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 THE RESPONDENT

TEAM NUMBER 20
COUNSEL FOR RESPONDENT

JANUARY 19, 2023

QUESTIONS PRESENTED

1. Whether a bankruptcy court has the authority to confirm a Chapter 11 reorganization plan as a core matter when the plan consists of nonconsensual releases of direct claims held by third parties against non-debtor affiliates.
2. Whether 11 U.S.C. § 523(a) discharge exceptions for an individual debtor apply to a corporate debtor seeking to discharge debts pursuant to 11 U.S.C. § 1192, when proceeding under Subchapter V of Chapter 11 of the Bankruptcy Code.

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot held for Respondent, Penny Lane Industries, Inc. on both issues. Specifically, the bankruptcy court found that (1) the bankruptcy court has authority to approve the non-consensual third-party releases provided for in the Debtor's Plan; and (2) in a Subchapter V bankruptcy case, the nondischargeability provisions of 11 U.S.C. § 523(a) apply only in cases where the debtor is an individual. The Thirteenth Circuit Court of Appeals affirmed on both issues. This Court then granted Petitioner, Eleanor Rigby, petition for writ of certiorari.

STATEMENT OF JURISDICTION

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

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provisions of the Bankruptcy Code are 11 U.S.C. §§ 105, 523, 1123, 1141, and 1191.[1] The relevant portions are provided herein.

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.

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

(a) A discharge under section 727, 1141, 1192[,] 1228(a), 1228(b), or 1328(b) 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[.]

[1] References within this brief to Title 11 of the United States Code may be to the Bankruptcy Code or to the statutory section provisions.

11 U.S.C. § 1123. Contents of plan

(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.

11 U.S.C. § 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.

. . . .

(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.

11 U.S.C. § 1191. Confirmation of plan

(a) Terms.--The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title 1 are met.

(b) Exception.--Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(c) Rule of construction.--For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:

(1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.

(2) As of the effective date of the plan—

(A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or

(B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

STANDARD OF REVIEW

The facts of this case are undisputed. (R. at 11.) Therefore, only questions involving the interpretation of the United States Bankruptcy Code remain, and such questions are questions of law. When there are only questions of law, the appropriate standard of review is de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). Under de novo review, this Court must decide questions of law as though it was the original court reviewing the case. *Razavi v. Comm'r*, 74 F.3d 125, 127 (6th Cir. 1996).

STATEMENT OF THE FACTS AND CASE

Penny Lane Industries, Inc. ("Debtor") is a manufacturer of plastic, glass, and metal food containers. (R. at 4.) The Debtor is a wholly owned subsidiary of Strawberry Fields Foods, Inc. ("Strawberry Fields"), a company that produces cereal and convenience foods and markets its products under several well-known brands sold in supermarkets throughout the country. (R. at 4-5.) Eleanor Rigby ("Petitioner") filed suit against the Debtor, alleging that it knowingly disposed of industrial chemicals and pollutants at its manufacturing facility in Blackbird and, in doing so, contaminated the area's ground water supply. (R. at 5.) The Petitioner listed Strawberry Fields as a co-defendant in the suit and alleged that it knew or should have known of its subsidiary's alleged misconduct. (R. at 6.) Hundreds of similar lawsuits were subsequently filed against the Debtor by residents of Blackbird and the surrounding communities. (R. at 6.) The Debtor and Strawberry Fields dispute all allegations in the lawsuits, asserting that any waste on the Debtor's property was disposed of in accordance with the applicable environmental laws and regulations that existed at the time. (R. at 6.) The Debtor and Strawberry Fields deny having any knowledge that such waste allegedly infiltrated the groundwater supply. (R. at 6.) Finally, both corporations assert there is insufficient evidence to link the pollutants found in the water supply to any waste disposed by the

Debtor, noting that there are dozens of other businesses with manufacturing facilities located upstream along the Liverpool River. (R. at 6.) No judicial determination has been made regarding the claims asserted against the Debtor or Strawberry Fields in any forum. (R. at 6.)

The Debtor filed its Chapter 11 case under Subchapter V on January 11, 2021. (R. at 6.) Although the Debtor owes less than $2 million to its trade creditors, claims were filed against the Debtor asserting cumulative damages of nearly $400 million, with the Petitioner accounting for $1 million. (R. at 6.) The Petitioner commenced an adversary proceeding against the Debtor to have her $1 million claim deemed nondischargeable pursuant to 11 U.S.C. §§ 523(a) and 1192(2). (R. at 7.) The Debtor moved to dismiss the complaint, arguing that the nondischargeability provisions of § 523(a) are inapplicable to business entities. (R. at 7.) The bankruptcy court ruled in favor of the Debtor, holding that in cases filed under Subchapter V, the § 523(a) exceptions to discharge do not apply when the debtor is a corporation and granting the Debtor's motion to dismiss the adversary proceeding. (R. at 7.)

The Debtor was granted a temporary injunction halting all actions against its "current and former owners, officers, directors, employees and associated entities." (R. at 7-8.) The bankruptcy court concluded that such a temporary injunction was appropriate to facilitate negotiation of a global settlement by the Debtor, Strawberry Fields, and a number of ad hoc creditor groups in mediation. (R. at 8.)

Several stakeholders negotiated a complex settlement framework that was ultimately memorialized in the Debtor's Plan of Reorganization ("the Plan"). (R. at 8.) Specifically, the Plan provides for the establishment of a creditor trust that would be funded with the Debtor's disposable net income for five years and $100 million to be paid by Strawberry Fields. (R. at 8.) The Plan also expressly releases and discharges "any and all claims" that third parties "have asserted or

might assert in the future against Strawberry Fields" to the extent that such claims are "based on or related to the Debtor's pre-petition conduct, its estate or this Chapter 11 case." (R. at 8.) The release under the Plan is non-consensual, binding parties regardless of whether they participated in the bankruptcy case and whether they voted in favor of or against the Plan. (R. at 8.) Claims against Strawberry Fields related to the Debtor's pre-petition conduct will be channeled into the creditors' trust. (R. at 8-9.) The trust likely will result in a significant distribution, estimated at 30-40 cents on the dollar, to creditors with allowed claims. (R. at 8.)

More than 95% of the Debtor's unsecured creditors submitted ballots and voted in favor of plan confirmation. (R. at 9.) Nevertheless, two creditors filed objections to confirmation: (1) the Petitioner, who asserted that the non-consensual releases of third-party direct claims against Strawberry Fields are not permissible under applicable bankruptcy and non-bankruptcy law, and (2) Norwegian Wood Bank, a secured creditor that was separately classified from other creditors under the Plan. (R. at 9.)

The bankruptcy court overruled the Petitioner's objection, noting that the highly unusual and complex nature of this case warranted non-consensual third-party releases. (R. at 10.) Specifically, the bankruptcy court found that the significant monetary contribution to be made by Strawberry Fields resulted in a meaningful distribution to creditors and there was overwhelming creditor support for the Plan. (R. at 10.) Regarding the claims against Strawberry Fields, the court made detailed findings that the probability of success and collectability of any judgment that would be obtained was substantially less than the proposed $100 million contribution to be made by Strawberry Fields. (R. at 10.) The court also overruled Norwegian Bank's objection, holding that the Debtor's treatment of its secured claim complied with the requirements of §§ 1129(b)(2)(A) and 1191. (R. at 10.)

Having overruled both objections, the bankruptcy court confirmed the Plan. (R. at 11.) Ultimately, the court found that "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan" and, therefore, the settlements memorialized therein, including the third-party releases, were fair and reasonable. (R. at 10.) Petitioner timely appealed the bankruptcy court's dismissal of her § 523 action and its overruling of her objection to confirmation. (R. at 7, 11.) Upon request of the parties, the disputes were certified for direct appeal to the Thirteenth Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d) and consolidated. (R. at 11). The Thirteenth Circuit affirmed both decisions of the bankruptcy court, and this Court granted certiorari to resolve the issues.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly ruled in favor of the Debtor when it held that the bankruptcy court had the authority to confirm the Debtor's Plan pursuant to 28 U.S.C. § 157(b) and that the bankruptcy court correctly applied 11 U.S.C. §§ 105 and 1123(b)(6) to the Plan's terms. The Thirteenth Circuit likewise correctly ruled that, pursuant to 11 U.S.C. § 1192, the Debtor's debts should be discharged because, in Subchapter V cases, the discharge exceptions of 11 U.S.C. § 523(a) apply only to individual debtors.

Through her appeal, the Petitioner seeks to circumvent the authority granted to bankruptcy courts by 28 U.S.C. § 157(b) to confirm plans. The Bankruptcy Amendments and Federal Judgeship Act codified "core" and "non-core" matters in 28 U.S.C. § 157(b), and confirmation of plans is listed as a "core matter" under 28 U.S.C. § 157(b)(2)(L). The Petitioner asserts that bankruptcy courts lack constitutional authority under Article III of the United States Constitution to enter final judgments on some state law counterclaims. However, this Court has held that principle is true only in a narrow set of circumstances: (1) when counterclaims by the trustee

against a claimant are statutorily core under § 157(b)(2)(C) but seek an affirmative recovery beyond the amount of a filed claim, and (2) avoidance actions of preferences and fraudulent conveyances under 28 U.S.C. § 157(b)(2)(F) and (H). The Thirteenth Circuit appropriately affirmed the bankruptcy court's confirmation of the Debtor's Plan that was comprised in part of non-consensual releases of direct claims held by third parties against non-debtor affiliates because the bankruptcy court had the constitutional and statutory authority to confirm the Plan. The bankruptcy court correctly interpreted and applied 11 U.S.C. §§ 105(a) and 1123(a) to the third-party releases necessary for the Plan's feasibility. As the plain text of the Bankruptcy Code states, a plan of reorganization may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Under section 105(a), the bankruptcy court may exercise its inherent equitable powers to further the goals of the Bankruptcy Code. The release of claims, including the Petitioner's, against the non-debtor affiliate, Strawberry Fields, was not only appropriate, but crucial to the Plan's feasibility. Moreover, the release of third-party claims was pivotal in upholding the Bankruptcy Code's general theme of equity because, without it, unfair discrimination among unsecured creditors was inevitable. Therefore, the Thirteenth Circuit reached the only logical conclusion by affirming the bankruptcy court.

In asserting that section 523(a) exceptions to discharge apply to nonindividual debtors, the Petitioner's argument inaccurately applies Chapter 12 case law to the Debtor's Subchapter V case. The Debtor, however, is neither a family-owned fishing nor farming business and is therefore ineligible to file under Chapter 12. Because most of its language mirrors the language of the Chapter 13 statutes, the execution of a Chapter 12 bankruptcy case is more akin to that of Chapter 13 than Chapter 11. Additionally, that Chapter 13 is available only to individual debtors further removes the Petitioner's argument from relevancy.

The majority approach to applying section 523(a) discharge exceptions only to individual debtors in a Subchapter V case best serves the intent of the Small Business Reorganization Act. The statute's plain meaning is unambiguous and clear: in a Subchapter V case, the enumerated exceptions affect individual debtors alone. Congress is perfectly capable of amending the Bankruptcy Code to expand section 523(a) to include nonindividual debtors, as it did when it abrogated the absolute priority rule and eliminated the requirement for an official committee of creditors in Subchapter V cases. The fact that Congress did not include nonindividual debtors in section 523(a) indicates that the omission was intentional.

This Court should affirm the Thirteenth Circuit Court of Appeals on both issues.

ARGUMENT

I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE BANKRUPTCY COURT HAD THE AUTHORITY TO CONFIRM THE DEBTOR'S PLAN OF REORGANIZATION PURSUANT TO 28 U.S.C. § 157(b)(2)(L) AND CORRECTLY APPLIED 11 U.S.C. §§ 105 AND 1123(b)(6) TO THE PLAN'S TERMS.

The bankruptcy court has core matter jurisdiction over Chapter 11 plan confirmations under 28 U.S.C. § 157(b)(2)(L), and confirmation of a Chapter 11 plan is appropriate where the plan's feasibility relies on a bankruptcy court's order, process, or judgment not exceeding the confines of the Bankruptcy Code. 11 U.S.C. §§ 105 and 1123(b)(6). Although Congress enacted 11 U.S.C. § 524(g) to provide consistent rulings in the wake of the historic Johns-Manville and UNR Industries Chapter 11 cases, *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648 (2d Cir. 1988), it did not include determinative language in the § 524 construction and, therefore, did not intend to eradicate nonconsensual third-party releases from all Chapter 11 filings.

A. The Thirteenth Circuit Correctly Held That The Bankruptcy Court Has Jurisdiction Over Plan Confirmation Under 28 U.S.C. § 157(b).

Bankruptcy courts have jurisdiction over "all cases arising under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section[.]" 28 U.S.C. § 157(b)(1). In 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act (the "Act"), which provided that federal district courts have original jurisdiction in bankruptcy cases and may refer to bankruptcy judges "proceedings arising under Title 11 or arising in or related to a case under Title 11." *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25, 33 (2014). The Act also created "core" and "non-core" designations, which were codified in 28 U.S.C. § 157. Core proceedings include but are not limited to matters concerning the administration of the estate; the allowance or disallowance of claims; determinations as to the dischargeability of particular debts; confirmation of plans; and those affecting liquidation of estate assets or adjustment of the debtor-creditor relationship. 28 U.S.C. § 157(b)(2)(A), (B), (I), (L), and (O). To the extent that a proceeding is not core but is otherwise "related to" the bankruptcy case, the bankruptcy court makes findings of fact and conclusions of law and sends its determination to the district court for de novo review. *See* U.S.C. § 157(c). The distinction between "core" and "non-core" was fairly clear until the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011), which seemed to usher in an opposing standard against what had been a commonly practiced exercise of jurisdiction within bankruptcy courts: the release of third-party claims in support of reorganization plans.

In *Stern*, the Court held that a bankruptcy court lacked constitutional authority under Article III of the United States Constitution to enter a final judgment on some state law counterclaims that would not be resolved in the process of ruling on a creditor's proof of claim. *Id.* at 495. In its ruling, the Supreme Court created a class of claims, now commonly referred to as

"*Stern* claims," that may not be adjudicated to final order or judgment by the bankruptcy court even though the Bankruptcy Code directs otherwise. *Id.* at 466. The Court later defined "*Stern* claims" as "claim[s] designated for final adjudication in the bankruptcy court as a statutory matter, but not as a constitutional matter." *Exec. Bens. Ins. Agency,* 573 U.S. at 25. Genuine "*Stern* claims" have proved rare, as predicted by Chief Justice Roberts in the *Stern* opinion.[2] In *In re Millennium Lab Holdings II, LLC*, for example, the Third Circuit specifically noted that one of the key takeaways from *Stern* was that "a bankruptcy court is within constitutional bounds when it resolves a matter that is integral to the restructuring of the debtor-creditor relationship." 945 F.3d 126, 135 (3d Cir. 2019). Thus, in the wake of *Stern*, bankruptcy courts have generally found two types of claims designated as "core proceedings" to be governed by *Stern*: (1) counterclaims by a trustee against a claimant that are statutorily core under 28 U.S.C. § 157(b)(2)(C) but seek an affirmative recovery beyond the amount of a filed claim[3] and (2) avoidance actions by a trustee to recover preferences under 28 U.S.C. § 157(b)(2)(F)[4] and fraudulent conveyances under 28 U.S.C. §

[2] "[T]he framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts. . . . . We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the statute; we agree . . . that the question here is a 'narrow' one." *Id.* at 502.

[3] *See, e.g., Glob. Comput. Enters. v. Steese, Evans & Frankel P.C. (In re Glob. Comput. Enters., Inc.)*, 561 B.R. 651, 658 (Bankr. E.D. Va. 2016); *Dr.'s Assocs. Inc. v. Desai (In re Patwari)*, No. 08-26178(JKS), Adv. No. 09-1022, 2016 WL 1577842, at *1, 2016 Bankr. LEXIS 1139, at *3 (Bankr. D.N.J. Apr. 7, 2016); *Alexander v. Carrington Mortg. Servs. LLC (In re Alexander)*, No. 15-40264-RFN-13, Adv. No. 15-4054-rfn, 2015 WL 6689243, at *2, 2015 Bankr. LEXIS 3713, at *7 (Bankr. N.D. Tex. Oct. 8, 2015).

[4] *See, e.g., Madden v. Morelli (In re Energy Conversion Devices, Inc.)*, 548 B.R. 208, 215 (Bankr. E.D. Mich. 2016); *Nisselson v. Salim (In re Big Apple Volkswagen, LLC)*, No. 11-11388 (JLG), Adv. No. 11-2251 (JLG), 2016 WL 1069303, at *7, 2016 Bankr. LEXIS 834, at *23 (Bankr. S.D.N.Y. Mar. 17, 2016); *Wilkins v. AmeriCorp Inc. (In re Allegro Law. LLC)*, 545 B.R. 675, 700 (Bankr. M.D. Ala. 2016); *Conti v. Perdue Bioenergy, LLC (In re Clean Burn Fuels, LLC)*, 540 B.R. 195, 199 (Bankr. M.D.N.C. 2015); *Off. Comm. of Unsecured Creditors v. Fountainhead Grp., Inc. (In re Bridgeview Aerosol, LLC)*, 538 B.R. 477, 484 (Bankr. N.D. Ill. 2015); *Faith v. Inline Distrib. Co. (In re Newton Enters.)*, No. 13-12388-PC, Adv. No. 9:14-01127-PC, 2015 WL 3524603, at *1, 2, 2015 Bankr. LEXIS 1831, at *4 (Bankr. C.D. Cal. June 3, 2015).

157(b)(2)(H).[5] Because the Court addressed a narrow category of claims in its decision, *Stern* does not prohibit a bankruptcy court from approving non-consensual releases of direct claims held by third parties against non-debtor affiliates as part of a Chapter 11 plan of reorganization.

As intended by the Supreme Court, *Stern* applies to very few bankruptcy cases, as evidenced by the continuation of courts to authorize third-party releases. *See In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126; *In re Rockall Energy Holdings, LLC*, Nos. 22-90000 (MXM), 14, 15, 92, 411, 412, 548, 2022 Bankr. LEXIS 1578 (Bankr. N.D. Tex. June 2, 2022). Both before and after *Stern*, bankruptcy courts have possessed the statutory and constitutional authority to confirm plans that may release third parties when warranted by extraordinary and unusual circumstances. *Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 658 (6th Cir. 2002) (following "those circuits that have held that enjoining a non-consenting creditor's claim is only appropriate in 'unusual circumstances'" and promulgating determinative factors therefor (citations omitted)); *Gillman v. Cont'l Airlines* (*In re Cont'l Airlines*), 203 F.3d 203, 212–13, 217 (3d Cir. 2000) (recognizing that the Second and Fourth Circuits have upheld non-debtor releases in "extraordinary cases" and holding that "the Bankruptcy Court and District Court lacked a sufficient evidentiary and legal basis to authorize

[5] *See, e.g., Slobodian v. Penn. State Univ. (In re Fisher)*, 575 B.R. 640, 641 41 (Bankr. M.D. Penn. 2017); *Reinbold v. Morton Cmty. Bank (In re Mid-Illini Hardwoods, LLC)*, 576 B.R. 598, 603 (Bankr. C.D. Ill. 2017); *Lofstedt v. Oletski-Behrends (In re Behrends)*, No. 13-22392 EEB, Adv. No. 14-1377 EEB, 2017 WL 4513071, at *1, 2017 Bankr. LEXIS 3674, at *3 (Bankr. D. Colo. Apr. 10, 2017); *Field v. Mirikitani (In re Mirikitani)*, No. 05-03693, Adv. No. 16-90002, 2016 WL 7367760, at *2, 2016 Bankr. LEXIS 4365, at *24 (Bankr. D. Haw. Dec. 19, 2016); *Howell v. Fulford (In re S. Home & Ranch Supply, Inc.)*, 561 B.R. 810, 812 n.1 (Bankr. N.D. Ga. 2016); *Dev. Specialists, Inc. v. Varanese (In re Coudert Bros. LLP)*, No. 06-12226 (RDD), Adv. No. 08-01467 (RDD), 2016 WL 6875900, at *4, 2016 Bankr. LEXIS 4059, at *13 (Bankr. S.D.N.Y. Nov. 21, 2016); *Weil v. United States (In re Tag Entm't Corp.)*, No. 1:09-bk-26982-VK, Adv. No. 1:10-ap-01342-VK, 2016 WL 1239519, at *1, 2016 Bankr. LEXIS 982, at *2 (Bankr. C.D. Cal. Mar. 29, 2016); *Dev. Specialists, Inc. v. Sullivan (In re Coudert Bros. LLP)*, No. 06-12226 (RDD), Adv. No. 08-1502 (RDD), 2016 WL 5363687, at *3, 2016 Bankr. LEXIS 3460, at *9 (Bankr. S.D.N.Y. Sept. 23, 2016); *Stillwater Liquidating LLC v. Net Five at Palm Pointe, LLC (In re Stillwater Asset Backed Offshore Fund Ltd.)*, 559 B.R. 563, 574-75 (Bankr. S.D.N.Y. 2016).

the release and permanent injunction of Plaintiffs' claims under any of the standards adopted by courts that have evaluated non-debtor releases and permanent injunctions").

In *In re Millennium Lab Holdings II, LLC*, the bankruptcy court considered whether it had subject matter jurisdiction and constitutional adjudicatory authority to enter a confirmation order that included third-party releases. *In re Millennium Lab Holdings II, LLC,* 575 B.R. 252 (Bankr. D. Del. 2017). The court found it had statutory jurisdictional authority to enter final judgment confirming the plan because confirmation of a plan is an enumerated core proceeding. *Id*. at 261-62; *see also* 28 U.S.C. § 157(b)(2)(L). The court also found it had constitutional authority to enter the confirmation order under any of the various interpretations of *Stern* adopted by courts. *Millennium Lab Holdings II, LLC*, 575 B.R. at 268-70. Accordingly, a bankruptcy court entering an order precluding a third-party lawsuit does not violate *Stern* because the relief being sought by the debtor in the operative proceeding is "quintessentially federal in nature." *Id*. at 277. Instead, the bankruptcy court should focus on the actual operative proceeding before it and the relief sought therein under the Bankruptcy Code rather than on the underlying state law claims or rights asserted by the non-debtor entities. *In re Lazy Days' RV Center Inc.*, 724 F.3d 418, 423-24 (3d Cir. 2013); *In re Linear Elec. Co*., 852 F.3d 313, 320 (3d Cir. 2017). "There is no question . . . that, if the proper standard is met, a bankruptcy judge may enter a final order in a core matter that impacts or even precludes a state law action between two non-debtors." *Millennium Lab Holdings II, LLC*, 575 B.R. at 279.

The purpose of a Chapter 11 filing is to transcend the Debtor from beneath a mountain of debt to a place of contribution in the economy while providing the most equitable distribution of repayment to creditors as possible. *Tamir v. United States Tr.*, 566 B.R. 278, 283 (D. Me. 2016). Where a plan of reorganization requires contribution from a non-debtor to be feasible, the

bankruptcy court has wide discretion in balancing the plan's success against the interest of third parties. *See, e.g., In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) (affirming the district court's decision that the settlement was reasonable, adequate, and fair); *Dow Corning Corp.*, 280 F.3d at 655, 662–63 (affirming the district court's conclusion that, under certain circumstances, a bankruptcy court may enjoin a non-consenting creditor's claim against a non-debtor to facilitate a Chapter 11 plan of reorganization); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988) (affirming the district court's decision to affirm the bankruptcy court's order enjoining claims against the debtor's insurers because "the insurance settlement/injunction arrangement was essential . . . to a workable reorganization").

As here, the bankruptcy court had statutory jurisdictional authority to confirm the Plan because plan confirmation is an enumerated core proceeding under 28 U.S.C. § 157(b)(2)(L). Similar to the argument advanced before the courts in both *Millennium Lab Holdings II, LLC* cases, the Petitioner essentially argues that her lawsuit against the Debtor and Strawberry Fields is the operative proceeding to adjudicate the release of third-parties; however, the Thirteenth Circuit correctly upheld the bankruptcy court's confirmation of the Plan because the operative proceeding was the confirmation of a plan. (R. at 11, 23.) Additionally, the Debtor's case was inundated with extraordinary and unusual circumstances. *Dow Corning Corp.*, 280 F.3d at 658. The Debtor was facing hundreds of suits based on allegations that it contaminated the local water supply. (R. at 6.) The Debtor is a wholly owned subsidiary of Strawberry Fields, and many of the lawsuits named Strawberry Fields as a co-defendant. (R. at 4, 6.) No judicial determination has yet been made regarding claims against the Debtor or Strawberry Fields (R. at 6.) The Debtor and Strawberry Fields assert there is insufficient evidence to link the pollutants found in the water supply to any waste disposed of by the Debtor. (R. at 6.) Dozens of other businesses with manufacturing facilities

are located upstream along the water supply. (R. at 6.) The source of contamination has yet to be conclusively determined. (R. at 5.) The Debtor owes less than $2 million to its trade creditors, but faced unliquidated tort claims related to the alleged dumping of pollutants asserting cumulative damages of nearly $400 million. (R. at 6.) The Plan consists of the Debtor's disposable income for five years, and $100 million to be paid by Strawberry Fields. (R. at 8.) Due to these complexities, the Plan would not have been feasible without Strawberry Fields's contribution such that it was not only appropriate but necessary to release Strawberry Fields from potential future third-party actions. (R. at 11.) Similarly, the contribution from Strawberry Fields was the only avenue through which creditors could be paid, and its contributions allowed creditors to be paid more than they would have otherwise (R. at 10.) Moreover, the release was necessary because Strawberry Fields could not have made its significant contributions with a lingering threat of indemnification claims. (R. at 8.) For these reasons, the Plan confirmation was integral to the restructuring of the debtor-creditor relationship and falls outside the limiting scope of *Stern*. *See Millennium Lab Holdings II, LLC*, 945 F.3d at 135.

B. The Thirteenth Circuit Correctly Held That The Bankruptcy Court May Utilize 11 U.S.C. §§ 105 And 1123(b)(6) When Determining Whether Third-Party Releases Are Appropriate.

This Court should uphold the Thirteenth Circuit's determination that the bankruptcy court appropriately applied U.S.C. §§ 105 and 1123(b)(6) when it confirmed the Plan, thereby releasing third parties. A Chapter 11 plan of reorganization may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 105(a). The contents of a Chapter 11 plan are set forth in § 1123(a), and bankruptcy courts are granted broad discretion in confirming a plan with provisions consistent with that title. 11 U.S.C. §§ 1123 and 1191; *Old Orchard Inv. Co. v. A.D.I. Distribs., Inc. (In re Old Orchard Inv. Co.)*, 31 B.R. 599, 601 (W.D.

Mich. 1983). Additionally, as required by 11 U.S.C. § 1129(a)(3), no plan may be confirmed unless it was proposed in good faith. When considering whether a plan has been filed in good faith, the court must determine "in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code." *In re Madison Hotel Assocs*., 749 F.2d 410, 425 (7th Cir. 1984).[6] Subchapter V modifies the rules under which particular classes of claims can be crammed down and permits a bankruptcy court to confirm a plan even if no impaired class of claims accepts the plan. 11 U.S.C. § 1191(b). A Subchapter V plan may include "any provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). However, the plan must be "fair and equitable"[7] to each impaired class that does not accept the plan, and the plan cannot "discriminate unfairly"[8] against any impaired, non-consenting class. 11 U.S.C. § 1191(b).

In *Millennium Lab Holdings II, LLC*, the Third Circuit approved certain broad third-party releases because they were "integral to the restructuring of the debtor-creditor relationship." *Millennium*, 945 F.3d at 140. There, all but one of the debtor's lenders agreed to release claims against certain shareholders of the debtor in return for a substantial monetary contribution by those shareholders to the bankruptcy estate. *Id.* at 131. The remaining lender objected. *Id.* at 132. The

[6] The Second Circuit has defined the good faith standard in the bankruptcy context "as requiring a showing that the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected.'" *Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984) (quoting *Manati Sugar Co. v. Mock*, 75 F.2d 284, 285 (2d Cir. 1935)).

[7] 11 U.S.C. § 1191(c) provides the following requirements to satisfy the "fair and equitable" standard: (1) all of debtor's projected disposable income during the term of the plan will be used for play payments to creditors, (2) a reasonable likelihood exists that all proposed plan payments will be made, and (3) appropriate remedies exist in the plan.

[8] While the Bankruptcy Code does not define "unfair discrimination," most courts agree that the purpose underlying the requirement is "to ensure that a dissenting class will receive relative value equal to the value given to all other similarly situated classes." *In re LightSquared Inc.*, 513 B.R. 56, 99 (Bankr. S.D.N.Y. 2014); *accord In re SunEdison, Inc.*, 575 B.R. 220 (Bankr. S.D.N.Y. 2017); *In re 20 Bayard Views, LLC*, 445 B.R. 83 (Bankr. E.D.N.Y. 2011); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988).

Third Circuit ruled that the bankruptcy court had the constitutional authority to confirm the plan with the release provisions because the releases were "critical to the success of the Plan," "necessary to both obtaining the funding and consummating a plan," and "without [prepetition shareholders'] contributions, there [would be] no reorganization." *Id.* at 137. The Third Circuit concluded that "[r]estructuring in this case was possible only because of the release provisions." *Id.* It further stated a bankruptcy court has the authority to adjudicate matters arising in the claims-allowance process "because those matters are integral to the restructuring of debtor-creditor relations." *Id.* at 138.

Nonconsensual third-party releases are acceptable when, if not for the release, the debtor might face indemnification claims, and the nondebtor's contribution is essential to the plan's feasibility. *A.H. Robins*, 880 F.2d at 701 (explaining that a release was acceptable because: (1) release was essential to the plan because without the releases, the debtor faced potential exposure for future indemnification claims; (2) the mass tort claimants would be fully compensated as provided for in the plan; and (3) 94.38% of claimants voted to accept the plan); *see A.H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), cert. denied, 479 U.S. 876 (1986). Courts should use the following factors stated by the Sixth Circuit in *Dow Corning* when determining whether nonconsensual third-party releases are appropriate:

> (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.

Dow Corning Corp., 280 F.3d at 658. "[B]ankruptcy courts should have discretion to determine which of the *Dow Corning* factors will be relevant in each case. The factors should be considered a nonexclusive list of considerations, and should be applied flexibly . . . and only where essential, fair, and equitable." *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1079 (11th Cir. 2015) (citing *Berhmann v. Nat'l Heritage Found*., 663 F.3d 704, 712 (4th Cir. 2011); *Munford v. Munford, Inc. (In re Munford, Inc.),* 97 F.3d 449, 455 (11th Cir. 1996)). The record is replete with facts to suggest that the bankruptcy court considered these factors in confirming the Debtor's Plan.

Whether a release is "appropriate" for the reorganization is fact-intensive and depends on the nature of the reorganization. *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 657 (7th Cir. 2008). Some bankruptcy courts that have disallowed third-party releases did so in reliance on an interpretation of 11 U.S.C. § 524(g), claiming that Congress intended releases be permitted only in asbestos cases. *Cont'l Airlines* 203 F.3d at 211 n.6. This interpretation is incorrect, however, because nothing in the Bankruptcy Code expressly prohibits third-party releases, Congress did not include the conclusive phrasing (i.e., "shall not" or "must") within the structure of 524(g) that mandates its application to all third-party releases, and § 1123(b)(6) deems such provisions permissible so long as the provision is consistent with the Bankruptcy Code. *See* 11 U.S.C. §§ 524(g) and 1123(b)(6).

Foundational principles of bankruptcy law require that debtors receive a "fresh start" upon emerging from bankruptcy, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364 (2006), and that creditors of the same class be treated equally. *Begier v. IRS*, 496 U.S. 53, 58 (1990). The bankruptcy court's ability to implement these principles was challenged in *In re Johns-Manville Corporation* as to a debtor facing an indeterminable number of future claimants at the time of

filing. *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986). Potential personal injury claims arising from exposure to asbestos were unpredictable and daunting because diseases resulting from asbestos exposure may not manifest themselves for years, or even decades, after an exposure to asbestos. *See* Mayo Clinic: *Patient Care & Health Information, Diseases & Conditions – Asbestosis,* https://www.mayoclinic.org/diseases-conditions/asbestosis/symptoms-causes/syc-20354637. Congress addressed this latency problem in 1994, when it crafted 11 U.S.C. § 524(g). Through § 524(g), the Bankruptcy Code makes clear that bankruptcy courts have the authority to establish trusts for the benefit of future claimants with asbestos-related injuries ("asbestos compensation trusts") and to issue "channeling injunctions" that prevent future asbestos claimants from taking legal action against any entity—including insurers—other than the asbestos compensation trust established in the chapter 11 reorganization of the relevant debtor. Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (Oct. 22, 1994). As argued in the Brief Amici Curiae of Future Claimants Representatives In Support of None of the Parties submitted to this Court in *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195 (2009) Nos. 08-295, 08-307, 2009 WL 271049, at *11: "By permitting a debtor to cleanse itself of asbestos-related liabilities through bankruptcy, Congress has enabled such debtors to truly obtain a fresh start through bankruptcy and continue to operate."

Plan confirmation resulting in the release of third parties was appropriate in *In re Johns-Manville Corporation* because the Manville Trust provided the most equitable payment possible to claimants. *In re Johns-Manville Corp.*, 68 B.R. at 638. Moreover, the creation of the Manville Trust through the plan established a judicially efficient remedy for those seeking relief for their asbestos-related claims. *Id.* at 633-34. Here, the Debtor faces allegations that it knowingly disposed of industrial chemicals and pollutants at its manufacturing facility, which was the basis for the

Petitioner's suit and her objection to the Plan's confirmation. (R. at 5.) Nearly 10,000 claims were filed against the Debtor asserting cumulative damages of nearly $400 million related to death or injury caused by exposure to pollutants that had contaminated the local water supply. (R. at 6.) Much like the Manville Trust, the Debtor's Plan was not structured to invalidate the Petitioner's claim but to provide the most equitable payment for all creditors, including the Petitioner. (R. at 8); *In re Johns-Manville Corp.*, 68 B.R. at 638. Creditors with allowed claims will receive a significant distribution through the trust created under the Plan. (R. at 8.) The bankruptcy court found that "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan" which provided Strawberry Fields would contribute $100 million to the trust. (R. at 8, 10.) As with the Manville Trust, the trust created through the Debtor's Plan and funded by Strawberry Fields is a definitive resolution that relieves the judicial system of the burden of nearly 10,000 claims while still providing fair and equitable payment to those claimants. (R. at 8, 10.)

While under the Petitioner's ideal scenario the Debtor would pay to her the $1 million she sought, the bankruptcy court determined that the only equitable solution was to confirm the Plan that created a trust providing distribution "substantially greater than what creditors would receive if the Debtor was liquidated under Chapter 7." (R. at 10.) For the terms of the Plan to be accomplished, it was required that Debtor's parent company, Strawberry Fields, be released from pending and future litigation so that it could maintain the financial means to make the proposed contributions. (R. at 8.) The Plan, as confirmed by the bankruptcy court, is the fairest solution to an alleged unfair problem, a fact that was recognized by the Thirteenth Circuit. (R. at 10.) Reversing the court's decision and allowing the Petitioner – or any claimant – to attempt to squeeze blood out of a stone would set a precedent inconsistent with the Bankruptcy Code's general theme

of equitable justice. *See 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.").

The Petitioner will likely argue against acknowledging the bankruptcy court's authority to approve non-consensual releases of direct claims held by third parties against non-debtor affiliates as part of a Chapter 11 plan of reorganization by stating that if Congress intended to grant such authority, it would have expressly done so. *See* Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 Chap. L. Rev. 173, 245 (2000). This argument is expressly refuted by the acknowledgment that Congress writes with an intentional level of vagueness to prevent arbitrary enforcement of laws and arbitrary prosecution. *Id*. The wisdom of such a stylistic choice is pointedly effective here, as confirming the Plan and resulting trust provided the Debtor's creditors, including the Petitioner, with compensation for their claims, which likely would not have happened had the Debtor been deprived of the benefits of having filed its Subchapter V bankruptcy case. (R. at 10.) Moreover, that Congress did not specifically address nonconsensual releases in the Bankruptcy Code cannot offer proof of its intention that bankruptcy courts be deprived of any authority over approving them. 1 Collier on Bankruptcy ¶ 3.02[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Rather, it is evident that Congress vested with confidence the power in bankruptcy courts to discern what is necessary and just in confirming proposed plans. *Id*. This Court has held that "simple statutory silence" is not enough to support an inference that Congress "intend[ed] a major departure" from fundamental bankruptcy principles. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017). Here, plan confirmation was not a "major departure" from bankruptcy principles; instead, it was also a direct execution of those principles because it provided the most equitable

distribution of assets to all creditors – including the Petitioner – while offering the Debtor its fresh start. (R. at 10.)

Nonconsensual third-party releases in Chapter 11 filings are not granted for the goal of debilitating tort claimants in litigation. *See Johns-Manville Corp*., 837 F.2d at 93. Rather, they promote the principles of bankruptcy law and the underlying need to foster American industry. *Id*. Where the precedent of disallowing bankruptcy courts discretion in plan confirmation exists, the spirit of ingenuity cannot. Kim Gerard, *How Chapter 11 Saved the US Economy*, Harvard Business School (Mar. 25, 2013), https://hbswk.hbs.edu/item/how-chapter-11-saved-the-us-economy. Tort cases are often riddled with emotion from genesis to resolution; thus, through the Bankruptcy Reform Act of 1978, Congress vested power in bankruptcy judges to be more than referees and to ensure the most equitable outcome possible without lodging a wrench in the cogs of America's industrial wheel. Enabling claimants to usurp the duty of a bankruptcy judge by disregarding the necessity of a plan confirmation to pursue further litigation is a drastic measure with little payout. *See Millennium Lab Holdings II, LLC*, 575 B.R. at 270. A tort claimant may perceive his or her day in court as a salve to financial and emotional wounds, but that salve will quickly turn to poison. *Id*. As the court in this case noted, the proposed distribution under the plan is "substantially greater" than what creditors would receive otherwise. (R. at 10.)

II. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE DISCHARGE EXCEPTIONS OF 11 U.S.C. § 523(a) APPLY ONLY TO INDIVIDUAL DEBTORS; THUS, THE DEBTOR'S DEBTS SHOULD BE DISCHARGED PURSUANT TO 11 U.S.C. § 1192.

It is "well-settled that section 523 does not apply to corporate debtors." *In re MF Glob. Holdings, Ltd.*, No. 11-15059(MG), 2012 WL 734175, at *3, 2012 Bankr. LEXIS 897 at *8 (Bankr. S.D.N.Y. Mar. 6, 2012) (citing *Adam Glass Serv., Inc. v. Federated Dep't Stores, Inc.*, 173 B.R. 840, 842 (E.D.N.Y. 1994) (finding that section 523(a) "only applies to individual debtors" and "is

not applicable to corporate debtors"); *Savoy Records, Inc. v. Trafalgar Assocs. (In re Trafalgar Assocs.)*, 53 B.R. 693, 696 (Bankr. S.D.N.Y. 1985) (holding that section 523(a) "on its face applies only to individual debtors")). The Bankruptcy Code distinguishes individual debtors from corporations in practically every chapter. *See, e.g.,* 11 U.S.C. §§ 109(e), 727(a)(1), 1141. The Bankruptcy Code was designed with an overarching goal to provide a "fresh start" to all debtors. *See* United States Courts, *Process – Bankruptcy Basics* (Jan. 17, 2023) https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics. However, Congress has maintained a contrast between the execution of bankruptcy for an "honest but unfortunate" individual debtor filing Chapter 7 and a corporate debtor filing Chapter 11. *See Grogan v. Garner,* 498 U.S. 279, 286, 287 (1991); Cornell Law School, *Chapter 7 Bankruptcy* (Jan. 17, 2023), https://www.law.cornell.edu/wex/chapter_7_bankruptcy; Steve Nitz, *The Different Chapters of Bankruptcy Explained*, National Foundation for Credit Counseling (Sept. 22, 2017), https://www.nfcc.org/blog/different-chapters-bankruptcy-explained/. While individuals file Chapter 7 cases to liquidate assets and achieve their "fresh start," *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), most corporations filing under Chapter 11 seek to reorganize their debt structure to emerge from bankruptcy as viable economic entities. *See Tamir v. United States Tr.*, 566 B.R. 278, 283 (D. Me. 2016). The restriction of exceptions to discharge in 11 U.S.C. § 523 to "an individual debtor" is a material differentiation and that 11 U.S.C. § 1192 grants a discharge of "any debt [except] . . . the kind specified in section 523(a)" is insufficient to evince that Congress intended to depart from the long-standing principles of Chapter 11 bankruptcy established in 1978, that included a restriction against allowing section 523 dischargeability actions against corporations. *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).

The Petitioner relied on statutory interpretation in two Chapter 12 cases for her argument before the Thirteenth Circuit. (R. at 19.) However, applying principles of Chapter 12 to the case at bar is erroneous because: (1) Chapter 12 does not distinguish between corporations and individual debtors; (2) Chapter 12 is limited to family-owned farming corporations; and (3) the language of Chapter 12 was borrowed from Chapter 13, which expressly does not apply to corporations. *See Satellite Rests. Inc. Crabcake Factory USA*, 626 B.R. at 877*; United States v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 430-31 (S.D.N.Y. 2014); 11 U.S.C. §§ 101(18), 109(e), 1328. Finally, Congress eliminated the absolute priority rule when it created Subchapter V and replaced it with a requirement that the debtor must pay its "disposable income" into the plan for a period of years. 11 U.S.C. § 1191(b), (c); *In re Johnson*, No. 19-42063-ELM, 2021 WL 825156, at *6, 2021 Bankr. LEXIS 471, at *16 (Bankr. N.D. Tex. Mar. 1, 2021).

A. The 11 U.S.C. § 523(a) Exceptions To Discharge Apply Only To Individual Debtors And Are Inapplicable To Non-Individuals.

As with any statute, courts must "look first to its language, giving the words their ordinary meaning." *Roberts v. Sea-Land Servs*., 566 U.S. 93, 100 (2012); *Conn, Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). "Statutory language, however, 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Roberts*, 566 U.S. at 101 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Furthermore, "[w]hen the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.'" *Conn. Nat'l Bank*, 503 U.S. at 254 (citations omitted).

Taking the language of the statute as it is written, it is clear that section 523 does not apply to corporate debtors.[9] *In re MF Glob. Holdings, Ltd.*, No. 11-15059(MG), 2012 WL 734175, at *3, 2012 Bankr. LEXIS 897 at *8 (Bankr. S.D.N.Y. Mar. 6, 2012) (citing *Adam Glass Serv., Inc.*, 173 B.R. at 842 (finding that section 523(a) "only applies to individual debtors" and "is not applicable to corporate debtors"); *In re Trafalgar Assocs.*, 53 B.R. at 696 (holding that section 523(a) "on its face applies only to individual debtors")). To conclude that the section 523 discharge exceptions apply to corporations, the bankruptcy court must ignore the substantive phrase "individual debtor" included in this statutory construction. *Concrete Log Sys. v. Better Than Logs, Inc. (In re Better Than Logs, Inc.)*, 631 B.R. 670, 678 (Bankr. D. Mont. 2021).

Section 523(a) includes two express requirements: (1) an individual debtor; and (2) the kind of debt excepted from discharge must be a consequence of one of the twenty-one listed circumstances. While the kind of debt at issue here is alleged to fall within section 523(a)(6) for "willful and malicious injury," the first requirement is not – and cannot be – met because Debtor is not an individual debtor. Petitioner rested her argument against dischargeability before the Thirteenth Circuit entirely on the following phrase in section 1192(2): "any debt . . . of the kind specified in section 523(a)." (R. at 19.) However, applying the section 523(a) exceptions to a corporation would be a substantial change to existing Chapter 11 law, and there is nothing in the House Judiciary Committee Report to suggest that doing so was Congress's intention. *See* H.R. Rep. No. 116-171, at 8.

[9] A majority of bankruptcy courts have ruled that section 523(a) exceptions apply only to individual debtors. *See Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, No. 22-50403-cag, Adv. No. 22-05052-cag, 2022 WL 16858009, at *4 , 2022 Bankr. LEXIS 3199, at *9 (Bankr. W.D. Tex. Nov. 10, 2022); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, No. 21-31500-jda, Adv. No. 22-3002, 2022 WL 1110072, at *2, 2022 Bankr. LEXIS 1032, at *4 (Bankr. E.D. Mich. Apr. 13, 2022); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559, 563 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466, 472 (Bankr. D. Md. 2021); *Satellite Restaurants, Inc. Crabcake Factory USA*, 626 B.R. at 873.

As amended by the Small Business Reorganization Act ("SBRA"), the preamble to section 523(a) includes that "[a] discharge under section 727, 1141, *1192*[,] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – [defined in paragraphs (1) through (19) of § 523(a)]." 11 U.S.C. § 523(a) (emphasis added). The SBRA added section 1192 to the list of other sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases. The implication of this language is that section 1192(2)'s reference to debts "of a kind specified" in section 523(a) includes only debts that section 523(a) excepts, which are only debts of individuals. In other words, although section 1192(2) states the discharge rules for all debtors without regard to whether they are individuals, its reference to section 523(a) in the case of an entity has no operative effect because section 523(a), as amended, applies only to individuals. The SBRA's amendment to include section 1192 within section 523(a) seems superfluous if Congress did not intend to limit the section 523(a) exceptions to individuals. Hon. Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* (rev. 2022), at 204 https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.). Without the amendment to section 523(a), section 1192(2) alone would except the types of debts listed from any section 1192 discharge, regardless of whether the debtor was an individual. Legislative history supports the conclusion that Congress did not intent to make the section 523(a) exceptions application to a section 1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the section 1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and "any debt that is otherwise nondischargeable." H.R. Rep. No. 116-171, at 8. The use of the words "otherwise nondischargeable" logically refers to section 523(a), which, by its own terms, applies only to individuals.

The bankruptcy courts have relied on two principles of statutory construction in determining that the discharge exceptions apply only to individuals. The first is to examine the language of the statute itself. *Satellite Rests. Inc. Crabcake Factory USA*, 626 B.R. at 875. "As stated by the United States Supreme Court, '[t]he task of resolving the dispute over [the interpretation of a statute] begins where all such inquiries must begin: with the language of the statute itself.'" *Id*. (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). The second principle is that "every word must be given meaning so that no word in a statute is rendered superfluous." *Id*. at 876.[10] The preamble of section 523(a) is "clear and unambiguous": a discharge under section 1192 discharges an "individual debtor" from all debts except the twenty-one types of debts listed. *Id*. In rendering its decision, the bankruptcy court adopted Judge Bonapfel's analysis:

> As amended, therefore, § 523(a) states that a discharge under new § 1192 does not discharge an *individual* debtor from the listed types of debts. This amendment would be superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), new § 1192 alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual. In other words, although new § 1192 states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of a non-individual has no operative effect. Section 523(a), as amended, applies only to individuals.

Id. at 878-79 (quoting Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* (rev. 2022), at 204).

[10] The court cited *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (stating that a court should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); and *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, —— U.S. ——, 137 S. Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'" (quoting *Walters v. Metro. Ed. Enter., Inc*., 519 U.S. 202, 207, (1997))).

In *Cleary Packaging, LLC*, the Fourth Circuit erroneously found that section 1192(2) applies to business entities and individual debtors, basing its reasoning on the explicit exclusion of the application of the section 523(a) discharge exceptions to a corporate discharge in section 1141(d).[11] *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 511 (4th Cir. 2022). However, section 1192(2) excepts debts from the cramdown discharge "of the kind specified in § 523(a)" and states that a section 1192 discharge does not discharge a debt "of the kind specified in § 523(a)." For the section 523(a) exceptions to apply to discharges of individuals and entities under section 1192(2), it would be unnecessary to add section 1192 to section 523(a). *Satellite Rests. Inc. Crabcake Factory USA*, 626 B.R. at 878. Thus, the reference in section 523(a) to section 1192 must mean something, and "the only reasonable meaning is that Congress intended to limit application of the § 523(a) exceptions in a Subchapter V case to individuals." *Id*. at 876. In other words, the only function of the addition of "§ 1192" to the qualifying language of § 523(a) was "to limit application of § 523(a) to individual debtors in Subchapter V cases." *Cleary Packaging LLC*, 630 B.R. 466, 472 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509. "This is not simply the logical reading of the statute but also it is the result mandated by common principles of statutory construction." *Id*. Under this textual analysis, "[w]hen giving effect to every word of the statute, the plain language of Section 523(a) is unequivocal and confirms that the exceptions to a debtor's discharge, including a discharge under Section 1192, apply only to an individual." *Satellite Restaurants, Inc. Crabcake Factory USA*, 626 B.R. at 876. "[T]he Code, read holistically and in accordance with common principles of statutory

[11] 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. 11 U.S.C. § 1141(d)(2).

interpretation, limits the application of section 523 in Subchapter V cases to individual debtors." *Cleary Packaging LLC*, 630 B.R. at 472.

B. Chapter 12 Language Is Irrelevant To A Corporate Debtor That Is Not a Family-Owned Farming Corporation Or Family Fisherman Corporation.

Chapter 12 is uniquely diversified from Chapter 11 in many regards.[12] First, there are no restrictions on the types of entities that can file under Chapter 11; almost anyone – including individuals, corporations, partnerships, joint ventures, and limited liability companies – are eligible to file bankruptcy under Chapter 11.[13] *See* 11 U.S.C. § 1121. In contrast, only family farmers or family fisherman "with regular annual income," as defined under the Bankruptcy Code, are eligible to file for Chapter 12, the purpose of which is to enable financially distressed family farmers and fishermen to propose and carry out a plan to repay all or part of their debts.[14] 11 U.S.C. §§ 101(18), 101(19A), 109(f). Second, in a Chapter 11 case, a debtor must make all required payments in the reorganization plan until it receives a discharge. 11 U.S.C. §§ 1129, 1192. Conversely, Chapter 12 allows debtors to cram down debts – to pay the current market value of a property instead of the whole debt – on almost all secured debts. 11 U.S.C. § 1222(b)-(c). Third, in a Chapter 11 case filed by a limited liability company or corporation, the debtor receives a discharge when the reorganization plan is confirmed by the court.[15] 11 U.S.C. § 1141(d)(1). Conversely, in a Chapter 12 case, the debtor receives a discharge after completing all plan payments. 11 U.S.C. § 1228.

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[12] *See* United States Bankruptcy Court Northern District of California, *What is the Difference Between Bankruptcy Cases Filed Under Chapters 7, 11, 12, and 13?* (Jan. 15, 2023), https://www.canb.uscourts.gov/faq/general-bankruptcy/what-difference-between-bankruptcy-cases-filed-under-chapters-7-11-12-and-13.

[13] *See* United States Courts, *Chapter 11 – Bankruptcy Basics* https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (Jan. 15, 2023).

[14] *See* United States Courts, *Chapter 12 – Bankruptcy Basics*, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-12-bankruptcy-basics (Jan. 15, 2023).

[15] Comparison: Chapter 11 vs Chapter 12 vs Chapter 13 , Practical Law Checklist w-009-8719.

Due to shared requirements and goals, Chapter 12 borrowed its statutory language from Chapter 13 and is essentially a Chapter 13 filing that has been limited by section 109(f) to debtors who are "family farmer[s] or family fishermen with regular annual income . . . [.]" 11 U.S.C. § 109(f); *Mitchell v. United States (In re Mitchell)*, 210 B.R. 978, 981 (Bankr. N.D. Tex. 1997) ("[C]ourts have not interpreted Chapter 12 of the Bankruptcy Code as they do Chapter 11. Instead, courts read Chapter 12 as Chapter 13 has been interpreted, primarily because Chapter 12 was essentially modeled after Chapter 13."), *aff'd and remanded by United States v. Mitchell (In re Mitchell)*, 241 B.R. 393 (N.D. Tex. 1997); *see also In re Key Farms, Inc.*, No. 19-02949-WLH12, 2020 WL 344525, at *4, 2020 Bankr. LEXIS 1642, at *9 (Bankr. E.D. Wash. June 23, 2020) ("[C]hapter 12 is a hybrid form of bankruptcy relief that has more structural features in common with chapter 13 than with chapter 11[.]"). Under 11 U.S.C. § 109(e), Chapter 13 does not apply to non-individuals, including corporations like the Debtor; therefore, by proxy, the Court should not consider interpretation of Chapter 12 cases in the case at bar. As the bankruptcy court in *Satellite Restaurants, Inc. Crabcake Factory USA* noted, any finding that the section 523(a) exceptions may apply to the discharge of non-individual Chapter 12 debtors cannot be "extended to Chapter 11 context." *Satellite Rests. Inc. Crabcake Factory USA*, 626 B.R. at 877.

Similarly, the Petitioner ineffectively relied on the interpretation of section 1228(a)(2) found in *In re Breezy Ridge Farms, Inc.* and *In re JRB Consolidated, Inc.* to argue before the Thirteenth Circuit that the Debtor cannot receive a discharge for the debt at issue. (R. at 19.) *SW Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, No. 08-12038-JDW, Adv. No. 09-1011, 2009 WL 1514671, 2009 Bankr. LEXIS 1396 (Bankr. M.D. Ga. May 29, 2009); *New Venture P'ship v. JRB Consol. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). By relying on Chapter 12 language borrowed from Chapter 13, Petitioner has

invalidated her argument because Chapter 12 narrows its scope to two industries and Chapter 13 applies only to individual debtors. 11 U.S.C. § 109(e),(f).

C. Congress Passed The SBRA To Streamline Reorganization, And Applying Section 523(a) To Non-Individual Debtors Would Contradict Its Intention.

Chapter 11 of the U.S. Bankruptcy Code "is a form of bankruptcy relief that is typically used by businesses to reorganize their financial affairs." H.R. Rep. No. 116-171, at 116. Most Chapter 11 business cases are filed by small business debtors and they are often "the least likely to reorganize successfully." *Id*. Congress attempted to shore up the bankruptcy process for small business debtors through "heightened security" and "streamlining the reorganization process." *Id*. However, "[n]otwithstanding the 2005 Amendments [to the Bankruptcy Code], small business Chapter 11 cases continue[d] to encounter difficulty in successfully reorganizing." *Id*. To alleviate this problem and better assist small businesses seeking to reorganize successfully, Congress passed the SBRA and removed some of the obstacles to reorganization. 11 U.S.C. §§ 1181-1195.

Among those changes, Subchapter V replaced the absolute priority rule with a requirement that the debtor must commit all projected "disposable income" to the plan for a period of time. 11 U.S.C. §§ 1191(b), (c)(2). This is a significant departure from a traditional Chapter 11 plan's requirements and allows equity holders to retain their interests in a Subchapter V debtor over the objection of nonconsenting creditors without having to pay all higher-priority claims in full. *Compare* 11 U.S.C. § 1181(a) *with* 11 U.S.C. § 1129(b)(2)(B)(ii). While in a traditional Chapter 11 case, the plan must either be accepted by creditors or otherwise the plan proponent must satisfy an arduous cramdown process to achieve confirmation, 11 U.S.C. §§ 1126(c), 1129(a)(10), 1129(b), under Subchapter V, a plan can be confirmed, through cramdown, in a much easier

fashion – by simply meeting the criteria set forth in 11 U.S.C. § 1191.[16] In Chapter 11 cases, a debtor must file with the court a detailed disclosure statement that contains adequate information about the debtor's business and if the debtor can repay its creditors. 11 U.S.C. §§ 1121, 1125. Conversely, in a Subchapter V case, a separate disclosure statement is not required; instead, many of the items that would be included in a disclosure statement are incorporated into the Subchapter V plan itself. 11 U.S.C. §§ 1181(b), 1190.

In a traditional Chapter 11 case, there is an exclusivity period wherein only the debtor may file a plan; however, if that period expires, any party in interest may do so. 11 U.S.C. § 1121(b), (c). In a Subchapter V case, however, only the debtor may file a Chapter 11 plan. 11 U.S.C. § 1189(a). This limitation allows Subchapter V debtors to focus on their reorganizational plans without having to worry about exclusivity or the distraction posed by a competing plan proposed by creditors as do the debtors in a traditional Chapter 11 case. In addition, Subchapter V eliminated the appointment of an official committee of unsecured creditors, partly because "creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases." H.R. Rep. No. 116-171, at 116. Eliminating the creditors committee also eliminates the substantial cost associated with paying professional fees that are incurred by such a committee in normal Chapter 11 cases. Jill C. Walters and William D. Curtis, *Bankruptcy, Professional Perspective – Subchapter V. vs. 'Ordinary' Chapter 11 Practice Changes for Small Business Debtors*, Bloomberg Law (Sep. 2021) https://www.bloomberglaw.com/product/health/document/XF089FIC000000?resource_id=8897 7b9d4399e7b44389f427511e5d2c.

[16] "The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met." 11 U.S.C. § 1191(a).

Congress made these changes to address the fact that "[w]hile the Bankruptcy Code envisions that creditors will play a major role in monitoring these cases, this often does not occur" because more often than not, "creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases." H.R. Rep. No. 116-171, at 116. The SBRA was the congressional remedy for the consistent inability of companies with 50 to 5,000 employees – "the backbone of the American economy" – to successfully reorganize in a traditional Chapter 11 case. *Id*. The constant failures at reorganization experienced under Chapter 11, even after Congress amended the Bankruptcy Code through enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[17] which often resulted in cases being converted to Chapter 7. *Id*.

The SBRA became public law on August 23, 2019, and was enacted on February 19, 2020, just over a month after the World Health Organization announced the outbreak caused by the 2019 Novel Coronavirus on January 10, 2020, which resulted in a world-wide pandemic. David J. Sencer CDC Museum, *CDC Museum COVID-19 Timeline* (Jan. 18, 2023), https://www.cdc.gov/museum/timeline/covid19.html. The COVID pandemic delivered a severe blow to small businesses in the form of mass layoffs, closures, and intensified financial fragility. Alexander W. Bartik, Marianne Bertrand, Zoe Cullen, Edward L. Glaeser, Michael Luca, and Christopher Stanton, *The Impact of COVID-19 on Small Business Outcomes and Expectations*, Vol. 117, No. 30, PNAS (Jul. 10, 2020), https://www.pnas.org/doi/10.1073/pnas.2006991117. Despite Congress passing "the most extensive reform for small business bankruptcy in fifteen

[17] "In response to this concern, Congress passed legislation in 2005 requiring heightened scrutiny of such cases and streamlining the reorganization process. The legislation sought to address the special problems presented by small business cases by instituting a variety of time frames and enforcement mechanisms designed to weed out small business debtors who are not likely to reorganize. It also requires these cases to be more actively monitored by United States trustees and the bankruptcy courts." H.R. Rep. No. 116-171, at 116.

years," the SBRA's effectiveness was threatened by the COVID-19 pandemic. Robert J. Landry, III, *Subchapter V and the COVID-19 Disruption: Did Congress Get Small Business Bankruptcy Reform Right This Time?* Ohio State Business Law Journal, Vol. 16:1 (2021), https://kb.osu.edu/bitstream/handle/1811/101715/1/OSBLJ_V16N1_066.pdf.

Recognizing the need to adjust the SBRA to make it accommodating to small businesses in light of the pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). 116 Pub. L No. 136, 2020 Enacted H.R. 748, 116 Enacted H.R. 748, 134 Stat. 281. Prior to the pandemic, the debt ceiling for the SBRA was $2.7 million. H.R. Rep. No. 116-171, at 116. The CARES Act raised the debt limit to $7.5 million. 116 Pub. L. No. 136, 2020 Enacted H.R. 748, 116 Enacted H.R. 748, 134 Stat. 281. Although the increased debt limit expired in March of 2021, Congress passed the Bankruptcy Threshold Adjustment and Technical Corrections Act on June 21, 2022, with the most recent debt limit extension rising to $7.5 million, which will remain effective until June 21, 2024. 117 Pub. L. No. 151, 2022 Enacted S 3823, 117 Enacted S 3823, 136 Stat. 1298. Congressional response to COVID-19 enabled many of the 3,400 cases filed in the last two years to be filed as they could not have proceeded but for the higher debt limits. The National Law Review, *Subchapter V Debt Ceiling Restored to $7.5 Million*, Vol. 13:18 (Jan. 18, 2023), https://www.natlawreview.com/article/subchapter-v-debt-ceiling-restored-to-75-million.

Congressional intent behind the SBRA is clear: to streamline reorganization to provide small businesses a realistic opportunity to contribute to the American economy once again. H.R. Rep. No. 116-171, at 116. That intention is clear in both the SBRA statutory construction, and the repeated raising of the Subchapter V debt limit. *Id*.; 116 Pub. L. No. 136, 2020 Enacted H.R. 748, 116 Enacted H.R. 748, 134 Stat. 281.; 117 Pub. L. No. 151, 2022 Enacted S 3823, 117 Enacted S

3823, 136 Stat. 1298. Attaching section 523(a) discharge exceptions to nonindividuals slams shut the door opened by bipartisan efforts to ease the reorganization process under the SBRA. 11 U.S.C. §§ 1181-1195; Jill C. Walters and William D. Curtis, *Bankruptcy, Professional Perspective – Subchapter V. vs. 'Ordinary' Chapter 11 Practice Changes for Small Business Debtors*, Bloomberg Law (Sep. 2021), https://www.bloomberglaw.com/product/health/document /XF089FIC000000?resource_id=88977b9d4399e7b44389f427511e5d2c.

CONCLUSION

The United States Code vests authority in the bankruptcy courts to confirm reorganization plans as core matters. The Bankruptcy Code provides guidance for bankruptcy judges to navigate the reorganization process equitably and fairly in Subchapter V cases. The Thirteenth Circuit correctly held that the bankruptcy court accurately executed its authority by confirming Debtor's Plan consisting of third-party releases against non-debtor affiliates. The Thirteenth Circuit also correctly held that the 11 U.S.C. § 523(a) discharge exceptions do not apply to corporate debtors filing under Subchapter V of the Bankruptcy Code. For the foregoing reasons, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals.