NO. 22-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2022

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,

ELANOR RIGBY, PETITIONER

v.

PENNY LANE INDUSTRIES, INC. RESPONDENT.

ON WRIT OF CERTIORARI

FROM THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Counsel of Record for Petitioner

TEAM NUMBER 41

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 when such releases would strip third parties of their constitutional right to petition.

II. Does 11 U.S.C. § 1192(2) except a Subchapter V corporate debtor from discharge of debts of the kind specified in 11 U.S.C. § 523(a) when that corporate debtor achieves confirmation of a non-consensual plan through 11 U.S.C. § 1191(b)'s "cramdown" provision.

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OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 21-0803 at reprinted at Record 3. The Bankruptcy Court for the District of Moot decided in favor of Debtor, Penny Lane Industries, Inc. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of Debtor.

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 also restated in full in the Appendix.

The relevant portion of 11 U.S.C. § 105(a) 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, sus 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) provides:

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

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

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

The relevant portion of 11 U.S.C. § 1123(a)(5) provides:

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

The relevant portion of 11 U.S.C. § 1123(b)(6) 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(2) 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

Bad actors and their supporters should not be able to manipulate the system and manufacture an outcome where they proceed without penalty. Penny Lane, Inc. (Debtor) is a manufacturer of plastic, glass, and metal food containers located in Blackbird, Moot. R. at 4. The Debtor is a wholly owned subsidiary of Strawberry Fields. R. at 4–5. Strawberry Fields, a cereal and convenience foods producer, markets its products under several well-known brands sold in supermarkets throughout the county. R. at 5. Petitioner, Eleanor Rigby (Rigby), is a long-time resident of Blackbird, Moot. *Id.*

In 2017, Rigby filed suit against the Debtor and Strawberry Fields asserting a wrongful death claim. *Id.* Rigby alleged that, for many years, the Debtor disposed of pollutants on its property as a cost-saving measure and such pollutants made their way into the Liverpool River, a river found along the rear of the Debtor's property. *Id.* Rigby also alleged both the Debtor's Chief Executive Officer and Strawberry Fields knew of the improper disposal of pollutants. *Id.* Residents filed hundreds of similar lawsuits against the Debtor by residents of Blackbird and surrounding communities. R. at 6. Each of these lawsuits asserted damages related to death or injury caused by exposure to pollutants that had contaminated the local water supply. *Id.* In total, residents of the communities filed nearly 10,000 claims asserting cumulative damages of nearly $400 million. *Id.* Both the Debtor and Strawberry Fields dispute these allegations and claim any waste disposal followed the applicable environmental laws. *Id.* However, there has been no judicial determination on the claims asserted against the Debtor or Strawberry Fields in any forum. *Id.*

Facing these looming lawsuits, on January 11, 2021, the Debtor filed this case under Subchapter V of Chapter 11. *Id.* The Debtor owes less than $2 million to its trade creditors,

making it a qualifying Subchapter V Debtor. *Id.* This proceeding soon split into two separate but related issues.

The Plan

Through over two months of mediation, several stakeholders negotiated a complex settlement framework that was ultimately memorialized in "the Plan." R. at 8. The Plan provides for the establishment of a creditor trust that would be funded with: (a) the Debtor's disposable income for five years, and (b) far more significantly, $100 million to be paid by Strawberry Fields. *Id.* The predicted result is creditors with allowed claims will receive a distribution estimated at around 30-40 cents on the dollar. *Id.*

In exchange for funding a global settlement, Strawberry Fields demanded a broad release from all claims, including both estate claims and third-party direct claims. *Id.* Furthermore, the Plan expressly releases and discharges "any and all claims" that third parties "have asserted or might assert in the future against Strawberry Fields" to the extent such claims are based on or related to the Debtor's pre-petition conduct, its estate, or this Chapter 11 case. *Id.* The Plan release was non-consensual; it bound parties regardless of whether they took part in the bankruptcy case and regardless of whether they voted in favor of, or against the Plan. *Id.* Thus, when the bankruptcy court confirmed the Plan, the parties were precluded from pursuing claims against Strawberry Fields related to the Debtor's pre-petition conduct. R. at 8–9. Rather, their claims were and will be channeled into the creditor's trust. R. at 9.

While over 95 percent of the creditors voted in favor of confirmation, Rigby—not wanting to lose her right to petition—objected. *Id.* The Norwegian Wood Bank (the "Bank") also objected. *Id.* Because the Bank voted against the Plan, the Debtor was unable to satisfy the requirements for confirmation of a consensual plan under § 1191(a). R. at 9, n. 9. Therefore, the Debtor was

forced to seek non-consensual confirmation through Subchapter V's "cramdown" provision in § 1191(b). *Id.* Subsection (b) provides that a plan can be confirmed despite the lack of acceptance by each class of impaired claims if the plan "does not discriminate unfairly and is fair and equitable with respect to each class of claims . . . that is impaired under and has not accepted, the plan." *Id.*

After a four-day confirmation hearing, the bankruptcy court confirmed the Plan and overruled Rigby's plan objection. R. at 10. The court found that there existed no other reasonably conceivable means to achieve the result the Plan carried out; and therefore, the settlements memorialized were fair and reasonable. *Id.* The court also overruled the objection of the bank finding that the Debtor's treatment of the Bank's secured claim followed the requirements of §§ 1129(b)(2)(A) and 1191. *Id.*

The Non-Dischargeability Action

Within weeks of the petition date Rigby brought an adversary proceeding against the Debtor seeking to have her $1 million claim deemed non-dischargeable pursuant to §§ 523(a)(6) and 1192(2). R. at 7. The Debtor filed a motion to dismiss the complaint for failure to state a claim asserting the § 523(a) exceptions were inapplicable to business entities. *Id.* The bankruptcy court ruled in favor of the Debtor and granted the Debtor's motion to dismiss. *Id.* Rigby then filed a timely notice of appeal. *Id.*

Procedural History

Rigby appealed both the bankruptcy court's approval of the Plan and dismissal of her non-dischargeability action. R. at 11. Upon the request of the parties, the disputes were certified for direct appeal to the Thirteenth Circuit per 28 U.S.C. § 158(d). *Id.* Once in front of the Thirteenth Circuit, the Thirteenth Circuit affirmed both decisions of the bankruptcy court. R. at 23. Rigby subsequently filed a writ of certiorari. R. at 2.

STANDARD OF REVIEW

Rigby asks this Court to resolve questions of statutory interpretation. Thus, the questions presented and discussed herein are purely questions of law. Therefore, the appropriate standard of review is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit erred by holding: (1) non-consensual third-party releases in Chapter 11 plans permissible, and (2) that the § 523(a) exceptions to discharge apply only to individual debtors in cases where a non-consensual plan is confirmed under Subchapter V. By allowing bankruptcy judges to authorize non-consensual third-party releases, this Court would be allowing the bankruptcy courts to threaten Due Process and stretch the bankruptcy court's jurisdictional bounds far beyond their limit. Moreover, the Bankruptcy Code does not contain such a colossal grant of authority. Additionally, a natural reading of § 1192(2)'s plain language calls for the application of the discharge exceptions in § 523(a) to both corporate and individual debtors under Subchapter V. This reading of the Bankruptcy Code is not only supported by case law surrounding a similarly drafted section, Chapter 12, but also by Congress's intent behind the enactment of Subchapter V. Therefore, this Court should reverse both the holdings of the Thirteenth Circuit and find in favor of Rigby.

ARGUMENT

I. The United States Court of Appeals for the Thirteenth Circuit Erred by Holding Non-Consensual Third-Party Releases in Chapter 11 Plans Permissible.

The United States Court of Appeals for the Thirteenth Circuit erred by holding non-consensual third-party releases in Chapter 11 plans permissible. Non-consensual third-party releases contravene the Due Process Clause of the Constitution and Bankruptcy Courts lack the jurisdiction to confirm them. The authority to grant such claims cannot be found within the

Bankruptcy Code. In contrast, the Bankruptcy Code expressly denies such authority. Therefore, this Court should reverse the Thirteenth Circuit's decision and hold that non-consensual third-party releases are impermissible.

A. Allowing bankruptcy judges to authorize non-consensual third-party releases threatens Due Process and stretches the Bankruptcy Court's jurisdictional bounds far beyond their limit.

Allowing the release of third-party claims threatens Due Process and violates the jurisdictional boundaries of the bankruptcy courts. Non-consensual third-party releases deprive an individual of a property right—the right to petition for relief—and function as a judgment in favor of the non-debtor. Additionally, bankruptcy courts are Article I courts whose jurisdiction is limited by statute. *Stern v. Marshall*, 564 U.S. 462, 487 (2011). Nowhere has Congress authorized bankruptcy courts to deprive individuals of their right to petition for relief and allow releases of present and future claims against individuals or entities who did not file for bankruptcy relief.

To determine whether there has been a Due Process violation, courts must find whether a person has suffered a deprivation of his or her life, liberty, or property interest without an opportunity to be heard. U.S. Const. Amend. XIV § 1; *see also Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). A property interest exists if a person has a legitimate claim of entitlement to the item or benefit in question. *Roth,* 408 U.S. at 577. A legitimate claim of entitlement is a question of state law and is "defined by existing rules or understandings that stem from an independent source." *Id.* Creditors whose claims are under consideration for release are potentially losing a legitimate claim of entitlement—the right to petition—as defined by state law and the Constitution. *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 723–27 (Bankr. S.D.N.Y. 2019); *see also In re Digital Impact, Inc.*, 223 B.R. 1, 13 n.6 (Bankr. N.D. Okla. 1998) (noting that a third-

party release has "the effect of a judgment–a judgment against the claimant and in favor of the non-debtor, accomplished without due process.").

Affirming plans over the objection of creditors relinquishes their right to have their claims heard. If the plan is confirmed, Rigby will lose her constitutionally protected right to pursue her claim against Strawberry Fields. To protect non-consenting individuals' Due Process right, plans should have an alternative for creditors to either "opt-in" or "opt-out" of the release through their affirmative consent. Creditors who choose to "opt-out" shall not be bound by the releases of the plan, unless they affirmatively "opt-in." Dorothy Coco, *Third Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law*, 88 Fordham L. Rev. 231 (2019).

Additionally, non-consensual third-party releases threaten jurisdictional boundaries. Bankruptcy courts are not Article III courts. They, like administrative courts, exist in a realm of limited authority. *See* 28 U.S.C. § 1334. As such, bankruptcy courts have *in rem* jurisdiction over a debtor's property as well as jurisdiction over "cases and proceedings" that "arise under" the Bankruptcy Code, or that "arise in" or are "related to" bankruptcy cases. *Id.* The claims that Rigby asserts against Strawberry Fields do not fall within the jurisdictional grants provided by Congress. These claims have no impact on the property of the bankruptcy estate. Nor do they "arise in" or are they "related to" the restructuring of the relationship between creditors and the Debtor. *See Patterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. 641, 670 (E.D.V.A. 2022). Much like how a Federal Magistrate Judge cannot hold trial and sentence someone to prison, a Bankruptcy Judge should not be able to approve a non-consensual third-party release that would serve to eliminate Rigby's legitimate claim of entitlement.

Even if this Court finds that Rigby's claim falls within the "related to" jurisdiction, this Court's recent decision in *Stern v. Marshall* prohibits the claim unless the claim is a "core matter." In *Stern*, the Court stated in the absence of consent, a bankruptcy court does not have constitutional authority to make a final decision in a dispute involving a pure state law tort claim when it was not necessarily resolved in deciding a claim against the estate and did not stem from the bankruptcy itself. *Stern,* 564 U.S. at 471–72. Thus, the claim must be a "core matter," or would necessarily be resolved in the claims-allowance process. *Id.*

Under *Stern*, a claim can become core when it "become[s] integral to the restructuring of the debtor-creditor relationship." *Id.* at 497. Rigby's claim against Strawberry Fields is a state law wrongful death claim. This claim does not stem from the bankruptcy proceeding. Instead, Rigby's claim is a pure state law tort claim, asserted against a non-debtor, that should be resolved by an Article III court. Following this Court's decision in *Stern,* a bankruptcy court does not have the authority to release a pure state law tort claim when it has no relation to the restructuring of the relationship between the debtor and its creditors.

B. The Thirteenth Circuit incorrectly held that the Bankruptcy Code grants authority for bankruptcy courts to release third-party non-debtors.

The Thirteenth Circuit incorrectly interpreted the Bankruptcy Code and found that bankruptcy courts have the authority to release third-party non-debtors. The Thirteenth Circuit relied on decisions from the First, Second, Third, Fourth Sixth, Seventh, and Eleventh Circuits to reach its conclusion. However, those circuits cannot agree on where the authority to grant such releases comes from because the Bankruptcy Code is explicit: there is no authority.

1. The Circuit Courts that recognize non-consensual third-party releases do so in a non-uniform and theoretical sense.

The First, Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits have all either left the door open to allowing non-consensual third-party releases, or held that the Bankruptcy Code specifically authorizes them in a Chapter 11 reorganization plan. However, even amongst these circuits, there is confusion and uncertainty as to which provisions of the code allow for such releases—if any such authority exists at all.

The Second and Third Circuits allow bankruptcy courts to release non-consensual third-party claims with limitations. *See Deutche Bank AG v. Metromedia Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 126, 141–43 (2d Cir. 2005) (holding that involuntary releases should only be approved if they form an important part in a reorganization plan, and that they are proper only in "rare cases"); *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000) ("The hallmark of permissible nonconsensual releases [are] fairness, necessity to the reorganization, and specific factual findings to support these conclusions."). The Second Circuit adopted an approach resembling the Third Circuit's approach. *See In re Metromedia Fiber Network Inc.*, 416 F.3d 136. Non-consensual third-party releases are permissible only in "rare cases," with proper consent or under unique circumstances. *Id.* at 142. The court in *Metromedia* recognized that third-party releases, such as the ones at issue in this case, are a "device that lends itself to abuse." *Id*. The court explained that its holding in the case was "specific and limited" and courts in the future have the "obligation to approach the inclusion of nonconsensual third-party releases or injunctions in a plan of reorganization with the utmost care" and must "thoroughly explain the justification for any such inclusion." *Id*.

The Fourth and Eleventh Circuits rely solely on § 105(a) for their source of authority. However, they too proceed with caution. *See Nat'l Heritage Found., Inc. v. Highbourne Found,*

Inc. 760 F.3d 344 (4th Cir. 2014); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying)*, 780 F.3d 1070, 1076–79 (11th Cir. 2015) (permitting releases but cautioning that they "ought to be issued lightly, and should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances."). This approach directly contradicts the approaches taken by the Second and Third Circuits, which noted that § 105(a) alone does not grant statutory authority for the releases. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2004); *In re Metromedia*, 416 F.3d at 136. This contrast in authority further illustrates the confusion over which section of the Code authorizes the releases at issue.

The Sixth Circuit has also concluded that §§ 105(a) and 1123(b)(6) grant bankruptcy courts the authority for such releases. *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 656–58 (6th Cir. 2002); *In re Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993). The Sixth Circuit established a test for when non-consensual releases are authorized. *In re Dow Corning Corp.*, 3 F.3d at 658. The test has seven requirements. First, there must be an identity of interest between the debtor and the third-party benefiting from the release. *Id.* Second, there must be a substantial contribution by the third-party. *Id.* Third, the release must be essential to the reorganization by hinging on the debtor being free from indirect lawsuits against parties who have indemnity or contribution claims against the debtor. *Id.* Fourth, the impacted class must vote overwhelmingly to accept the plan. *Id.* Fifth, the plan has a mechanism for paying all or a substantial portion of the claims in the classes affected by the release. *Id.* Sixth, the plan provides claimants who choose not to settle an opportunity to recover in full. Lastly, the factual findings of the court support its conclusion. *Id*.

While the Seventh Circuit has also concluded that bankruptcy courts have the authority to grant such releases, its method is yet again different. The Seventh Circuit recognized that one way to avoid the issue of non-consensual releases is by getting parties to consent. *In re Specialty Equip. Cos.*, *Inc.*, 3 F.3d at 1047 (stating "courts have found releases that consensual and non-coercive to be in accord with the structures of the Bankruptcy Code.")

This Circuit split is telling. While some Circuits agree that § 105 alone grants the authority, other Circuits are not convinced. Some Circuits point to more in the code, the conjunction of § 105(a) and § 1123(b)(6). However, this struggle to agree on where the authority comes from emphasizes the conclusion—there is no authority to grant these releases within the Bankruptcy Code.

2. The speculative authority to grant non-consensual third-party releases is not supported by the text of §§ 105 and 1123.

The United States Court of Appeals for the Thirteenth Circuit erred by holding the Bankruptcy Code authorizes non-consensual third-party releases. In doing so, the court relied on §§ 1123 and 105. Whether read individually or in conjunction, §§ 105(a), 1123(a)(5), and 1123(b)(6) do not authorize bankruptcy courts to release these types of claims.

Section 105(a) is not a catch-all that creates "residual authority" for bankruptcy courts. Section 105(a) states that a 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). Section 105(a) does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law or constitute a roving commission to do equity." *United States v. Sutton*, 786 F.2d 2305, 1308 (5th Cir. 1986). Rather, the provision acts as a limitation on bankruptcy court's equitable powers, which "must and can only be exercised within the confines of the Bankruptcy

Code." *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 59 (2d Cir. 1992) (quoting *Nw. Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988)).

The text of § 105(a) "suggests that an exercise of § 105 power must be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective." 2 *Collier on Bankruptcy* ¶ 105.01[1] (Richard Levin & Henry J. Sommer eds., 16th ed.). This equitable power granted through § 105(a) "is the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise do the right thing." *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F. 3d 86, 92 (2d Cir. 2003) (emphasis added). Additionally, § 1123 of the Bankruptcy Code does not authorize the release of claims like Rigby's. Section 1123(a)(5) requires that a Chapter 11 plan, "notwithstanding any otherwise applicable nonbankruptcy law, shall provide adequate means for [its] implementation." 11 U.S.C. § 1123(a)(5). Section 1123(a)(5) enumerates various actions that may be taken to implement a plan, such as providing for the debtor to retain or transfer property. *See id.* Section 1123(b)(6) provides that "a plan may . . . include any other provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Thus, whether read in conjunction or in isolation, these provisions of the Bankruptcy Code do not authorize non-consensual third-party releases.

3. Allowing the bankruptcy courts the authority to authorize non-consensual releases of third-party claims runs the risk of creating absurd results.

Allowing the bankruptcy courts the authority to authorize non-consensual releases of third-party claims runs the risk of creating absurd results. It would also allow for debtors acting in bad faith to take advantage of bankruptcy protection without filing for bankruptcy, and therefore would allow certain actors to abuse the system. In recent years, the Sackler family, USA Gymnastics,

the Boy Scouts of America, and Catholic Dioceses have all tried to reap the benefits of bankruptcy protections by trying to obtain discharges without filing for bankruptcy. For example, the Sackler Family—the family many blame for the opioid crisis in America—recently sought the release from any potential liability in exchange for putting $6 billion in a bankruptcy estate plan for Purdue Pharma, the company the family owns. New Hampshire Public Radio, *Patrick Radden Keefe on Opioids and the Sackler* Family, NHPR, at 1:23 (Jan. 18, 2023), https://www.nhpr.org/nh-news/2023-01-18/patrick-radden-keefe-on-opioids-and-the-sackler-family. While the $6 billion seems like a large sum, the opioid crisis is estimated to cost nearly $2 trillion. *Id.* Similar to the opioid crisis, no sum of money can truly restore what the residents of Blackbird have lost. This Court should not, as a matter of public policy, allow bad actors to reap the benefits of the bankruptcy process without filing for bankruptcy.

These releases have become widely used in Chapter 11. Since they have now become a commonplace tool, they have no place under the "exceptional circumstances" requirement for such releases. As stated in *In re Purdue Pharma, L.P.*, "[w]hen every case is unique, none is unique." 635 B.R. 26, 37 (S.D.N.Y. 2021). Even the "rare case" rule is under scrutiny. This Court recently held there is no "rare case" rule in bankruptcy that allows a court to trump the Bankruptcy Code. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 986 (2017). Bankruptcy was designed to aid failing businesses—not restructure businesses so that bad actors who wish to avoid liability for their actions can seek protection afforded to struggling businesses.

C. The Bankruptcy Code expressly states only Debtors are entitled to a bankruptcy discharge.

The Bankruptcy Code expressly states only Debtors are entitled to a bankruptcy discharge. Section 524(e) governs discharges and states that a discharge of a debt of the debtor does not affect the liability of any other entity for such debt. There is one exclusive exception to this provision,

and it is strictly limited to asbestos-related cases. By enacting only one exception, Congress intended to limit the use of non-consensual third-party releases exclusively to asbestos-related cases.

The starting point for resolving bankruptcy disputes is always the language of the Bankruptcy Code itself. *See United States v. Ron Pair Enters.*, 489 U.S. 225, 241 (1989). It is the job of the courts to presume that a legislature means what it says and says what it means. When the words of a statute are unambiguous, then this first canon is also the last and the judiciary's inquiry is complete. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Section 524 of the Bankruptcy Code governs the effects of discharges. Section 524(e) provides, "the 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). Section 524(e) does not provide for the release of third parties from liability, but states that such liability will not be affected by the discharge. *Id.* This explicit and unambiguous language prohibits bankruptcy courts from allowing the release of third-party claims against both individuals and entities in a Chapter 11 plan for reorganization. Non-consensual third-party releases act as a discharge on non-debtors' liability. In essence, non-debtors can obtain the benefits of bankruptcy without submitting themselves through the bankruptcy process.

Congress created one exception to the rule lineated in § 524(e). That exception, in its plain terms, applies only to asbestos cases. *See* 11 U.S.C. § 524(g). Section 524(g) allows a company to resolve its asbestos related liability through the creation of a trust, funded by the debtor and other proper parties, where present and future claims are channeled. 11 U.S.C. § 524(g). The § 524(g) exception is narrowly drawn to provide protection to non-debtors only when the specific requirements of § 524(g)(2)(B) are met.

Congress created this exception in 1994 when it enacted the Bankruptcy Reform Act. This Act added section 524(g) to the Bankruptcy Code. Congress enacted Section 524(g) in response to, and modeled it after, the channeling trust created in the *Manville* cases. *See* Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments,* 69 Am. Bankr. L.J. 487, 498–99 (1995) (describing the Manville Amendments). Congress's creation of explicit authority for bankruptcy courts to issue injunctions for a narrow class of third parties reinforces the conclusion that § 524(g) denies such authority in other, non-asbestos cases. *Resorts Int'l v. Lowenschuss (In re Lowenschuss)*, 67 F.3d at 1401–02.

The Thirteenth Circuit misinterpreted the exception in § 524(g) as "an additional requirement" placed on asbestos-related releases. However, Congress included specific language in § 524(g)(4)(A)(ii) ("Notwithstanding the provisions of section 524(e). . .") that plainly indicates intent for § 524(g) to be an exception to an otherwise applicable rule of law. This explicit language buttresses the belief that Congress was authorizing a type of injunction, specifically for asbestos-related cases, that would be barred by § 524(e). Had Congress intended to allow for releases outside of the asbestos related context, it would have done so.

This Court should adopt the approach taken by the Fifth, Ninth, and Tenth Circuits. These courts have correctly concluded that non-consensual third-party releases are prohibited by the Bankruptcy Code. *See Bank of N.Y. Trust Co. v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 1995); *In re Lowenschuss*, 67 F.3d at 1401–02; *Lansing Diversified Props. II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc)*, 922 F.2d 595, 600 (10th Cir. 1990).

Non-consensual third-party releases violate the Due Process Clause and Bankruptcy Courts do not have jurisdictional authority to grant them. Additionally, the Bankruptcy Code does not

authorize these releases. Rather, the Code expressly prohibits the release of such claims. Therefore, this Court should reverse the Thirteenth Circuit's decision.

II. The United States Court of Appeals for the Thirteenth Circuit Erred in Holding That the § 523(a) Exceptions to Discharge Apply Only to Individual Debtors in Cases Where a Non-Consensual Plan is Confirmed Under Subchapter V.

Rigby should be permitted to pursue a non-dischargeability action against the Debtor under § 523(a)(6) because in Subchapter V under a non-consensual plan corporate debtors do not receive a complete discharge. While § 1141(d) governs discharge in both traditional Chapter 11 cases and Subchapter V cases confirmed under § 1191(a), the Debtor's plan for reorganization was confirmed by the bankruptcy court as a non-consensual plan under § 1191(b). R. at 9, n. 9. Congress enacted Subchapter V in 2019 as part of the Small Business Reorganization Act ("SBRA"). Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.). Having seen a trend in the number of small business debtors who filed under Chapter 11 versus the number of small business debtors who successfully reorganized, Congress intended for Subchapter V to aid small business debtors in successful reorganization. Small Business Reorganization Act of 2019, 116 H. Rpt. 171. ("Not surprisingly, while most chapter 11 business cases are filed by small business debtors, they are often 'the least likely to reorganize successfully.'"). Furthermore, Congress intended to "streamline reorganizations for small business debtors . . . whose debt is not more than $7.5 million[.]" *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 514 (4th Cir. 2022); *see also* 11 U.S.C. § 1182(1).

Subchapter V provides many benefits for eligible debtors. One of these benefits is the elimination of the "absolute priority rule." A rule of judicial construction, the absolute priority rule "provides that a dissenting class of unsecured creditors must be provided in full before any

junior class can receive or retain any property [under a reorganization] plan." *Nw. Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (citation omitted). In 1978, Congress adopted and incorporated the rule in Chapter 11 of the Bankruptcy Code. *Id.* (citing 11 U.S.C. § 1129(b)(2)(B)(ii)). However, Subchapter V departs from this rule and allows for authorization of reorganization plans even where creditors have not consented to the plan. *In re Cleary Packaging, LLC*, 36 F.4th at 514. In a Subchapter V proceeding, if the debtor contributes its "disposable income" for a period of three to five years, the bankruptcy court can confirm a plan, assuming that it is feasible. *See* 11 U.S.C. § 1191.

Additionally, Subchapter V has special rules for discharge. *See* 11 U.S.C. § 1181. If a Subchapter V plan is confirmed consensually, the traditional Chapter 11 discharge provisions govern. 11 U.S.C. § 1191(a). However, when confirmation of a plan is carried out through Subchapter V's "cramdown" provision, the rules of Subchapter V are clear: § 1192, not § 1141(d), governs discharge. 11 U.S.C. § 1181(c); *see also* 11 U.S.C. § 1192. Here, the Debtor used Subchapter V's "cramdown" provision. R. at 3, 9. Because the Debtor used Subchapter V's "cramdown" provision, § 1192(2) specifically dictates that § 523(a)'s discharge exceptions apply. Under these discharge rules, § 1192 does not limit the applicability of the discharge exceptions in § 523(a) to individuals. Instead, the discharge exceptions also apply to a corporate debtor.

The Thirteenth Circuit incorrectly held that § 523(a)'s exceptions to discharge apply only to individual debtors. *See* R. at 15. However, this Court should reverse the Thirteenth Circuit and hold that the discharge exceptions listed in § 523(a) apply to corporate debtors in a Subchapter V proceeding. First, the text and plain language of § 1192 necessitates that the discharge exceptions apply to both individual and corporate debtors. Second, the underlying similarities between Chapter 12 and Subchapter V supports the application of § 523(a) to Subchapter V corporate

debtors. Lastly, the policy and purpose behind Subchapter V's enactment calls for the application of § 523(a)'s exceptions to corporate debtors.

A. The text of § 1192(2) warrants the application of the discharge exceptions in § 523(a) to both corporate and individual debtors under Subchapter V.

The text of § 1192(2) excepts a Subchapter V corporate debtor from discharge of the kinds of debts listed in § 523(a) when a non-consensual plan is confirmed under § 1191(b)'s "cramdown" provision. Both the plain language of § 1191(2) and the rules of statutory construction support this conclusion. Additionally, the Fourth Circuit—the only circuit court to address this issue—held that § 1192(2) provides discharges to Subchapter V corporate debtors, except with respect to those kinds of debts listed in § 523(a). *See In Re Cleary Packaging, Inc.*, 36 F.4th at 514–15. Lastly, the Thirteenth Circuit's holding creates statutory dissonance between §§ 1181(c) and 1141(d)(6). Therefore, this Court should hold § 523(a)'s discharge exceptions are applicable to corporate debtors.

1. The plain language of § 1192(2) provides that debts of the kind specified in § 523(a) except Subchapter V corporate debtors from discharge.

A natural reading of § 1192(2)'s plain language shows that debts of the kind specified in § 523(a) are excepted from discharge under Subchapter V cases for individual *and* corporate debtors. When conducting a statutory interpretation analysis, the starting point is always the text of the statute. *United States v. Ron Pair Enterp., Inc.,* 489 U.S. 235, 241 (1989) ("[T]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself."). When "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Id.* (quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917)). The language of § 1192(2) is plain, the relevant part of which 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 . . ., the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title . . . except any debt—
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> ***
>
> (2) of the kind specified in section 523(a) of this title.

11 U.S.C. § 1192(2).

Unlike § 1141(d)(2), which explicitly limits the applicability of the discharge exceptions to individuals, the language of § 1192(2) does not provide for any such limitation. *See* 11 U.S.C. § 1141(d)(2) ("A discharge under this chapter does not discharge a debtor who is an *individual* from any debt excepted from discharge under § 523 of this title." (emphasis added)). Instead, the only limitation is debts of the "kind." The ordinary meaning of "kind" is category. *See Kind*, Merriam-Webster, https://www.merriam-webster.com/dictionary/kind (last visited Jan. 16, 2022) ("[A] group united by common traits or interests: CATEGORY."). In its subsections, § 523(a) specifies twenty-one *categories* of debt that are excepted from discharge with no mention of *who* is excepted from discharge. *See* 11 U.S.C. § 523(a)(1)–(19). Thus, § 1192(2) excepts from discharge debts "of the kind specified in section 523(a)[,]" regardless of the type of debtor.

The only circuit court of appeals to have addressed the specific issue at hand is the Fourth Circuit. *In re Cleary Packaging, LLC*, 36 F.4th at 517 (holding that § 1192(2) "provides discharges to small business debtors, *whether they are individuals or corporations*, except with respect to the 21 kinds of debt listed in § 523(a)."). In reaching its conclusion, the Fourth Circuit in *Cleary* supplied a thorough textual analysis of § 1192(2). *See id.* at 514–16. First, the court noted that § 1192(2) "provides for granting debtors a discharge of all debts, subject to stated exceptions." *Id.* at 514. Under Subchapter V, "debtor" is defined as "a person engaged in commercial or business activities that has debt of not more than $7.5 million." *Id.* (quoting 11 U.S.C. § 1182(1)). "Person" includes "both individuals and corporations[.]" *Id.* (citing 11 U.S.C. § 101(9)(A)). Thus, the court

in *Cleary* concluded that "§ 1192(2) provides for the discharge of debts for both individual and corporate debtors." *Id.* at 514–15. However, because § 523(a)'s introductory language "limits the discharge exceptions to individual debtors[,]" the court was left to decide whether the discharge exceptions apply to both individual and corporate debtors. *Id.* at 515.

Addressing the remaining issue, the court focused on two things: § 1192(2) as, "the provision specifically governing discharges in a Subchapter V proceeding and the scope of § 1192(2)'s incorporation of § 523(a)." *Id.* Again, § 1192(2) "excepts from discharge 'any debt . . . of the kind specified in section 523(a)." *Id.* (citation omitted). The court found § 1192(2)'s use of the word "debt" to be decisive, "as it does not lend itself to encompass the 'kind' of debtors discussed in the language of § 523(a)." *Id.* Furthermore, the court noted that the phrase "of the kind" within the statute modifies "debt," and that "combination of the terms . . . indicates that Congress intended to reference only the list of non-dischargeable debts found in § 523(a)." *Id.* Thus, while § 523(a) does provide that discharges under various sections do not "discharge an individual debtor" from any debt of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any kind of *debtor* addressed by § 523(a). *Id.* Instead, § 1192(2) refers to a kind of *debt* listed in § 523(a). *Id.* Subsequently, the Fourth Circuit found that both individual and corporate debtors are "subject to the 21 kinds of debt listed in § 523(a)." *Id.* Therefore, this Court should adopt the Fourth Circuit's reasoning and hold that under Subchapter V, corporate debtors are subject to the exceptions to discharge listed in § 523(a).

Finally, any tension between §§ 1192(2) and 523(a) can be resolved using the general-specific canon of statutory interpretation. This canon is an interpretive tool used by this Court and others. According to the general-specific canon, statutory provisions are to govern over general provisions. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 647 (2012) ("[I]t

is a commonplace of statutory construction that the specific governs the general. That is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." (citations and internal quotations omitted)). Here, § 1192 is the more specific statutory provision because it applies only in subchapter V cases, whereas § 523(a) applies to most bankruptcy cases. *In re Cleary Packaging, LLC*, 36 F.4th at 513 ("[W]hile § 523(a) references numerous discharge provisions of the Bankruptcy Code, § 1192(2) is the more specific, addressing only Subchapter V discharges."). Hence, this Court should give the more specific provision, § 1192, precedent.

2. The Thirteenth Circuit erroneously relied on incorrect interpretations of §§ 1192 and 523(a).

The Thirteenth Circuit declined to follow the Fourth Circuit's reasoning in favor of other courts' incorrect interpretations. *See* R. at 18. Some courts have found § 523(a)'s exceptions applicable to only individual debtors in a Subchapter V case. *See e.g., Gaske v. Satellite Rest., Inc. v. Crabcake Factory USA (In re Satellite Rest., Inc.)*, 626 B.R. 871 (Bankr. D. Md. 2021); *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC (In re GFS Indus., LLC),* 2022 WL 16858009 (Bankr. W.D. Tex. Nov. 10, 2022); *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging LLC),* 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.),* 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022). Relying on those decisions, the Thirteenth Circuit inferred that "Section 1192(2)'s exception to discharge for debts 'of the kind specified in section 523(a)' applies only to individual debtors, 'because section 1192 is specifically referenced in the introductory language of section 523(a).'" R. at 30.

The majority's reliance on these cases is misplaced and the analysis that follows is problematic. In 2021, a bankruptcy court in Maryland addressed the issue presented as one of first

impression. *See In re Satellite Rest., Inc.,* 626 B.R. at 871. There, the *Satellite* court held "that the discharge exceptions in Section 523(a) apply only to individual Subchapter V debtors." *Id.* at 872. The court's reasoning focused on the "plain language of Section 523(a)[,]" arguing that § 523(a)'s reference to § 1192 "must be given meaning[.]" *Id.* at 876. Furthermore, the court stated, "[w]hen giving effect to every word of the statute, the plain language of Section 523(a) is unequivocal and confirms that the exceptions to a debtor's discharge, including a discharge under Section 1192, apply only to an individual." *Id.* The *Satellite* court tried to give "meaning" to every word within §§ 1192(2) and 523(a). However, the court's analysis disregards § 1181(c). "Although the result may be salutary, the problem with the analysis is that it overlooks section 1181(c) which in effect provides that § 1192 controls the discharge in subchapter V cases where the plan is a non-consensual plan confirmed under § 1191(b)." 8 *Collier on Bankruptcy* ¶ 1192.02 (Richard Levin & Henry J. Sommer eds., 16th ed.) (discussing the flaws in the *Satellite* court's analysis). Section 1192 says debts of the "kind specified in" § 523(a) are excepted from discharge. Furthermore, the statute "does not say the exceptions only apply to certain debtors," such as individuals. *Id.*

Not only does the single-lensed focus on § 523(a)'s preamble disregard § 1181(c), but the result that follows is contradictory to the traditional Chapter 11 discharge provision. Unlike § 1192, § 1141(d) distinguishes the scope of discharge based on the type of debtor: individual or corporate. *See* 11 U.S.C. § 1141(d)(2) ("A discharge under this chapter does not discharge a debtor who is an individual from any debt except from discharge under section 523 of this title."); *see also* 11 U.S.C. § 1141(d)(6)(A) ("[T]he confirmation of a plan does not discharge a debtor that is a corporation from any debt . . . of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)[.]").

As said by Judge McCartney in his dissenting opinion, "[i]f Congress intended to limit the scope of Section 1192 to individual debtors, one would think it would have stated as much in Section 1192 itself, as it did in the traditional Chapter 11 discharge section, Section 1141." R. at 31; *see also In re Cleary Packaging, LLC*, 36 F.4th at 517 ("It is readily apparent from a review of different Bankruptcy Code chapters that Congress conscientiously defined and distinguished the kinds of debtors covered by each provision [, and] Congress purposefully addressed both individual and corporate debtors when defining the right of discharge in Subchapter V proceedings.").

Furthermore, the rationale that the limitation on discharge exceptions to individual debtors under Subchapter V comes from § 523(a)'s reference to § 1192 in its preamble lacks merit when considering § 1141(d)(6)'s explicit reference to corporate debtors. Section 523(a)'s preamble also includes a reference to § 1141, stating that "[a] discharge under section . . . 1141 . . . does not discharge an individual debtor from any debt[.]" 11 U.S.C. § 523(a). However, under § 1141(d)(6), a traditional Chapter 11 discharge does not discharge a *corporate* debtor from debt "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed" to certain types of creditors. 11 U.S.C. § 1141(d)(6). Thus, if § 523(a)'s reference to § 1192 and individual debtors is what limits the discharge exceptions to individual debtors only, then the same rationale would apply to § 1141. However, such an outcome does not harmonize with § 1141(d)(6)'s explicit reference to corporate debtors and, consequently, creates absurd results. *See Nixon v. Mo. Mun. League*, 541 U.S. 125, 138 (2004) (explaining that statutes should not be construed in a way that would lead to absurd or futile results). Therefore, the best interpretation of §§ 1192(2) and 523(a) is that the discharge exceptions apply to both individual and corporate debtors.

B. This Court should read Subchapter V similarly to Chapter 12 of the Bankruptcy Code and hold the discharge exceptions applicable to corporate debtors.

Due to its similarity to Chapter 12 of the Bankruptcy Code, the discharge exceptions should apply to corporate debtors under Subchapter V. Decisively, [s]everal aspects of Subchapter V are premised on the provisions of chapter 12 of the Code for family farmers and fisherman[.]" *In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020). The language of Subchapter V's "cramdown" discharge provision seems to mirror Chapter 12's discharge provision. *Compare* 11 U.S.C. § 1192(2) *with* 11 U.S.C. § 1228(a)(2); *see also Hall v. United States,* 566 U.S. 506, 519 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning."). Additionally, "Congress is presumed to be aware of judicial interpretations of a statute." *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 524 (1985); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

Chapter 12 addresses the scope of discharge in § 1228, where in relevant part, it provides that "the court shall grant the debtor a discharge of all debts provided for by the plan . . . except any debt . . . of a kind specified in section 523(a) of this title." 11 U.S.C. § 1228(a). As noted by the Fourth Circuit in *Cleary*, the "language in Chapter 12 is virtually identical to the language included in § 1192(2)." *In re Cleary Packaging, LLC*, 36 F.4th at 516. There is only one inconsequential difference, § 1228(a) refers to "debt of *a* kind specified," whereas § 1192(2) refers to "debt of *the* kind specified." *Id.* (emphasis added). The case law interpreting § 1228 has long recognized that a Chapter 12 discharge does not include debts of the kind specified in § 523(a)'s exceptions, regardless of whether the debtor is an individual or a corporation. Furthermore, these

cases existed at the time of Subchapter V's enactment in 2019. *See e.g., New Venture P'ship. v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995); *Sw. Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Farms, Inc.),* 2009 Bankr. LEXIS 1396 (Bankr. M.D. Ga. 2009).

In *JRB Consol.*, the Texas bankruptcy court highlighted that § 1228(a), has a specific provision "which says 'the debtor' gets a discharge 'except' for debts 'of the kind' specified in § 523(a)." *In re JRB Consol., Inc.,* 188 B.R. at 374. It further emphasized that Chapter 12 does not make a distinction for "corporate or partnership debtors," nor does it have a specific separate section that refers to individual debtors. *Id.* Additionally, the court noted that the language of § 1228(a) is broader than § 523(a), "in that its language is inclusive of all debtors—individuals, partnerships, and corporations." *Id.* Thus, because § 1228(a) "uses the term debtor without restriction, has its own definition of debtor for all purposes in all sections of Chapter 12 and . . . [because] the term "of a kind" does not incorporate the limiting definition found in the introductory paragraph of § 523(a) [,]" the court in *JRB Consol.* held that *any* type of Chapter 12 debtor could be excepted from discharge under § 523(a). *Id.*

In *Breezy Ridge*, the debtor also made an argument similar to the one presented by the Debtor in this case. *See In re Breezy Ridge Farms, Inc.*, 2009 Bankr. LEXIS 1396, at *2. There, the debtor argued that § 523(a) did not apply to corporate debtors and in doing so attempted to rely on the introductory language of § 523(a). *Id*. However, when the court in *Breezy Ridge* looked at the language of § 1228, it found the two statutes can be harmonized. *Id.* at *6. The court determined even though § 523(a) "applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals." *Id.* Meaning, "it is appropriate to rely on § 523(a) to determine whether a debt is included in the

discharge, even when the debtor is a *corporation*." *Id.* (emphasis added). Furthermore, the court in *Breezy Ridge* recognized that were §§ 1228 and 523(a) unable to be harmonized, then "§ 1228 would control because it is more specific . . . than § 523(a)." *Id.*

The language of § 1192(2) and § 1228(a)(2) is virtually identical, and the decisions interpreting § 1228 were decided at the time of Subchapter V's enactment. Thus, Congress is presumed to have known of those decisions. Consequently, using the same reasoning, this Court should find that § 523(a)'s discharge exceptions apply to Subchapter V corporate debtors per § 1192(2).

C. The purpose and policy behind Subchapter V's enactment further support holding the discharge exceptions apply to corporate debtors.

This Court should treat individual and corporate debtors in a Subchapter V case identically following Subchapter V's purpose. Congress enacted Subchapter V as part of the SBRA of 2019 "with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses." *In re Cleary Packaging, LLC*, 36 F.4th at 517. Ultimately, "[t]o make a distinction between individuals and corporations would not only undermine [the] balance but would also . . . create preserve incentives." *Id.*

1. Given Subchapter V's elimination of the absolute priority rule, applying the discharge exceptions to corporate debtors in a Subchapter V case is the most fair and equitable choice.

Under Subchapter V, § 1191 governs confirmation of the plan of reorganization. *See* 11 U.S.C. § 1191. Plans confirmed under § 1191(a) have satisfied the requirements in § 1129(a) for confirmation of a consensual plan. 11 U.S.C. § 1191(a). Specifically, one requirement is that "each class of claims or interests . . . has accepted the plan." 11 U.S.C. § 1129(a)(8). However, if each class of claims or interests does not accept the plan, a debtor may seek non-consensual confirmation of a plan by using Subchapter V's "cramdown" provision. *See* 11 U.S.C. § 1191(b).

Under this subsection of § 1191, the court shall confirm a plan without satisfaction of specific requirements in § 1129(a), "if the plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims or interests that is impaired under and has not accepted the plan." 11 U.S.C. § 1191(b).

Rigby's interpretation of § 1192(2) yields the most "fair and equitable" result in Subchapter V cases where plans are confirmed through the "cramdown" provision. Under Subchapter V the "stakeholders in the bankruptcy estate are treated differently than they would be in traditional Chapter 11 proceedings under the absolute priority rule." *In re Cleary Packaging, LLC*, 36 F.4th at 517. In traditional Chapter 11 proceedings, corporate debtors must pay all debts in full or subject their equity interests to new shareholders. *See* 11 U.S.C. § 1129(b)(2)(B)(ii). Under this principle, the general rule and purpose for broad discharge makes sense. *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018) (explaining that the discharge exceptions align with the basic bankruptcy law policy to afford relief only to the "honest but unfortunate debtor"). If the corporate debtor in a traditional Chapter 11 proceeding has paid its debt in full; discharge is unnecessary.

In contrast, under Subchapter V, creditors are not required to be paid in full for the corporate debtor to keep its ownership interests. *See In re Cleary Packaging, LLC,* 36 F.4th at 517 ("Under a Subchapter V plan, owners of a debtor can retain ownership interests to continue conducting the reorganization at the expense of and over the objection of creditors."). While this elimination of the absolute priority rule is beneficial to debtors, creditors such as Rigby are afforded fewer tools to challenge the confirmation of a plan. Moreover, unlike plans confirmed under § 1191(a), Subchapter V plans confirmed under § 1191(b) and Chapter 12 plans confirmed under § 1225 may be confirmed without the high voting requirements of § 1129(a)(8). 8 *Collier*

on Bankruptcy ¶ 1192.02 (Richard Levin & Henry J. Sommer eds., 16th ed.). Thus, creditors with the kind of claims described by § 523(a) have much less control over how their claims are treated within plans for reorganization under both Chapter 12 and Subchapter V, § 1191(b). *Id.*

Additionally, a qualifying corporate debtor under Subchapter V can choose to file for reorganization under either Subchapter V or traditional Chapter 11. It is reasonable for a Subchapter V debtor, whether individual or corporate, to choose to file under Subchapter V because of the ability to confirm a plan of reorganization over the objection of a dissenting creditor. However, it would be inequitable under Subchapter V to allow existing equity-holders to keep their equity interests, pay creditors pennies on the dollar, and allow the corporate debtor to discharge debts for claims of bad acts. As the Fourth Circuit stated in *Cleary*, "[g]iven the elimination of the absolute priority rule, 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. To keep the balance, a Subchapter V corporate debtor should not be able to discharge § 532(a) debts because, a qualifying corporate debtor may choose to reorganize under Subchapter V and have a plan confirmed over creditor objections.

2. The Thirteenth Circuit's interpretation of § 1192(2) will wrongly incentivize corporate debtors to pursue non-consensual plans.

Interpretating § 1192(2) in a way that incentivizes a Subchapter V corporate debtor to seek a consensual plan confirmation aligns with the purpose behind Subchapter V's enactment. *See* U.S. Dep't of Justice, Executive Office for U.S. Trustees, *Handbook for Small Business Chapter 11 Subchapter V Trustees* 1-1 (2020) ("The legislative purpose of the SBRA was to provide a fast track for small businesses to confirm a consensual plan with the assistance of a private trustee, a subchapter V trustee."); *see also* 11 U.S.C. § 1183(b)(7) (explaining that one of the duties of a

Subchapter V trustee is to "facilitate the development of a consensual plan of reorganization"). The Thirteenth Circuit's interpretation of § 1192(2) is antithetical to this purpose and goal, as it creates an incentive for corporate debtors to pursue non-consensual plans under § 1191(b).

In a Subchapter V case, if a court confirms a consensual plan under § 1191(a), then a corporate debtor receives a traditional Chapter 11 discharge, per § 1141. *See* 11 U.S.C. § 1191; 11 U.S.C. § 1181. Meaning, the corporate debtor's discharge is subject to § 1141(d)(6), which provides certain exceptions to that debtor's discharge. *See* 11 U.S.C. § 1141(d)(6). Specifically, § 1141(d)(6)(A) prevents corporate debtors from discharging debts owed to a domestic governmental unit that arise under the False Claims Act. 11 U.S.C. § 1141(d)(6)(A); *see also* 11 U.S.C. § 523(a)(2)(A)–(B). Additionally, under § 1141(d)(6) a corporate debtor is excepted from discharge any debt "for a tax or customs duty" in which the debtor "made a fraudulent return" or "willfully attempted . . . to evade or to defeat such tax or such customs duty." 11 U.S.C. § 1141(d)(6)(B).

In contrast, under a non-consensually confirmed plan, § 1141(d) does not govern discharge. Section 1181 makes clear that if a plan is confirmed per § 1191(b), then "section 1141(d) of this title shall not apply, except as provided in Section 1192 of this title." 11 U.S.C. § 1181(c). Under the Thirteenth Circuit's holding, if a court confirms a non-consensual plan under § 1191(b), then the corporate debtor's dischargeability is much broader than it would be under a consensual plan. This is because under the Thirteenth Circuit's interpretation of § 1192, none of the discharge exceptions in § 523(a) would apply to corporate debtors. *See* R. at 15.

The result of the Thirteenth Circuit's interpretation is that a Subchapter V corporate debtor with debts that fall within the scope of § 1141(d)(6) would be incentivized to seek confirmation of a non-consensual plan. Were a corporate debtor to have a consensual plan confirmed, the debtor

would not be able to discharge its debts per § 1141(d)(6). However, if the plan was confirmed under Subchapter V's cramdown provision the corporate debtor would be able to have those debts discharged.. Given Congress enacted Subchapter V to encourage debtors to confirm consensual plans, such an absurd result cannot be allowed. Conversely, under Rigby's interpretation of § 1192(2), confirmation of a consensual plan allows for the corporate debtor to discharge any debt, except for the few listed in § 1141(d)(6), whereas confirmation of a non-consensual plan excepts from discharge all debts listed in subsection of § 523(a). This result encourages corporate debtors to seek confirmation of a consensual plan, which comports with the purpose of Subchapter V's enactment.

his Court should reverse the decision of the Thirteenth Circuit. The plain language of § 1192(2) requires that the debts of both individual and corporate debtors be excepted from discharge under § 523(a). This interpretation is further supported when the statute is read with Chapter 12 and its case law. Moreover, the purpose and policy behind Subchapter V's enactment further support holding the discharge exceptions apply to corporate debtors.

CONCLUSION

For these reasons we respectfully ask this Court to reverse the decision of the Thirteenth Circuit and find in favor of Rigby.

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.

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

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

(1) for a tax or a customs duty—

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

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

(i) was not filed or given; or

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

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

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

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

(B) use of a statement in writing—

(i) that is materially false;

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

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

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

(C)

(i) for purposes of subparagraph (A)—

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

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

(ii) for purposes of this subparagraph—

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

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

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

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

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

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

(5) for a domestic support obligation;

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

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

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

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

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

(A)

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

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

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

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

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

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

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

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

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

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

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

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

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

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

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

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

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

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

(19) that—

(A) is for—

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

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

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

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

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

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

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

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

(c)

> **(1)** Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.
>
> **(2)** Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

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

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

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11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title—

> **(1)** voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)

(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)

(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1192, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)

(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1192, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—

(1) inform the debtor—

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of—

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(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.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)

(1)

(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)

(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)

(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A) (ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A) (ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)

(A)

(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection [enacted Oct. 22, 1994].

(h) Application to existing injunctions. For purposes of subsection (g)—

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)

(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be—

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements—

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement."

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as—

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is

asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following—

(i) by making the statement: "Your first payment in the amount of $__ is due on __ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held."

(J) [omitted]

(l) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)

(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed

debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

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11 U.S.C. § 1123. Contents of Plan

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

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

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

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

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

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

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

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

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

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

(E) satisfaction or modification of any lien;

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

(G) curing or waiving of any default;

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

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

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

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

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

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

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

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

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

(3) provide for—

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

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

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

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

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

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

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

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11 U.S.C. § 1192. Discharge

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

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

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