Team 40

No. 22-0909

IN THE

Supreme Court of the United States

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,

ELEANOR RIGBY, PETITIONER

V.

PENNY LANE INDUSTRIES, INC., RESPONDENT.

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

BRIEF FOR RESPONDENT

JANUARY 19, 2023

TEAM NUMBER 40
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Does a bankruptcy court have 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. Do the exceptions to discharge specified in subparagraphs (1) through (19) of 11 U.S.C. § 523(a) apply to corporate debtors proceeding under subchapter V of chapter 11 of the Bankruptcy Code?

TABLE OF CONTENTS

QUESTIONS PRESENTED……………………………………………………………………..i

TABLE OF CONTENTS……………………………………………………………………..ii

TABLE OF AUTHORITIES…………………………………………………………………...iv

OPINIONS BELOW……………………………………………………………………..viii

STATEMENT OF JURISDICTION……………………………………………………viii

RELEVANT STATUTORY PROVISIONS………………………………………………viii

STATEMENT OF THE CASE………………………………………………………………1

I. FACTUAL HISTORY……………………………………………………………………1

II. PROCEDURAL HISTORY………………………………………………………………6

STANDARD OF REVIEW…………………………………………………………………...7

SUMMARY OF THE ARGUMENT……………………………………………………...7

ARGUMENT……………………………………………………………………………..8

I. THE THIRTEENTH CIRCUIT CORRECTLY CONFIRMED THE DEBTOR'S CHAPTER 11 PLAN BECAUSE, INTER ALIA, 11 U.S.C. §§ 1123(B)(6) AND 105(A) PERMIT BANKRUPTCY COURTS TO APPROVE NON-CONSENSUAL RELEASES OF THIRD-PARTY CLAIMS IN SPECIFIC CIRCUMSTANCES…………………………………….....8

A. The plain language of Section 1123(b)(6) grants bankruptcy courts the authority to confirm Chapter 11 plans that contain non-consensual releases of direct claims held by third parties against non-debtor affiliates.……………………………………..…9

B. While Section 105(a) does not create new substantive rights that are otherwise unavailable under applicable law, it works in tandem with Section 1123(b)(6) to authorize bankruptcy courts to, inter alia, confirm plans that adhere to the requirements of Section 1123………………………………………………………..11

1. Section 524(e) of does not displace the bankruptcy court's power to approve non-consensual releases of third-party direct claims.……………………………14

2. By following the dissent's application of section 524(e), this Court will allow Creditors to attempt a "second bite at the apple."…………………………………16

C. Neither constitutional nor jurisdictional considerations revoke the statutory authority that sections 105(a) and 1123(b)(6) grant the bankruptcy court to confirm chapter 11 plans containing non-consensual third-party releases…………………...17

D. The bankruptcy court's authority to approve non-consensual releases of third-party claims is not absolute, and courts should engage in a fact-intensive analysis pursuant to several factors outlined within the case law of sister circuits……………20

E. The authority vested in the bankruptcy court to approve non-consensual releases of third-party claims in Chapter 11 plans is consistent with the policy goals of Bankruptcy law………………………………………………………………23

II. THE DISMISSAL OF RIGBY'S ADVERSARY COMPLAINT AGAINST THE CORPORATE DEBTOR MUST BE AFFIRMED BECAUSE THE EXCEPTIONS TO DISCHARGE IN 11 U.S.C. § 523(A) APPLY ONLY TO INDIVIDUAL DEBTORS IN SUBCHAPTER V OF CHAPTER 11. …………………………………………………...25

A. The exceptions to discharge provided in subparagraphs (1) through (19) of section 523(a) clearly and unambiguously apply only to individual Chapter 11 debtors……26

B. Congress did not introduce any language in section 1192 that purports to alter or override the clear and unambiguous language of section 523(a) in cases involving a non-individual subchapter V debtor……………………………………………….27

C. The use of the exceptions to discharge provided in section 523(a) may deprive corporate debtors in subchapter V of a viable opportunity to reorganize and does not comport with the policy goals of chapter 11 of the Bankruptcy Code…………...32

CONCLUSION………………………………………………………………………35

APPENDIX…………..……………………………………………………………….36

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Celotex Corp. v. Edwards, 514 U.S. 300 (1995)……………………………………………...17, 19

Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992)………………………………………………9

Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017)……………………………………….23

Dewsnup v. Timm, 502 U.S. 410 (1992)……………………………………………………29, 30

Duncan v. Walker, 533 U.S. 167 (2001)…………………………………………………………28

Emil v. Hanley, 318 U.S. 515 (1943)……………………………………………………………..29

Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651 (2006)……………………..33

Kothe v. R.C. Taylor Tr., 280 U.S. 224 (1930)……………………………………………………33

Local Loan Co. v. Hunt, 292 U.S. 234 (1934)……………………………………………………11

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)……………………………………..9, 17, 25

Rubin v. United States, 449 U.S. 424 (1981)……………………………………………………...10

Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941)……………………………...33

United States v. Energy Res. Co., 495 U.S. 545 (1990)……………………………………11, 12

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989)…………………………...9, 10, 26

Williams v. Taylor, 529 U.S. 362 (2000)…………………………………………………………28

FEDERAL COURT OF APPEAL CASES

Airadigm Commc'ns, Inc. v. F.C.C. (In re Airadigm Commc'ns, Inc.),
519 F.3d 640 (7th Cir. 2008)…………………………………………………………….……12, 13

Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.),
885 F.2d 621, 626 (9th Cir. 1989)……………………………………………………………....14

Bank of N.Y. Trust Co. v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.),584 F.3d 229 (5th Cir. 2009)……………………………………………………….14, 15

Behrmann v. Nat'l Heritage Found., 663 F.3d 704 (4th Cir. 2011)…………………16, 20, 21, 23

Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022)……………………………………………………………30, 31

Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d. Cir. 2005)……………………………12, 13, 20, 23

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

Landsing Diversified Props. II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.), 922 F.2d 592 (10th Cir. 1990)………………………………14

Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989)…………..15, 16

In re Millennium Lab Holdings II, LLC, 945 F.3d 126 (3d Cir. 2019)…………………...18, 19, 20

Razavi v. Comm'r of Internal Revenue, 74 F.3d 125 (6th Cir. 1996)……………………………….5

Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394 (9th Cir. 1995)………14, 15

SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying), 780 F.3d 1070 (11th Cir. 2015)……………………………………….21, 22, 33

SEC v. Drexel Burnham Lambert Grp., Inc., 960 F.2d 285 (2d Cir. 1992)…………………..11, 20

Texas v. Soileau (In re Soileau), 488 F.3d 302 (5th Cir. 2007)……………………………………..5

<u>DISTRICT COURT CASES</u>

Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC), No. 22-50403-CAG, 2022 WL 16858009 (Bankr. W.D. Tex. Nov. 10, 2022)……………………………………28, 30

Patterson v. Mahwah Bergen Retail Group, Inc., 636 B.R. 641 (E.D. Va. 2022)………………..18

United States v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.), 515 B.R. 416 (S.D.N.Y. 2014)…………………………………………………………………30

<u>BANKRUPTCY COURT CASES</u>

Catt v. RTECH Fabrications, LLC (In re RTECH Fabrications, LLC), 635 B.R. 559 (Bankr. D. Idaho 2021)…………………………………………………...27, 28, 30

Gaske v. Satellite Rests., Inc. Crabcake Factory USA (In re Satellite Rests., Inc. Crabcake Factory USA), 626 B.R. 871 (Bankr. D. Md. 2021)……………………………..28, 29

Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.), 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022)…………………………………………………………26

In re Mallinckrodt PLC, 639 B.R. 837 (Bankr. D. Del. 2022)……………………………………19

<u>STATUTES</u>

11 U.S.C. § 105(a)………………………………………………………………………...*passim*

11 U.S.C. § 523……………………………………………………………………28, 29, 30, 31

11 U.S.C. § 523(a)………………………………………………………………………...*passim*

11 U.S.C. § 523(a)(5)………………………………………………………………………….27

11 U.S.C. § 523(a)(9)………………………………………………………………………….27

11 U.S.C. § 523(a)(15)………………………………………………………………………...27

11 U.S.C. § 524(e)………………………………………………………………...14, 15, 16

11 U.S.C. § 1123……………………………………………………………………………..9
11 U.S.C. § 1123(a)…………………………………………………………………………..9
11 U.S.C. § 1123(a)(5)…………………………………………………………………..10, 23
11 U.S.C. § 1123(b)…………………………………………………………………………..9
11 U.S.C. § 1123(b)(6)………………………………………………………………….*passim*
11 U.S.C. § 1141(d)…………………………………………………………………………28
11 U.S.C. § 1141(d)(1)(A)…………………………………………………………………..25
11 U.S.C. § 1141(d)(2)…………………………………………………………………25, 28
11 U.S.C. § 1141(d)(6)……………………………………………………………………...28
11 U.S.C. § 1191……………………………………………………………………………32
11 U.S.C. § 1191(b)…………………………………………………………………………25
11 U.S.C. § 1192…………………………………………………………………………*passim*
11 U.S.C. § 1192(2)……………………………………………………………26, 30, 31
11 U.S.C. § 1228……………………………………………………………………………30
28 U.S.C. § 157……………………………………………………………………………..30
28 U.S.C. § 157(a)…………………………………………………………………………..19
28 U.S.C. § 157(b)…………………………………………………………………………19, 20
28 U.S.C. § 1334……………………………………………………………………………19
28 U.S.C. § 1334(b)…………………………………………………………………………19

<u>OTHER AUTHORITIES</u>

H.R. Rep. No. 95-595 (1977)…………………………………………………………………...9
H.R. Rep. No. 116-61 (2019)…………………………………………………………………29
H.R. Rep. No. 116-171 (2019)………………………………………………………………...34

Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* (2020) (updated 2022), [hereinafter *SBRA Guide*], *available at* https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf…………………*passim*

Oversight of the Bankruptcy Code, Part 1: Confronting Abuses of the Chapter 11 System: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L., Comm.on the Judiciary, 117th Cong. (2021) (statement of Douglas G. Baird, Professor, University of Chicago Law School) …………………………………………24

Pub. L. No. 116-54, 133 Stat. 1079……………………………………………………….25

Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*,
13 Am. Bankr. Inst. L. Rev. 757 (2005)……………………………………………………….32, 33

OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 21-0803 and reprinted at Record 2. The Bankruptcy Court for the District of Moot decided in favor of the Debtor, Penny Lane Industries, Inc. in both disputes, resulting in a dismissal of Ms. Rigby's adversary complaint and confirmation of the Debtor's Chapter 11 Plan. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the bankruptcy court on both issues.

STATEMENT OF JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

This action requires statutory construction of certain provisions of Title 11 of the United States Code. The following sections are restated in full in the Appendix.

The relevant portion of 11 U.S.C. § 105(a), titled "Power of Court," provides:

> (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.

The relevant portion of 11 U.S.C. § 523(a), titled "Exceptions to Discharge," 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—

The relevant portion of 11 U.S.C. § 1123(b)(6), titled "Contents of Plan," provides:

> (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. § 1192, titled "Discharge," provides:

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

***

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

STATEMENT OF THE CASE

This appeal arises from a mass tort chapter 11 case relating to the Debtor's alleged contamination of groundwater. Petitioner's appeal is an attempt to unravel a confirmed subchapter V chapter 11 plan that received overwhelming support from creditors and have her debt excepted from discharge in direct contravention of the Bankruptcy Code.

I. FACTUAL HISTORY

Penny Lane Industries, Inc. (the "Debtor") operates a manufacturing facility and is a "major employer in the . . . economically challenged city of Blackbird." *Id.* at 3, 12. The Debtor is a wholly owned subsidiary of Strawberry Fields, a well-known manufacturer that sells products across the United States. *Id.* at 3-4. Petitioner, Ms. Eleanor Rigby ("Rigby"), is a resident of Blackbird and has lived there for over thirty-five years. *Id.* at 5.

Several years ago, testing detected the presence of toxins in the groundwater under Blackbird. *Id.* Over the next four years, tens of thousands of Blackbird residents drank and bathed in contaminated water. *Id.* Sadly, excessive exposure to these toxins may result in adverse health effects, including "sickness, birth defects, or even death." *Id.* However, the investigating authorities and agencies failed to conclusively determine the source of the contamination. *Id.*

Nevertheless, in 2017, Rigby filed the first lawsuit against the Debtor and Strawberry Fields. *Id.* Rigby alleged that the Debtor improperly dumped pollutants, which caused her four-year old daughter to develop terminal leukemia. *Id.* at 5. She postulated that the Debtor dumped toxins on its property as a cost saving measure, which contaminated the groundwater and seeped into the nearby Liverpool River. *Id.* Additionally, she alleged that the Debtor knew about the risks associated with the disposal procedures and that Strawberry Fields, as the Debtor's corporate parent, knew, or should have known, of the alleged misconduct of its subsidiary. *Id.* at 5-6.

If a court were to find in favor of Rigby, the Debtor might be well-equipped to handle a singular adverse ruling. However, Rigby's case was just the beginning. After her initial 2017 lawsuit, residents of Blackbird and the surrounding communities filed hundreds of lawsuits against the Debtor. *Id.* at 6. Each plaintiff alleged that the Debtor contaminated the community's groundwater and sought damages for death or injury caused by exposure to excessive levels of pollutants. *Id.* A significant number of lawsuits named Strawberry Fields as a co-defendant. *Id.*

Unsurprisingly, the Debtor and Strawberry Fields disputed these allegations, raising three main defenses. First, they asserted the Debtor properly disposed of industrial waste on its property because it complied with every "applicable environmental law[] and regulation[] that existed at the time." *Id.* Second, neither the Debtor nor Strawberry Fields had any knowledge that the waste dumped on its property allegedly seeped into Blackbird's groundwater supply. *Id.* Lastly, they point to the "insufficient evidence to link the pollutants found in the water supply to any waste disposed by the Debtor" because its property is located downstream from "dozens" of other manufacturing facilities on the Liverpool River. *Id.*

Despite the Debtor's best efforts, almost 10,000 "disputed, unliquidated tort claims" were filed against the Debtor seeking nearly $400 million in damages, threatening its viability. *Id.* Because the Debtor owed its trade creditors less than $2 million and its "aggregate noncontingent liquidated" debts were less than $7.5 million as of the petition date, the parties stipulated that the Debtor "satisfie[d] the requirements for a small business debtor" under section 1182. *Id.* at 6, 6 n.5. On January 11, 2021, the Debtor filed a petition for subchapter V chapter 11 relief. *Id.* Rigby filed a $1 million unsecured claim against the Debtor, which was deemed allowed pursuant to section 502(a). *Id.* at 6.

Once the Debtor filed its petition for relief, the nearly 10,000 non-bankruptcy claims against the Debtor were automatically stayed pursuant to section 362(a). *Id.* at 7. Because Strawberry Fields was not a debtor, it was not afforded the protection of the automatic stay. *Id.* Thus, the Debtor sought a temporary injunction to halt any litigation against the Debtor's "current and former owners, officers, directors, employees and associated entities" stemming from its alleged groundwater contamination. *Id.* at 7-8. The bankruptcy court granted this request and "all of the pending litigation, including litigation against Strawberry Fields, was temporarily stayed." *Id.* at 8.

The temporary injunction was intended to "facilitate negotiation of a global settlement" by the parties in mediation. *Id.* After months of post-petition mediation, and several extensions of the injunction, the Debtor devised a plan that contained third-party releases which was approved by 95% of the voting creditors. *Id.* at 9. Under the Plan, the Debtor was required to establish and fund a creditor trust funded by the Debtor's "disposable (net) income for five years" and Strawberry Fields' $100 million contribution. *Id.* Such a contribution would enable creditors holding allowed claims to receive a "signification distribution," estimated to be "30-40 cents on the dollar." *Id.* Strawberry Fields' contribution precipitated a third-party release provision wherein it would receive "a broad release from all claims, including both estate claims and third-party direct claims." *Id.* at 8.

Rigby and Norwegian Wood Bank (the "Bank") filed two notable objections to confirmation. *Id.* Rigby argued that, under the Bankruptcy Code and non-bankruptcy law, the Plan impermissibly granted "non-consensual releases of third-party direct claims against Strawberry Fields." *Id.* The Bank, a secured creditor holding a first priority security interest on the Debtor's

manufacturing equipment, also objected. *Id.* at 9. However, the Bank's objection is irrelevant for purposes of this appeal.

The bankruptcy court overruled both objections. *Id.* at 10. Because "no other reasonably conceivable means to achieve the result accomplished by the Plan" existed, the court held that the Plan was "fair and reasonable." *Id.* The court continued by reasoning that the lack of the third-party release would likely lead to "complex and protracted litigation, with attendant risk, cost and delay." *Id.* Thus, after an arduous four-day confirmation hearing, the bankruptcy court confirmed the Plan. *Id.*

Shortly after the petition date, Rigby commenced an adversary proceeding against the Debtor. *Id.* at 7. Rigby, relying on sections 523(a) and 1192(2), argued that her $1 million claim should be deemed non-dischargeable. *Id.* The Debtor quickly filed a motion to dismiss, arguing that Rigby's complaint fails to state a claim upon which relief can be granted. *Id.* Specifically, the Debtor asserted that section 523(a)'s non-dischargeability provisions "are not applicable to business entities. R. at 7. The court held that under subchapter V of chapter 11, section 523(a)'s exceptions to discharge do not apply to a corporate debtor and granted the Debtor's motion to dismiss. *Id.*

II. PROCEDURAL HISTORY

The bankruptcy court addressed two issues in this case, ruling in favor of the Debtor on both. First, the court overruled the objection to confirmation of the Plan filed by Rigby, holding that the Bankruptcy Code provided the court with the authority to approve the non-consensual third-party releases. *Id.* at 10-11. Second, the bankruptcy court ruled in favor of the Debtor, holding that section 523(a)'s non-dischargeability provisions do not apply to corporate debtors seeking relief under subchapter V of chapter 11. *Id.* at 7. Rigby timely filed a notice of appeal for

both issues. *Id.* at 11. Pursuant to 28 U.S.C. § 158(d), the district court certified the disputes for direct appeal, which were then consolidated as this appeal. *Id.*

On appeal, the United States District Court for the District of Moot affirmed the bankruptcy court's rulings on both issues. *Id.* at 23. Again, Rigby filed a timely appeal. *Id.* On March 7, 2022, the United States Court of Appeals for the Thirteenth Circuit likewise affirmed.

STANDARD OF REVIEW

The facts set forth herein are undisputed. The issues presented in this appeal involve only questions of law and require statutory interpretation of the Bankruptcy Code.[1] Accordingly, the standard of review is *de novo*. *See, e.g.*, *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007); *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly ruled in favor of the Debtor on both issues before this Court. First, the court properly ruled that the bankruptcy court had the requisite constitutional and statutory authority, pursuant to sections 1123(b)(6) and 105(a), to grant the non-consensual third-party releases requested by the non-debtor, Strawberry Fields. Also, the court properly held that section 523(a) does not preclude a corporate debtor from receiving a complete discharge in a subchapter V non-consensual plan of reorganization.

Rigby's appeal seeks to undermine the statutorily granted authority of bankruptcy courts provided in the Bankruptcy Code. It asserts that neither the Bankruptcy Code nor applicable non-bankruptcy law provide a bankruptcy court with authority to approve the non-consensual third-party releases in the Debtor's Plan. Such assertions cannot be reconciled with section 1123(b)(6).

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq.* Specific sections of the Bankruptcy Code are identified herein as "section __."

The plain language of section 1123(b)(6) is clear and unambiguous. It states that a reorganization plan "may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title." Appropriateness is not at issue here, and Rigby fails to cite a single provision of the Bankruptcy Code that prohibits, or is incompatible with, the releases granted therein. Thus, the bankruptcy court's authority to approve the non-consensual release of third-party claims against Strawberry Fields could not be clearer.

If this Court chooses looks beyond the plain language of section 1123(b)(6), the same conclusion will be reached. Other sections of the Bankruptcy Code are not prohibitive of such releases. Rather, they support the conclusion that releases granted by the bankruptcy court were proper. The authority granted to bankruptcy courts by section 1123(b)(6), coupled with the broad authority granted by section 105(a), provide bankruptcy courts with broad discretion to determine whether a plan should be approved. Accordingly, the majority of sister circuits, and the reviewing courts in this case, correctly adopt this reading of sections 1123(b)(6) and 105(a).

Based on the clear and unambiguous language of the Bankruptcy Code, a bankruptcy court possesses the constitutional and statutory authority to approve non-consensual third-party releases of a non-debtor. However, the Debtor readily concedes that this authority is not absolute. Releases of this nature should only be granted in "unusual circumstances." The Sixth Circuit developed a seven-factor test to determine the existence of unusual circumstances. If all seven factors are met, a bankruptcy Court has the authority to grant the releases. The facts of this case satisfy six out of seven factors. The lone factor the Debtor failed to satisfy required a provision in the Debtor's Plan that would be wholly unreasonable in a mass tort chapter 11 reorganization. Thus, the Debtor urges this Court to follow the broader approach adopted by the Fourth and Eleventh Circuits that provides courts with the discretion to determine which factors are relevant on a case-by-case basis.

Further, the appeal asks this Court to look past Congressional intent and the plain language of sections 1192 and 523(a) to have a debt held non-dischargeable. The language of section 523(a) is clear and unambiguous—it applies only to individual debtors. When Congress drafted section 1192, governing a debtor's discharge in a subchapter V case, it included a cross-reference to section 523(a), without additional language that changed the plain meaning of the statute.

Additionally, since there is no evidence in the Small Business Reorganization Act of 2019 ("SBRA") of any legislative intent to change pre-SBRA bankruptcy practice, the Court should not engage in further judicial inquiry. Corporate debtors in chapter 11, including small business debtors pursuant to subchapter V, are entitled to receive a complete discharge of pre-petition debts pursuant to sections 1141(d) and 1192(2), respectively.

Moreover, the inapplicability of the exceptions to discharge in section 523(a) to non-individual debtors comports with policy goals of bankruptcy law, and chapter 11 specifically. Congress intended to provide corporate debtors with an opportunity to reorganize their financial affairs, continue operating as a going concern, and pay creditors in accordance with the confirmed plan. When Congress introduced subchapter V in 2019, it did so to address the difficulties small businesses incurred as they tried to reorganize under chapter 11. The design of subchapter V seeks to lower costs and improve efficiency to permit viable small businesses to successfully reorganize.

To permit creditors to seek exceptions to discharge pursuant to section 523(a), without the explicit statutory grant from Congress, would undermine Congress' attempt to promote small business reorganization and instead, would bizarrely force more small businesses to liquidate—resulting in a loss of jobs and contributions to society.

Likewise, ensuring that corporate debtors in chapter 11 receive a complete discharge is commensurate with one of the basic tenets of bankruptcy law—equality of distribution.

Exceptions to discharge in this context propel certain claimholders to the front of the line, to the detriment of similarly situated creditors and to the estate as a whole.

Here, Penny Lane faces nearly $400 million in disputed debts. By satisfying of all the subchapter V eligibility requirements in good faith, Penny Lane has every right to use the mechanisms provided by Congress to attempt to reorganize and continue operations. The appeal's misguided interpretation of sections 523(a) and 1192 would effectively block Penny Lane's chance to reorganize. Instead, well-established canons of statutory interpretation should control, and Rigby's debt should be discharged upon Penny Lane's satisfaction of the requirements laid out in section 1192, along with every other similarly situated creditor's debt.

For the foregoing reasons, this Court should affirm the Thirteenth Circuit on both issues.

ARGUMENT

This Court should affirm the Thirteenth Circuit's decision that under a chapter 11 plan of reorganization, the Bankruptcy Code ("Code") provides bankruptcy courts with the authority to approve non-consensual releases of third-party direct claims against non-debtor affiliates in limited circumstances, pursuant to sections 1123(b)(6) and 105(a). Additionally, this court should affirm the circuit court's holding that section 523(a)'s non-dischargeability provisions do not apply to a corporate debtor proceeding under a nonconsensual, subchapter V chapter 11 plan.

I. THE THIRTEENTH CIRCUIT CORRECTLY CONFIRMED THE DEBTOR'S CHAPTER 11 PLAN BECAUSE, INTER ALIA, 11 U.S.C. §§ 1123(B)(6) AND 105(A) PERMIT BANKRUPTCY COURTS TO APPROVE NON-CONSENSUAL RELEASES OF THIRD-PARTY CLAIMS IN SPECIFIC CIRCUMSTANCES.

When drafting chapter 11 of the Code, Congress faced the faced the difficult challenge of balancing competing interests. It sought to provide creditors, debtors, and the bankruptcy courts with the tools needed to strike a balance between rehabilitating the honest, but unfortunate debtor while simultaneously maximizing shareholder value. "In reorganization cases, there is frequently

great uncertainty. Therefore, the need for flexibility is greatest." H.R. Rep. No. 95-595, at 409 (1977).

Section 1123, titled "Contents of Plan," provides this flexibility. *See* 11 U.S.C. § 1123. Subsection (a) sets forth eight provisions that must be included in a chapter 11 plan. Congress's use of the word "shall" make the provisions found in subsection (a) mandatory. *Id.* § 1123(a). Section 1123(b) sets forth the permissive provisions of a chapter 11 plan. This subsection provides a non-exhaustive list of optional provisions that "may" be included in a chapter 11 plan. *See id.* § 1123(b). So long as mandatory provisions listed in section 1123(a) are present, subsection (b) provides the debtor with discretion to include non-mandatory provisions in the chapter 11 plan.

Section 1123 is demonstrative of chapter 11's tenets of "flexibility and equity." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525 (1984). It allows for creative drafting that adapts to the changing circumstances of each case. However, the powers granted by this section are not absolute. Thus, this Court must address whether section 1123(b)(6) provide bankruptcy courts with the statutory authority to grant non-consensual third-party releases of a non-debtor.

The unambiguous language of the statute and overarching goals of the Code support a finding that section 1123(b)(6) provides bankruptcy courts with this power. Accordingly, the dismissal of Rigby's objection to confirmation of the Plan should be affirmed.

A. The plain language of Section 1123(b)(6) grants bankruptcy courts the authority to confirm Chapter 11 plans that contain non-consensual releases of direct claims held by third parties against non-debtor affiliates.

A court will start its analysis by looking to the plain language of section 1123. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). It "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) When the words of the statute are unambiguous, a court's "judicial

inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981); *see also Ron Pair Enters., Inc.*, 489 U.S. at 240-241 ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.").

Section 1123(b)(6) is clear and unambiguous. In relevant part, it states:

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

11 U.S.C. § 1123(b)(6) (emphasis added). As a forum for resolving "large and complex mass litigations," a bankruptcy court "has substantial power to reorder creditor-debtor relations needed to achieve a successful reorganization." *In re Dow Corning*, 280 F.3d 648, 656 (2002); *see also* 11 U.S.C. § 1123(b)(6). However, when determining whether section 1123(b)(6) provides a bankruptcy court with authority to include a non-mandatory provision in a plan, the court must consider whether: (1) the provision is appropriate pursuant to section 1123(b)(6), and (2) the provision is inconsistent with other Code provisions. On appeal, the Thirteenth Circuit held that the global settlement provisions in question were appropriate and "not at issue here." R. at 14. Thus, the court turned its focus to whether releases granted in the Plan were inconsistent with any other Code provisions. *Id.*

The court determined that the releases were not inconsistent with other provisions of the Code. In fact, it found section 1123(a)(5) "not only authorizes, but requires, the inclusion of provisions such as the releases and the channeling injunction that are crucial to securing Strawberry Fields'" $100 million contribution "that is necessary for the Plan's implementation." R. at 14. Statutory support is also found in section 105(a), discussed below.

The substantial powers granted by section 1123(b)(6) allow bankruptcy courts to "enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's

reorganization." *SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992). Here, the third-party releases are not merely some important part of the reorganization plan. They are the keystone holding the Debtor's Plan together. The releases allow for Strawberry Fields' to make a "significant monetary contribution" to the creditors' trust, resulting "in a meaningful distribution to creditors." R. at 10. Without them, the Debtor would be forced to convert its case and undergo a chapter 7 liquidation, a situation that would prevent creditors from reaping the benefits of a proposed distribution that "is substantially greater than what creditors would receive under chapter 7." *Id.*

Thus, the plain and unambiguous language of section 1123(b)(6) provides the bankruptcy court with the statutory authority to grant the non-consensual third-party releases requested by Strawberry Fields. *See* 11 U.S.C. § 1123(b)(6). Because Rigby is unable to cite to any Code provision that prohibits such releases, the "[s]tatutory authority for including any imaginable provision in a plan could not be clearer." R. at 14.

B. While Section 105(a) does not create new substantive rights that are otherwise unavailable under applicable law, it works in tandem with Section 1123(b)(6) to authorize bankruptcy courts to, inter alia, confirm plans that adhere to the requirements of Section 1123.

The plain language of the Code is silent on the bankruptcy court's specific authority to confirm plans that contain third-party releases. *See In re Dow Corning*, 280 F.3d 648, 656 (2002). However, "as courts of equity," bankruptcy courts "have broad authority to modify creditor-debtor relationships." *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *see Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). However, section 1123(b)(6) inherently provides bankruptcy courts with the statutory authority to grant this type of relief. Notably, section 105(a) supplements this authority.

In relevant part, section 105 of the Bankruptcy Code, titled "Power of Court," states, "(a) The court may issue *any* order, process, or judgment that is *necessary or appropriate* to carry out the provisions of this title." 11 U.S.C. § 105(a) (emphasis added). This section "grants the bankruptcy court the power to take appropriate equitable measures needed to implement other sections of the Code," and its importance cannot be downplayed. *In re Dow Corning*, 280 F.3d 648, 656 (2002).

Section 105(a)'s "broad grant of authority" provides bankruptcy courts with "considerable discretion to approve plans of reorganization." *Id.* It can "effect any 'necessary or appropriate' order to carry out the provisions of the bankruptcy code." *Airadigm Commc'ns, Inc. v. F.C.C. (In re Airadigm Commc'ns., Inc.)*, 519 F.3d 640, 657 (7th Cir. 2008) (citation omitted). The Seventh Circuit referred to these powers granted as the bankruptcy court's "residual authority." *Id.*; *see also United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) (noting that section 1123(b)(6) provides bankruptcy courts with the "residual authority" to approve a plan that contains features that are not explicitly authorized by statute).

This residual authority is vital to the case at bar. The statutory authority granted to bankruptcy courts by section 1123(b)(6), coupled with the residual authority granted by section 105(a), enables the court to grant the releases requested here. *See In re Airadigm Commc'ns, Inc.*, 519 F.3d at 657. However, a bankruptcy court will engage in a fact intensive analysis when determining whether a third-party release of non-debtor claims is "appropriate." *Id.* Whether a release is granted "depends on the nature of the reorganization." *Id.*

In *In re Airadigm Commc'ns, Inc*, the bankruptcy court determined that the release of third-party claims was necessary for the debtor's reorganization for three reasons, two of which are relevant here. *Id.* First, the limitation provided by the release was narrow, applying only to third-

party claims "arising out of or in connection with the reorganization." *Id.*; *see also Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d. Cir. 2005). Second, during fact finding, "the bankruptcy court found 'adequate' evidence that [the non-debtor third-party] required this limitation before it would provide the requisite financing, which was itself, essential to the reorganization." *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 657; *see also In re Metromedia Fiber Network, Inc.*, 416 F.3d at 143.

The Debtor in the current action is similarly situated. The non-consensual third-party releases granted by the bankruptcy court were limited to "any and all claims" that a third party has "asserted or might assert in the future against Strawberry Fields" that are "based on or related to the Debtor's pre-petition conduct, its estate or this chapter 11 case." R. at 8. Thus, the releases applied only to third-party claims related to the reorganization.

Like the Seventh Circuit, the bankruptcy court here found "adequate" evidence that the third-party releases requested by Strawberry Fields were "essential to the reorganization." *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 657; *see* R. at 10. "In exchange for funding the global settlement, Strawberry Fields *demanded* abroad release from all claims, including both estate claims and third-party direct claims." R. at 8 (emphasis added). This $100 million contribution is essential to the reorganization, evidenced by the court's finding that "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan." *Id.* at 10. Absent Strawberry Fields contribution to the creditors' trust, a "reorganization simply would not have occurred." *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 657.

Given the narrow limitation on the non-consensual third-party releases "and how essential" Strawberry Fields "was for reorganization," the release granted by the bankruptcy court here was

"appropriate" and "within its powers." *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 657; *see also* R. at 8, 10.

1. Section 524(e) of does not displace the bankruptcy court's power to approve non-consensual releases of third-party direct claims.

In the dissent, Judge McCartney asserts that section 105(a) cannot be reconciled with section 524(e). In relevant part, section 524(e) of the Code states:

> (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.

11 U.S.C. § 524(e).

Judge McCartney's reading of section 524(e) follows the Fifth, Ninth, and Tenth Circuits, all of which prohibit nonconsensual third-party releases. *See, e.g.*, *Bank of N.Y. Trust Co. v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009) ("In a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties."); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995) ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging liabilities of non-debtors."); *Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989) ("We therefore conclude that the specific provisions of section 524 displace the court's equitable powers under section 105 to order the permanent relief sought by American."); *Landsing Diversified Props. II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990) ("Congress did not intend to extend such benefits to third-party bystanders). Relying on our sister circuit's decisions, Judge McCartney asserts that "section 524(e) expressly and unambiguously prohibits the release of any person or entity by the bankruptcy court where that person or entity is not itself the subject of a bankruptcy discharge." R. at 25. Such a reading is misguided. The

language of section 524(e) "explains the effects of a debtor's discharge. It does not prohibit the release of a non-debtor." *In re Dow Corning Corp.* 280 F.3d at 657 (citations omitted).

In *In re Pac. Lumber Co.*, cited by the dissent, the Fifth Circuit chose not to "adopt a more lenient approach to non-debtor releases taken by other courts" because the cases cited by the debtor therein "all concerned global settlements of mass claims against the debtors and co-liable parties." *Pac. Lumber Co.*, 584 F.3d 229 at 252. The court went as far as recognizing "non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets." *Id.* (citation omitted). The limited circumstances where the Fifth Circuit recognizes non-debtor releases as proper are identical to the facts of this case.

In *In re Lowenschuss*, the Ninth Circuit found that the broad third-party releases granted by the bankruptcy court also violated section 524(e). *Lowenschuss*, 67 F.3d at 1401-02. However, the court cites to *In re A.H. Robins Co.,* a case that supports the Debtor's assertion that the third-party releases herein do not violate section 524(e). *See Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989). There, the Fourth Circuit held that the third-party non-debtor releases were within the bankruptcy court's equitable powers under section 105(a) and not prohibited by section 524(e). *See id.* at 701-02.

The unusual facts of *In re A.H. Robins Co.* mirror the facts of this case. Here, the Debtor's reorganization Plan was approved by "over 95% of the creditors" despite the inclusion of a non-consensual third-party release. R. at 9; *see A.H. Robins Co.*, 880 F.2d at 698, 702. Although the Plan does not provide the full payment of creditors' claims, "the proposed distribution . . . is substantially greater than what creditors would receive" under chapter 7. R. at 10; *see A.H. Robins Co.*, 880 F.2d at 701. Like the releases granted by the Fourth Circuit, the third-party non-debtor release granted to Strawberry Fields was "essential," because "there existed no other reasonably

conceivable means to achieve the result accomplished by the Plan." *A.H. Robins Co.*, 880 F.2d at 701; R. at 10. Lastly, "the entire reorganization hing[ed] on" Strawberry Fields "being free[d] from indirect claims such as suits against parties who would have indemnity claims against" it. *A.H. Robins Co.*, 880 F.2d at 702; R. at 10. Without such releases, all creditors are left worse off.

The cases cited by Judge McCartney fail to adequately support his argument that section 524(e) precludes such releases. Ironically, these cases identify situations supports to the Debtor's assertion that the releases granted here are permitted under sections 1123(b)(6) and 105(a).

2. By following the dissent's application of section 524(e), this Court will allow Creditors to attempt a "second bite at the apple."

The non-consensual third-party releases granted by the bankruptcy court were not solely intended to protect Strawberry Fields. Such releases also prevent "an end-run around the plan by not allowing dissatisfied claimants to attempt second and third bites at the apple in another forum." *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 708 (4th Cir. 2011) (quotations omitted).

If this Court chose to give weight to Judge McCartney's dissent regarding section 524(e) and Strawberry Fields still opts to contribute $100 million to the creditors' trust without the protections of a release, this Court will bizarrely allow creditors to attempt a "second bite at the apple." *Behrmann*, 663 F.3d at 708. Creditors with allowed claims would receive a "significant distribution" under the chapter 11 Plan, while preserving the right to pursue their claims against Strawberry Fields "in another forum." R. at 8; *Behrmann*, 663 F.3d at 708. Such an absurd result would be inequitable and would allow creditors to seek a double recovery from deep pockets.

The more likely scenario, however, is a chapter 7 liquidation. Strawberry Fields will be forced to "incur substantial legal costs in defending" against mounting mass tort claims without the third-party releases. *Behrmann*, 663 F.3d at 708. This litigation would likely prevent

Strawberry Field's from contributing $100 million to the Debtor's reorganization efforts, thereby forcing the Debtor to covert its case to chapter 7.

"The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB v. Bildisco & Bildisco* 465 U.S. 513, 528 (1984). There is already a Plan in place that accomplishes this goal—one that 95% of creditors voted in favor of. *See* R. at 9. To hold that the bankruptcy court does not have the authority to approve the non-consensual third-party releases granted here would only leave creditors worse off, unduly burden the courts tasked with resolving this mass litigation, and "result in one more closed factory along the banks of the Liverpool River." R. at 12. "Chapter 11 is about maximizing the recoveries of creditors and preserving viable businesses," and the Debtor's proposed plan does just that. R. at 11.

C. Neither constitutional nor jurisdictional considerations revoke the statutory authority that sections 105(a) and 1123(b)(6) grant the bankruptcy court to confirm chapter 11 plans containing non-consensual third-party releases.

Judge McCartney's dissent in the Thirteenth Circuit's opinion posits that the bankruptcy court lacks both the constitutional and jurisdictional authority to confirm chapter 11 plans that contain non-consensual third-party releases. *See* R. at 26-27. However, consistent with case law in the majority of circuits, bankruptcy courts have both the statutory and constitutional authority to approve reorganization plans that contain non-consensual third-party releases.

Nothing in the Constitution explicitly precludes bankruptcy courts from approving confirmation orders that involve the rights of third parties. *See* R. at 12. In fact, in 1898, when Congress first codified the bankruptcy laws, "most bankruptcy proceedings were conducted by referees who resolved controversies involving . . . certain disputes involving property in the possession of third parties." *Celotex Corp. v. Edwards*, 514 U.S. 300, 327 (1995). Whether a

bankruptcy court has the constitutional authority to approve chapter 11 plans containing nonconsensual third party releases is dependent on "whether, looking to the content of the plan, the Bankruptcy Court [is] resolving a matter integral to the restructuring of the debtor-creditor relationship." *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 137 (3d Cir. 2019).

In *Millennium*, the release provisions at issue were carefully considered by the bankruptcy court, which in turn held:

> [T]he injunctions and release provisions are critical to the success of the Plan because, without the releases, and the enforcement of such releases through the Plan's injunction provisions, the Released Parties would not be willing to make their contributions under the Plan, and absent those contributions the Debtors would be unable to satisfy their obligations . . . and no chapter 11 plan would be feasible and the Debtors would likely have shut down.

Id. Additionally, the Third Circuit noted that "the release provisions – agreed to only after extensive, arm's length negotiations – were absolutely required [and] restructuring in this case was possible only because of the release provisions." *Id.* Thus, the Bankruptcy Court was unequivocally resolving a matter integral to the restructuring of the debtor-creditor relationship. *See id.* at 140; *but see Patterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. 641, 670 (E.D. Va. 2022).

The factual parallels between *Millennium* and the instant case are palpable. Here, Strawberry Field's $100 million contribution is critical to the success of Penny Lane's reorganization. As a small business debtor proceeding under subchapter V of chapter 11, it is unlikely that Penny Lane has enough cash on-hand to fund an adequate creditor trust and survive a reorganization.[2] Penny Lane is facing nearly 10,000 claims asserting cumulative damages of approximately $400 million. R. at 6. Further, Penny Lane's contribution would create the trust

[2] Although not clearly stated in the Record, it can be inferred that because the Debtor is an insolvent small business, it is unlikely that they have $100 million on-hand to contribute to the reorganization plan.

that would provide the means to pay Rigby, and other unsecured creditors, a significant distribution of 30-40 cents on the dollar. R. at 8. Without this contribution, upon which the third party release is premised, Penny Lane will likely be required to liquidate, paying general unsecured creditors significantly less, if anything at all. As was the case in *Millennium*, the release provision in the instant case is absolutely required and singly responsible for the feasibility of Penny Lane's reorganization plan. Seeing as though the third-party release at issue in this case is indisputably integral to the restructuring of the debtor-creditor relationship, the Thirteenth Circuit correctly recognized the bankruptcy court's constitutional authority to confirm the Debtor's chapter 11 plan.

Sections 1334 and 157 govern the jurisdiction of bankruptcy courts. 28 U.S.C. §§ 157, 1334. Section 1134(b) provides in relevant part that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." § 1334(b). Section 157(a) permits district courts to refer "any and all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." § 157(a). Section 157(b) confers the authority on bankruptcy judges to "hear and determine all cases under title 11 and all core proceedings under title 11 . . .." § 157(b).

First, although Congress did not specifically articulate an exhaustive list of "related to" jurisdiction, "its choice of words suggests a grant of some breadth." *Celotex*, 514 U.S. at 307-08. Second, plan confirmation is one of the enumerated core proceedings set forth in section 157(b)(2). *See also In re Mallinckrodt PLC*, 639 B.R. 837, 855 (Bankr. D. Del. 2022) ("The Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Code and should be confirmed.").

Notably, the jurisdictional authority granted to bankruptcy courts to approve chapter 11 plans containing non-consensual third-party releases is not limitless. In *Millennium*, the Third

Circuit held that the bankruptcy court had the authority to approve a plan which included third-party releases as a core proceeding under section 157(b) but was careful to limit its holding to the "specific, exceptional facts of [the] case." *Millennium*, 945 F.3d 126 at 127.

D. The bankruptcy court's authority to approve non-consensual releases of third-party claims is not absolute, and courts should engage in a fact-intensive analysis pursuant to several factors outlined within the case law of sister circuits.

Although section 1123(b)(6) provides a bankruptcy court with the authority to grant a non-consensual third-party release to a non-debtor, this authority is not absolute.

A non-consensual release of third-party claims against a non-debtor "is a dramatic measure" that is only appropriate in "unusual circumstances." *In re Dow Corning Corp.* 280 F.3d 648, 658 (6th Cir. 2002); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992). Such a release "should be granted cautiously and infrequently." *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 712 (4th Cir. 2011); *see In re Metromedia Fiber Network, Inc.,* 416 F.3d at 142 ("No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique.").

To solve this issue, the Sixth Circuit developed a seven-factor test. If the seven factors are met, a bankruptcy court has the authority to approve a third-party release against a non-debtor. *See In re Dow Corning Corp.*, 960 F.2d at 658. In relevant part, the seven factors are:

> (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.

Id. (citations omitted). The Fourth Circuit broadened the application of the *Dow Corning* factors in *Behrnmann*, holding that it is the bankruptcy court's job to determine "which factors may be relevant in a specific case." *Behrmann*, 663 F.3d at 712; *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying),* 780 F.3d 1070, 1079 (11th Cir. 2015).

In the case at bar, the indemnity relationship between the Debtor and Strawberry Fields satisfies the first factor. *See* R. at 12. Strawberry Fields contributed $100 million to the creditors' trust to enable the Debtor, its subsidiary, to reorganize. *Id.* at 8. If a third-party release is not granted, the significant number of lawsuits against Strawberry Fields will undoubtedly "deplete the assets of the estate." *In re Dow Corning Corp.*, 960 F.2d at 658.

Strawberry Fields "contributed substantial assets," totaling $100 million, "to the reorganization." *Id.* Thus, the second factor is also met.

The injunction here was "essential to reorganization" because "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan." *Id.*; R. 10. If creditors are free to sue the Debtor's parent company, Strawberry Fields "would have indemnity or contribution claims against the debtor." *In re Dow Corning Corp.*, 960 F.2d at 658. Such a finding supports a conclusion that the third factor is satisfied.

The fourth factor is also satisfied. "[T]he class of unsecured creditors overwhelmingly supported the Plan," evidenced by 95% of creditors voting in favor of confirmation of the Plan. R. at 9; *In re Dow Corning Corp.*, 960 F.2d at 658.

The reorganization Plan "provides for the establishment of a creditor trust" funded with the Debtor's disposable net income and a $100 million contribution from Strawberry Fields. R. at 8. All affected "claims will be channeled into the creditors' trust," and "claimants will receive

compensation promptly." Thus, the mechanisms for payment provided by the Plan satisfy the fifth factor. *Id.* at 9, 12; *In re Dow Corning Corp.*, 960 F.2d at 658.

The sixth factor is not satisfied because the Debtor's Plan does not "provide[] an opportunity for those claimants who choose not to settle to recover in full." *In re Dow Corning Corp.*, 960 F.2d at 658. This is a mass tort chapter 11 case with almost "10,000 claims asserting cumulative damages of nearly $400 million." R. at 6. With such a significant number of claimants, it makes sense why the Debtor did not provide claimants with the opportunity to "recover in full." *In re Dow Corning Corp.*, 960 F.2d at 658. Nevertheless, the Fourth and Eleventh Circuits recognize that one factor is not determinative of the bankruptcy's authority to approve a third-party release. *See Behrmann*, 663 F.3d at 712; *In re Seaside Eng'g & Surveying,* 780 F.3d at 1079.

Lastly, the seventh factor is satisfied because "[t]he bankruptcy court made a record of specific factual findings that support its conclusions." *In re Dow Corning Corp.*, 960 F.2d at 658. The bankruptcy court cites: (1) "the highly unusual and complex nature of the case," (2) Strawberry Fields' "significant monetary contribution" that "resulted in meaningful distribution to creditors," (3) "the overwhelming creditor support for the Plan," (4) the fact "that the proposed distribution under the Plan is substantially greater than what creditors would receive if the debtor was liquidated under chapter 7" and (5) its detailed findings that Strawberry Fields' "$100 million contribution was substantially greater than any likely recovery" from the non-debtor. R. at 10.

The Debtor concedes that the Code does not provide a bankruptcy court with the unbridled authority to grant nonconsensual third-party releases in any chapter 11 case. However, facts of this case support the bankruptcy court's utilization of this "dramatic measure." *In re Dow Corning Corp.* 280 F.3d at 658. By satisfying six of the seven factors propounded by the Sixth Circuit, the

Debtor has sufficiently established the existence of the requisite "unusual circumstances" necessary for a bankruptcy court to grant the releases requested here.

E. The authority vested in the bankruptcy court to approve non-consensual releases of third-party claims in Chapter 11 plans is consistent with the policy goals of Bankruptcy law.

While both chapter 7 liquidation plans and chapter 11 reorganization plans are governed by a general concept of priority, the latter provides the debtor with much more flexibility. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017); *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 515 (1984) (discussing the "Code's express provisions and . . . overall effort to give a debtor-in-possession some flexibility and breathing space.").

Congress's intent to provide chapter 11 debtors with flexibility when drafting reorganization plans is evidenced, inter alia, by the language in various subsections of section 1123. *See* 11 U.S.C. § 1123. While section 1123(a)(5) dictates that chapter 11 plans must "provide adequate means for the plan's implementation," the statute provides a non-exhaustive list of ways in which the debtor may opt to satisfy the provision in its reorganization plan. *Id.* § 1123(a)(5). Similarly, section 1123(b)(6) dictates that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." § 1123(b)(6). Thus, restricting the ability of chapter 11 debtors to construct reorganization plans that meet the specific needs of their businesses without clear language from Congress to do so simply does not comport with the flexibility inherent in chapter 11 proceedings.

Notably, at least one court has expressed concern that non-debtor releases present a "potential for abuse that is heightened when releases afford blanket immunity." *See Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.),* 416 F.3d 136, 142 (2d. Cir. 2005). Even if true, however, the appropriate channel for addressing the perceived

issue is through the democratic process and legislation, not through a preferential method of statutory interpretation. *Oversight of the Bankruptcy Code, Part 1: Confronting Abuses of the Chapter 11 System: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L., Comm. on the Judiciary*, 117th Cong. (2021) (statement of Douglas G. Baird, Professor, University of Chicago Law School) ("The Bankruptcy Code offers no explicit guidance, and this may not be an arena in which it is prudent to entrust the matter to unbridled judicial discretion.").

Further, when Congress has not explicitly prohibited courts from the authority to approve non-consensual releases of third-party claims, it is not prudent to advocate for their sweeping proscription. "Third-party releases in the hands of able professionals and a fair judge can bring about resolutions of hard cases relatively swiftly and on terms that . . . are vastly better than what could be achieved in bankruptcy or anywhere else. There are many able bankruptcy judges who wield firm hands and refuse to approve third-party releases when the facts do not justify them." *Id.*

In the instant case, the Thirteenth Circuit was correct to affirm the bankruptcy court's confirmation of Penny Lane's reorganization plan, in consideration of the applicable policy goals of Bankruptcy law, and chapter 11 specifically. Pursuant to the facts of the case, Penny Lane's filing was appropriate and serves the policy goals underlying chapter 11 of the Code. Penny Lane is a viable manufacturing business, which provides substantial employment in the local community. R. at 12. Chapter 11 provides Penny Lane with the opportunity to remain intact as a going concern and ensure maximum recovery for all creditors–including the tort claimants–while simultaneously preserving jobs and other contributions Penny Lane makes to society.

As this Court has previously stated, "the fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of

economic resources. In some cases, reorganization may succeed only if new creditors infuse the ailing firm with additional capital." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

For the foregoing reasons, the court should affirm the Thirteenth Circuit's decision, upholding the bankruptcy court's authority to confirm chapter 11 plans containing non-consensual third party release provisions.

II. THE DISMISSAL OF RIGBY'S ADVERSARY COMPLAINT AGAINST THE CORPORATE DEBTOR MUST BE AFFIRMED BECAUSE THE EXCEPTIONS TO DISCHARGE IN 11 U.S.C. § 523(A) APPLY ONLY TO INDIVIDUAL DEBTORS IN SUBCHAPTER V OF CHAPTER 11.

Subchapter V of chapter 11, codified in sections 1181-1195 of the Code, was promulgated by the Small Business Reorganization Act of 2019 ("SBRA"), and became effective in 2020. *See* Pub. L. No. 116-54, 133 Stat. 1079. Debtors in both chapter 11 and subchapter V of chapter 11 may confirm reorganization plans consensually, or non-consensually through the use of cramdown provisions.

A subchapter V debtor that can confirm its plan consensually is entitled to a discharge pursuant to section 1141(d)(1)(A), which in relevant part states, "the confirmation of a plan discharges the debtor from any debt that are before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A). Section 1141(d)(2) clearly indicates that the exceptions to discharge, listed in subparagraphs (1) through (19) of section 523(a), apply only to individual debtors. *See id.* § 1141(d)(2) ("A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.").

On the other hand, the discharge of subchapter V debtors leveraging the cramdown provision in section 1191(b) to non-consensually confirm a plan is governed by section 1192. In relevant part, section 1192 grants subchapter V debtors a discharge of "all debts provided in section 1141(d)(1)(A) of this title . . . except any debt . . . of the kind specified in section 523(a) of this

title." 11 U.S.C. § 1192(2). Notably, the preamble of section 523(a) refers specifically to individual debtors. *See* 11 U.S.C. § 523(a) ("A discharge under section . . . 1191 . . . of this title does not discharge an *individual* debtor from any debt . . . .") (emphasis added). Thus, the critical inquiry is whether the exceptions to discharge in section 523(a) are applicable to *all* subchapter V debtors seeking to confirm a nonconsensual plan, or solely to individual debtors in accordance with the plain language of section 523(a).

The canons of statutory interpretation, the legislative history of the SBRA, and the policy goals of the Code all support a finding that subchapter V corporate debtors are not subject to the exceptions to discharge listed in section 523(a). Thus, the dismissal of Rigby's adversary proceeding which sought to except her debt from discharge pursuant to 523(a)(6) should be affirmed.

A. The exceptions to discharge provided in subparagraphs (1) through (19) of section 523(a) clearly and unambiguously apply only to individual Chapter 11 debtors.

Section 523(a) of the Code, in relevant part, states that "a discharge under section . . . *1192* . . . of this title does not discharge *an individual debtor* from any debt…" defined in the subsequent subparagraphs. 11 U.S.C. § 523(a) (emphasis added). "[A]s long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989); *see also Dewsnup v. Timm*, 502 U.S. 410, 434 (1992). It follows that courts have consistently held that the exceptions to discharge made available in section 523(a) only apply in cases wherein the Chapter 11 debtor is an individual. *See Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, 2022 WL 1110072, at *2 (Bankr. E.D. Mich. April 13, 2022) (holding that because the corporate debtor, as a matter of law, is not subject to the exceptions to discharge under section 523(a), the plaintiff seeking an exception to discharge failed to state a claim for which relief could be granted); *Catt v.*

RTECH Fabrications, LLC (In re RTECH Fabrications, LLC), 635 B.R. 559, 564 (Bankr. D. Idaho 2021) ("[S]ection 523(a) only applies to individual debtors.").

It also bears worth noting that many of the exceptions in subparagraphs (1) through (19) of section 523(a) could not possibly apply to corporate debtors, which are merely aggregations of assets. *See* 11 U.S.C. § 523(a)(5) (providing an exception for domestic support obligations); 11 U.S.C. § 523(a)(9) (providing an exception if "death or personal injury was caused by the debtor's operation of a motor vehicle . . . if such operation was unlawful because the debtor was intoxicated."); 11 U.S.C. § 523(a)(15) (providing an exception "to a spouse, former spouse, or child of the debtor . . . that is incurred by the debtor in the course of a divorce or separation . . . ."). The fact that many of the subparagraphs apply only to actions or obligations of individual debtors, in conjunction with section 523(a)'s introductory "individual debtor" language, renders Congress' intent to provide exceptions to discharge only to individual debtors clear and unambiguous.

B. Congress did not introduce any language in section 1192 that purports to alter or override the clear and unambiguous language of section 523(a) in cases involving a non-individual subchapter V debtor.

In relevant part, section 1192 of the Code states:

> If the plan of the debtor is confirmed under section 1191(b) of this title . . . the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt . . . of the kind specified in section 523(a) of this title.

11 U.S.C. § 1192(2). Although the plain language of section 1192(2) does not discern between individual and non-individual debtors, its cross-reference to section 523(a) limits its application to individual debtors only. Congress's addition of the "of the kind specified in section 523(a) of this title" phrase directs one back to section 523(a)'s preamble and its clear and unambiguous "individual debtor" language. Further, Congress's decision to "include section 1192 in section 523(a) seems superfluous if Congress did not intend to limit the section 523(a) exceptions to

individuals." Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* (2020) (updated 2022), [hereinafter *SBRA Guide*] *available at* https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.

If Congress had intended to expand the application of section 523 to all debtors proceeding under subchapter V, including corporate debtors, it would have done so. *See Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, No. 22-50403-CAG, 2022 WL 16858009, at *4 (Bankr. W.D. Tex. Nov. 10, 2022) ("Congress's choice not to insert this [expansive] language is instructive."). In fact, Congress chose to do just that in section 1141(d). *See* 11 U.S.C. § 1141(d). Section 1141(d)(2) states, "[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," and section 1141(d)(6) states, in relevant part, "the confirmation of a plan does not discharge *a debtor that is a corporation* from any debt." Therefore, there can be no question as to whether Congress knew *how* to make this distinction when it drafted section 1192—it intentionally chose not to do so.

Further, the "cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 364 (2000) is to "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Congress's addition of section 1192 to section 523, and vice versa, forms a closed loop within which each clause and word must be given its proper effect. Reading section 1192 as inclusive of all debtors proceeding under subchapter V removes the effect of section 523(a)'s preamble in direct violation of the aforementioned "cardinal principle" of statutory construction. Therefore, adherence to this well-established canon of statutory construction logically leads to the conclusion that "Congress intended to limit the application of section 523(a) to individual debtors in subchapter V cases." *RTECH*, 635 B.R. 559, 564 (Bankr. D. Idaho 2021); *see also Gaske v. Satellite Rests., Inc. Crabcake Factory USA (In re Satellite*

Rests., Inc. Crabcake Factory USA), 626 B.R. 871, 876 ("Moreover, the reference to section 1192 added to section 523(a) by the SBRA must be given meaning, and the only reasonable meaning is that Congress intended to continue to limit application of the section 523(a) exceptions in a subchapter V case to individuals.").

"When Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup*, 502 U.S. at 419 (citing *Emil v. Hanley*, 318 U.S. 515, 521 (1943)). For that reason, the Court is "reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Id*. The House Report does not indicate that any change in pre-Code practice was intended with regards to non-dischargeability in Subchapter V. *See* H.R. Rep. No. 116-61, at 8 (2019). The Report describes the addition of section 1192 as requiring "the court to grant the debtors a discharge . . . [which] pertains to all debtors as provided under the plan except any debt . . . that is otherwise non-dischargeable." *Id.* The "otherwise non-dischargeable" language can only refer to the exceptions to discharge listed in section 523(a), which unambiguously apply only to individual debtors. It bears worth noting that any changes to existing law must be reported in the House Report, with proposed changes designated with italics.[3] Section 523 is reprinted on pages 34-38 of the Report. While "1192" is italicized in the text of section 523 to indicate a change, the "individual debtor" language is left unaltered—in unitalicized Roman text—indicating that Congress did not intend to enact a change to that part of the statute because of the SBRA. *See id.*

Judge McCartney's dissent, in recognition of the lack of legislative history to support his argument, seeks to liken the subchapter V cramdown discharge provision in section 1192 to the chapter 12 discharge provision in section 1228. *See* R. at 32-33; 11 U.S.C. § 1228. However,

[3] Any changes to existing law made by a proposed bill must be reported in compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives. H.R. Rep. No. 116-61, at 9 (2019).

subchapter V is "sufficiently distinguishable from chapter 12 to warrant different treatment." *RTECH*, 639 B.R. at 568 n.6; *see also United States v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 430 (S.D.N.Y. 2014) ("The discharge provisions of each chapter, read in context, are too attenuated . . . to be read *in pari materia* with one another."). In *GFS Industries*, the bankruptcy court addressed this issue and concluded:

> [B]ecause chapter 12 is only available to a small and specific subset of debtors, chapter 12 cases have unique considerations that are not present in a chapter 11 case. Therefore, the Court is not mandated to extend the holding that chapter 12 corporate debtors are subject to § 523 dischargeability actions into subchapter V notwithstanding the similar language between §§ 1228 and 1192.

GFS, 2022 WL 1658009 at *7.

In *Dewsnup*, the Supreme Court rejected the petitioner's argument that the bankruptcy terms at issue must be afforded the same meaning in two *subsections of the same section* of the Code, understanding that they are not "writing on a clean slate." *Dewsnup*, 502 U.S. at 778. The Court reasoned that granting Dewsnup's argument would have the effect of granting debtors a new remedy without Congress "mentioning the new remedy somewhere in the Code or in the legislative history [which] is implausible and contrary to basic bankruptcy principles." *Id.* at 775. Thus, this court should consider the agreed upon lack of legislative history to support the dissent's argument and instead, defer to the plain language of the relevant statutes provided by Congress.

The Fourth Circuit has held that the addition of section 1192(2) renders *all* subchapter V debtors subject to the exceptions to discharge in section 523. *See, e.g., Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 515 (4th Cir. 2022). In *Cantwell-Cleary*, the court reasoned that any lack of harmony between the language of the two statutory provisions could be corrected by focusing on the more specific provision—section 1192(2), since it only applies in subchapter V cases. *Id.* The sole focus on the language of 1192(2),

however, is misguided. The Fourth Circuit, by prioritizing the "debt" language in section 1192(2) over the "individual debtor" language of section 523(a), renders Congress's intentional choice to add "1192" to the preamble language of section 523(a) superfluous. The change to pre-SBRA practice that the Fourth Circuit's interpretation suggests is a drastic one, not to mention one without any clear underpinnings in the legislative history of subchapter V. The better approach to reconciling any ambiguity between these two provisions is the one taken by the bankruptcy courts.

Further, the Fourth Circuit argues that section 523 should apply to both individual and non-individual debtors in subchapter V for equitable reasons. The *Cantwell-Cleary* court asserts that the removal of the absolute priority rule in subchapter V cramdown proceedings favors debtors, thus, "Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor." *In re Cleary Packaging, LLC*, 36 F.4th at 517. The Fourth Circuit, however, does not provide support from either legislative history or case law to support this assertion and discusses subchapter V's removal of the absolute priority rule in a vacuum. Other identifying features of subchapter V (e.g., the elimination of the unsecured creditors committee and disclosure statements, the 90-day exclusivity period for debtors to file plans, and the ability to stretch out administrative expenses over the life of a chapter 11 plan) are not solely for the debtor's favor but are designed to wholistically "facilitate the efficient and economical administration of the case and prompt confirmation of the plan." *SBRA Guide*, at 89.

Here, the court should, pursuant to well-established canons of statutory interpretation and legislative history, affirm the dismissal of Rigby's adversary proceeding. Permitting Rigby's complaint would essentially effect a significant change in pre-SBRA bankruptcy practice, without any clear direction from Congress to do so.

Instead, Penny Lane, pursuant to section 1191's cross-reference to section 523(a), should receive a complete discharge of its debt as described in section 1192. Penny Lane properly leveraged subchapter V of chapter 11, meeting all the requirements for small business debtors identified in section 1182, to restructure its small business debt, continue to operate and pay its creditors in accordance with a chapter 11 plan. 11 U.S.C. § 1182; *see* R. at 16 n.5. Rigby, through the plan, will receive a pro rata share of the creditors trust that is both significantly greater than she would receive under a liquidation plan, and equal to that of similarly situated creditors.

C. The use of the exceptions to discharge provided in section 523(a) may deprive corporate debtors in subchapter V of a viable opportunity to reorganize and does not comport with the policy goals of chapter 11 of the Bankruptcy Code.

Chapter 11 reorganization seeks to "give[ ] pro rata treatment to similarly situated claims and . . . bind[ ] all parties, notwithstanding the dissent of particular claimants." Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 761 (2005). Plan confirmation in chapter 11—whether debtors elect to proceed under subchapter V or not—requires equal treatment of similarly situated creditors. It also functions to promote reorganization, rather than liquidation, of viable businesses. *See id.*; *See also* H.R. Rep. No. 95-595, at 220 (1977) ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."). Therefore, complete discharge for corporate debtors in subchapter V comports with the policy goals of the Code.

Subjecting small business debtors to the exceptions to discharge in section 523(a) would not only be inconsistent with the statutory interpretation of the applicable provisions but would also violate two important policy goals in chapter 11: (1) the tenet of equality of distribution, *Brubaker*, at 761, and (2) the promotion of reorganization, as opposed to liquidation, of small

businesses. *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying),* 780 F.3d 1070, 1082 (11th Cir. 2015) ("[P]urposes [of the Code] include preserving jobs in the community, [and] allowing the businesses to continue to operate instead of liquidation.").

Most importantly, the complete discharge for subchapter V corporate debtors comports with the basic Bankruptcy tenet of equality of distribution. *See Howard Delivery Serv., Inc, v. Zurich Am. Ins. Co.*, 547 U.S. 651, 667 (quoting *Kothe v. R.C. Taylor Tr.*, 280 U.S. 224, 227 (1930)) ("The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate); *Id.* (quoting *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941)) ("The theme of the Bankruptcy Act is 'equality of distribution' . . .; and if one claimant is preferred over others, the purpose should be clear from the statute."). "Discharge without exceptions is essential for the reorganization of the entity, rather than its liquidation, in accordance with chapter 11's creditor equality principles that require equal treatment of similarly situated creditors." *SBRA Guide*, at 238.

Here, granting Rigby's motion to have her debt be held non-dischargeable would reduce the amount available for all other similarly situated creditors who, in fact, voted in favor of the reorganization plan. *See Howard Delivery*, 547 U.S. at 667 ("Every claim granted priority status reduces the funds available to general unsecured creditors and may diminish the recovery of other claimants qualifying for equal or lesser priorities."). In this sense, depriving subchapter V corporate debtors of a complete discharge may also have the inadvertent effect of punishing creditors who vote in favor of the debtor's proposed plan of reorganization.

Prior to the introduction of subchapter V, most chapter 11 cases were filed by small business debtors. However, these small business debtors were the least likely to reorganize

successfully. *See* H.R. Rep. No. 116-171, at 3 (2019). Even after Congress passed amendments in 2005 to streamline the reorganization process, small businesses struggled with successfully reorganizing under chapter 11. Subchapter V was subsequently enacted by Congress to provide support for small businesses as they attempted to reorganize their financial affairs. *Id.* Small businesses are arguably the lifeblood of society—providing employment for more individuals than large businesses do. *See* H.R. Rep. 116-171, at 2. Recognizing the importance of small businesses to American communities, Congress designed subchapter V to both remove several expensive and overly burdensome chapter 11 features (e.g., creditors' committees, disclosure statements, absolute priority rule), and add some expeditious subchapter V-specific features (e.g., plan confirmation without a consenting creditor, 90-day exclusivity period for the debtor to file a plan) to make reorganization less expensive and more efficient for small business debtors. Permitting creditors in subchapter V to seek exceptions to discharge, therefore, simply does not comport with the policy goals of subchapter V.

Excepting debts from discharge would have the bizarre effect of promoting liquidation over restructuring, since debts held to be non-dischargeable must be paid in full after plan confirmation. If a small business debtor is unable to pay these debts in full, the business would be liquidated, and the creditors would receive less than they would in a chapter 11 plan to the detriment of both the subchapter V debtor and the creditors. Further, "a conclusion that an entity's debt is excepted from an entity's discharge does not mean that it will be paid in full." *SBRA Guide*, at 238. This conclusion is based on the premise that the small business was in fact able to successfully reorganize, which is unlikely in the scenario discussed above. Resorting to liquidation would result in such a creditor receiving its pro rata share of the liquidation proceeds at the back of the

line, behind higher priority creditors including those with secured, administrative and priority claims. *See SBRA Guide*, at 238.

For the foregoing reasons, the court should affirm the Thirteenth Circuit's holding that subchapter V corporate debtors are not subject to the exceptions to discharge in section 523(a).

CONCLUSION

Congress introduced subchapter V into chapter 11 of the Code to provide viable small business debtors with an efficient mechanism to reorganize their financial affairs. Congress also granted the bankruptcy court the constitutional, jurisdictional, and statutory authority to oversee these cases and use its discretion to issue orders that are consistent with the overarching policy goals of chapter 11 of the Code. Affirming the Thirteenth Circuit's decision guards these grants of authority without flouting Congressional intent. For the foregoing reasons, the court should AFFIRM.

APPENDIX

11 U.S.C. § 105. Power of court.

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

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

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

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

- **(1)** shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and
- **(2)** unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—
  - **(A)** sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
  - **(B)** in a case under chapter 11 of this title—
    - **(i)** sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;
    - **(ii)** sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;
    - **(iii)** sets the date by which a party in interest other than a debtor may file a plan;
    - **(iv)** sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;
    - **(v)** fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or
    - **(vi)** provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan

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

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

- **(1)** for a tax or a customs duty—
  - **(A)** of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
  - **(B)** with respect to which a return, or equivalent report or notice, if required—
    - **(i)** was not filed or given; or

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

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

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

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

(B) use of a statement in writing—

(i) that is materially false;

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

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

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

(C)

(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $500 [2] for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 2 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

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

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

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

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

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

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

(5) for a domestic support obligation;

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

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—
  (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
  (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
  (A)
    (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
    (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
  (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

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

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has

condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

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

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

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

(19) that—

(A) is for—

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

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

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

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

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

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

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

pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

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

(c)

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

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

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

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

11 U.S.C. § 1123. Contents of plan.

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

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

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

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

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

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

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

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;
(C) merger or consolidation of the debtor with one or more persons;
(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;
(E) satisfaction or modification of any lien;
(F) cancellation or modification of any indenture or similar instrument;
(G) curing or waiving of any default;
(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;
(I) amendment of the debtor's charter; or
(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

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

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

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

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

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

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

(3) provide for—
(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

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

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

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

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

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

11 U.S.C. § 1192. Discharge.

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

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

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