Team 2

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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

JANUARY 18, 2023

TEAM NUMBER 2
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether a bankruptcy court has the 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.

II. Whether a corporate debtor proceeding subchapter V of chapter 11 of the Bankruptcy Code may, pursuant to 11 U.S.C. § 1192, discharge debts of types specified in subparagraphs (1) through (19) of 11 11 U.S.C. § 523(a)

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OPINIONS BELOW

The Bankruptcy Court for the District of Moot, the United States District Court for the District of Moot, and the United States Court of Appeals for the Thirteenth Circuit all decided in favor of the Respondent on both issues. The Thirteenth Circuit's decision is available at No. 21-0803 and reprinted in the Record at 3.

STATEMENT OF JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

The relevant portion of 11 U.S.C. § 1123 provides:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall-
(5) provide adequate means for the plan's implementation
(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 relevant portion of 11 U.S.C. § 105 provides:
(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title

The relevant portion of 11 U.S.C. § 524 provides:

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

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

If the plan of the debtor is confirmed under section 1191(b) … 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—

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

The relevant portion of 11 U.S.C. § 523(a) provides:

(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—

STATEMENT OF THE CASE

I. Factual History.

Penny Lane Industries, Inc. (the "Debtor") is a manufacturer of plastic, glass, and food products containers. R. at 4. The Debtor is a wholly owned subsidiary of Strawberry Fields Foods, Inc. ("Strawberry Fields"). R. at 4. The Debtor's manufacturing facility is located in the City of Blackbird, Moot along the Liverpool River. R. at 3.

In 2017, Ms. Rigby (the "Petitioner"), a resident of Blackbird, filed suit against the Debtor and Strawberry Fields alleging that the Debtor polluted the Liverpool River, which in turn contaminated Blackbird's water supply. R. at 5. Other residents of Blackbird and surrounding communities subsequently filed suit against the Debtor and Strawberry Fields. R. at 6. Each lawsuit asserted damages related to death or injury caused by an alleged exposure to pollutants. R. at 6.

The Debtor denies the allegations of the lawsuits. R. at 6. Most notably, the Debtor asserts that there is insufficient evidence to link the pollutants found in the water supply to any waste disposed by the Debtor, as opposed to the dozens of other businesses situated along the Liverpool River. R. at 6. No judicial determination has been made regarding any of the claims against the Debtor. R. at 6.

In the face of these lawsuits, the Debtor filed this case under subchapter V of chapter 11 of the Bankruptcy Code on January 11, 2021. [1] R. at 6. Almost all of the claims in this case are disputed, unliquidated tort claims. R. at 6. In total, nearly 10,000 claims in the amount of $400

[1] Specific sections of the Bankruptcy Code—set forth in 11 U.S.C. §§ 101 et seq.—are identified herein as "section ___." The Bankruptcy Code as a whole is sometimes referred to herein as "the Code."

million were filed.[2] R. at 6. Petitioner filed an unsecured claim of $1 million against the Debtor and is included in the class of unsecured creditors. R. at 6.

II. Procedural History.

A. Non-dischargeability Action Dispute.

Petitioner commenced an adversary proceeding against the Debtor seeking to have her $1 million dollar claim deemed non-dischargeable pursuant to sections 523(a) and 1192(2) of the Code. R. at 7. The Debtor filed a motion to dismiss the complaint for failure to state a claim on which relief can be granted under Rule(b)(6) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. R. at 7. The Debtor argues that the non-dischargeability provisions of section 523(a) do not apply to corporate debtors. R. at 7. The Bankruptcy Court for the District of Moot ("the Bankruptcy Court") ruled in favor of the Debtor, dismissing the Petitioner's non-dischargeability action and holding that the non-dischargeability provisions of section 523(a) do not apply to corporate debtors. R. at 7.

B. The Plan Dispute.

After months of post-petition mediation, the Debtor filed a nearly consensual *Plan of Reorganization* (the "Plan"). R. at 8. The Plan provides for the establishment of a creditor trust that would be funded with the Debtor's disposable income for five years, and $100 million to be paid by Strawberry Fields. R. at 8. The creditor trust is anticipated to result in creditors with allowed claims receiving a significant distribution, an estimated 30-40 cents on the dollar. R. at 8. Strawberry Fields agreed to fund the creditor trust on the condition that the Plan release estate

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[2] The parties have stipulated that the Debtor is a "small business debtor" eligible for relief under subchapter V because its "aggregate noncontingent liquidated" debts were less than $7.5 million on the petition date and because it otherwise satisfies the requirements set forth in section 1182.

and third-party direct claims against it. R. at 8. Thus, the Plan expressly released and discharged "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. This release is "non-consensual" because it binds third parties who did not participate in the bankruptcy case and who may have voted against the Plan. R. at 8.

The class of unsecured creditors, primarily composed of tort claimants, overwhelmingly supported the Plan, with Petitioner being the one exception. R. at 9. Petitioner objected to the Plan asserting that the non-consensual releases of third-party direct claims against Strawberry Fields were not permissible under applicable law. R. at 9. Additionally, the Norwegian Wood Bank (the "Bank"), a secured creditor, objected to the Plan. R. at. 9. The Bank's objection prevented the Debtor from seeking confirmation of a consensual plan under section 1191(a) and instead caused the Debtor to seek confirmation of a non-consensual plan by utilizing the subchapter V cramdown provisions in section 1191(b). R. at 9.

The Bankruptcy Court confirmed the Plan after a four-day confirmation hearing. R. at 10. The court overruled the Bank's objection, holding that the Plan complied with the requirements of sections 1129(b)(2)(A) and 1191. R. at 10. The Bankruptcy Court also overruled Petitioner's objection, holding that the non-consensual releases of the third-party direct claims were permitted in extraordinary cases, such as this case. R. at 10. The Bankruptcy Court reasoned that this case was extraordinary because of its complex nature, Strawberry Fields' significant monetary contribution, and almost unanimous creditor support for the Plan. R. at 10. Further, the Bankruptcy Court concluded that "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan" because the proposed distribution under the Plan is

substantially greater than what creditors would receive if the Debtor was liquidated under chapter 7 and the probability of securing and collecting a judgment against Strawberry Fields at all is low, much less in the amount each creditor would receive pursuant to the Plan. R. at 10. Moreover, the Bankruptcy Court noted that the Plan would provide immediate and certain relief to creditors, unlike the alternative which would involve lengthy, complex litigation and only a chance at recovery. R. at 10.

Petitioner timely appealed the Bankruptcy Court's ruling on the non-dischargeability action, and the Bankruptcy Court's confirmation of the Plan. R. at 11. Upon the request of the parties, the disputes were certified for direct appeal to this court pursuant to 28 U.S.C. § 158(d). R. at 11. The two issues are consolidated in this appeal. R. at 11.

SUMMARY OF THE ARGUMENT

This case is a permutation of an age-old tale that is as simple as it is enlightening. Petitioner's position is cloaked in fairness and a cry for change that on its face, appears reasonable. However, a rigorous analysis of the relevant issues reveals that Petitioner's position comes to this Court as wolf in sheep's clothing. While shrouded in noble sentiments, at its core Petitioner's arguments threaten the ability of bankruptcy courts to achieve the stated purposes of chapter 11.

The first issue before this Court concerns the Bankruptcy Court's authority to approve the Plan, which contained a non-consensual third-party release. Pursuant to constitutional and statutory limitations a bankruptcy court may only approve third-party releases in unique and extraordinary circumstances such as the circumstances of this case. No action of a bankruptcy

court is authorized unless the action is made within: the confines federal jurisdiction, the scope of constitutional authority, and within the statutory limits of the Code.

The majority of circuits agree that a bankruptcy court has constitutional authority to act when those actions pass a two-part disjunctive test. The first step of this test is to establish federal jurisdiction for the action of the court, and the second part of the test requires the court to establish whether inclusion of a third-party release is integral to the restructuring of the debtor-creditor relationship. Because the Bankruptcy Court had jurisdiction to confirm the Plan and the Plan would be unsuccessful without inclusion of the release, it is indisputably integral to the restructuring of the debtor-creditor relationship. Therefore, the Thirteenth Circuit correctly concluded that the Bankruptcy Court had constitutional authority to approve the Plan.

In addition to possessing the requisite constitutional authority to approve the Plan, numerous sections of the Code authorize inclusion of third-party releases within appropriate limits. However, Petitioner asserts that section 524 of the Code prohibits third-party releases outside of the context of asbestos cases. Petitioner's argument is undermined by the plain meaning and legislative history of the relevant statutory provisions, and the numerous sections of the Code which undoubtedly authorize the inclusion of third-party releases in extraordinary circumstances. Additionally, as this brief will illustrate, a per se prohibition on third-party releases outside of the asbestos context would inhibit the ability of the bankruptcy courts of achieving reorganization, the guiding purpose of chapter 11. Finally, the facts of the present case establishes it is one of the extraordinary cases in which a majority of circuits approve third-party releases.

The second issue in this case is whether a debtor proceeding under subchapter V of chapter 11 may, pursuant to section 1192, discharge debts of types specified in the subparagraphs

following section 523(a). A majority of courts that have addressed this precise issue have concluded that 523(a)'s exceptions do not apply to subchapter V corporate debtors pursuant to section 1192. However, the Fourth Circuit recently became the first and only court to conclude that 523(a)'s exceptions to discharge apply to subchapter V corporate debtors, and Petitioner asks the Court to adopt the Fourth Circuit's approach. Thus, section II of this brief conducts a diligent analysis of the statutory text of sections 1192 and 523(a), the relevant legislative history, the purpose of chapter 11, and the fairness concerns implicated by exceptions to corporate discharge. This analysis reveals that the legislature has already balanced the competing interests under chapter 11 and has continually decided in favor of broad corporate discharge since chapter 11's inception, recognizing that broad corporate discharge promotes creditor equality and the survival or viable corporate debtors post-reorganization.

Therefore, Respondent asks this court to affirm the Thirteenth Circuit.

ARGUMENT

I. The Bankruptcy Court had constitutional and statutory authority to confirm the Plan.

When acting within the scope of its statutory and constitutional power, bankruptcy courts possess broad discretion allowing them to confirm plans which include non-consensual third-party releases in rare cases. This broad discretion facilitates the fundamental purpose of chapter 11 reorganization which is to "prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." H.R.Rep. No. 95-595, p. 220 (1977); *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Complete relief is necessary to allow the debtor to continue to operate, provide paychecks to employees, pay creditors, pay taxes, and produce returns for shareholders. *N.L.R.B. at* 528. This goal of complete relief is based on the

principle that assets used for production in a debtor's industry are more valuable than those same assets "sold for scrap." H.R. Rep. 95-595, 220, 1978.

Petitioner asks this court to declare a per se rule prohibiting bankruptcy courts from approving third-party releases under any circumstance. This assertion finds no statutory or constitutional footing and has thus been rejected by the majority of circuits that have considered the issue. For these reasons, Respondent as this Court to affirm the Thirteenth Circuit and hold that bankruptcy courts may approve third-party releases in extraordinary cases.

A. Bankruptcy courts possess constitutional authority to confirm global reorganization plans containing non-consensual third-party releases when they are integral to the restructuring of the debtor-creditor relationship.

This Court has established a two-part test disjunctive test to establish when a bankruptcy court is acting within the scope of its constitutional authority. *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 136 (3d Cir. 2019). The threshold question relevant to establishing constitutional authority is whether the bankruptcy court has federal jurisdiction over a proceeding. *Stern v. Marshall*, 564 U.S. 462, 475-478 (2011). The second step of the analysis is determining if the proceeding in question is integral to the debtor creditor relationship. *Id*.

1. The Bankruptcy Courts has federal jurisdiction to confirm a plan of reorganization because it is an enumerated "core proceedings."

The Bankruptcy Court in this case acted within the scope of its jurisdiction when it confirmed the Plan, because plan conformation is a "core proceeding" under section 157 of Title 28. 28 U.S.C. § 157(b)(2(L). Congress granted bankruptcy courts broad authority allowing them to efficiently resolve matters connected to the bankruptcy estate. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). This authority manifests in sweeping federal jurisdiction over "all core proceedings" arising under the Code. 28 U.S.C. § 157 (b)(1). Title 28 section 157 states in relevant part "core proceedings include but are not limited to…confirmations of plans." 28

U.S.C. § 157(b)(2(L). Therefore, the Bankruptcy Court in this case was indisputably acting within its federal jurisdiction to confirm a global settlement plan.

Petitioner argues that the Bankruptcy Court violated Due Process and exceeded the scope of its federal jurisdiction by adjudicating her claim against Strawberry Fields because her claim is not a core proceeding and does not "arise from" or "relate to" the bankruptcy case. R. at 27. This argument mischaracterizes the actions taken by the Bankruptcy Court. The Bankruptcy Court did not rule on the merits of Petitioner's claim against Strawberry Fields. R. at 13. To the contrary, the court simply approved a plan which channeled her claims into the creditor's trust. R. at 13. Global settlement plans are not "claims" or "counterclaims." *In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 271 (Bankr. D. Del. 2017), *aff'd,* 591 B.R. 559 (D. Del. 2018), *aff'd sub nom. In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019). Rather, a settlement plan classifies claims and specifies the treatment for those claims. *Id*. As a result, the Thirteenth Circuit correctly concluded the Bankruptcy Court was acting within its federal jurisdiction to confirm a global settlement plan in the current case because doing so is a core proceeding under section 157.

2. The Bankruptcy Court has constitutional authority to approve a plan containing non-consensual third-party releases in the present case because the release is integral to the restructuring of the debtor-creditor relationship.

This Court established that bankruptcy courts act within their constitutional limits when an action or provision is "integral to the restructuring of the debtor-creditor relationship*." Id.* at 497. In *Stern*, this Court concluded that while Title 28 section 157(b)(2)(C) authorized the Bankruptcy Court to enter a final judgment on the debtor's counterclaim because it was a core proceeding, the court lacked the requisite constitutional authority because the counterclaim was not integral to the restructuring of debtor-creditor relationship. *Id*. at 482.

In *Stern*, the debtor filed a counterclaim against a creditor of the bankruptcy estate for tortious interference. After a bench trial the bankruptcy court found in favor of the debtor. *Id*. at 470. This Court agreed that the bankruptcy court had jurisdiction to enter judgment on the counterclaim, because counterclaims by the "estate against persons filing claims against the estate are core proceedings under section 157." *Id*. at 482. However, while Title 28 section 157 permitted the bankruptcy court to enter final judgment on the counterclaim, Article III of the constitution did not, because the counterclaim was not integral to the restructuring of the debtor-creditor relationship. *Id.*

While the facts of *Stern* are distinct from the present case, its reasoning clarifies the parameters of the constitutional authority granted to bankruptcy courts and forms the basis of the reasoning applied in majority circuits. Courts in most circuits conclude that where third-party releases are critical to the success of the reorganization plan, they are therefore integral to the restructuring of the debtor-creditor relationship and thus within the scope of the court's constitutional authority. *Millennium* 945 F.3d at 140.

Determining whether a provision is critical to the success of a plan is a fact specific inquiry. For example, in *Millennium*, two of the debtor's primary shareholders agreed to pay $325 million toward a plan of reorganization. In exchange for this massive contribution, the equity holders were to receive a "full release" of any claims which might be asserted against them originating before the restructuring agreement. *Id.* at 131. The bankruptcy court concluded that absent the promised releases, the shareholders would be unwilling to contribute any capital to the debtor's restructuring plan. *Id*. As a result, the release provisions were necessary for the success of the plan, because without them the released parties would be unwilling to make their contribution, and without the contribution, no chapter 11 plan would be feasible. *Id*. at 137.

Based on these facts, the court concluded the release provisions were integral to the restricting, and therefore constitutionally authorized. *Id.* at 40.

Applying the foregoing principles to the present case demonstrates the Bankruptcy Court had the requisite constitutional authority to confirm the Debtor's reorganization plan. Strawberry Fields' sizable contribution to the Plan was conditioned on a general release of any claims against them related to Debtor's pre-petition conduct. R. at 8. Additionally, the Bankruptcy Court concluded that absent Strawberry Fields' contribution, there exists no reasonable means to achieve the result accomplished by the plan. R. at 10. Therefore, a third-party release in the present case is integral to restructuring the debtor creditor relationship because without the release the plan would be unsuccessful.

B. The Code grants the Bankruptcy Court statutory authority to approve non-consensual third-party releases when they are necessary to provide adequate means for a plan's implementation.

This Court has recognized the authority granted by the bankruptcy code supports the "traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990). While the Code does not explicitly authorize non-consensual third-party releases outside the asbestos context, this Court has further recognized the bankruptcy court's ability to approve orders not explicitly authorized based on the broad authority granted by the Code. *Id*. at 545. For example, while the Code does not explicitly authorize designating tax payments as either trust fund or non-trust fund, this Court held that under sections to 11 U.S.C. § 1123(b)(5), and § 105 such orders were entirely consistent with the authority granted under the Code. *Id.* Pursuant to this reasoning, several sections of the Code work together to establish the authority of bankruptcy courts to approve non-consensual third-party releases.

1. Sections 1123(a)(5) and 1123(b)(6) authorize the Bankruptcy Court to approve third-party releases if they are necessary to provide adequate means for the Plan's implementation, necessary, and not inconsistent with any other provision of the Code.

Authority to approve non-consensual third-party releases is found in multiple provisions of the Code. The first grant of authority is found in section 1123(a)(5). 11 U.S.C. § 1123. Section 1123(a)(5) requires that a plan "provide adequate means for the plan's implementation." *Id*. Therefore, if it is impossible to provide adequate means for a plan's implementation without a third-party release, then a bankruptcy court is not only authorized to include it but required to by statute. In the present case Strawberry Fields' sizable contribution is conditioned on the issuance of a release. R. at 8. Additionally, after findings of fact the Bankruptcy Court in this case concluded there was no other reasonable means of achieving successful results outside of the Plan which contains a third-party release. R. at 10. As a result, while Section 1123 (a)(5) may not grant statutory authority for every third-party release, it does in the present case because it is necessary to provide adequate means for the plan's implementation.

In addition to the authority granted by 1123(a)(5), 1123(b)(6) also allows the bankruptcy court to approve third-party releases. *See* 11 U.S.C.A. § 1123. Section 1123 (b)(6) states in part, "a plan may … include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). This statutory language indicates that even when there is no explicit authority for the bankruptcy court to approve certain provisions, authority exists when the provision is appropriate, and not otherwise prohibited by the Code.

Finally, the statutory authority for third-party releases evident in sections 1123(b)(6) and (a)(5) is authorized by the equitable powers of bankruptcy courts found in section 105(a). *See* 11 U.S.C. § 105(a). Section 105(a) permits a bankruptcy court to issue "any order, process, or

judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). At its core this provision establishes the broad discretion granted to the bankruptcy court to carry out the statutory directives found elsewhere in the Code. Courts recognize any "power that a judge enjoys under § 105 must derive ultimately from some other provision of Bankruptcy Code." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). In analyzing the relationship between sections 1123(b)(6), 1123(a)(5) and section 105, this Court explained the combination of these statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships. *United States v. Energy Res. Co.*, 495 U.S. at 549.

Based on the above referenced provisions a majority of courts have correctly concluded that bankruptcy courts may authorize non-consensual third-party releases if the release is "appropriate" and not inconsistent with any other section of the Code. *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008). This Court's reasoning in *Siegel* further supports this assertion. *See L. v. Siegel*, 571 U.S. 415, 421 (2014). *Siegel* clarifies that while Section 105(a) confers authority to "carry out" the provisions of the Code, it does not grant authority for actions the Code prohibits. In other words, a statute's grant of authority must yield to specific prohibitions found elsewhere. *Id.*

2. Petitioner's per se rule prohibiting third-party releases finds no support in the text nor the legislative history of section 524.

Tools of statutory interpretation support the majority view that nothing in the Code prohibits bankruptcy courts from approving a plan containing a third-party release. Petitioner erroneously relies on the minority view that sections 524(e) and 524(g) explicitly prohibit non-debtor release outside the asbestos context. However, that view is at odds with plain meaning of section 524 and section 524's legislative history. Congress included section 524 in the Code as a

part of the Bankruptcy Reform Act of 1994. H.R. Rep. 103-835, 40-41, (1994). Section 524(e) states, "[D]ischarge of a 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(e). The simple language of this provision controls—discharge alone does nothing to affect the liability of other parties. This does not mean, however, that discharge of a debt or confirmation of a plan cannot affect liability of other parties if it includes a third-party release. Additionally, section 524(e) does not specifically address, and it certainly does not prohibit, third-party releases.

Alternatively, majority courts interpreting section 524 have concluded nothing in the provision prohibits a bankruptcy court from issuing a non-debtor release. *See, e.g., In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015) (explaining that discharge of the debt itself does not affect the liability of a third-party, but §524(e) says nothing about the authority of the bankruptcy court to release a non-debtor from a creditor's claims); *Airadigm* 519 F.3d at 656 (stating "a natural reading of this provision [525(e)] does not foreclose a third-party release from a creditor's claims"). Section 524(e) is merely a savings clause intended to limit other portions of the Code and preserve rights which might otherwise be deemed lost due to reorganization. *Id.*

If Congress meant to limit the power of bankruptcy courts to issue third-party releases, it would have done so directly. *Id.* This is evidenced by the numerous instances where Congress has done precisely that. For example, section 105(b) states, "[A] court may not appoint a receiver in a case under this title." 11 U.S.C. § 105(b). Additionally, section 1129(a) states that in creating requirements for a plan of confirmation, "The court shall confirm a plan only if the following requirements are met...." 11 U.S.C. § 1129(a). These examples demonstrate that when Congress intends to limit the bankruptcy court's power, it uses the language of command, such as "the

court shall" and "may not." To accept Petitioner's view of section 524 (e) would require this Court to make an analytical jump from the plain language of section 524 to a result that is consistent with Petitioner's interests in this case. While a third-party release is not warranted in every case, "a per se rule disfavoring all releases in a reorganization plan would be similarly unwarranted, if not a misreading of the statute." *Matter of Specialty Equip. Companies, Inc*., 3 F.3d 1043, 1047 (7th Cir. 1993).

In addition to the support for third-party releases demonstrated by the text, the legislative history of section 524 further supports the power of the Bankruptcy Court to approve such releases. As a part of the Bankruptcy Reform Act of 1994, Congress included section 524 to address the tidal wave of tort claims plaguing the asbestos industry. H.R. Rep. 103-835, 40-41, (1994). One of the provisions included as a part of this Act is section 524(g), which explicitly allows third-party releases in asbestos cases. Petitioner argues this explicit grant of authority in the asbestos context is a clear exception to a rule prohibiting third-party release created by 524 (e). However, this assertion is at odds with Congress's stated intent. *Id*.

Congress cited uncertainty amongst the financial community after recent exercises of injunctive power in asbestos cases, as a primary factor in their decision to create section 524. *Id*. Congress resolved to grant "certitude" to "similar trust/injunction" arrangements. *Id*. Congress explained that the confusion concerning bankruptcy courts' power to form mass tort trusts "undermined the 'fresh start' objectives of bankruptcy and the goals of the trust arrangement." *Id*. By granting "certitude," Congress blessed an action already taken by a bankruptcy court. *Id.* Said differently, Congress did not intent to grant bankruptcy courts new or exceptional authority to grant third-party releases with the passage of section 524. *See id.* Instead, the new provisions placed a seal of approval on previous actions of bankruptcy courts in the context of mass tort

claims. *Id.* Congress wanted to "strengthen" previous injunctions related to mass tort suits, it did not grant authority for those actions, because Congress recognized that the bankruptcy courts already possessed the authority to grant those injunctions. *Id.*

The asbestos provisions are undoubtedly unique, but instead of creating an exception, they offer assurance that when bankruptcy courts act according to "high standards" and "with respect and regard for the rights of claimants." they are well within their statutory authority. *Id.* As a result, this Court should hold that while third-party releases in the context of a mass tort claim should only be granted in rare instances, and be subject to considerable scrutiny, a per se rule that prohibits them is at odds with the legislative history of section 524.

C. The present case exemplifies the extraordinary case in which a non-consensual third-party release is warranted.

While the Thirteenth Circuit has not yet addressed the issue, the overwhelming majority of circuits that permit third-party releases only do so only extraordinary circumstances. *See, e.g. Metromedia* 416 F.3d at 142; *In re Cont'l Airlines*, 203 F.3d 203, 209 (3d Cir. 2000); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *SE Prop. Holdings* 780 F.3d at 1076-79. This is because this Court has long held that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of" the Code. *L. v* at 134. In accordance with this understanding majority circuits employ factor-based tests to ensure that they are acting within the confines of their equitable statutory authority pursuant to section 105(a). 11 U.S.C. § 105(a). Therefore, third-party releases are authorized only in the rare instances where the court can establish the release is "necessary" and "appropriate" in accordance with section 105(a). *In re Midway Gold US, Inc.*, 575 B.R. 475, 502–03 (Bankr. D. Colo. 2017); 11 U.S.C. § 105(a).

While there is no single dispositive approach among the majority, a survey of the various methods reveals substantial commonality among them. A comparison of the factors used in the Third and Sixth Circuits Courts illustrates the point. The Third Circuit applies the *Master Mortgage Factors*. *In re Master Mortg. Inv. Fund, Inc*., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994). While the Sixth Circuit use a similar analysis known as the *Dow Corning Factors*. *Dow Corning* 280 F.3d at 658. Both tests consider whether: (1) There is an identity interest between the debtor and the third-party, (2) The non-debtor has contributed substantial assets to the reorganization, (3) The injunction is essential to reorganization, and whether (4) The impacted class, or classes, has overwhelmingly voted to accept the plan. *Id*. If the factors are answered in the affirmative, the bankruptcy court grants the third-party releases. *Id.*

Applying these factors to the present case reveals that this case is precisely the type of case third-party releases were designed to address. Under the first factor the court must examine whether an identity relationship exists between a debtor and the third-party. *Id.* This is typically an indemnity relationship where a suit against the non-debtor is equivalent to a suit against the debtor or will deplete the assets of the estate. *Id*. Here, any claim Petitioner has against Strawberry Fields is equivalent to a suit against the Debtor, because Strawberry Fields is the parent company of the Debtor. R. at 4. Thus, the first factor weighs in favor of authorizing the third-party releases in this case.

The second factor considers whether the third-party has made a sizable contribution to the reorganization. *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 348 (4th Cir. 2014) To overcome this hurdle a third-party “must have provided a cognizable and valid contribution to the debtor as part of the debtor's reorganization.” *Id*. Here, Strawberry Fields agreed to contribute $100 million to the Debtor's reorganization. R. at 8. This massive

contribution alone is both cognizable and substantial. However, to further highlight the magnitude of Strawberry Field's contribution, the Bankruptcy Court further concluded the amount was significantly larger than any collective recovery the creditors could hope to gain on claims against Strawberry Fields separately. R. at 10. Thus, Strawberry Fields' contribution to the creditor trust far exceeds its potential tort liability. Thus, this factor weighs in favor of granting the third-party releases in this case.

Under the third factor courts consider if the releases are "essential to the reorganization" of the debtor. *Master Mortg.* at 935 (Bankr. W.D. Mo. 1994). A release is essential to the reorganization of the debtor when there is little likelihood of success without the third-party party release. *Id*. Strawberry Fields' contribution is dependent on the grant of a third-party release. R. at 8. Additionally, the Bankruptcy Court concluded "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan." R. at 10. Therefore, a third-party release is essential in this case because, without the release, there is no alternative means to achieve the success of the Plan.

The final factor considers whether the impacted class of creditors has overwhelmingly voted in favor of the Plan. *Id*. at 935. In the Debtor's case more than 95 percent of the creditors who submitted ballots voted in favor of confirmation. R. at 9. There is no better authority on the equitable solution in a case, than the aggrieved parties. Here, the creditors overwhelmingly favor the confirmation of the Plan. Thus, the fourth factor also weighs in favor of granting the third-party releases in this case.

D. Beware of the wolf in sheep's clothing.

At first glance, prohibiting the Bankruptcy Court in this case from approving the third-party releases appears congruent with principles of justice. But reorganization plans are not the

arms of justice, and they should not be manipulated to achieve ends that were not intended by Congress. Plans of reorganization function to maintain the survival of viable businesses and achieve equitable results for creditors. Petitioner's position threatens these vital functions. In this case, Petitioner is the only creditor in her class who is opposed to the Plan. If the Plan is not confirmed, every creditor in Petitioner's class will be robbed of the equitable recovery conceived by the Plan that they cannot receive under other avenues of the law. Additionally, the Debtor could be forced into liquidation, and the guiding purpose of chapter 11, reorganization, will be subverted.

The tension between the competing interests of creditors and debtors is present in every Chapter 11 plan of reorganization. For this reason, when working within its statutory limits, bankruptcy courts are best equipped to balance these competing interests and construct a fair and equitable plan. The alternative is the harrowing result proposed by Petitioner. One in which a single creditor holds the power to derail an otherwise fair and equitable plan of reorganization. For these reasons, Respondent asks this Court to affirm the Thirteenth Circuit's decision to affirm the confirmation of the Plan.

II. Corporate debtors proceeding under subchapter V of chapter 11 of the Code may not, pursuant to section 1192, discharge debts of types specified in subparagraphs (1) through (19) of section 523 (a).

Congress has already carefully considered the issue arising under Petitioner's non-dischargeability action and has given the same answer since the creation of the Code: corporations filing under chapter 11 are entitled to broad discharge. Unfortunately, the longstanding principle of broad corporate discharge does not align with Petitioner's interest in this case. Thus, Petitioner creatively argues that Congress silently created over 20 new exceptions to corporate discharge for subchapter V debtors due to the recently enacted section

1192(2)'s cross reference to section 523(a). Petitioner's argument defies the language of sections 1192(2) and 523(a) and ignores over four decades of Congressional support and preservation of broad corporate discharge in chapter 11. Therefore, the Thirteenth Circuit correctly rejected Petitioner's interpretation of section 1192(2).

Of the few courts that have considered this precise issue, an overwhelming majority have concluded that section 1192(2)'s cross reference to section 523(a) does not create exceptions to broad corporate discharge for subchapter V debtors. *See Avion Funding, LLC v. GFS Indus., LLC* (*In re GFS Indus., LLC*), 2022 WL 16858009 (Bankr. W.D. Tex. Nov. 10, 2022); *Jennings v. Lapeer Aviation, Inc*. (*In re Lapeer Aviation, Inc.*), 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022); *Catt v. RTECH Fabrications, LLC* (*In re RTECH Fabrications, LLC*), 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC* (*In re Cleary Packaging LLC*), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA* (*In re Satellite Restaurants, Inc. Crabcake Factory USA*), 626 B.R. 871 (Bankr. D. Md. 2021).

However, the Fourth Circuit in *Cantwell-Cleary Co. v. Cleary Packaging, LLC*, recently held that section 1192(2)'s cross reference to 523(a) does create exceptions to broad corporate discharge for subchapter V debtors. 36 F.4th 509, 512 (4th Cir. 2022). The discrepancy between the Fourth Circuit's resolution of the issue compared to that of the other courts' stems from the Fourth Circuit's interpretation of sections 1192(2) and 523(a) and the Fourth Circuit's perceived equitable concerns. *See id.* The Fourth Circuit recognized that "the question is a close one," and the court's erroneous interpretation of the relevant statutory text and illusory policy arguments demonstrate that this issue demands a rigorous analysis. *See id.* This section asserts the text of sections 1192(2) and 523(a), the relevant legislative history, and the fairness surrounding the

issue of corporate discharge, support the Thirteenth Circuit's holding that section 1192(2)'s cross reference to section 523(a) does not create exceptions to broad corporate discharge for subchapter V debtors.

A. The Thirteenth Circuit correctly interpreted section 1192(2) because Congress intended to preserve, not destroy, broad corporate discharge for subchapter V debtors.

The Thirteenth Circuit correctly interpreted section 1192(2) because Congress intended to preserve broad corporate discharge for subchapter V debtors. Congress's intent to preserve broad corporate discharge for subchapter V debtors is evidenced by the application of the relevant canons of statutory construction and an examination of the legislative history of chapter 11 and section 1192(2).

1. The applicable canons of statutory construction reveal Congress's intent to preserve broad corporate discharge for subchapter V debtors.

The plain meaning of sections 1192(2) and 523(a) evidence Congress's intent to preserve broad corporate discharge for subchapter V debtors. Section 1192 governs the discharge of corporate and individual debtors proceeding under subchapter V when the plan of the debtor is confirmed under section 1191(b) via cramdown. 11 U.S.C. §§ 1191(b), 1192. Section 1192 dictates the court shall grant the debtor a discharge of all debts, except any debt specific in subsections (1) and (2). 11 U.S.C. § 1192. Section 1192(2) states "of the kind specified in section 523(a) of this title." 11 U.S.C. § 1192(2). Section 523(a) states "A discharge under section … 1192 … of this title does not discharge an individual debtor from any debt …" and lists 19 subsections that describe over 20 exceptions to discharge for the individual debtor. 11 U.S.C. § 1192(2). An analysis of the plain meaning of sections 1192(2) and 523(a) reveals that section 1192(2) does not create exceptions to broad corporate discharge for subchapter V debtors.

a. The plain meaning of sections 1192(2) and 523(a) supports the Thirteenth Circuit's interpretation of section 1192(2).

Congress's intent to preserve, not destroy, broad corporate discharge for subchapter V debtors is evidenced by the plain meaning of sections 1192(2) and 523(a). The goal of statutory interpretation is to ascertain the intent of the legislature. *E.g., United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The first step of statutory interpretation is to examine the plain language of that statute. *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[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"). This Court has continuously emphasized that "when 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).

Section 1192(2) states, in relevant part, that any debt "of the kind specified in section 523(a) of this title" will be excepted from discharge after the confirmation of a plan under section 1191(b). 11 U.S.C. § 1192(2). Thus, section 1192(2) plainly, and wholly, incorporates section 523(a). In other words, the language of section 1192(2) does not except from discharge any debts that section 523(a) does not already except. *In re GFS Indus., LLC*, 2022 WL 16858009 at *4. Section 523(a) states: "A discharge under section …1192… of this title does not discharge an individual debtor from any debt …" 11 U.S.C. § 523(a). This language of section 523(a) indicates that section 523(a) excepts individuals, not corporations, from the types of debt specified in the subsections following section 523(a). 11 U.S.C. § 523(a). Additionally, Congress's addition of a reference to section 1192 in section 523(a)'s introductory and limiting language is further evidence that Congress wanted section 523(a)'s limiting language to apply to discharge under section 1192. *In re GFS Indus., LLC*, 2022 WL 16858009 at *4. Thus, the

Thirteenth Circuit correctly concluded that section 523(a)'s exceptions to discharge do not apply to the Debtor because the plain language of sections 1192(2) and 523(a) show that section 523(a)'s exceptions do not apply to corporate debtors discharged under section 1192.

b. Petitioner's interpretation of section 1192(2) contravenes the ordinary meaning of the term "kind" in section 1192.

Petitioner's interpretation of section 1192(2), which aligns with the Fourth Circuit's recent interpretation of section 1192(2), fixates on the word "kind" in the phrase "of the kind specified in section 523(a) of this title" in section 1192(2). *In re Cleary Packaging*, LLC, 36 F.4th at 515. Petitioner asserts the term "kind" in reference to "debt" excludes consideration of the type of debtor. Thus, Petitioner argues, section 1192(2)'s incorporation of section 523(a) implicitly excludes section 523(a)'s language limiting the applicability of section 523(a)'s exceptions to discharge to individual debtors. Consequently, Petitioner argues that section 523(a)'s exceptions to discharge apply to corporate debtors, like the Debtor in this case. This interpretation is erroneous because it ignores the ordinary meaning of the term "kind" and the Code's classification of some categories of debt by the type of debtor.

Section 1192 does not define the term "kind." 11 U.S.C. § 1192. When a statute does not define a term, courts look to the term's ordinary meaning. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012). The ordinary meaning of a term can be derived from its dictionary definition. *See id.* (defining the ordinary meaning of the term "individual" by referencing its dictionary definitions). As a noun, "kind" ordinarily means "a group united by common traits or interests." *Kind*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/kind; *See also, Kind,* OXFORD ENGLISH DICTIONARY ONLINE, https://www-oed-com.ezproxy.baylor.edu/view/Entry/103444 (defining the noun "kind" as "Nature, character, or related senses.") Petitioner's argument presumes that a "kind" of debt

cannot be united by the common trait of the type of debtor who possesses that debt. This assumption is not supported by the Code.

As the Thirteenth Circuit noted, the Code recognizes that the type of debtor *can* be a common trait uniting a group or category of debt. *See, e.g.,* 11 U.S.C. § 101(8) (defining "consumer debt" using two common traits: the nature of the debtor as an individual and the purpose of the debt). Thus, Congress's use of the phrase "of the kind specified in section 523(a)" in section 1192 in no way excludes the language of section 523(a), limiting its applicability to individual debtors. The "kind" of debt that section 1192(2) references with its incorporation of 523(a) has two common traits: the individual nature of the debtor and conformity to one of the subparagraphs delineating the exceptions to discharge following 523(a).

Because the ordinary meaning of "kind" refers to the manifestation of common traits, section 1192(2)'s reference to section 523(a) includes 523(a)'s language limiting the applicability of its discharge exceptions to individual debtors. Therefore, Petitioner's interpretation of section 1192(2) is erroneous.

c. The Thirteenth Circuit's interpretation of section 1192(2) gives effect to the language of sections 1192(2) and 523(a).

The Thirteenth Circuit's interpretation gives meaning to every word in sections 1192(2) and 523(a). Another rule of statutory construction is that every word of a statute must be given meaning so that no word is rendered superfluous. *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."). When Congress enacted section 1192, it specifically added language referencing section 1192 to section 523(a). 11 U.S.C. § 523(a). The Thirteenth Circuit, and other courts that have wrestled with this issue, have recognized that the only way to give section 523(a)'s reference to section 1192 meaning, is to determine that section

1192(2)'s incorporation of 523(a) incorporates all of 523(a), and not just the exceptions to discharge that follow it. *In re GFS Indus., LLC*, 2022 WL 16858009 at *4; *In re Satellite Restaurants Inc.*, 626 B.R. at 876; *In re Rtech Fabrications, LLC*, 635 B.R. at 565.

2. The legislative history of chapter 11 and section 1192(2) reveal Congress's intent to preserve broad corporate discharge for subchapter V debtors.

The legislative history of chapter 11 and section 1192(2) demonstrate Congress's intent to preserve, not destroy, broad corporate discharge for subchapter V debtors. First, the legislative history of chapter 11 indicates Congress's dedication to broad corporate discharge in the creation and modification of chapter 11. Second, the legislative history of section 1192(2) demonstrates that Congress did not intend to create exceptions to corporate discharge with the enactment of section 1192(2).

a. The legislative history of chapter 11 indicates Congress's desire to preserve broad corporate discharge in chapter 11.

The legislative history of chapter 11 indicates Congress's desire to preserve broad corporate discharge in chapter 11. Congress intentionally decided to grant complete corporate discharge when it drafted chapter 11 of the Code. Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 765 (2005). Chapter 11's predecessor contained numerous exceptions to corporate discharge and Congress determined that these exceptions thwarted the statutes' purpose to reorganize as opposed to liquidating a viable business. *See* id. at 763–66. In Congress's view, the previous statute merely worked to postpone, rather than alleviate, the crippling effect of debt on an otherwise viable business. *See* id. Additionally, the discharge exceptions allowed creditors to opt-out of restructuring in hopes of receiving a greater recovery than creditors bound to a restructuring plan, which fostered holdout creditor problems that sabotaged efficient plan confirmation. *Id.* Due to these failings, Congress

viewed complete corporate discharge as a necessary ingredient of chapter 11. *Id.* Congress reasoned that any exception to complete corporate discharge "would leave an undesirable uncertainty surrounding reorganization that is unacceptable." *See id*; 124 CONG. REC. 34,008 (1978) (statement of Sen. DeConcini).

Only once since Congress enacted chapter 11 has it strayed from the complete corporate discharge principle, with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). *See* Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23, 1-2 (2005). The BAPCPA codified two exceptions to chapter 11's complete corporate discharge in section 1141(d)(6). 11 U.S.C. § 1141(d)(6). While the BAPCPA represents the end of complete corporate discharge in some chapter 11 cases, the manner in which Congress passed the BAPCPA is a testament to Congress's enduring commitment to the preservation of broad corporate discharge in chapter 11.

The BAPCPA was preceded by eight years of debate and Congress's careful re-balancing of the competing interests involved in chapter 11 cases. *See* Roger S. Goldman et al., *Discharging False claims Liability in Bankruptcy*, *Section 1141(d)(6)(A) of the Bankruptcy Code: An Incentive to Settle FCA Cases?*, ABA J. (2010). The legislative history of the BAPCPA demonstrates Congress's recognition that wide sweeping, if not technically complete, corporate discharge is necessary to achieve the purposes of chapter 11. *See* H.R. Rep. No. 109–131(I) at 31 (2005). Congress swiftly rejected a proposition to make just one of the exceptions to discharge listed in the subsections proceeding 523(a) applicable to corporate debtors proceeding under chapter 11. *Id*. Thus, Congress had the opportunity to expand section 523(a)'s applicability to corporate debtors proceeding under chapter 11, and it chose not to. The Thirteenth Circuit's

interpretation of section 1192(2) heeds Congress's clear directive in favor of broad corporate discharge, and against section 523(a)'s applicability to corporate debtors in chapter 11.

b. The legislative history of section 1192(2) indicates Congress's desire to preserve corporate discharge in subchapter V.

The Thirteenth Circuit's interpretation of section 1192(2) is consistent with the legislative history of section 1192(2). Subchapter V or chapter 11, including section 1192(2), was enacted in accordance with the Small Business Reorganization Act of 2019 (the "SBRA"). 290 H.R. Rep. No. 116-171, at 1(2019). The legislative history of section 1192(2) is silent concerning any potential expansion of section 523(a)'s applicability to individual debtors or the creation of any exceptions to corporate discharge under subchapter V. *See* id. In fact, the legislative history of section 1192(2) contradicts the notion that 1192(2)'s reference to section 523(a) created any exceptions to broad corporate discharge. *See id.* at 8. A Report of the Judiciary Committee of the House of Representatives concerning the SBRA states that section 1192 is to except debts on which the last payment is due after the plan, which refers to 1192(1)'s exception to discharge, and "any debt that is otherwise nondischargeable." *Id.* The use of the words "otherwise nondischargeable" indicates that Congress did not intend for section 1192(2) to create any new discharge exceptions. *In re Satellite Restaurants Inc.*, 626 B.R. at 878. Instead, the "otherwise nondischargeable" language indicates Congress intended section 1192(2) to incorporate exceptions to discharge which were already recognized under the Code. *Id.*

Additionally, the SBRA was introduced in April 2019 and signed into law only four months later. *In re Cleary Packaging LLC*, 630 B.R. at 475. The notion that Congress created over 20 exceptions to discharge in as little as four months is inconceivable against the backdrop of over four decades of Congress's commitment to broad corporate discharge, and the eight years of debate that preceded the only time that Congress ever passed two single exceptions to

corporate discharge. *Id.* As this Court has recognized "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

B. The Thirteenth Circuit's interpretation of section 1192(2) is consistent with the purposes of subchapter V.

The Thirteenth Circuit's interpretation of section 1192(2) advances the purposes of subchapter V. Congress intended subchapter V to allow small-business debtors "to file [for] bankruptcy in a timely, cost-effective manner, and hopefully allow them … to remain in business." H.R. Rep. No. 116-171, at 4. To achieve these purposes, Congress made sweeping changes to the reorganization process under subchapter V as compared to an ordinary chapter 11 proceeding, most notably giving subchapter V debtors more control over the plan and confirmation. Richard P. Cook, *Discharges in Subchapter V What Has Changed? What Remains the Same? Are Elephants Hiding in Mouseholes?*, Am. Bankr. Inst. J., June 2022, at 24–26. The Thirteenth Circuit's interpretation of section 1192(2) is consistent with theses purposes of subchapter V.

1. The Thirteenth Circuit's interpretation allows subchapter V debtors to achieve timely and cost-effective outcomes.

The Thirteenth Circuit's interpretation of section 1192(2) allows subchapter V debtors to achieve the timely and cost-effective outcomes intended by Congress. One of Congress's stated purposes in in enacting subchapter V was to allow businesses to reorganize in a more "timely, cost-effective manner" than is possible under an ordinary chapter 11 proceeding. *See* H.R. Rep. No. 116-171, at 4. Thus, Congress made changes to the proceedings under subchapter V compared to ordinary chapter 11 proceedings, including generally baring creditors' committees,

not per se requiring debtors to file disclosure statements, and never requiring debtors to pay quarterly fees. Cook, *supra*, at 25. The Thirteenth Circuit's interpretation allows subchapter V to achieve the timely and cost-effective outcomes intended by Congress by preserving broad corporate discharge for subchapter V debtors.

Petitioner's interpretation defies the legislature's intent because it opens the floodgates of costly, time-consuming non-dischargeability litigation on subchapter V debtors. The timely and costly nature of non-dischargeability litigation is exemplified by this lawsuit—this appeal arises from the non-dischargeability action of one creditor. Exposing subchapter V debtors to non-dischargeability litigation pursuant to 20 discharge exceptions would negate Congress's concerted effort to make subchapter V organization more efficient than traditional chapter 11 reorganization. Further, subjecting subchapter V debtors to over 20 exceptions to discharge that do not, and have never, applied to debtors in ordinary chapter 11 cases, would have the perverse effect of making subchapter V reorganization *less* efficient than traditional chapter 11 reorganization. Thus, Petitioner's interpretation would inhibit the efficient purposes of subchapter V.

2. The Thirteenth Circuit's interpretation is consistent with Congress's efforts to give subchapter V debtors more control over reorganization.

The Thirteenth Circuit's interpretation of section 1192(2) is consistent with Congress's efforts to give subchapter V debtors more control over reorganization. Subchapter V debtors have control over reorganization that does not exist in traditional chapter 11 cases. This is reflected in a subchapter V debtor's ability to file or modify a plan, and it is especially evidenced in subchapter V's abrogation of the absolute priority rule. Cook, *supra*, at 25. The absolute priority rule in chapter 11 gives unsecured creditors considerable power over confirmation by only allowing a debtor's owners to retain their equity in the debtor over the objection of a class

of unsecured creditors if the unsecured class is paid in full or the owners contribute material new value into the debtor. *Id.* Thus, Congress's elimination of the absolute priority rule in subchapter V means that subchapter V debtors do not need the consent of holdout unsecured creditors to confirm a plan. *See id.* This readjusts the power dynamic of plan confirmation decidedly in favor of the debtor. The Thirteenth Circuit's interpretation of section 1192(2) does not alter the allocation of power that Congress drafted into subchapter V, thus, the Thirteenth Circuit allows debtors to wield the power over reorganization that Congress intended.

Conversely, Petitioner's interpretation of section 1192(2) would render Congress's careful rebalancing of plan confirmation power in subchapter V ineffectual. Under Petitioner's interpretation of section 1192(2), creditors will not only have the power to hijack the confirmation process, but they will have an incentive to do so. *See id.* Petitioner's interpretation only allows creditors to use the exceptions to discharge under section 523(a) when there is a nonconsensual plan confirmation. Thus, under Petitioner's interpretation of section 1192(2), a creditor will be incentivized to try and force a cramdown under section 1191(b), because the creditor would then have access to over 20 exceptions to discharge. *See id.* This result would thwart Congress's attempt to give subchapter V debtors more control over confirmation.

3. Petitioner's interpretation would prevent subchapter V debtors from remaining in business.

Petitioner's interpretation jeopardizes the most basic purpose of subchapter V: for debtors to stay in business. H.R. Rep. No. 116-171, at 4. Subchapter V was enacted with bipartisan support due to Congress's acknowledgement that small businesses, like big businesses, must be able to reorganize and remain in business for the betterment of the economy. *Id.* Petitioner's interpretation threatens the viability of Congress's purpose of allowing subchapter V debtors to remain in business in two ways. First, as the Thirteenth Circuit noted, if non-dischargeable

claims due to section 523(a) are high enough, the plan will not be confirmable, and the debtor will be liquidated to the detriment of all stakeholders. R. at 22; 11 U.S.C. § 1191(c)(3)(A) (requiring that the debtor "be able to make all payments under the plan"). Second, section 523(a) claims against corporate subchapter V debtors would have to be paid in full unless the business stops operating. Cook, *supra*, at 25. Thus, a creditor with a nondischargeable judgment under section 523(a) would be able to seize the corporate debtor's assets as soon as the plan has been completed, to the detriment of the business's survival. *Id.* Therefore, Petitioner's interpretation contravenes the overlying edict of subchapter V, by threatening the continued operation of a viable business.

C. Baseless appeals to fairness and case law interpreting chapter 12 are unavailing against the backdrop of the legislature's commitment to broad corporate discharge.

The Fourth Circuit supported its interpretation of section 1192(2) with a creditor fairness argument and two cases interpreting chapter 12 of the Code. *In re Cleary Packaging LLC*, 36 F.4th at 517. Petitioner likewise uses these arguments to support her shared interpretation of section 1192(2), but these arguments fail to support her position. First, the Fourth Circuit's argument concerning creditor fairness is not only erroneous in its propositions, but it also ignores the legitimate fairness concerns that are implicated by exceptions to corporate discharge. Second, the Fourth Circuit's reliance on case law interpreting chapter 12 does not, and cannot, support an interpretation of section 1192(2).

1. The Fourth Circuit's appeal to fairness is illusory.

The Fourth Circuit's appeal to fairness is illusory because the Fourth Circuit's interpretation of section 1192(2) does not advance creditor autonomy. *See id.* The Fourth Circuit argued in *Cleary* that its interpretation of 1192(2) works to "provide an additional layer of

fairness and equity to creditors to balance against the altered priority that favors the debtor." *Id.* This baseless appeal to fairness defies the process of plan confirmation under subchapter V. As the Thirteenth Circuit noted, such a balance would only exist if the creditor who is owed a nondischargeable debt pursuant to section 1192(2)'s incorporation of section 523(a) also controlled whether the debtor's debt will be discharged under section 1192(2) at all, i.e., whether the plan is consensual. R. at 22. Whether a plan is consensual is determined by class voting. 11 U.S.C. § 1129(a)(8). Thus, the holder of a non-dischargeability claim pursuant to section 523(a) who may want to try and force a cramdown could be outvoted by other creditors in their class who do not hold non-dischargeable claims. Or, as shown in this case, a creditor's debt can suddenly become nondischargeable because a of a completely unrelated class's, the Bank's, rejection of the plan. Thus, the Fourth Circuit's and Petitioner's interpretation of section 1192(2) does not work to increase creditor autonomy.

The Fourth Circuits' creditor fairness argument is also illusory because the Fourth Circuit's interpretation needlessly reduces the recovery of innocent creditors. Broad corporate discharge is not only essential for reorganization, but it also represents the crucial difference between the rationale for exceptions to corporate discharge versus exceptions to individual discharge. Brubaker, *supra,* at 759. As applied to individuals, section 523(a)'s exceptions to discharge represent the legislature's determination that some individual debtors are undeserving of the fresh start that the Code can provide. *See Id.* Unfortunately, the non-dischargeability of a claim against an individual debtor reduces the recovery of other innocent creditors, but the legislature has determined that this outcome is the necessary cost of holding individual debtors responsible for certain types of past conduct. *See id.* This same cost arises in the context of exceptions to corporate discharge, but without any of the benefits.

Exceptions to corporate discharge result in reduced recovery for innocent creditors, but unlike exceptions to the discharge of an individual debtor, no justice is advanced when a claim against a corporate debtor is declared nondischargeable. *See id.* A corporation is an intangible entity separate and distinct from its owners. *See id.* A corporation cannot be held "responsible" in a moral, or almost any sense. And, unlike in the case of an individual, a corporation can escape debt if necessary. *See id.* A corporation is capable of dissolving and being rebirthed in new form; and unless a creditor can pierce the corporate veil, the corporate entity will always work to shield its owners from personal liability regardless of whether some of the corporation's debts are nondischargeable. *See id.* Thus, only the cost of reducing the recovery of innocent creditors and not the benefit of advancing justice is implicated in the case of exceptions to corporate discharge. *See id.* For this reason, Congress has not promulgated an exhaustive list of corporations' owners' bad conduct that will result in claims against a corporation being held nondischargeable. *See id.* Congress recognizes that exceptions to discharge in the corporate context simply shift the burden to the remaining creditors, reducing their recovery dollar for dollar, and essentially give the non-dischargeable claim priority over the claims of other creditors. *See id.*

In addition to this being an unfair result for creditors, it also violates a core tenet of bankruptcy law: that all creditors receive an equal distribution. *Howard Delivers Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) ("The Bankruptcy Code aims, in the main, to secure equal distribution among creditors."). Therefore, the Fourth Circuit's appeal to creditor fairness is erroneous and fails to consider the actual fairness concerns implicated by exceptions to corporate discharge.

2. Case law interpreting chapter 12 of the Code does not, and cannot, support an interpretation of section 1192(2).

The Fourth Circuit's interpretation of section 1192(2) cannot be supported by case law interpreting chapter 12 of the Code. The Fourth Circuit rests its interpretation of section 1192(2) on two cases interpreting similar language present in section 1228(a) of chapter 12. *In re Cleary Packaging LLC*, 36 F.4th at 517; *See Southwest Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc.* (*In re Breezy Ridge Farms, Inc.*), 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *New Venture P'ship v. JRB Consol*. (*In re JRB Consol., Inc.*), 188 B.R. 373 (Bankr. W.D. Tex. 1995). However, as the Thirteenth Circuit noted, even if these cases were correctly decided, the inference that similar terms have identical meanings in different chapters of the Code is a weak one. *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992). The weakness of this inference is illustrated by the fact that the court that decided *JRB Consol, Inc.* rejected Petitioner's very argument concerning subchapter V this year in *GFS Indus., LLC.* 2022 WL 16858009 at *6. However, the Fourth Circuit and Petitioner's reliance on this inference here is especially misplaced for the three reasons given by the Thirteenth Circuit. R. at 20.

First, both *Breezy Ridge Farms, Inc* and *JRB Consol., Inc.* rely on the same interpretation of the term "kind" which Petitioner relies, which is discussed, and rejected in this section of Respondent's brief. 2009 WL 1514671 at *2; 188 B.R. at 374; R. at 20. Second, Congress drafted chapter 12 to achieve different purposes and goals than chapter 11. Recognizing numerous exceptions to corporate discharge under chapter 12 would not have a devastating effect on the reorganization of corporations because very few corporations are covered by chapter 12. R. at 20. Chapter 11 is designed to accommodate both individuals and corporations while chapter 12 is designed to cover primarily *individuals.* R. at 20. Chapter 12's coverage of corporations is limited to the narrow class of family-owned farming corporations. R. at 20. The

differences between the chapter 11 and 12 is underscored by the fact that chapter 11 distinguishes between individual and corporate debtors, while chapter 12 does not. *United States v. Hawker Beechcraft, Inc.* (*In re Hawker Beechcraft, Inc.*), 515 B.R. 416, 430-31 (S.D.N.Y. 2014); R. at 20. Third, and most importantly, as the Thirteenth Circuit highlighted, the similar language shared by section 1192(2) and 1228(a)(2) was borrowed from chapter 13, which does not apply to corporations. R. at 20. The suggestion that Congress borrowed language from a chapter of the Code that does not apply to corporations and placed it in a chapter that applies to both individuals and corporations—chapter 11—to expand the application of individual discharge exceptions to corporations is "nonsensical." R. at 20.

CONCLUSION

For the foregoing reasons, the Respondent asks this Court to affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.