TEAM 18

No. 22-0909

IN THE

# Supreme Court of the United States

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,

ELEANOR RIGBY, PETITIONER

V.

PENNY LANE INDUSTRIES, INC., RESPONDENT

*ON APPEAL FROM THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE THIRTEENTH CIRCUIT*

**BRIEF FOR RESPONDENT**

TEAM NUMBER 18
COUNSEL FOR RESPONDENT

JANUARY 19, 2023

## QUESTIONS PRESENTED

I. Does a bankruptcy court have the authority to approve non-consensual releases that prevent third parties from taking direct legal action against non-debtor affiliates, when those releases are included in a proposed chapter 11 plan of reorganization and the releases are necessary for a successful reorganization?

II. When a plan is non-consensual and discharge is governed by 11 U.S.C. § 1192, does 11 U.S.C. § 523(a) prevent a corporate subchapter V debtor from receiving the discharge traditionally granted to corporate debtors in chapter 11?

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The Bankruptcy Court for the District of Moot found in favor of Appellee, Penny Lane Industries. Appellant, Eleanor Rigby, filed a direct appeal to the Court of Appeals for the Thirteenth Circuit. On appeal, the Thirteenth Circuit affirmed the bankruptcy court's findings in favor of Penny Lane Industries. The Thirteenth Circuit Court of Appeals' opinion is available at No. 21-0803 and reprinted in full beginning at Record 3.

## STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII.

## RELEVANT STATUTORY PROVISIONS

This action requires a close reading of several provisions of Title 11 of the Unites States Code. The following sections are included in full in this document's Appendix.

The first issue before the court requires an analysis of §§ 105 and 1123 of Title 11.

The relevant portion of 11 U.S.C. § 105(a) states:

(a) The court may issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title.

The relevant portion of 11 U.S.C. § 1123(b)(6) states:

(b) subject to subsection (a) of this section, a plan may–
    (6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

The second issue before the court requires an analysis of §§ 1192 and 523 of Title 11.

The relevant portion of 11 U.S.C. § 1192 states:

If the plan is confirmed under section 1191(b) of this title . . . the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title . . . except any debt . . . (2) of the kind specified in section 523(a) of this title.

The relevant portion of 11 U.S.C. § 523 states:

(a) A discharge under section . . . 1192 . . . of this title does not discharge an individual debtor from any debt . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

## STATEMENT OF THE CASE

Petitioner challenges two issues on appeal. First, Petitioner argues that bankruptcy courts do not have the authority to approve settlements that prevent third parties from taking direct legal action against non-debtors. Second, Petitioner argues that a corporation proceeding under subchapter V does not receive a discharge of debts listed in § 523(a) when a non-consensual plan is confirmed. Adopting either of these positions would significantly undermine the functionality of chapter 11 of the Bankruptcy Code[1] and potentially reduce overall recoveries for creditors.

### I. FACTUAL HISTORY

Penny Lane Industries, Inc. (the "Debtor") is a manufacturer of plastic, glass, and metal food containers. R. at 4. The Debtor is a wholly owned subsidiary of Strawberry Fields. R. at 3–4. The Debtor operates a manufacturing facility in the city of Blackbird. R. at 4. The manufacturing facility is a major employer in the economically challenged Blackbird community. R. at 12.

It is alleged that the Debtor knowingly disposed of industrial chemicals improperly at its manufacturing facility in Blackbird. R. at 5. It is further alleged that this improper disposal contaminated Blackbird's groundwater. *Id*. The Debtor rejects these allegations.

The Debtor does not contest that Blackbird's water is contaminated. *Id*. State and federal authorities have determined that between 2013 and 2017, tens of thousands of people drank and bathed in toxic water. *Id*. Exposure to the toxins found in Blackbird's water has been linked to

[1] The Bankruptcy Code ("The Code") is set forth in 11 U.S.C. §§ 101–1532. Specific sections of the Bankruptcy Code are identified herein as "section __" or "§ __" when appropriate. Statutes outside of Title 11 will be referred to in their entirety.

severe illness and death. R. at 5. State and federal authorities have not determined the source of the toxins discovered in Blackbird's groundwater. *Id*.

Petitioner, Ms. Eleanor Rigby, sued the Debtor in 2017. *Id*. Rigby alleges that the waste disposed of at the Debtor's manufacturing facility leaked into the city's groundwater and caused her daughter to develop leukemia and pass away at the age of four. *Id*. Rigby further alleges that the CEO of the Debtor was aware that the waste disposal was contaminating the city's water. *Id*. Rigby also alleges that the Debtor's parent company, Strawberry Fields, is liable on unnamed theories and a theory of what appears to be negligence. *Id*. at 5–6. The Debtor is facing hundreds of lawsuits that are similar to Rigby's, and Strawberry Fields has been named as a co-defendant in many of those lawsuits. *Id*. at 6.

Penny Lane and Strawberry Fields deny these allegations. *Id*. Penny Lane states that the manufacturing facility was operated in accord with all applicable environmental regulations, it never had any knowledge of contaminants leaking into the city's water supply, and that there are multiple manufacturing facilities operating along the bank of the Liverpool River. *Id*. No judicial determination has been made on the merits of any of the pending cases. *Id*.

On January 11, 2021, the Debtor filed under subchapter V of chapter 11. *Id*. It is stipulated that the Debtor qualifies as a small business debtor and that Rigby's claim is allowed. *Id*. at 6.

*A. The non-consensual third-party release issue.*

After filing the case, the Debtor sought and received a temporary injunction from the bankruptcy court halting all actions against the Debtor's associated entities. *Id*. at 7–8. Over two months of intense mediation, several stakeholders came up with a complex Plan of Reorganization for the Debtor. *Id*. at 8. The Plan establishes a creditor trust that will be funded primarily by a one-time payment of $100 million into the trust by Strawberry Fields. *Id*. The trust will also receive the Debtor's net profits over the next five years. *Id*. It is anticipated that the tort creditors under this arrangement will receive a significant payment of thirty to forty cents on the dollar for each of their claims. *Id*. In exchange for its contribution of $100 million to the creditor trust, Strawberry Fields received a release from estate claims as well as third-party direct claims. *Id*. The Plan is non-consensual, meaning that it binds parties even if they did not participate in the bankruptcy and even if they voted against the Plan. *Id*. All claims are channeled into the creditor trust. *Id*. at 9.

Over 95% of the creditors that cast ballots voted in favor of the Plan. *Id*. Rigby objected, arguing that the bankruptcy court lacked the authority to grant non-consensual third-party releases. *Id*. The bankruptcy court overruled Rigby's objection, finding that the court had authority to confirm the Plan and the releases it contained under the circumstances. *Id*. at 10.

*B. The nondischargeable debt issue.*

Rigby also brought action to have her claim deemed nondischargeable under § 523(a)(6) of Title 11. *Id*. at 7. Penny Lane filed a motion to dismiss, arguing that the nondischargeability provisions of § 523(a) are not applicable to business entities. *Id*. The bankruptcy court granted Penny Lane's motion to dismiss. *Id*.

## II. PROCEDURAL HISTORY

In the Bankruptcy Court for the District of Moot, appellant Rigby argued (1) the bankruptcy court lacked authority to confirm a plan containing non-consensual third-party releases, and (2) Rigby's debt was nondischargeable under § 523(a)(6) of Title 11.

Addressing the non-consensual third-party release issue, the bankruptcy court overruled Rigby's objection and made six (6) key findings:

(1) The case is highly unusual and complex (mass tort litigation),

(2) the significant contribution to the creditor trust by Strawberry Fields provides a meaningful distribution to creditors,

(3) the Plan was overwhelmingly supported by creditors (95% voted in favor),

(4) the proposed distribution under the Plan is substantially greater than what the creditors would receive if the Debtor was liquidated under chapter 7,

(5) the creditors were unlikely to recover anything near the $100 million paid by Strawberry Fields in potential direct actions, and

(6) there were no other reasonably conceivable means by which to accomplish the results of the Plan.

R. at 10. The bankruptcy court found that in this factual situation, it had the authority to approve the settlement and confirmed Penny Lane's Plan. *Id*.

The bankruptcy court also addressed Rigby's nondischargeability claim. *Id*. at 7. The court again found in favor of Penny Lane, holding that the nondischargeability provisions of § 523(a) are not applicable to a business debtor even if that business debtor is proceeding under subchapter V of chapter 11. R. at 7.

Rigby filed a timely direct appeal to the Thirteenth Circuit. *Id*. at 3. The Thirteenth Circuit affirmed the bankruptcy court's findings on both issues in favor of the Debtor. *Id*. at 11; *Id*. at 15.

**STANDARD OF REVIEW**

The questions presented are based on conflicting interpretations of the Bankruptcy Code and are therefore questions of law. The standard of review for questions of law is *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

**SUMMARY OF THE ARGUMENT**

The Thirteenth Circuit correctly ruled in favor of Penny Lane when it held (1) the bankruptcy court had the power to grant a non-consensual third-party release under the specific circumstances of Penny Lane's bankruptcy, and (2) Penny Lane, as a corporate debtor, was not subject to the discharge exceptions contained in § 523(a).

First, Rigby's appeal seeks to vacate the bankruptcy court's order releasing Strawberry Fields from any potential liability related to the Debtor's alleged actions. The bankruptcy court's order should be affirmed because (1) the bankruptcy court has the jurisdiction to issue a binding final order, (2) the Code authorizes the non-consensual release of a creditor's claims against a third-party when necessary, and (3) the bankruptcy court has the ability and expertise to wield the tool of third-party releases carefully.

Section 1334(b) of Title 28 grants the federal district courts jurisdiction over bankruptcy proceedings that are "related to" cases arising under Title 11. Creditor actions against third-parties are "related to" the bankruptcy case when those creditor actions will deplete the assets of the bankruptcy estate. Section 157 of Title 28 provides district courts the ability to assign their powers to bankruptcy courts in their district, and also grants bankruptcy courts the power to hear and determine all core proceedings arising under Title 11. The confirmation of Penny Lane's Plan and the attendant third-party releases were integral to the bankruptcy and therefore "core" proceedings under § 157 of Title 28.

The Bankruptcy Code itself is silent on non-consensual third-party releases, but it does permit a bankruptcy court to issue orders that are necessary and appropriate for the reorganization of the debtor. Section 105(a) of Title 11 states that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. While Penny Lane acknowledges that third-party releases are an intensely powerful device, the circumstances of its bankruptcy warrant a third-party release because there is no alternative chance at a successful reorganization. The only alternative is liquidation, which would hurt all parties. This puts the third-party release firmly within the authority of the bankruptcy court.

Given their power, non-consensual third-party releases should only be permitted in exceptional circumstances where the release is necessary for a successful reorganization, and the release maximizes the recovery for all creditors. Penny Lane's bankruptcy is such a circumstance; principles of equity necessitate a third-party release in order to maximize value for all parties involved. Moreover, the bankruptcy court, with its specialized knowledge and experience, has the competence to issue narrowly tailored permanent injunctions and to prevent the abuse of such injunctions.

Second, Rigby's appeal seeks to reverse the bankruptcy court's judgment that § 523(a) does not apply to a corporate debtor in subchapter V. The bankruptcy court's decision should be affirmed because it is supported by (1) the plain meaning of the words used in § 523 and 1192, (2) the legislative history of § 1192 and the Small Business Reorganization Act (SBRA), and (3) the goals of the SBRA.

Section 1192 states that a debtor receives a discharge of debts as long as the debt is not of the "kind" described in § 523(a). Section 523(a) states that individual debtors are not allowed to discharge certain debts. Since § 1192 refers to § 523(a) to identify debts that are excepted from discharge, and § 523(a) only applies to individual debtors, the only reasonable conclusion is that corporate debtors adhering to the requirements of § 1192 are not limited by the discharge provisions in § 523(a). Corporate debtors are not individual debtors.

The legislative history also shows that Congress did not intend to significantly modify the discharge exceptions for corporate debtors. When the SBRA was adopted, it was widely understood that the exceptions to discharge in § 523(a) did not apply to corporate debtors. The House Report for the SBRA stated that the bill excepts from discharge debts that were already nondischargeable. There was no clear intent to fundamentally alter the discharge options available to a corporate debtor in chapter 11.

Finally, Rigby's nondischargeability argument would fundamentally undermine the goals of subchapter V by making it harder, not easier, for a small debtor to reorganize.

This Court should affirm the bankruptcy and circuit court's findings on both issues.

## ARGUMENT

This Court should affirm the Thirteenth Circuit's decision that a bankruptcy court presented with Penny Lane's facts has the authority to confirm a plan containing non-consensual third-party releases. This Court should also affirm the circuit court's decision that the nondischargeability provisions of § 523(a) only apply to individual debtors.

### I. THE BANKRUPTCY COURTS ARE PERMITTED TO APPROVE PLANS OF REORGANIZATION THAT INCLUDE THIRD-PARTY RELEASES WHERE APPROPRIATE AND NECESSARY.

#### *A. The bankruptcy court had the jurisdiction and constitutional authority to issue a final order confirming a plan with third-party releases.*

The jurisdiction of the bankruptcy court to confirm Penny Lane's Plan is supported by 28 U.S.C. § 1334(b),[2] 28 U.S.C. § 157, and Supreme Court precedent.

##### 1. 28 U.S.C. § 1334(b) grants federal courts jurisdiction over all civil proceedings that are "related to cases under title 11" and third-party actions that affect the bankruptcy estate are related to the bankruptcy case.

The third-party releases at issue are "related to" the Debtor's bankruptcy case, and the bankruptcy court therefore had jurisdiction to enter a final order binding the parties. While Congress did not provide a list of all actions "related to" a bankruptcy, this Court has previously held that suits between third parties that affect the bankruptcy estate fall within the statute's broad grant of "related to" jurisdiction. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995).

The Court has previously noted that a bankruptcy court's jurisdiction is not "limitless," but is tailored to allow a bankruptcy court to deal efficiently and expeditiously with the bankruptcy

[2] 28 U.S.C. § 1334(b) applies to the bankruptcy courts through the operation of 28 U.S.C. § 157.

estate. *Id*. at 308. To determine whether a proceeding is "related to" a bankruptcy case, the bankruptcy court must find that the proceeding "could conceivably have any effect on the estate being administered in bankruptcy." *Celotex*, 514 U.S. at 308 n.6 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). The proceeding does not necessarily have to be against the debtor or the debtor's property; it only needs to affect the debtor's estate. *Id*. The Court also noted that while Congress "did not delineate the scope of 'related to' jurisdiction…[Congress's] choice of words suggests a grant of some breadth." *Celotex*, 514 U.S. at 307–08.

Here, Rigby's claims against Penny Lane's parent company, Strawberry Fields, are sufficiently "related to" Penny Lane's chapter 11 case to establish the bankruptcy court's jurisdiction over the claims. The basis of the claims is the Debtor's alleged conduct, and Strawberry Fields would likely have contribution and indemnification rights against the Debtor, which in turn affects the Debtor's estate. These facts are very similar to the situation in *Celotex*, as well as a number of circuit court cases upholding "related to" jurisdiction. *See*, *e.g.*, *SPV OSUS, Ltd. v. UBS AG*, 882 F.2d 333 (2nd Cir. 2018) (holding removal proper because plaintiff's claims would give defendant contribution rights against the debtor in the Madoff bankruptcy, which itself is "related to" the chapter 11 case); *In re El Paso Refinery, LP*, 302 F.3d 343 (5th Cir. 2002) (allowing "related to" jurisdiction where there was a "chain of indemnification provisions" leading to liability for the debtor's estate).

Rigby's claims against Strawberry Fields could reduce the financial resources available to Penny Lane's bankruptcy estate and reduce the recovery available to Penny Lane's creditors. An action which reduces the financial resources available for distribution from a bankruptcy estate is an action "related to" a case under Title 11.

2. The third-party releases were integral to the restructuring of the debtor-creditor relationship and were therefore "core" proceedings under 28 U.S.C. § 157.

28 U.S.C. § 157(b) grants bankruptcy courts authority to "hear and determine all core proceedings arising under title 11." 28 U.S.C. § 157(b) also explicitly grants bankruptcy courts "core" authority to confirm a plan of reorganization. Rigby argues that the presence of third-party releases in a plan creates a situation where bankruptcy courts no longer have the constitutional authority to confirm the plan.

In *Stern v. Marshall*, this Court explained that the bankruptcy courts validly exercise their constitutional authority under 28 U.S.C. § 157 as long as they are deciding a "core matter," or one that is "integral to the restructuring of the debtor-creditor relationship." *Stern v. Marshall*, 564 U.S. 462, 497 (2011) (quoting *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (per curiam)). If the third-party releases included in Penny Lane's Plan were integral to the restructuring of the debtor-creditor relationship, then the bankruptcy court acted within its constitutional authority when it confirmed the Plan.

The third-party releases included in Penny Lane's Plan were integral to the restructuring of the debtor-creditor relationship. During intense negotiations, Strawberry Fields offered to essentially fund the bankruptcy by providing $100 million to the creditor trust, but only if Strawberry Fields received the third-party releases at issue. R. at 8. The Bankruptcy Court for the District of Moot found that there were no other conceivable means to achieve the results accomplished by the Plan. R. at 10. Because the Plan could not be confirmed without the third-party releases, the third-party releases were critical to the success of the Plan. Being critical to the success of the Plan, the releases were integral to the restructuring of the debtor-creditor relationship, and therefore constitutionally core under *Stern*. *Stern*, 564 U.S. at 497; *see also In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 137 (3d Cir. 2019) (holding approval of third-party releases "core" under *Stern* when the releases were "critical to the success of the plan").

*B. The Bankruptcy Code authorizes third-party releases that are necessary and appropriate for the implementation of a plan of reorganization.*

Penny Lane recognizes that the Code does not explicitly state that a bankruptcy court may grant third-party releases as part of a plan of reorganization. However, the fact that third-party releases are not explicitly listed in § 105(a) simply means that they are not listed; it does not suggest that the bankruptcy courts are prohibited from using them. *See Comm'r. v. Asphalt Prods. Co., Inc.*, 482 U.S. 117, 120–21 (1987); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 95 (2012). Sections 105, 524, 1123, and 1129 show that Congress intended to give bankruptcy courts wide power to confirm plan provisions as long as the provisions are necessary and appropriate for the reorganization.

1. Section 105 is a broad grant of power that, when combined with other sections of the Code, provides the statutory basis for third-party releases.

Section 105(a) states that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. 11 U.S.C. § 105. Section 1123(a)(5) requires that a proposed plan must "provid[e] adequate means for the plan's implementation." 11 U.S.C. § 1123. Section 1123(b)(6) of the Code governs plan confirmation, and, after listing some common plan provisions, explicitly states that a plan may "include any other plan provisions not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123. The bankruptcy courts are courts of equity, and this Court has previously recognized the broad authority of the bankruptcy courts to modify creditor-debtor relationships. *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990). Sections 105 and 1123 codify the traditional broad understanding of the bankruptcy court's equity powers. *Airadigm Commc'ns, Inc. v. FCC* (*In re Airadigm Commc'ns, Inc.*), 519 F.3d 640, 657 (7th Cir. 2008). These broad powers include the power to grant third-party releases when they are necessary for the plan's implementation.

Third-party releases are subject to §§ 105, 524, 1129(a)(1), 1123(a)(5) and 1123(b)(6). *Lynch v. Lapidem Ltd.* (*In re Kirwan Offices S.a.r.l.*), 592 B.R. 489, 511 (S.D.N.Y. 2018), *aff'd sub nom*. 792 F. App'x. 99 (2d Cir. 2019). Third-party releases are explicitly approved of in § 524(g)(2), which discusses mass tort bankruptcies related to asbestos exposure. 11 U.S.C. § 524. The concept of a third-party release is therefore not foreign to the Code, and § 524(g) has not been ruled unconstitutional. No text provision of § 524(g) prohibits third-party releases outside the context of an asbestos-related bankruptcy; § 524(g) merely clarifies the procedure for securing third-party releases when a debtor is in an asbestos-related bankruptcy. 11 U.S.C. § 524; *see* H.R. Rep. No. 103-835 at 40 (1994). Third-party releases are contemplated and approved of in the Code, albeit with the acknowledgement that a third-party release is a powerful tool and requires adequate safeguards for its use. *See* 11 U.S.C. § 524(g) (imposing several requirements on both the injunction and the debtor seeking an injunction).

2. Section 524(e) does not prohibit third-party releases.

Section 524(e) states that "the discharge of any debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524. A minority of lower courts have erroneously found that this section of the Code prohibits bankruptcy courts from granting third-party releases. *Bank of N.Y. Tr. Co. v. Official Unsecured Creditors Comm*. (*In re Pac. Lumber Co.*), 584 F.3d 229, 252 (5th Cir. 2009); *Resorts Int'l, Inc. v. Lowenschuss* (*In re Lowenschuss*), 67 F.3d 1394, 1401–02 (9th Cir. 1995); *Landsing Diversified Props. v. First Nat'l Bank and Tr. Co.* (*In re W. Real Estate Fund, Inc.*), 922 F.2d 592 (10th Cir. 1990), *modified sub nom*. 932 F.2d 898 (10th Cir. 1991). These decisions are based, at least in part, on the belief that § 524(e) delineates the boundary of a bankruptcy court's discharge powers. This belief is inconsistent with both the Code and historical practice.

Section 524(e) "explains the effect of a debtor's discharge. It does not prohibit the release of a non-debtor." *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002); *see also Matter of Specialty Equip. Co.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (discussing § 524(e) in the context of a consensual third-party release, stating "[t]his language does not purport to limit or restrict the power of the bankruptcy court to . . . grant a release to a third party."). The purpose of the section is to preserve rights that might otherwise appear to have been lost through the operation of the Code. *Airadigm Commc'ns, Inc. v. FCC* (*In re Airadigm Commc'ns, Inc.*), 519 F.3d 640, 656 (7th Cir. 2008). Section 524(e) merely establishes that the debtor's discharge alone will not prevent a creditor from seeking recourse against a co-debtor for debt that was discharged from the bankrupt debtor's estate. *Id*. It does not restrict the ability of a court to enter an order for a third-party release. *See id*.

Further, the language of § 524(e) is inconsistent with an intent to limit the power of the bankruptcy court. As the Seventh Circuit aptly stated:

> If Congress meant to include such a limit, it would have used the mandatory terms "shall" or "will" rather than the definitional term "does." And it would have omitted the prepositional phrase "on, or ... for, such debt," ensuring that the "discharge of a debt of the debtor shall not affect the liability of another entity"—whether related to a debt or not. See 11 U.S.C. § 34 (repealed Oct. 1, 1979) ("The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.") (prior version of § 524(e)).

*Airadigm*, 519 F.3d at 656. When Congress intends to limit the power of the bankruptcy court, its command is explicit, not obfuscated. *See* 11 U.S.C. § 105(b) ("[A] court may not appoint a receiver in a case under this title"); 11 U.S.C. § 1129(a) ("The court shall confirm a plan *only if* the following requirements are met…) (emphasis added). Finding an intent to limit the bankruptcy court's powers in the language of § 524(e) would be inconsistent with the structure of the Code as well as the historical precedent that bankruptcy courts have broad equitable powers. *See United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990) (collecting Supreme Court cases supporting the proposition that bankruptcy courts have broad authority to modify creditor-debtor relationships).

3. Because § 524(e) does not prohibit third-party releases, § 105(a) applies and provides the standard that governs third-party releases.

Section 105(a) requires that any order the bankruptcy court issues, including a third-party release, must be "necessary or appropriate" to carry out the provisions of the Code. 11 U.S.C. § 105. In the chapter 11 context, this means third-party releases can only be granted when they are necessary or appropriate to a successful reorganization of the debtor. The phrase "necessary or appropriate" is vague and open to interpretation, so the circuit courts have developed a litany of different tests for deciding whether a third-party release is "necessary or appropriate." *See, e.g., Deutsche Bank A.G. v. Metromedia Fiber Network, Inc.* (*In re Metromedia Fiber Network*), 416 F.3d 136, 142 (2d Cir. 2005) (taking a holistic approach, stating that non-consensual releases should only be permitted in "unique" and "truly unusual" circumstances); *In re Ingersoll, Inc.*, 562 F.3d 856, 865 (7th Cir. 2009) (releases must be "narrowly tailored and critical to the plan as a whole"); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying* (*In re Seaside Eng'g & Surveying, Inc.*), 780 F.3d 1070, 1081 (11th Cir. 2015) (releases must be "narrowly limited in scope to claims arising out of the chapter 11 case and does not include claims arising out of fraud, gross negligence, or willful misconduct"); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002) (requiring a finding of "unusual circumstances" to issue a third-party release, and creating a seven-part test to determine if a case is sufficiently unusual to allow a third-party release).

One key theme running through each circuit court decision is that non-consensual third-party releases are an extraordinarily powerful tool and should only be used when absolutely necessary to administer the bankruptcy successfully. Penny Lane Industries is mindful of the strength of the order it sought during its plan confirmation proceedings and encourages this Court to adopt a test similar to the extensive *Dow Corning* test for non-consensual third-party releases. The *Dow Corning* test, with some modification, effectively prevents the abuse of third-party releases while still allowing their use in the appropriate circumstances. The bankruptcy of Penny Lane Industries is such a circumstance.

*C. Penny Lane Industries' Plan of Reorganization complies with the requirements of § 105(a) and nearly all of the Dow Corning test factors.*

The *Dow Corning* test states that if the following seven factors are present, a bankruptcy court may grant a non-consensual third-party release:

(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;

(2) The non-debtor has contributed substantial assets to the reorganization;

(3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;

(4) The impacted class, or classes, has overwhelmingly voted to accept the plan;

(5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;

(6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and;

(7) The bankruptcy court made a record of specific factual findings that support its conclusions.

*In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002).

Penny Lane's Plan complies with factor (1) of the *Dow Corning* test. The third party being released, Strawberry Fields, is the parent company of Penny Lane. R. at 3–4. Strawberry Fields would likely be able to seek indemnity from Penny Lane for any loss. A suit against Strawberry Fields would therefore deplete the assets of the Debtor's estate. *Id*. at 8.

The Plan complies with factor (2) of the *Dow Corning* test. The non-debtor, Strawberry Fields, has made a significant financial contribution to the bankruptcy estate. *Id*. More than half of the money that the unsecured tort claimants receive from the Plan comes from Strawberry Fields. *See id*. (finding Strawberry Fields' contribution more significant than the Debtor's contribution).

The Plan complies with factor (3) of the *Dow Corning* test. Strawberry Fields demanded a release before it would contribute $100 million to the Debtor's estate. *Id*. Without the injunction, the Plan would not have had the assets needed to complete the reorganization. The bankruptcy court agreed that Strawberry Fields' contribution was far more significant than the Debtor's own contribution. *Id*. Without that contribution, the creditors' recovery would have been much smaller.

The Plan complies with factor (4) of the *Dow Corning* test. Over 95% of the unsecured creditors that submitted ballots voted in favor of the Plan. R. at 9.

The Plan is very close to explicit compliance with factor (5) of the *Dow Corning* test. The Plan provides for recoveries of thirty to forty cents on the dollar for the unsecured creditors bound by the third-party release. *Id*. at 8. The Debtor concedes that this is not a recovery of "substantially all" of the creditors' claims. However, the amount recovered is much greater than what the tort creditors would have recovered if they had pursued their cases separately. *Id*. at 10. When a creditor class receives more from a plan than it would without the plan, it is logical to consider the claim substantially paid. *Opt-Out Lenders v. Millennium Lab Holdings II, LLC* (*In re Millennium Lab Holdings II*, *LLC*), 591 B.R. 559, 586 (D. Del. 2018) (finding that there is payment of "all, or substantially all" of a class's claims when the class receives more than they would in a chapter 7 liquidation) *aff'd sub nom*. *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019).

Penny Lane's Plan does not comply with factor (6) of the *Dow Corning* test. Penny Lane encourages the Court to eliminate this factor of the *Dow Corning* test. If creditors of a debtor in chapter 11 are authorized to recover in full against the Debtor's financially contributing affiliates outside of the Plan, there is no effective third-party release. Additionally, Penny Lane's case is distinguishable from the facts of *Dow Corning*, and there is no need for factor (6) to be applied in a situation like Penny Lane's.

In *In re Dow Corning Corp.*, hundreds of thousands of tort claimants sued Dow Corning for injuries they sustained because of Dow's silicone gel breast implants. *In re Dow Corning Corp.*, 280 F.3d 648, 653 (6th Cir. 2002). Under the plan, Dow's shareholders and insurers contributed $2.35 billion to a creditor trust for the tort claimants and received a release from all further liability related to the underlying injuries. *Id*. at 654–55. Class 15, comprised of the United States and certain Canadian provinces, voted against the plan and challenged the bankruptcy court's authority to issue non-consensual third-party releases. *Id*. at 655. The Sixth Circuit affirmed the power of the bankruptcy court to enjoin a non-consenting creditor's claim against a non-debtor to facilitate a chapter 11 plan in "certain situations." *Id*. at 653.

The key difference between the *Dow Corning* bankruptcy and the Penny Lane bankruptcy is that, in Penny Lane's bankruptcy, there is no *class* of creditors that is objecting to the non-consensual third-party release. The class of unsecured creditors being bound by the Plan voted overwhelmingly in support of the Plan. R. at 9. Just because a minority of creditors in a class disagree with a plan does not mean that those creditors have a right to blow up the reorganization by taking legal action against a third party. The Code explicitly states that creditors of a class can be bound by a plan even if they do not vote in favor of the plan. 11 U.S.C. § 1126; 11 U.S.C. § 1129. The purpose of the Code is to prevent a "race to the courthouse" and provide for a "creditor's bargain" in the distribution of the bankrupt's assets. Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 860 (1982) (hypothesizing the bankruptcy system as designed to mirror the agreement one would expect creditors to form among themselves). If factor (6) of the *Dow Corning* test is enforced in this situation, it would allow individual tort claimants to hold hostage settlements involving thousands of other claimants, violative of the democratic class voting parameters specified in §§ 1126 and 1129. For the above reasons, factor (6) of the Dow Corning test should not be applied in situations where the vast majority of mass tort claimants in a class vote in favor of the plan's confirmation and, therefore, the plan's non-consensual third-party releases.

Finally, Penny Lane's Plan complies with factor (7) of the *Dow Corning* test. The bankruptcy court made specific factual findings as to each relevant factor. R. at 10.

The orders sought in Penny Lane's Plan of Reorganization were "necessary or appropriate" as required by § 105, and the Plan survives a reasonable application of the restrictive *Dow Corning* test. The Court should therefore affirm the lower court's confirmation of Penny Lane's Plan.

*D. Bankruptcy courts should allow third-party releases if their application is restricted to exceptional situations where the release maximizes the recovery for all creditors, and is necessary and appropriate for the reorganization.*

Penny Lane Industries concedes that non-consensual third-party releases are powerful tools that should be wielded with extreme caution. However, certain situations necessitate their use to maximize creditors' recovery and effectuate reorganization. The purpose of chapter 11, the expertise of the bankruptcy courts, and the difficulty of mass tort litigation all suggest that the bankruptcy courts should be permitted to issue third-party releases in situations like Penny Lane's.

1. The purpose of chapter 11 is to maximize recovery for creditors and preserve viable businesses.

The Bankruptcy Code was enacted to prevent the historic "race to the courthouse" when a debtor defaulted and codify a hypothetical "creditors' bargain" to maximize recovery. Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 860 (1982); Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 Yale L.J. 1238, 1252–53 (1981) (discussing evolution of bankruptcy law to maximize recovery). Chapter 11 was created to prevent viable businesses from liquidating. *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 37 n.2 (2008). These goals are best served by allowing non-consensual third-party releases when they are needed to keep a business going, and the creditors do not have another clear shot at recovery.

Under Penny Lane's Plan, creditor recovery is maximized. The bankruptcy court found that the tort claimant's recovery in the proposed Plan was far greater than any recovery they could reasonably expect from litigation against Strawberry Fields directly. R. at 10. No party objected to this finding. *See id.*; R. at 11. Penny Lane's Plan, and the attendant third-party releases, maximize the recovery of the creditors overall.

Penny Lane's Plan allows it to continue to operate and employ a significant number of people in the Blackbird community. The Liverpool river is already lined with closed factories, and an unnecessary liquidation of Penny Lane will only add to the region's challenges. *Id.* at 12. The "fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). The approval of the non-consensual third-party releases promotes policies central to the Code by maximizing creditor recovery and preserving viable businesses.

2. The flexible approach condoned by § 105(a) allows bankruptcy courts to engage in what they do best – equitable determinations of what would be best for all parties in a collective action.

Bankruptcy courts have a long history of acting in the interest of equity. Adam J. Levitin, *Toward A Federal Common Law of Bankruptcy: Judicial Lawmaking in A Statutory Regime*, 80 Am. Bankr. L.J. 1, 1 n.1 (2006) (collecting cases describing bankruptcy courts as courts of equity). This Court itself has made the same observation. *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). However, it is not always clear what powers or responsibilities are granted to bankruptcy courts when lawyers call them "courts of equity." Levitin, *supra*, at 6. The bankruptcy court's "equitable powers" certainly include the ability of the bankruptcy court to issue and enforce injunctions. *Id.* at 7; *In re Ohio Copper Mining Co.*, 241 F. 711, 713 (S.D.N.Y. 1917) ("It has . . . become elementary that a court of equity will enjoin a party to the proceedings from attacking [its own orders] in other courts . . . the bankruptcy court is a court of equity"). When Penny Lane refers to the bankruptcy court's ability to consider equitable principles, it is specifically pointing out the ability of bankruptcy courts to act as needed to further the goals of the Code, despite "technical considerations." *Pepper v. Litton*, 308 U.S. 295, 304–05 (1939).

The bankruptcy courts are specialized in their application of equitable principles. Channeling diverse and competing interests towards a specific goal is the primary function of the Code and the courts. *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 857–58 (1982). The bankruptcy courts are uniquely situated to equitably balance the power of third-party releases with principles of restraint.

Rigby's argument for a bright-line rule against any non-consensual third-party releases goes against the well understood purpose and function of the bankruptcy courts. *See Pepper v. Litton*, 308 U.S. 295, 304–05 (1939). Prohibiting third-party releases would lead to more chapter 7 liquidations, and less recovery for tort claimants like Rigby. *See generally* Bris, A., Welch, I., & Zhu, N., *The Costs of Bankruptcy: Chapter 7 Liquidation versus Chapter 11 Reorganization*, 61 J. of Fin. 1253 (2006) (finding higher recoveries for creditors in chapter 11 proceedings than in chapter 7). Equitable principles suggest that the bankruptcy court is obligated to prevent individual creditors from taking actions that would reduce the overall payout to the entire creditor class.

3. The bankruptcy courts are particularly well suited to maximize the recoveries of mass tort claimants.

The bankruptcy court's designation as a court of equity makes it particularly well suited to handle mass tort litigation. The court is allowed the flexibility to deal with complex issues, and can more efficiently reach a global settlement which can maximize the recoveries for creditors.

Bankruptcy courts also resolve cases more quickly than district courts and can get financial compensation to tort victims considerably faster. Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C.L. Rev. 129, 166 n.226 (2005) (average length of a chapter 11 case has historically been about 16 months).

Rigby may argue that she has better options elsewhere to litigate her claims. However, the alternative options to a global settlement in bankruptcy are much more difficult for claimants like Rigby to pursue. Rule 23 of the Federal Rules of Civil Procedure makes it difficult for claimants to unify in a single action to recover. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–23 (1997) (finding class did not satisfy Rule 23(b)(3) predominance inquiry because claimants had different levels of asbestos exposure); David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. Pa. L. Rev. 1565, 1566 (2017) (arguing that Rule 23 is unable to handle mass tort litigation after *Amchem*). Rigby may also argue that she and her co-claimants could secure better recovery by pursuing multidistrict litigation, but that path is rife with dysfunction and inequity. Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. 447, 476 (2022) (describing MDL as a "captive settlement negotiation" where "cases languish—sometimes for years"). The bankruptcy court is the optimal forum for distributing funds to the claimants, even if it involves the usage of a powerful bankruptcy tool: the non-consensual third-party release. These are precisely the types of trade-offs that the equitable bankruptcy court is specialized to evaluate. The interests and votes of the vast majority of Rigby's class of creditors must be considered when the court is evaluating the best path forward for the bankruptcy.

## II. THE DISCHARGE EXCEPTIONS IN § 523(a) APPLY ONLY TO INDIVIDUAL DEBTORS.

Section 1192 governs the discharge of debts for subchapter V debtors under a non-consensual plan. 11 U.S.C. § 1192. Section 1192 grants subchapter V debtors a discharge of all debts "except any debt of the kind specified in section 523(a)." *Id.* Section 523(a) provides that a "discharge . . . under section 1192 . . . does not discharge an individual debtor" from certain debts. 11 U.S.C. § 523(a). Penny Lane is a corporate debtor. Even though § 523(a) is explicitly limited to individual debtors, Rigby brought a nondischargeability action against Penny Lane under § 523(a)(6) and insists that her claim is "of the kind specified in 523(a)." *See* R. at 7. The Thirteenth Circuit properly rejected this interpretation; it is inconsistent with the statutory text, the legislative history, and the policies animating subchapter V and the Code. Because the only kinds of debt excepted from discharge by § 523(a) are those owed by individuals, the debt allegedly owed by Penny Lane is not a debt "of the kind specified" in § 523(a)(6). This Court should therefore affirm the dismissal of Rigby's nondischargeability action and discharge her debt consistent with § 1192.

### *A. Sections 1192 and 523(a), when read in accordance with principles of statutory interpretation and according to their plain meaning, unambiguously limit the application of § 523(a) to individual subchapter V debtors.*

#### 1. The plain language of § 523(a) makes it clear that a subchapter V debtor's discharge is only restricted by § 523(a) if the debtor is an individual.

The scope of a corporate subchapter V debtor's discharge is a matter of statutory interpretation. To resolve a dispute over the meaning of a statute, courts are instructed to begin "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron*

*Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

The text of §§ 1192 and 523(a) clearly limits the discharge exceptions to individual subchapter V debtors. Section 1192, enacted by the Small Business Reorganization Act (SBRA), provides that "the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title . . . except any debt . . . of the kind specified in section 523(a) of this title." 11 U.S.C. § 1192. To determine which debts are excepted from discharge, one must look to the text of § 523(a). Section 523(a), as amended by the SBRA, states that "[a] discharge under section . . . 1192 . . . of this title does not discharge an individual debtor from any debt" of the type listed. 11 U.S.C. § 523(a).

First, the discharge exceptions incorporated by reference in § 1192(2) are limited to the debts deemed nondischargeable under § 523(a). Section 1192 explicitly states that it only excepts debts "of the kind specified in section 523(a)" from discharge. 11 U.S.C. § 1192. Because § 523(a) only applies to an "individual debtor" seeking a "discharge under section . . . 1192," § 1192(2) only excepts from discharge the debts owed by *individual* debtors proceeding under subchapter V. This is because debts owed by corporate debtors are not among the kind of debt specified in § 523(a). *See Kind*, Merriam-Webster Dictionary (online ed. 2022) (defining "kind" as sharing "common traits."). Further, the "language of section 1192(2) does not empower section 523(a) to cast a wider net then the text of section 523(a) permits." *Avion Funding, LLC v. GFS Indus., LLC* (*In re GFS Indus., LLC*), No. 22-50403-CAG, 2022 WL 16858009, at *4 (Bankr. W.D. Tex. Nov.

10, 2022). Nothing in the text indicates that Congress intended to drastically expand the scope of § 523(a) in the context of subchapter V. *See id.* To the contrary, Congress intended to simply make the existing discharge exceptions applicable in subchapter V cases. *See* H.R. Rep. No. 116-171, at 8 (describing § 1192(2) as excepting from discharge debt "that is otherwise nondischargeable.").

Second, when Congress has intended to subject corporate debtors to § 523(a)'s discharge exceptions, it has been explicit in doing so. Corporate debtors are generally granted a complete discharge without exception under chapter 11. *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 761 (2005). In enacting the Code in 1978, Congress made a measured choice to grant corporate debtors a complete discharge under chapter 11 and Congress has only departed from this principle once. *See id.* Section 1141(d)(6) provides that confirmation of a plan "does not discharge a *debtor that is a corporation* from any debt of the kind specified in paragraph 2(A) or 2(B) of section 523(a)." 11 U.S.C. § 1141(d)(6) (emphasis added). The absence of any language in § 1192 extending § 523(a) to corporate debtors is instructive here. Congress knows how to distinguish dischargeability based on the type of debtor and did not do so in § 1192(2). As a result, one can only determine which debtors are subject to the discharge exceptions in § 1192(2) by looking to § 523(a), which unambiguously applies only to individual debtors. *See GFS Indus.*, 2022 WL 16858009 at *4.

2. The Thirteenth Circuit's interpretation gives effect to every word in §§ 1192 and 523(a).

Courts engaged in statutory interpretation have a "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2002); *see also* Antonin

Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (stating that courts should "lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory."). When enacting the SBRA, Congress amended § 523(a) to include § 1192 in the list of discharge provisions to which it applies. Small Business Reorganization Act, H.R. 3311, 116th Cong. (2019). Rigby argues that § 1192 applies to both corporate and individual debtors, but this interpretation would render the amendment to § 523(a) meaningless as mere surplusage. "[T]he reference to Section 1192 added to Section 523(a) by the SBRA must be given meaning, and the only reasonable meaning is that Congress intended to continue to limit application of the Section 523(a) exceptions in a Subchapter V case to individuals." *Gaske v. Satellite Rests., Inc. Crabcake Factory USA* (*In re Satellite Rests., Inc. Crabcake Factory USA*), 626 B.R. 871, 876 (Bankr. D. Md. 2021). This Court should give effect to every word in the statutes and adopt the interpretation that gives meaning to the SBRA's amendment to § 523(a) rather than rendering it meaningless as surplusage.

Rather than giving effect to § 523(a), the Fourth Circuit addressed the SBRA's amendment to § 523(a) by applying the "general/specific" canon of construction. *See Cantwell-Cleary Co., Inc v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 36 F.4th 509, 515 (4th Cir. 2022). The Fourth Circuit concluded that § 1192's "use of the word 'debt' is . . . decisive" as it "does not refer to any *kind of debtor* addressed by § 523(a)" and that to the extent the kinds of debtor addressed by §§ 523(a) and 1192(2) are in tension, § 1192(2)'s inclusion of corporate debtors should control. *Id.* This interpretation ignores Congress's decision to amend § 523(a) to include § 1192 in its limiting language. *See In re GFS Indus.*, 2022 WL 16858009 at *8. The general/specific canon dictates that when "two provisions may not be harmonized . . . the more specific will control over the general." *Universal Am. Mortg. Co. v. Bateman* (*In re Bateman*), 331 F.3d 821, 825 (11th Cir. 2003); Scalia & Garner, *Reading Law* 183 (stating that the general/specific canon applies only "when conflicting provisions simply cannot be reconciled").

Sections 1192 and 523 can be harmonized, so the general/specific canon does not apply. The Thirteenth Circuit interpreted the statutes as applying § 523(a)'s discharge exceptions in subchapter V cases, but only for individual debtors. This Court should affirm the Thirteenth Circuit because its interpretation makes both sections effective and preserves historical distinctions between corporate and individual debtors.

### *B. The legislative history of § 1192 confirms that Congress did not intend for § 523(a) to apply to corporate subchapter V debtors.*

While the Court need not consult legislative history because the text is clear, the legislative history of § 1192 supports the Thirteenth Circuit's interpretation. The House Report accompanying § 1192 states that the intent of the discharge provision was to discharge all debts "except any debt: (1) [that is due within the payment period provided for in the plan]; or (2) that is otherwise nondischargeable." H.R. Rep. No. 116-171, at 8 (2019). At that time, it was widely understood that corporate debt was not subject to the discharge exceptions in § 523(a) and thus the only debt that would be "otherwise nondischargeable" would be debt held by an individual debtor per § 523(a). *Gaske v. Satellite Rests., Inc. Crabcake Factory USA (In re Satellite Rests., Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021). (collecting pre-SBRA cases holding that non-individuals are not subject to § 523(a)). Any other reading of § 1192 suggests that

Congress significantly modified the nondischargeable debts of corporations without discussion, which is quite improbable.

Modifying corporate dischargeability via a cross-reference would be inconsistent with the principle that Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). The Supreme Court has repeatedly held that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Id.* Under Rigby's interpretation, Congress hid an elephant in the mousehole of a cross-reference. It is well understood bankruptcy practice that corporations are not subject to the § 523(a) exceptions to discharge, and subjecting corporate subchapter V debtors to discharge exceptions would be a major departure from this practice. Such an interpretation is disfavored, as this Court itself has stated "[w]e will not read the Bankruptcy Code to erode past . . . practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990). There is no clear indication that Congress intended such a radical departure from past practice, and the Court should not accept Rigby's contention that it has.

*C. The Thirteenth Circuit's interpretation is consistent with the overarching objectives of subchapter V and chapter 11 of the Code.*

Despite comprising the majority of chapter 11 filers, small businesses "are often the least likely to reorganize successfully." H.R. Rep. No. 116-171, at 2 (2019). Chapter 11 was designed with large businesses in mind, and as a result the process often proved unworkable for small businesses. *ABI Commission to Study the Reform of Chapter 11*, 23 Am. Bankr. Inst. L. Rev. 1, 12, 63–64 (2015). Congress enacted the SBRA to "ensure quick and successful reorganization and provide small businesses' the ability to restructure in a way that meets their needs." *See* H.R. Rep. No. 116-171, at 2 (2019); *Small Business Reorganization Act*, 38 Am. Bankr. Inst. J. 8, 8 (2019) (quoting Rep. Marino). Subjecting corporate subchapter V debtors to discharge exceptions is inconsistent with these policy aims because it can jeopardize successful reorganization and creates a de facto priority for nondischargeable claims. *See* Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* 235 (2022); Brubaker, *supra*, at 764.

1. Subjecting corporate subchapter V debtors to discharge exceptions jeopardizes reorganization and makes liquidation more likely.

Discharge exceptions decrease the prospects for a successful reorganization. The creation of corporate discharge exceptions in subchapter V would undermine plan finality, as it would "leave an undesirable uncertainty surrounding reorganizations that is unacceptable." Brubaker, *supra*, at 766. More importantly, discharge exceptions can make it impossible for businesses to address the causes of their financial difficulties by preventing them from restructuring certain debts. *See id*. at 765. Discharge exceptions make liquidation inevitable for small businesses facing significant claims. *See* Bonapfel, *supra*, at 236. These small businesses will pursue liquidation over reorganization and start over without the insurmountable burden of the nondischargeable debt. While this may be the outcome desired by Rigby, liquidation would be disastrous for the owners, employees, customers, and super-majority of voting tort creditors that are relying upon Penny Lane's continued operation.

The existence of dischargeability exceptions will also create a Field of Dreams dilemma for small business debtors.[3] The ability to bring a nondischargeability action under § 523(a) can "create perverse incentives," encouraging the assertion and prosecution of claims regardless of their merits. *See* Bonapfel, *supra*, at 236. These actions are inexpensive for creditors to file, but they impose huge costs on debtors who are required to defend claims regardless of their merit and for creditors who stand to gain a significant advantage if their debt is deemed nondischargeable. *See id.*; Brubaker, *supra*, at 764. The existence of discharge exceptions also creates a holdout problem, as they "suppl[y] to any creditor who could assert colorable allegations…a credible threat to 'opt-out' of the . . . restructuring, in an attempt to receive a greater recovery than other creditors." Brubaker, *supra*, at 764. This problem is not new, and concerns regarding de facto priority of nondischargeable debt led Congress to grant corporate debtors a discharge almost without exception under chapter 11. *See id.* Interpreting § 1192(2) as subjecting both corporate and individual subchapter V debtors to all of § 523(a) would reintroduce these issues, raising significant concerns regarding equity and fairness.

Concerns that nondischargeable debt would hinder successful reorganization and increase the chances of liquidation led Congress to grant corporate debtors a complete discharge in 1978, and these same concerns exist in the context of non-consensual plans in subchapter V. It defies reason that "in enacting a statute universally proclaimed to have the purpose of facilitating reorganization of small businesses . . . Congress in 2019 intended to re-introduce all the problems

[3] If you build it, they will come.

with exceptions to the discharge of a corporation that it eliminated over 50 years earlier." *See* Bonapfel, *supra*, at 237. Given the history of a broad corporate discharge and extremely narrow exceptions, it is far more likely that Congress intended to provide a simplified process for small businesses that also preserved the existing limitation of § 523(a). *See In re GFS Indus., LLC*, 2022 WL 16858009, at *10; *In re Satellite Rests.*, 626 B.R. at 878. This is the only interpretation consistent with the text, history, and underlying policy underlying subchapter V and chapter 11 more broadly.

2. Excluding certain debts from discharge under § 1192 gives priority to nondischargeable debts and is inconsistent with the Code's central policy of securing equal treatment among creditors.

Allowing creditors to pursue nondischargeability actions under § 523(a) creates a de facto priority for nondischargeable debt, undermining the principles of equity and fairness at the heart of the Code. The Fourth Circuit, the only other circuit to address this issue, concluded that discharge exceptions "provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor" arising from the elimination of the absolute priority rule. *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 36 F.4th 509, 517 (4th. Cir. 2022). However, as the Thirteenth Circuit noted, the Fourth Circuit's balance concept is "erroneous," and considerations of equity support a contrary conclusion. R. at 22.

First, the Fourth Circuit's balance concept is based on the premise that the elimination of the absolute priority rule comes "at the expense of . . . creditors." *See Cleary Packaging*, 36 F.4th at 517. Subchapter V eliminated the absolute priority rule, which gave creditors an ownership interest in a reorganized entity in the absence of full payment or a consensual plan, because it was a barrier that prevented small businesses from reorganizing. *See* Bonapfel, *supra*, at 231; H.R. Rep. No. 116-171, at 2 (2019). As small business owners are generally involved in their business's operation, "the value of a small business is dependent on the services that [owners] provide." *See* Bonapfel, *supra*, at 231. Eliminating the absolute priority rule gave owners a way to retain an ownership interest in their business, making reorganization more attractive to small business owners and encouraging them to continue operating the business. *See id.* at 232. This change increases the chances of a successful reorganization, which benefits creditors because creditors generally receive greater payments under a plan of reorganization than a liquidation. *See id.*; *In re GFS Indus.*, 2022 WL 16858009 at *10. The Fourth Circuit's analysis ignores the value that small business owners add to their companies and the potential benefit creditors receive from successful reorganizations even under a cramdown plan.

Further, considerations of fairness and equity favor shielding a debtor from discharge exceptions. Bonapfel, *supra*, at 234. Discharge exceptions can "tip[] the scale in favor of the creditor whose debt is excepted from discharge and against creditors whose debts are not dischargeable." *Id*. While dischargeable debts are paid as a pro rata share of a debtor's projected disposable income, nondischargeable debts must be paid in full after a debtor reorganizes. *In re GFS Indus.*, 2022 WL 16858009 at *10. Consequentially, "every dollar paid on the nondischargeable debt in excess of a pro rata share of disposable income is a dollar that is not paid to unsecured creditors generally." *Id.* This de facto prioritization and competition for funds leads to unequal treatment among similarly situated creditors and is inconsistent with the Code's central aim "to secure equal distribution among creditors." *See Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006).

*D. Despite similar language, any comparison between the scope of discharge exceptions in chapter 12 and chapter 11 is unavailing due to the differences between each chapter.*

Section 1228(a) of chapter 12 excepts debts "of the kind specified in section 523(a)." *Compare* 11 U.S.C. § 1228(a) *with* 11 U.S.C. § 1192(a). While this language is virtually identical to § 1192(2), caselaw interpreting § 1228(a) is not instructive for two key reasons.

First, chapter 12 makes no distinction between corporate and individual debtors. *See* 11 U.S.C. §§ 1201–1232 (referring only to a "debtor"); *United States v. Hawker Beechcraft, Inc*. (*In re Hawker Beechcraft, Inc.*), 515 B.R. 416, 430 (S.D.N.Y. 2014). Only family farmers and fishers can be debtors under chapter 12. 11 U.S.C. § 109(f); *see also* 11 U.S.C. § 101(18), (19A) (including family-owned operations within the meaning of both terms). As a result, § 1228(a) "is broader [than section 523(a)] in that its language is inclusive of all debtors" as it makes no distinction between individual family farmers and small family-run farms. *See New Venture P'ship v. JRB Consol. INC.* (*In re JRB Consol., INC.*), 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995). Chapter 11, by contrast, is available to almost anyone and anything. 11 U.S.C. § 109. The broad scope of chapter 11 makes it fundamentally incomparable to the narrowly tailored chapter 12. Chapter 12 cases "have unique considerations not present in a chapter 11 case." *In re GFS Indus.,* 2022 WL 16858009 at *7.

Second, when § 1228 refers to § 523(a)'s exceptions to discharge, it does so in a vacuum; there is not an already existing reference to § 523 within the chapter. *See id*. at *6. In contrast,

§ 1141(d) of chapter 11, which provides its own specific exceptions to discharge, references § 523(a) and makes it clear that only individual debtors are subject to its discharge exceptions. 11 U.S.C. § 1141(d)(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.") (emphasis added); *In re JRB Consol., INC.*, 188 B.R. at 373 ("It seems clear from that language that corporate debtors in chapter 11 are not subject to . . . section 523(a)."). Because subchapter V was intentionally enacted as a subchapter of chapter 11, the language in § 1141 is instructive and properly frames the § 523(a) analysis in the context of § 1192. *In re GFS Indus.*, 2022 WL 16858009 at *6. Due to the differences between chapter 11 and chapter 12, there is no mandate that the Court extend findings regarding the relationship between §§ 523 and 1228 to findings regarding the relationship between §§ 523 and 1192. *Id.* at *7.

**CONCLUSION**

The bankruptcy court had the power, authority, and specialization to issue a necessary non-consensual third-party release. The bankruptcy court and the Thirteenth Circuit also applied sound reasoning to the interpretation of § 1192. Affirming the lower courts is consistent with the history of the Code and ensures that bankruptcy courts can continue to handle corporate reorganizations going forward. For the foregoing reasons, we ask that the court AFFIRM.

## APPENDIX

**11 U.S.C. § 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, may 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.

**11 U.S.C. § 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.

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**11 U.S.C. § 1192. Discharge.**

If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—

**(1)** on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or

**(2)** of the kind specified in section 523(a) of this title.

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**11 U.S.C. § 523. Exceptions to discharge.**

**(a)** A discharge under section 727, 1141, 1192[1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

**(1)** for a tax or a customs duty—

**(A)** of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

**(B)** with respect to which a return, or equivalent report or notice, if required—

**(i)** was not filed or given; or

**(ii)** was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

**(C)** with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

**(2)** for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

**(A)** false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

**(B)** use of a statement in writing—

**(i)** that is materially false;

**(ii)** respecting the debtor's or an insider's financial condition;

**(iii)** on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

**(iv)** that the debtor caused to be made or published with intent to deceive; or

**(C)**

**(i)** for purposes of subparagraph (A)—

**(I)** consumer debts owed to a single creditor and aggregating more than $800 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

**(II)** cash advances aggregating more than $1,100 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

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[1] So in original. Probably should be followed by a comma. 11 U.S.C.A. § 523 (West); Small Business Reorganization Act, H.R. 3311, 116th Cong. (2019).

**(ii)** for purposes of this subparagraph--

**(I)** the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

**(II)** the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

**(3)** neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

**(A)** if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

**(B)** if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

**(4)** for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

**(5)** for a domestic support obligation;

**(6)** for willful and malicious injury by the debtor to another entity or to the property of another entity;

**(7)** to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

**(A)** relating to a tax of a kind not specified in paragraph (1) of this subsection; or

**(B)** imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

**(8)** unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

**(A)**

**(i)** an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

**(ii)** an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

**(B)** any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

**(9)** for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

**(10)** that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;
**(11)** provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;
**(12)** for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;
**(13)** for any payment of an order of restitution issued under title 18, United States Code;
**(14)** incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);
**(14A)** incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);
**(14B)** incurred to pay fines or penalties imposed under Federal election law;
**(15)** to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;
**(16)** for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;
**(17)** for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);
**(18)** owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under--

> **(A)** a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

**(B)** a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

**(19)** that--

**(A)** is for--

**(i)** the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

**(ii)** common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

**(B)** results, before, on, or after the date on which the petition was filed, from--

**(i)** any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

**(ii)** any settlement agreement entered into by the debtor; or

**(iii)** any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

**(b)** Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

**(c)**

**(1)** Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

**(2)** Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

**(d)** If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

**(e)** Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).