 5 (1785)).

a related corporation." *In re Cont'l Vending Mach. Corp.,* 517 F.2d at 1000. Looking beyond the name and into the substance, substantive consolidation is rooted into this pre-1789 remedy. Substantive consolidation merely fine-tunes traditional rules of equity to address modern corporate practices. *See Eastgroup Props. v. S. Motel Assoc., Ltd.*, 935 F.2d 245, 248-49 (11th Cir. 1991). Moreover, the remedy is "not a drastic departure from accepted equitable remedies. . . ." Johnson, 24-AUG AM. BANKR. INST. J. at 63. Thus, substantive consolidation, even if not known as such, is rooted within equitable remedies existing at the time of the Judiciary Act of 1789.

C. Courts have developed substantive consolidation in order to advance equity in modern business practices, such as those engaged in by ACME.

1. Modern business practices necessitate the application of substantive consolidation.

A modern view of the corporate landscape provides further insight into the legal basis of substantive consolidation as well as justification for its existence. Although the roots of this doctrine can be traced to 18th century principles of equity, its continued application is necessary because many of today's multi-subsidiary corporation engage in inter-company transactions and project themselves as one entity. *See Eastgroup Props.*, 935 F.2d at 248-49 ("[A]llowing substantive consolidation is due to the increased use of interrelated corporate structures for tax and other business purposes."). Moreover, substantive consolidation is employed to advance a fundamental tenant of the Bankruptcy Code—that all creditors are treated equitably. *See In re Bonham,* 229 F.3d at 764. Substantive consolidation allows creditors to reach beyond ACME's multi-subsidiary facade to reach all of its assets. *First Nat'l Bank v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 712, 721 (6th Cir. 1992) ("The order of consolidation rests on the foundation that the assets of all the consolidated parties are substantially the same."); *In re*

Brentwood, 329 B.R. at 811 ("If the separate existence of the two companies was a mere fiction, then [substantive] consolidation simply recognizes the existing reality that there were no intercompany claims, and all property was held in a single entity.").

That is not to say that the remedy of substantive consolidation should be exercised perfunctorily or without adherence to strict standards, but to say that a finding that federal courts lack the power to provide justice to creditors would stifle equity. Over forty years ago, the Second Circuit best depicted this juxtaposition:

> [I]n the rare case such as this, where the interrelationships of the group are hopelessly obscured and the time and expense necessary even to attempt to unscramble them so substantial as to threaten the realization of any net assets for all the creditors, equity is not helpless to reach a rough approximation of justice to some rather than deny any to all.

Chemical Bank N.Y. Trust Co. v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966).

2. ACME's estate satisfies both the *Augie/Revisto* and *Auto-Train* test for substantive consolidation.

Traditionally, courts applied a factor test to determine whether to order substantive consolidation. *See, e.g., Eastgroup Props.,* 935 F.2d at 249; *In re Food Fair, Inc*., 10 B.R. 123, 126 (Bankr. S.D.N.Y. 1981). In performing these tests, courts often applied the factors developed *In re Vecco Construction Industries, Inc.*:

> (1) The degree of difficulty in segregating and ascertaining individual assets and liability;
> (2) The presence or absence of consolidated financial statements;
> (3) The profitability of consolidation at a single physical location;
> (4) The commingling of assets and business functions;
> (5) The unity of interests and ownership between various corporate entities;
> (6) Te existence of parent and intercorporate guarantees on loans; and
> (7) The transfer of assets without formal observance of corporate formalities

4 B.R. 407, 410 (Bankr. E.D. Va. 1980).

However, the factor-method of analyzing estates has largely been replaced by balancing tests. *See In re Owens Corning*, 419 F.3d at 210 ("Too often the factors in a check list fail to

separate the unimportant from the important, or even to set out a standard to make the attempt."). "Ultimately most courts slipstreamed behind two rationales—those of the Second Circuit in *Augie/Restivo* and the D.C. Circuit in *Auto-Train*." *Id.* at 207. Because the Third Circuit views the *Augie/Restivo* test as setting a higher bar than *Auto-Train*, the following analysis will first demonstrate how ACME's estate satisfies the *Augie/Restivo* test, and will then show the same according to the *Auto-Train* test. *In re Owens Corning*, 419 F.3d at 210.

a. ACME's estate satisfies the *Augie/Revisto* test.

The Second Circuit viewed the *Vecco* factors as merely a variant of two critical factors. According to the *Augie/Revisto* test, an order of substantive consolidation must be based on the following: 1) creditors dealt with entities as a single economic unit and did not rely on their separate identity in extending credit, or 2) the assets and liabilities of the entities were hopelessly intermingled. *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2d Cir. 1988).

The two-prong *Augie/Restivo* test weighs creditor reliance against hopeless entanglement of assets. On one hand, creditors set contract terms and interest rates according to corporate structures; on the other hand, untangling assets results in significant expenses—including costs for accountants, lawyers, and employees. *In re Worldcom, Inc.*, No. 02-13533, 2003 WL 23861928, *37 (Bankr. S.D.N.Y. Oct. 31, 2003). The *Augie/Restivo* test has been adopted by the Ninth Circuit in *In re Bonham*, and was recently supported by the Third Circuit in *In re Owen Corning*. *In re Owen Corning*, 419 F.3d at 210 ("[W]e favor essentially that of *Augie/Revisto*."); *See In re Bonham*, 229 F.3d 750.

As to the first prong of the *Augie/Restivo* test, no creditor has come forth to state that it relied on the subsidiaries' separateness when extending credit to ACME. In fact, no creditor has objected to ACME's motion for substantive consolidation. The only opposing party is Tien. She

represents a class of involuntary creditors. Because she did not choose to become a creditor, reliance is not relevant. *In re Owen Corning,* 419 F.3d at 212 (explaining that tort and statutory claimants did not rely on anything in becoming creditors and are excluded from claiming reliance). Therefore, Tien's objection is not considered under the first prong.

As to the second prong, the facts demonstrate that the assets and liabilities of ACME, CAPCO, and TAPCO are severely entangled. The District Court found that ACME, along with its wholly-owned subsidiaries TAPCO and CAPCO, "routinely participated in inter-company loans and transactions that were poorly recorded and accounted." (R. at 7.) The loans and transactions that occurred between ACME and each of its subsidiaries are difficult to segregate, and it would be difficult to account for the trade debt that ACME guaranteed and paid on TAPCO's and CAPCO's behalf. (R. at 8.) Moreover, ACME operated a central cash management system which was used by ACME, TAPCO, and CAPCO, and which further entangled the companies' financials. (R. at 4). Based on the above, the District Court found that "[i]t would be prohibitively expensive to unravel all of the inter-corporate dealings and determine the true state of affairs of each company." (R. at 8.) Even if significant money is allocated to ascertain the financials of each company, the result would be dubious at best. With uncertainty as to the state of affairs of each company, the District Court found "it virtually impossible to apportion the sale proceeds between the companies in any principled manner," and the administrative expenses of reaching the contrived result would only decrease the creditors' recovery. *Id.*

Therefore, ACME's estate satisfies both prongs of the *Augie/Restivo* test because the first prong demonstrates that there are no objecting creditors, and the second prong demonstrates that the assets and liabilities of ACME, TAPCO, and CAPCO are hopelessly intermingled.

b. ACME's estate satisfies the *Auto-Train* test.

The D.C. Circuit's *Auto-Train* test authorizing substantive consolidation applies a balancing test with a linchpin that requires that the demonstrated benefits heavily outweigh the harm. *Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.)*, 810 F.2d 270, 277 (D.C. Cir. 1987); *Eastgroup Props.*, 935 F.2d at 249. According to the test, ACME, a proponent of substantive consolidation, must show: 1) a substantial identity between entities; and 2) that substantive consolidation is necessary to avoid some harm or realize some benefit. *Id.* The Eleventh Circuit adopted the *Auto-Train* test and expanded it. *Eastgroup,* 935 F.2d at 249. Under *Eastgroup*, if ACME satisfies the first two prongs, then it has made a prima facie case and the burden shifts to the objecting creditor to show reliance and prejudice. *Id.* at 249. In this case, Tien is the only objecting creditor. Because she represents involuntary creditors, she cannot demonstrate reliance. Thus, the *Eastgroup* elements are not in issue, and only the *Auto-Train* test is applied below.

As to the first prong—substantial identity between entities—the three companies share board members, corporate officers, and senior management; all of which are employed by ACME. (R. at 4.) These shared corporate officials have "the overall responsibility for managing the daily operations of both subsidiaries, including operations, sales, marketing and financial maters." (R. at 4.) Also, the transactions between the subsidiaries and ACME further skew the independence of each company, for such transactions are conducted at prices that do not reflect their true value. (R. at 4.) Yet, perhaps the most compelling evidence of the substantial identity among the companies is the District Court finding that "the numerous creditors of ACME, TAPCO, and CAPCO did not rely upon independence of companies when extending credit, but

rather treated the three companies as a single unit. . . . [T]rade creditors often believed they were dealing with ACME rather than one of its subsidiaries." (R. at 8.)

To satisfy the second prong, ACME must prove that substantive consolidation is necessary to avoid some harm or realize some benefit. Presumably, Tien is contesting the District Court order because she believes that if her claim is successful, she will receive a greater satisfaction from CAPCO than from the consolidated estate. Tien believes substantive consolidation will cause a harm—she will receive less proceeds. However, no other creditors have objected. If Tien is allowed to block the consolidation, the recovery of all other creditors is reduced, thereby causing a greater harm. Substantive consolidation would pool the assets of all three companies and extinguish any inter-company debt existing among them. Additionally, an order of substantive consolidation avoids the administrative expenses that the estate would incur to untangle the assets and liabilities. Due to the central financial management and inter-company transactions that were poorly recorded (R. at 7), these costs would be substantial. (R. at 8.) The savings associated with substantive consolidation will increase the estate, providing a benefit to all creditors.

Thus, ACME's estate satisfies the first prong of the *Auto-Train* test by demonstrating the substantial identity among ACME, TAPCO, and CAPCO. The second prong of the test is satisfied because substantive consolidation increases the value of ACME's estate and avoids high administrative costs. Therefore, substantive consolidation provides benefits which substantially outweigh the harm.

II. SECTION 363(F), EQUITABLE POWERS, AND BANKRUPTCY POLICIES AUTHORIZE FEDERAL COURTS TO SELL ACME'S ASSETS FREE AND CLEAR OF TIEN'S SUCCESSOR LIABILITY CLAIM.

The federal courts' power to order a section 363(f) sell is a question of law and is reviewed de novo. *Sasson v. Sokoloff, M.D. (In re Sasson)*, 424 F.3d 864, 867 (9th Cir. 2005). As a condition of purchasing ACME, TAPCO, and CAPCO (hereinafter "ACME"), SOUSA demands that the sale absolves SOUSA of any successor liability. To meet this demand, ACME has moved to sell substantially all of the three companies' assets free and clear under section 363(f). In dispute is the scope of the term "interests" as employed in this section of the Code. The following demonstrates how statutory construction, judicial tests, and equitable powers demand a broad interpretation of the term. Accordingly, Tien's claims fall within this meaning.

A. Statutory construction, as well as the "connected to or arises from" test, demand a broad interpretation of "interests" within section 363(f).

1. The plain language, the specific context in which the language is used, and the broader context of the statute as a whole demand a broad interpretation of "interests" within section 363(f).

In 1978, Congress[3] enacted section 363 of the Bankruptcy Code, providing a means for ACME to sell its assets free and clear of interests without the expense and delay of confirming a reorganization plan. Section 363 states that the trustee[4] may sell property . . . "free and clear of *any interest* in such property of an entity other than the estate." 11 U.S.C. § 363(f) (2005). The term "interest" is not defined in the Bankruptcy Code and interpretation of the word in a section 363 context is often the gravamen of a contested section 363 sale. Thus, it is fitting that in determining the propriety of ACME's proposed sale, we begin by expounding upon the meaning

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[3] *See* H.R. REP. NO. 95-595, at 344-46 (1977), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6301-02.

[4] Although 11 U.S.C. § 363(f) refers to "trustee," 11 U.S.C § 1107(a) supplants the Chapter 11 debtor-in-possession all the rights, powers, and duties of a trustee.

of "interest," looking to the plain meaning of the word as it is employed within section 363. *Ron Pair v. United States,* 489 U.S. 235, 241(1989).

Although this Court has not defined the term "interest" within the scope of section 363, in other legal contexts, this Court has observed that the term "'interest' is a broad term no doubt selected by Congress to avoid rigid and technical definitions drawn from other areas of the law . . . ." *Russello v. United States*, 464 U.S. 16, 21 (1983). There is further support for this broad interpretation of "interest" in the Seventh Circuit and the Fourth Circuit. *See, e.g., Precision Indus., Inc. v. Qualitech Steel SBQ, LLC,* 327 F.3d 537, 546 (7th Cir. 2003); *see also United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) (construing "legal interest" in 21 U.S.C. § 853(n)(2), to include "all legally protected rights, claims, titles, or shares in real or personal property"). Further, the same year[5] of section 363's enactment, Black's Law Dictionary published a broad definition of "interest": "The most general term that can be employed to denote a right, claim, title, or legal share in something." BLACK'S LAW DICTIONARY 729 (5th ed. 1979).

In addition to the plain meaning of "interest," the word preceding "interest" in the statute compels a broad meaning of the term. Section 363 authorizes ACME to sell property free and clear of *any* interest. "[T]he use of the term "any" counsels in favor of a broad interpretation." *Qualitech Steel,* 327 F.3d at 545 ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States v. Gonzales,* 520 U.S. 1, 5 (1997)). Also, the phrase "any interest" should not be viewed in isolation but consistent with the

[5] The most current edition of Black's Law Dictionary conveys a similar definition of "interest": "A legal share in something; all or part of a legal or equitable claim to or right in property." BLACK'S LAW DICTIONARY 828 (8th ed. 2004).

use of that phrase in other provisions of the Code.[6] *Id.* at 546. Including Tien's claim within the meaning of "any interest" is consistent with the policies of the Code: "The well established rule that sales within a bankruptcy proceeding occur free and clear of *any interests* is founded upon the principle that good faith purchasers receive clean title to the property and that any claims against the property attach to the proceeds." *In re Lady H. Coal Co.*, 193 B.R. 233, 247 (Bankr. S.D. W. Va. 1996) (emphasis added). This broad, yet not limitless, interpretation of "any interest" provides the following: protection to good faith buyers, maximization of the bankruptcy estate, maintenance of the Code's distribution scheme, and assurance that similarly situated creditors are treated equally. *Id.*

Although 11 U.S.C. § 1141(c)[7] and 11 U.S.C. § 1123(b)(4) specifically include the term "claims" with "interests" when discussing "free and clear," and Congress could have included it, this argument ignores the term "any," thwarts bankruptcy policies, and would rigidly and technically confine "any interests" in defiance of case law and legislative history. *See Myers v. United States*, 297 B.R. 774, 781 (S.D. Cal. 2003) (stating that "interest" as used in section 363(f) applies to general unsecured claims, including pending lawsuits). As stated by the Honorable William T. Bodoh, former Bankruptcy judge for the Northern District of Ohio,

> It makes good sense to specifically reference the term "claims" in § 1141(c) because a plan of reorganization is intended to resolve all prepetition obligations of a debtor and represent a new contract between the debtor and each respective creditor. On the other hand, a § 363 sale is focused on the liquidation of property of the estate and not per se resolution of all claims asserted against a debtor. However, when a debtor satisfies the business justification standard and is authorized by a court to sell all or substantially all of its assets pursuant to § 363,

[6] *See, e.g.,* 11 U.S.C. § 541(a)(3) (2005) ("Any interest in property that the trustee recovers . . . ."); *see also* 11 U.S.C. § 541(a)(4) (2005) ("Any interest in property preserved for the benefit of or ordered transferred to the estate . . . .").

[7] *See* Appendix "I."

> the purchaser should receive protection from all prepetition claims asserted against the debtor which will be satisfied in whole or in part through the bankruptcy process.

Honorable William T. Bodoh and Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutional Use Of Successor Liability To Create A New Class Of Priority Claimants*, 4 AM. BANKR. INST. L. REV. 325, 336 (1996).

Thus, "any" coupled with "interest" delineates an expansive range of rights, claims, titles, or legal shares, which include successor liability claims. This interpretation resonates within the broad definition of a "claim" in section 101(5) as well as within the underlying dual policy of the Bankruptcy Code—to grant the debtor a fresh start and to provide equitable distribution to creditors. Budoh, 4 AM. BANKR. INST. L. REV. at 337.

2. Consistent with decisional law, this Court should interpret Tien's successor liability claim as an "interest" because there is a nexus between ACME's assets and the claim.

As an alternative to the broad interpretation, Tien's successor liability claim is "an interest in such property" because there is a nexus between ACME's assets and the claim. *See Equal Employment Opportunity Comm'n v. Know-Schillinger (In re Trans World Airlines, Inc.)*, 322 F.3d 283, 290 (3d Cir. 2003); *Folger Adam Sec., Inc., v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 259 (3d Cir. 2000); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 582 (4th Cir. 1996), *cert. denied*, 520 US. 1118 (1997); *In re Lawrence*, 221 B.R. 661, 669 (Bankr. N.D. N.Y. 1998). In adopting this test, the *Trans World Airlines* Court reasoned that section 363(f) interests are based on obligations that are *connected to or arise from* the property being sold because it is this property that gave rise to the claims. *In re Trans World Airlines,* 322 F.3d at 290.

The "connected to or arises from" test provides enough flexibility to foster equitable policies, while being definitive enough to instruct lower courts. "The precise boundaries of the phrase ["any interests"] likely will be defined only as the courts continue to apply it to the facts presented in the cases brought before them." *In re Leckie Smokeless Coal Co*., 99 F.3d at 582. One commentator has reconciled the cases that have addressed the "connected to or arises from" test by describing a standard for the application of the test: "A court may hold these interests to be so ingrained in the asset itself that they simply cannot be separated from it . . . . It also resembles those cases holding that rights of recoupment are so intrinsic to a particular asset that they follow assets sold whereas rights to setoff do not." George W. Kuney, *Further Misinterpretation of Bankruptcy Code Section 363(f): Elevating In Rem Interests and Promoting the Use of Property Law to Bankruptcy-Proof Real Estate Developments,* 76 Am. Bankr. L.J. 289, 297 (2005); *see Folger,* 209 F.3d at 253 (explaining that interests do not include affirmative defenses or right of recoupment.); *accord In re Lawrence*, 221 B.R. at 669 ("[R]ight to recoupment is not an 'interest' in property for section 363(f) purposes."); *Ninth Avenue Remedial Group v. Allis Chalmers Corp*. 195 B.R. 716 (N.D. Ind. 1996) (holding that "interest" does not include future claims); *Zerand-Bernal, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994) (same).

3. The legal theory that equates "interests" with in rem property does not extend to the facts of this case.

The Thirteenth Circuit, basing its opinion on only one case that is distinguishable from this case, narrowly defined "any interest in such property" as applying to only in rem claims. (R. at 16.) Although the Thirteenth Circuit and the *Fairchild* Court reasoned that the language "in such property" "'define[s] the real breadth of *any interests,*'" there are many reasons why this definition is too narrow. *See Fairchild Aircraft, Inc. v. Cambell (In re Fairchild Aircraft Corp.),* 184 B.R. 910, 917-18 (Bankr. W.D. Tex. 1993); *see also Zerand,* F.3d at 163. As the dissent in

the Thirteenth Circuit correctly stated, “This position [defining *interests in such property*] is contrary to the policies behind § 363(f).” (Schmid, J., dissenting) (R. at 23.)

Limiting interests to in rem is too narrow because the claims in *Fairchild* and *Zerand* were product liability claims which arose post petition. *Zerand*, 23 F.3d at 160; *Fairchild,* 184 B.R. at 915. In the context of product liability, rather than employment, it is difficult to give notice to potentially interested parties because at the time of bankruptcy not all events involving the debtor’s product have occurred. *See, e.g., Mooney Aircraft, Inc. v. Foster (In re Mooney Aircraft, Inc.*), 730 F.2d 367, 375 (7th Cir. 1984). Moreover, had the claims been prepetition claims, like Tien’s, the claims would have received pro rata distribution, just like other unsecured creditors. *Zerand*, 23 F.3d at 163; *See* Ezra H. Cohen, *Successor Liability in §363 Sales*, 22-9 AM. BANKR. INST. J. 18, 45 (2003).

There is support in the Bankruptcy Code that Congress did not intend to limit “free and clear” sales to in rem interests. *See* Bodoh, 4 AM. BANKR. INST. L. REV. at 336, 364. If Congress had intended asset sales to occur only free and clear of in rem interests it could have used the term “lien” instead of “interests.” *See* 11 U.S.C. § 101(37) (2005). Furthermore, evidence of Congress’ intention is found in section 363(f)(3), which applies to situations in which “such interest is a lien.” *See* Matthew T. Gunlock, *An Appeal to Equity: Why Bankruptcy Courts Should Resort to Equitable Powers for Latitude in Their Interpretation of “Interests” Under Section 363(f) of the Bankruptcy Code*, 47 WM. AND MARY L. REV. 347, 354 (2005). This subsection of 363 suggests that liens constitute a subcategory of “any interest” and that Congress contemplated other interests besides in rem interests to be sold free and clear. *See Criimi Mae Servs. Ltd. P’ship v. WDH Howell, LLC (In re WDH Howell, LLC)*, 298 B.R. 527, 532 (Bankr. D.N.J. 2003) (“§ 363(f)(5) . . . also applies to unsecured interests in property that could be

reduced to a specific monetary value."); *WBQ Partnership v. Virginia Dep't of Med. Assistance Servs. (In re WBQ Partnership),* 189 B.R. 97, 105 (Bankr. E.D. Va. 1995); *P.K.R. Convalescent Ctrs., Inc. v. Virginia* (*In re P.K.R. Convalescent Ctrs., Inc.*), 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (stating that the plain meaning of section 363 reveals that interests beyond liens were contemplated); *see also In re Canonigo*, 276 B.R. 257, 265 (Bankr. N.D. Cal. 2002) (discussing that section 363(f)(5) applies to interests other than liens; if it applied to liens sections (1)-(4) would be superfluous); c*f. In re Takeout Taxi Holdings, Inc.*, 307 B.R. 525, 534 (Bankr. E.D. Va. 2004) (stating that subsection (f)(5) is intended to apply to interests other than secured interests).

Limiting section 363(f) to in rem interests could not have been what Congress intended. If section 363(f) is limited to in rem interests, except for traditional interests that run with property, then only a narrow subset of Chapter 11 debtors could sell property under this section. *See* Kuney, 76 AM. BANKR. L.J. at 296 (discussing several cases that have excluded traditional in rem interests from being stripped under a section 363(f) sale.).

B. Section 105(a) grants this Court flexible equity powers in interpreting 363(f), while providing adequate protection to Tien.

1. Section 105(a) couples with section 507 to enforce the priority scheme outlined by Congress and to suggest a broad interpretation of "interests."

Section 105(a) grants courts equitable powers which, when tied to another provision, provide courts latitude to perform flexible and pragmatic interpretations of the Bankruptcy Code. *See* Gunlock, 47 WM. AND MARY L. REV. at 354; *Young v. United States*, 535 U.S. 43, 50 (2002); *see generally Sears, Roebuck & Co.*, 265 B.R. at 371 ("Section 105 of the Bankruptcy Code bestows on bankruptcy courts a specific equitable power to act in accordance with principles of justice and fairness."). By employing section 105(a) in this manner, courts have the power to

"fill in the gaps left by the statutory language." 2-105 Collier on Bankruptcy P 105.01 (15th ed. rev. 2005).

When section 105 is tied to sections 363(f) and 507 of the Code,[8] it is proper for this Court to advance a broad interpretation of the term "interests" and allow ACME to sell its assets free and clear of Tien's claim. A narrow interpretation of "interests" would undermine the objectives of section 507. *Ninth Ave.,* 195 B.R. at 729-33 (pontificating without deciding that other sections of the Code may support a broad interpretation of the term "interests" in a 363 sale). Because Tien's claim has not attached to ACME's assets, the claim is a general unsecured claim,[9] which is accorded low priority and paid pro rata distributions along with the other unsecured creditors. *In re Trans World Airlines*, 322 F.3d at 292.

The propriety of employing section 105(a) to supplement ACME's sale under section 363(f) finds support in the historic use of section 363(f). Section 363(f) originally arose as a general equitable doctrine. "A review of case law illustrates that as a matter of statute or under general equitable principles, the remedy afforded by § 363(f) has been a part of U.S. bankruptcy law for more than a century . . . . It would be difficult to contend broadly that § 363(f) lost its equitable character upon codification into its modern statutory form." Gunlock, 47 WM. AND MARY L. REV. at 367. Further, in *Van Huffel v. Harkelrode*, a case decided prior to the enactment of section 363(f), this Court used its equitable powers to order assets sold free and clear of claims. *Van Huffel v. Harkelrode*, 284 U.S. 225, 227-28 (1931). Faithful to judicial precedent, this Court should allow ACME's assets to be sold free and clear of Tien's claims.

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[8] Section 507 demands that creditors are paid according to the priority scheme. 11 U.S.C. § 507 (2005).

[9] A Creditor holding a claim as a result of a judgment that is not secured by property is a general unsecured creditor. *See New England Diaries, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores),* 351 F.3d 86, 90 (2d Cir. 2003); *see also* 11 U.S.C. § 506(a) (2005).

2. The Bankruptcy Code and judicial scrutiny provide Tien's claim adequate protection in a section 363 sale.

a. Section 363(e)'s mechanism for affording adequate protection enables Tien's claim to attach to the proceeds of the sale.

Applying equity will also not abandon Tien's claim. In fact, "[t]he Bankruptcy Code and the scrutiny exercised by courts reviewing proposed bankruptcy sales provide an adequate means of protecting parties from improprieties such as fraudulent transfers and collusive bidding." Bodoh, 4 AM. BANKR. INST. L. REV. 325, 345. Section 363(e) demands that "on request of an entity that has an interest in property . . . the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e) (2005). When applying section 363, the court determines whether Tien's claims are "adequately protected through consent or compensation." *In re Gulf States Steel, Inc.*, 285 B.R. 497, 511 (Bankr. N.D. Ala. 2002).

To provide adequate protection to Tien's interest, as part of ACME's free and clear sale, "will be to have those interests attach to the proceeds of the sale." *In re Haskell L.P.*, 321 B.R. 1, 6 (Bankr. D. Mass. 2005). In a section 363 sale, creditors are paid, in the same priority and extent to which their interest exists, with the proceeds generated by the sale. *See* H.R. REP. NO. 95-595, at 344-46 (1977), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6301-02 (indicating that in a "free and clear sale" adequate protection requires that the subject interests attach to the proceeds of the sale). Consistent with section 507's priority scheme, a section 363 sale does not impair undercollateralized creditors, and unsecured claims, such as Tien's, are not impaired. *See In re Gulf States Steel, Inc.,* 285 B.R. at 512. The estate's property is sold, just as if liquidated except for at a higher price, and the interests attach to the proceeds of the sale. Therefore distribution of ACME's estate will be conducted in an equitable manner.

b. Courts exercise judicial scrutiny to prevent rampant and abusive use of 363(f).

Upon showing that the interests of creditors fall under one of the subsections of 363(f),[10] ACME seeks to sale its property free and clear of any interest in such property pursuant to section 363(b). Section 363(b)(1) permits ACME to sell property of the estate outside the ordinary course of business "after notice and a hearing." 11 U.S.C. § 363(b)(1) (2005). In addition to the notice, hearing, and adequate protection requirements specified in section 363, courts have developed several factors to consider when confirming a 363 sale. The bankruptcy court must find: "(1) a sound business purpose exists for the sale; (2) the sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the purchaser has acted in good faith." Judith Greenstone Miller and Michael P. Di Laura, *The Ultimate Garage Sale: Disposing of a troubled company*, 14 BUS. L. TODAY 1 (2004), *available at* http://www.abanet.org/buslaw/blt/2004-09-10/dilaura.shtml; s*ee Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *Comm. of Equity Security Holders v. Lionel Corp.* (*In re Lionel Corp.)*, 722 F.2d 1063, 1069 (2d Cir. 1983).

C. A broad interpretation of "interests" is consistent with the purposes and policies that pervade the Bankruptcy Code.

1. Allowing ACME's 363 sale maximizes the estate by increasing efficiency and reducing costs.

The trustee's duty is to maximize ACME's estate. *Myers v. Martin* (*In re Martin)*, 91 F.3d 389, 394 (3d Cir. 1996). Likewise, "the purpose behind the 'free-and-clear' language is to

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[10] Section 363(f)(5) allows sale where interest is reducible to a claim and subject to a hypothetical money satisfaction. *See In re Gulf States Steel, Inc*, 285 B.R. at 508; see also *In re Haskell L.P.*, 321 B.R. at 9 ("The focus of § 363(f)(5) is on whether the interest is reducible to a claim."). Alternatively, Tien's interest can be interpreted to fall under subsection (f)(4) as the claim is currently in a bona fide dispute. 11 U.S.C. § 365(f)(4) (2005).

maximize the value of the asset, and thus enhance the payout made to creditors." *In re WBQ P'ship*, 189 B.R. at 108. Moreover, section 363(f) frees the estate from frivolous administrative fees, litigation costs, and a burdensome delay: "It allows a trustee to quickly cut through the potential morass of such controversies, promptly sell the property for the best price available and resolve those controversies at a later date." *In re Takeout Taxi Holdings, Inc.*, 307 B.R. at 528.

Thus, section 363 allows ACME's estate to be maximized and thereby maximizes the potential recovery available to creditors such as Tien. *See* Bodoh, 4 AM. BANKR. INST. L. REV. at 335. Although Tien will argue that allowing ACME to sell its assets free and clear of her claim will constitute a disguised sub rosa plan, it is well founded in bankruptcy law that Chapter 11 provides ACME the opportunity to reorganize its business in order to continue operations and preserve jobs. *In re Lady H. Coal Co.,* 193 B.R. at 245. In cases such as ACME's where the necessary capital to continue operations is not present and confirming a plan is cost prohibitive, a sale free and clear of substantially all of ACME's assets is justified and will prevent continuing losses. *Id.; see also* Budoh, 4 AM. BANKR. INST. L. REV. at 335.

2. Allowing ACME's assets to be sold free and clear of Tien's successor liability claim maintains the priority scheme, increases the purchase price, and distributes proceeds equitably.

Historically, courts[11] have refused to impute successor liability claims when doing so would undermine the priority scheme or impair the trustee's function in maximizing the estate. *See Forde v. Kee-Lox Mfg. Co., Inc.,* 437 F. Supp. 631, 633 (W.D.N.Y. 1977), *aff'd on other grounds*, 584 F.2d 4 (2d Cir. 1978). Relieving a section 363 buyer, like SOUSA, of successor liability, would place claimants, like Tien, in a distribution class with other unsecured creditors

[11] This case was decided under the old Bankruptcy Act, but continues to be cited for interpretation.

and allow them to recover accordingly. 11 U.S.C. § 1123(a)(4) (2005). This result would be consistent with the bankruptcy priority scheme. 11 U.S.C. § 507.

Moreover, relieving SOUSA of successor liability increases the marketability of the assets and creates a more favorable purchase price. *See Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.*), 75 B.R. 944, 951-52 (Bankr. N.D. Ohio 1987). SOUSA has stated that without the risk of Tien's successor liability claims, it will purchase ACME's assets at a higher price. (R. at 8.) Gunlock, 47 WM. AND MARY L. REV. 347 (2005). Likewise, SOUSA's interest in ACME's assets would be reduced if the prospect of successor liability exists. *Rubenstein v. Alaska Pac. Consortium (In re New England Fish Co.*) 19 B.R. 323, 326 (Bankr. W.D. Wash. 1982).

Furthermore, if SOUSA pays a depressed price for ACME's assets, less will be distributed to the creditors. Thus, successor liability would not only disrupt the priority scheme by allowing unsecured creditors to recover before secured creditors, but it would likely create a depressed sale. After satisfying Tien, secured creditors and higher prioritized creditors would be left a much lower recovery.

CONCLUSION

This Court has the equitable power to order the substantive consolidation of the three estates, and a 363(f) sale extinguishes Tien's successor liability claim. ACME respectfully requests that this Court reverse the Thirteenth Circuit's holding in its entirety and rendered judgment in favor of ACME.

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APPENDIX "A"

11 U.S.C. § 101 (2005)

§ 101. Definitions

In this title the following definitions shall apply:

(5) The term "claim" means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(37) The term "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

APPENDIX "B"

11 U.S.C. § 105 (2005)

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest--

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that--

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title--

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

APPENDIX "C"

11 USCS § 363 (2005)

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title [11 USCS § 552(b)], whether existing before or after the commencement of a case under this title.

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332 [11 USCS § 332], and after notice and a hearing, the court approves such sale or such lease—

(i)giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act [15 USCS § 18a(a)] in the case of a transaction under this subsection, then--

(A) notwithstanding subsection (a) of such section [15 USCS § 18a(a)], the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section [15 USCS § 18a(b)], the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the

Department of Justice, of the notification required under such subsection (a) [15 USCS § 18a(a)], unless such waiting period is extended--

(i) pursuant to subsection (e)(2) of such section [15 USCS § 18a(e)(2)], in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section [15 USCS § 18a(g)(2)]; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title [11 USCS § 721, 1108, 1203, 1204, or 1304] and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only--

(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and

(2) to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362 [11 USCS § 362].

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such

property being subject to an order to grant relief from the stay under section 362 [11 USCS § 362]).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365 [11 USCS § 365], the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title [11 USCS §§ 1101 et seq., 1201 et seq., or 1301 et seq.] may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section--

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interests.

APPENDIX "D"

11 U.S.C. § 506 (2005)

§ 506. Determination of secured status

(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or state statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

APPENDIX "E"

11 U.S.C. § 507 (2005)

§ 507. Priorities

a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $10,000 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan-

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of--

(i) the number of employees covered by each such plan multiplied by $10,000; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons--

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or
(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility--

but only to the extent of $4,925 [FN1] for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $2,225 [FN1] for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days.'; and

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise--

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or

fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

APPENDIX "F"

11 U.S.C. § 541 (2005)

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to
the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds--

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(7) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(7) any amount--

(A) withheld by an employer from the wages of employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition. Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section

notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

APPENDIX "G"

11 U.S.C § 1107 (2005)

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

APPENDIX "H"

11 U.S.C. § 1123 (2005)

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as--

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of
this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may--

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for--

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

APPENDIX "I"

11 U.S.C. § 1141 (2005)

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not--

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if--

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual--

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if--

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and

(ii) modification of the plan under section 1127 is not practicable; and

(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that--

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt--

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor--

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

APPENDIX "J"

Fed. R. Bankr. P. 1015 (2005)

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

(a) Cases involving same debtor.

If two or more petitions are pending in the same court by or against the same debtor, the court may order consolidation of the cases.

(b) Cases involving two or more related debtors.

If a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of a husband and wife shall, if one spouse has elected the exemptions under § 522(b)(1) of the Code and the other has elected the exemptions under § 522(b)(2), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(1).

(c) Expediting and protective orders.

When an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay.