**No. 22-0909**

IN THE

# Supreme Court of the United States

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,
ELEANOR RIGBY, PETITIONER

v.

PENNY LANE INDUSTRIES, INC., RESPONDENT

**On Writ of Certiorari to**
**the United States Court of Appeals**
**for the Thirteenth Circuit**

**BRIEF FOR PETITIONER**

45P
*Counsel for Petitioner*

# Questions Presented

1. Whether a bankruptcy court has the authority to approve non-consensual releases of direct claims held by third parties against non-debtor affiliates as part a chapter 11 plan of reorganization.

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

# Table of Contents

## TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES



FEDERAL COURT OF APPEALS CASES

BANKRUPTCY COURT CASES

STATUTES



OTHER AUTHORITIES

## OPINIONS BELOW

The Thirteenth circuit Court of Appeals' decision is available at No. 21-0803 and reprinted at Record 3. The bankruptcy court decided in favor Debtor, Penny Lane Industries, Inc.'s, favor. 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

**11 U.S.C § 523**

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

**(1)**for a tax or a customs duty—

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

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

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

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

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

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

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

**(B)**use of a statement in writing—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(A)**

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

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

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

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

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

> **(A)** a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or
> **(B)** a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

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

**(19)**that—

**(A)**is for—

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

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

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

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

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

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

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

**11 U.S.C. § 524(e)**

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

**11 U.S.C. § 524(g)(2)**

**(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.

**11 U.S.C. § 1192**

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.

## STATEMENT OF THE CASE

This appeal arises from the bankruptcy court's exceeding its statutory authority in approving Debtor's chapter 11 plan containing non-consensual releases of third-party claims against non-debtor affiliates and from its improper exclusion of a subchapter V corporate debtor from the scope of the nondischargeability provisions contained in section 523. The court's decisions jeopardize the Bankruptcy Code's integrity by providing a windfall benefiting a bad actor debtor and its affiliates at the expense of individual victims harmed by those parties' bad acts.

### I. FACTUAL HISTORY

Eleanor Rigby has resided in Blackbird, Moot, since 1972. R. at 5. Ms. Rigby shared her hometown with Penny Lane Industries ("Debtor"), a manufacturer of plastic, glass, and metal food containers based in Blackbird. *Id.* at 3–4. Ms. Rigby and other residents of Blackbird and its surrounding communities had a tenuous relationship with the manufacturer. *Id.* at 5–6. They sat by as Debtor, perhaps in a cost-cutting effort, knowingly and wrongfully disposed of industrial chemicals and pollutants at its facility. *Id.* at 5.

Those pollutants flowed into the community's sources of drinking water, including the Liverpool River. *Id.* Indeed, from 2013 through 2017, the United States Environmental Protection Agency and the Centers for Disease Control and Prevention determined that local residents were drinking and bathing in water contaminated with toxins at 250 to 3,000 times the permitted level. *Id.* Perhaps unsurprisingly, given the linkage between exposure to such toxins and sickness, congenital disabilities, and death, Ms. Rigby's tied tragically and prematurely at the age of four. *Id.*

Seeking justice for her deceased daughter, Ms. Rigby filed suit against Debtor in 2017. *Id.* Ms. Rigby specifically asserted that her daughter died of leukemia caused by exposure to pollutants dumped by the Debtor. *Id.* Ms. Rigby further asserted that Debtor's then Chief Executive Officer, Maxwell Hammer ("Hammer"), from at least 2014 that Debtor was disposing of its industrial waste in such a way as to contaminate the local water supply and cause serious harm to local residents. *Id.* Additionally, Ms. Rigby asserted claims against Strawberry Fields Foods, Inc. ("Strawberry Fields), the Debtor's sole owner and corporate parent, because it knew or should have known about Debtor's reckless and harmful misconduct. *Id.* at 4–5, 6.

Other members of the community appeared to agree with Ms. Rigby's assertions. Following Ms. Rigby's lead, hundreds of other members of the community filed lawsuits against Debtor, all arguing that Debtor caused injury by improperly dumping hazardous waste from its facility. *Id.* at 6. In total, there are approximately 10,000 claims of this type asserting cumulative damages approaching $400 million. *Id.*

**A. Penny Lane Files for Bankruptcy**

Although Debtor's business debts were minimal, it filed a subchapter V chapter 11 bankruptcy in January 2021. *Id.* In contrast to the nearly $400 million in disputed, unliquidated tort claims, that is, Debtor owes less than $2 million to trade creditors. *Id.* Ms. Rigby filed an unsecured claim against the Debtor's estate for $1 million. *Id.* Other similarly situated victims of Debtor's alleged misconduct filed similar claims of varying amounts.

Following Debtor's bankruptcy petition, two disputes arose between Ms. Rigby and Debtor. The first involves Ms. Rigby's adversary proceeding seeking to have her $1 million claim deemed non-dischargeable pursuant to section 523(a)(6). *Id.* at 7. The second broadly involves an objection to confirmation on the grounds that Debtor's plan impermissibly sought

to release and discharge future claims against non-debtor third parties, most notably Strawberry Fields. *Id.* at 8.

**B. Procedural History**

The bankruptcy court granted Debtor's motion to dismiss Ms. Rigby's nondischargeability action pursuant to the Federal Rule of Civil Procedure 12(b)(6). *Id.* at 7. The bankruptcy court likewise overruled the two objections to confirmation and confirmed Debtor's chapter 11 plan. *Id.* at 11.

Before confirming the plan, the bankruptcy court conceded that non-consensual releases such as those granted to Strawberry Fields are permitted only in extreme cases. *Id.* at 10. The court concluded that this case met that standard, noting the complex nature of the case and the size of Strawberry Fields' monetary contribution. *Id.* The bankruptcy court also justified its conclusion by finding that "there existed no other reasonably conceivable means to achieve the result accomplished by the plan" without Strawberry Fields' contribution and the release it received in exchange for it. *Id.*

Ms. Rigby timely appealed both the dismissal of her nondischargeability and the plan confirmation to the Thirteenth Circuit Court of Appeals. *Id.* The appellate court rejected each of Ms. Rigby's arguments. *Id*. at 12–23.

## II. STANDARD OF REVIEW

The parties do not dispute the facts at issue here. Rather, the issues presented involve the bankruptcy court's conclusions of law and statutory constructions. Accordingly, this Court's review is *de novo*. *See, e.g., Texas v. Soileau (In re Soileau),* 488 F.3d 302, 305 (5th Cir. 2007). Moreover, under a *de novo* standard, this Court may decide issues if it were the original trial

court. *See, e.g.*, *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127, (6th Cir. 1996) (quotation omitted).

## III. SUMMARY OF THE ARGUMENT

The bankruptcy court erred in confirming Debtor's plan and granting Debtor's 12(b)(6) motion to dismiss Ms. Rigby's nondischargeability action. First, the bankruptcy court misinterpreted the language of the Bankruptcy Code to come to the flawed conclusion that it permits nonconsensual releases for non-debtor third parties. It improperly invoked its residual authority pursuant to 11 U.S.C. §§ 1123(a)(5) and 105(a) to ignore the unambiguous language forbidding third-party releases contained in section 524(e). Beyond that, the bankruptcy court myopically relied on equitable considerations favoring efficiency and flexibility for the debtor, ignoring the Bankruptcy Code's overarching role of *balancing* the creditor-debtor relationship, not tipping the scales in the debtor's favor. Moreover, the bankruptcy court's interpretation resulted in a violation of Ms. Rigby's due process rights.

Second, the bankruptcy court engaged in a similarly flawed reading of section 523(a) in dismissing Ms. Rigby's nondischargeability action. There are three justifications for extending the nondischargeability provisions contained in that section. First, a plain language reading of section 1192(2) supports the conclusion that corporate subchapter V debtors, in addition to individual debtors, should be eligible for exceptions to discharge for conduct outlined in section 523. Second, because subchapter V shares many similarities with chapter 12, the understanding of nondischargeability in chapter 12 should be extended to subchapter V. Finally, equitable considerations weigh in favor of exceptions to discharge where, as here, a debtor engages in fatally reprehensible conduct such that it should be denied the benefits of a bankruptcy discharge.

## IV. ARGUMENT

This Court should overrule the Thirteenth Circuit's decisions because it provides a windfall to a debtor who engaged in bad acts *and* its affiliates in contravention of both the spirit and language of the Bankruptcy Code.

### A. The lower courts erred in confirming Debtor's plan despite its inclusion of non-consensual third-party releases of claims against Strawberry Fields.

The lower courts erred in allowing Debtor to confirm a plan containing non-consensual third-party releases for three reasons: (1) the language of the bankruptcy code prohibits it; (2) even if the bankruptcy code did permit non-consensual third-party releases, the circumstances, in this case, were not sufficiently "unusual" to justify it; and (3) the bankruptcy code does not extend jurisdiction over disputes such as these to the bankruptcy court.

#### *1. The language of the bankruptcy code does not permit third-party releases.*

At its core, the bankruptcy code regulates "the relations between an insolvent . . . debtor, and his creditors, extending to his and their relief." *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513–14 (1938). To effectively do so, the Constitution vested in Congress the power to "adjust[] a failing debtor's obligations" in "cases where the law causes to be distributed, the property of the debtor among his creditors." *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982) (internal quotations omitted).

The purpose of such a system is twofold: to fairly and equitably distribute a debtor's property to its creditors and to give debtors a fresh start. *See Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). To obtain relief under this system, a debtor incurs numerous obligations. It must disclose its assets, liabilities, and the state of its financial affairs generally. 11 U.S.C. § 521(a). Perhaps most importantly, it must satisfy its creditors' claims with those assets. As thanks for submitting to these rigorous and sometimes painful procedures, an honest debtor is entitled to a

discharge. *See Id.* § 523. That discharge is a fundamental adjustment in the creditor-debtor relationship that "releases a debtor from personal liability with respect to any discharged debt by voiding any past or future judgments on the debt." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). Crucially, for a debtor, the discharge enjoins "creditors from attempting to collect or to recover the debt." *Id.*

To effectuate such an adjustment in the creditor-debtor relationship, the Code contains various provisions limiting the effects of discharge on third parties. Save for section 524(g), which specifically and exclusively applies to asbestos cases, no provision allows for a debtor's discharge to preclude creditors from pursuing claims against unaffiliated third parties. In fact, the language of the Code provision that most directly pertains to and defines debtor discharge in simple terms disclaims the notion that a debtor's discharge can affect the liability of another non-debtor entity. Specifically, section 524(e) provides that "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 a debt." Id., 11 U.S.C. § 524(e).

The language of this provision alone forbids Debtor's plan from releasing Strawberry Fields from all future claims. Any statutory analysis begins with the language of the Code. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). It is a foundational principle that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (internal quotation omitted). Section 524(e) unambiguously prohibits the exact type of release Debtor attempts to include in its plan. To be sure, Debtor is entitled to a discharge on its own

debts, provided it complies with other sections of the Code and confirms a plan. Its discharge may not, however, be extended to third parties such as Strawberry Fields.

The exception to this general rule, contained within section 524, confirms the conclusion that nonconsensual third party releases are impermissible. In section 524(g), the Code explicitly provides a narrow exception that applies in certain circumstances. *See* 11 U.S.C. § 524(g). Specifically, section 524 allows a debtor to confirm a chapter 11 plan enjoining entities from taking action against a third-party non-debtor who is "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor" to the extent that "such alleged liability . . . arises from one of four specified types of legal relationships with the debtor. *Id.* § 524(g)(4)(A)(ii). Beyond the requirements for determining whether the third-party non-debtor is eligible, the plan's releases themselves must satisfy several further requirements. *Id.* § 524(g)(2)(B)(ii)(IV)(bb). Finally, for all those requirements, section 524(g) states that such releases are permitted "[n]otwithstanding the provisions of section 524(e)."

In sum, section 524(e) codifies the general rule that a debtor's discharge does not affect the liability of any third party on such debt. Therefore, section 524(g) provides the narrow exception to that general rule, making clear that it applies only in asbestos cases with exceedingly narrow circumstances, none of which arise here. The narrowness of the exception only underscores the predominance of the rule.

No section of the Code contravenes section 524(e) and empowers the bankruptcy court to approve a plan containing non-consensual third-party releases. The 13th Circuit Court of Appeals mistakenly relies upon sections 1123(a)(5) and 105(a). R. at 14–15. Neither section justifies that court's conclusion.

First, section 1123(a)(5) provides: "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation . . . ." Section 1123(a)(5) also includes a list defining what constitutes "appropriate means." *See id.* § 1123(a)(5)(A)–(J). That list includes a variety of appropriate measures. However, it does not include the non-consensual release of claims against third parties. Under the canons of statutory construction, the specific omission of third-party releases from this list is significant. *See, e.g., United States v. Hernandez-Ferrer*, 599 F.3d 63, 67 (1st Cir. 2010) ("The maxim '*expressio unius est exclusion alterius*'—which translates roughly as 'the expression of one thing is the exclusion of other things'—is a venerable canon of statutory construction."). If Congress had intended to make the list of appropriate means "illustrative rather than exhaustive, it could have used the rule of statutory construction found in the Bankruptcy Code, which provides that the words "'includes' and 'including' are not limiting." *Matter of Cash Currency Exch., Inc.*, 762 F.2d 542, 552 (7th Cir. 1985) (quoting 11 U.S.C. § 102(3)). Congress chose not to do so, so the Court should conclude that the enumerated list of "appropriate means" is intended to be exhaustive.

Even beyond the language section 1123(a)(5), its invocation, in this case, is unnecessary. The 13th Circuit concluded that section 1123(a)(5) "not only authorizes, but requires, the inclusion of provisions such as the releases and the channeling injunction that are crucial to securing the Strawberry Fields contribution that is necessary for the Plan's implementation." R. at 14. Such a conclusion is unfounded. To be sure, negotiating a global settlement and confirming the plan in this case was a tall task, and Strawberry Fields' contribution no doubt facilitated the negotiation process. That is not to say, however, that such a contribution was Debtor's only option to confirm a plan that would allow it to avoid a straight

liquidation. Without the subject releases, Debtor would likely find alternative means to confirm an alternative plan, albeit perhaps on terms less favorable to the Debtor itself. In sum, even if section 1123(a)(5) allowed a plan to contain non-consensual third-party releases, Debtors have not shown that such releases would be required to implement a plan.

Second, section 105(a), which authorizes the court to "issue any order, process, or judgment that is necessary to carry out the provisions of this title," does not permit the bankruptcy court to contravene the Code's other provisions, most notably section 524(e). This Court has "long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 422 (2014) (quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988)). In other words, the bankruptcy court may not use its residual equitable powers in ways that contradict the Code's other provisions. That is just what the bankruptcy court and the Thirteenth Circuit did here.

***2. Equitable considerations weigh against allowing non-consensual third-party releases.***

Finally, the overarching purpose of the bankruptcy system supports the conclusion that the Court should not allow non-consensual third-party releases, both in this case and writ large. Debtor and the lower courts cited the importance of providing flexibility to the Debtor, preserving jobs, and avoiding potential misuse of resources. *See* R. at 12; *NLRB v. Bildisco & Bildisco, 46*5 U.S. 513, 528 (1984). Although that list no doubt enumerates *some* of the bankruptcy system's objectives, it is not exhaustive. The Thirteenth Circuit also myopically focuses on debtors to the detriment of creditors, violating the spirit of the bankruptcy code. Although "the policy of Chapter 11 is to permit successful rehabilitation of debtors . . . [d]etermining what would constitute a successful rehabilitation involves balancing

the interests of the affected parties." *Id.* at 527. To allow Debtor to confirm a plan enjoining individual creditors such as Ms. Rigby from pursuing claims against Strawberry Fields is to ignore the bankruptcy court's duty to balance the interests of creditors and debtors. To effect and preserve that delicate balance, Debtor's plan should not be confirmed.

### *3. The third-party release should not be permitted because it violates Ms. Rigby's due process rights.*

The Due Process Clause of the Fifth Amendment United States Constitution protects "species of property," a category that includes causes of action. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Accordingly, "a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *City of New York v. New York*, 344 U.S. 293, 297 (1953). "This rule is part of our deep-rooted historic tradition that everyone should have his own day in court." *Martin v. Wilks*, 490 U.S. 755, 768 (1989) (internal quotation omitted).

The Strawberry Fields release violates this foundational principle by permanently enjoining Ms. Rigby from exercising her rights to bring action against Strawberry Fields. First, the release binds every claimant, including claimants who do not consent to it, such as Ms. Rigby. Second, and more crucially, the release enjoins potential claimants from bringing any future claims against Strawberry Fields. Third, even if Ms. Rigby wished to consent to accept a paltry sum for her claim against Debtor, the Due Process Clause protects her right to bring subsequent action against Strawberry Fields as a party liable for causing her injuries. Finally, although Debtor maintains that Ms. Rigby's Due Process rights could not have been violated where no court made a judicial determination regarding her claims against Strawberry Fields, such an argument defies logic. Should Debtor's plan be confirmed, Ms. Rigby would unwittingly relinquish her constitutionally guaranteed right to bring action against Strawberry Fields.

***4. Even if the non-consensual third-party releases are permissible in narrow circumstances, no such circumstances exist here.***

Jurisdictions that allow third-party releases only do so in narrow circumstances, which do not apply here. *See In re Millennium Lab Holdings II, L.L.C.*, 945 F.3d 126, 138 (3d Cir. 2019) (third-party releases permissible when "integral to the restructuring"); *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc.* (*In re Metromedia Fiber Network, Inc.*), 416 F.3d 136, 141–42 (2d Cir. 2005) (plan containing third-party releases not confirmable unless "truly unusual circumstances exist"); *SE Prop. Holdings, L.L.C. v. Seaside Eng'g & Surveying* (*In re Seaside Eng'g & Surveying)*, 780 F.3d 1070, 1078 (11th Cir. 2015) (bankruptcy court may approve plans containing third-party release when it 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"); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (using a seven-factor test to determine the permissibility of third-party releases). Should this Court rule on whether extraordinary circumstances existed here, the applicable standard of review is whether the bankruptcy court abused its discretion. *In re Munford*, 97 F.3d 449, 456 (11th Cir. 1996).

Debtor's plan fails to meet several of the factors allowing for non-consensual third-party releases. The Sixth Circuit articulated the factual requirements most clearly in *In re Dow Corning Corp.*, 280 F.3d 648. It stated that a bankruptcy court could approve a plan containing third-party releases "when the following seven factors are present":

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution

> claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

*Id.* at 658. In this instance, Debtor's plan fails the first, second, third, fifth, sixth, and seventh conditions.

First, there is insufficient "identity of interests" between Strawberry Fields and Debtor. In *Seaside Eng'g*, 780 F.3d at 1079, the court reasoned that such an identity of interest existed where the reorganized entity would be "completely dependent upon the skilled labor of the releasees, its professional surveyors and engineers, as was the former business of the Debtor. In other words, where the Debtor and the releasee share personnel, forcing those persons to be tied down in litigation would burden the Debtor and, thereby, the estate. We have no such situation here. Nothing indicates that Strawberry Fields supplies personnel or other tangible organizational benefits to Debtor such that Strawberry Fields would facilitate Debtor's reorganization in anything more than the most basic financial terms.

Beyond that, the second factor also favors Ms. Rigby. In *Seaside Eng'g*, the court determined that the releasees had contributed substantial value to the estate not through a lump-sum contribution but through manpower. *Id.* at 1080. The Eleventh Circuit stated: "the contribution of [releasee's] services to the reorganized entity is the very life blood of the reorganized debtor." *Id*. Here, Strawberry Fields provided no services to Debtor in exchange for its release. It only provided a one-time cash payment. Under *Seaside*, that cash payment is insufficient to establish that this factor of the "unusual circumstances" test is met.

Third, the *Seaside* court explicitly noted "the close relationship between the first factor" and the third." *Id.* at 80. As such, the *Seaside* court focused again on personnel, inquiring whether the Debtor's engineering and surveying employees would, as a result of litigation being allowed to proceed, "ever be able to perform their work, complete contracts and create receivables necessary for the life blood of the reorganized debtor." *Id.* As mentioned above, the record provides no evidence that Strawberry Fields provides, or would provide, any services necessary to the performance of Debtor's day-to-day operation. As such, this factor also favors the disallowance of a third-party release.

Concerning the fifth factor, there can be no dispute that the plan does not provide for full payment to the affected classes but rather for payment estimated at 30 to 40 cents on the dollar. R. at 8. This factor above all weighs against confirming the plan as proposed.

The sixth factor, whether the plan provides an opportunity for claimants who choose not to settle to recover in full, also favors Ms. Rigby. In *Seaside*, the court's consideration weighed in the debtor's favor where Vision, the objecting party, failed to "identify other claims that Vision may be asserting." *Seaside Eng'g*, 780 F.3d at 1081. The claims Ms. Rigby seeks to assert against Strawberry Fields here are not so vague. She, as well as other claimants, seek to hold Strawberry Fields liable for its failure to prevent Debtor, its corporate subsidiary, from illegally dumping toxic waste into the Liverpool river and thereby contaminating the local water supply. Debtor's plan ensures to the point of certainty that Ms. Rigby will not recover in full on her claims, and it should not be confirmed for that reason.

Finally, the seventh factor, whether the bankruptcy court made a record of specific factual findings that support its conclusion, also favors Ms. Rigby. The bankruptcy court's

analysis of the issue here was merely conclusory. It stated that Strawberry Fields' contribution was the only "reasonably conceivable means to achieve the result accomplished by the Plan" with little support. R. at 10. This conclusion lacks the specificity required under the "unusual circumstances test," and the bankruptcy court should have denied plan confirmation as a result.

Because consideration of several of these factors weighs in Ms. Rigby's favor, the Court should conclude that the bankruptcy court abused its discretion in approving Debtor's Plan.

***5. The bankruptcy court lacked jurisdiction to approve a plan that resolves claims against a non-debtor.***

Bankruptcy courts have *in rem* jurisdiction over a debtor's property along with jurisdiction over "cases and proceedings" that "arise under" the Bankruptcy Code or that are "related to" bankruptcy cases. 28 U.S.C. § 1334. "As a general rule, a bankruptcy court has no power to say what happens to property that belongs to a third party, even if that third party is a creditor or otherwise a party in interest." *In re Aegean Marine Petrol. Network, Inc.*, 599 B.R. 717, 723 (Bankr. S.D.N.Y. 2019) (citing *Callaway v. Benton*, 336 U.S. 132, 136–41 (1949)). In determining whether a bankruptcy court has jurisdiction, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern v. Marshall*, 564 U.S. 462, 499 (2011). Ms. Rigby's claim against Strawberry Fields falls outside the scope of those jurisdictional boundaries.

In *Stern*, 564 U.S. at 489, the Court held that Article III prohibits bankruptcy courts from entering a final judgment on "matters of private right;" in other words, "of the liability of one individual to another under the law as defined." (Internal quotations omitted). The Strawberry Fields release at issue here extinguishes Ms. Rigby's private right to pursue state law claims

against Strawberry Fields for injury, fraud, or any other private cause of action independent from the bankruptcy proceeding. Further, any cause of action Ms. Rigby would bring against Strawberry Fields is necessarily "independent of the federal bankruptcy law" because, as a claim against a non-debtor, it is by definition independent from a claim against Debtor. *See id.* at 487.

Moreover, Ms. Rigby's claim will not be "resolved in the claims allowance process." *Id.* at 499. Significantly, under *Stern*, such resolutions are limited only to claims against debtors. *Id.* . Potential claims against a third party, such as Strawberry Fields, fall outside that scope. Incorporating the releases into the plan itself does not change this fact, just as it does not extend jurisdiction to the bankruptcy court.

**B. The Thirteenth Circuit incorrectly held that corporate debtor proceeding under Subchapter V may, pursuant to 11 U.S.C. § 1192, discharge debts specified in subparagraphs (1) through (19) of 11 U.S.C. § 523(a).**

In 2019, Congress passed the Small Business Reorganization Act ("SBRA") to streamline chapter 11 bankruptcy plans for small business debtors through a new subchapter V codified as 11 U.S.C. §§ 1181–1195. At issue in this case is whether 11 U.S.C. § 1192, which disallows the discharge of all debts "of the *kind specified* in [s]ection 523(a)" in non-consensual plans, applies to corporate as well as individual debtors. (Emphasis added). Following the Court's long-established rules of statutory construction, this Court should hold that it does.

Specifically, the Court should reverse the Thirteenth Circuit's decision in this case and follow the Forth Circuit's statutory construction of section 1192 in *In re Cleary Packaging, L.L.C.*, 36 F.4th 509, 517–18 (4th Cir. 2022) (holding that section 1192 applies to individual and non-individual debtors). The rules of statutory construction, applicable case law, and equitable considerations all favor the Court adopting the Fourth Circuit's decision.

***1. A plain language of section 1192(2) shows that corporate subchapter V debtors can be excepted from discharge pursuant to section 523(a).***

When the language of a statute is unambiguous, the Court must interpret the language according to its plain meaning. *Ron Pair Enters.*, 489 U.S. at 241. If the statute contains unambiguous language, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Additionally, every word of a statute must be given meaning, if possible. *See, e.g., Rake v. Wade*, 508 U.S. 464, 471 (1993). However, where tension exists between the language of two statutes, the more specific provision should control over the more general. *In re Cleary Packaging, L.L.C.*, 36 F.4th at 515. In this instance, the most natural reading of section 1192 is to apply the restrictions of debt discharge listed in section 523(a) to corporate as well as individual debtors. Moreover, any potential conflict or ambiguities created in the interplay of the two sections of the bankruptcy code must be decided in favor of the more specific section, which in this case is section 1192.

A plain language reading of section 1192 shows that the drafters intended it to apply to both corporate and individual debtors. The statute controlling Subchapter V debt discharge, section 1192, states that:

> [i]f 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* (emphasis added).

The word "specified" in section 1192(2) qualifies the kind of debt found in section 523(a); therefore, the preamble of section 523 limiting the application of the statute to individual debtors must be ignored. Moreover, in section 1192(2), the clause "any debt . . . of the kind *specified* in section 523(a)" (emphasis added) makes no reference to who holds the debt. This plain language reading of section 1192(2) explicitly references the kinds of debt specified in section 523(a), with no regard for who holds the debt. Moreover, the most natural reading while giving every word in section 1192(2) means applying section 523(a) to subchapter V corporate debtors. Kind, as used by the drafters of section 1192, is defined as "a group united by common traits or interests." MERRIAM-WEBSTER DICTIONARY (online ed. 2022). Here, the typical traits uniting the group are that they are *specified* in section 523(a), not that they are debts held by an individual. Had the language of section 1192(2) simply read "any debt . . . of the kind found in section 523(a)," there would be a strong argument that section 1192(2) only applies to individual debtors. In that alternative scenario, the rules of statutory construction would strongly suggest that section 1192 only applies to individuals because there is no modifier for the type of debt; it only references the debt discharged under section 523(a), which only applies to individuals. However, the drafters of section 1192 specifically added the modifier "*of the kind specified*" (emphasis added) to limit the restrictions of section 523's preamble. The addition of this modifier clearly signals the drafters' intent to have section 1192(2) function as a shorthand reference to the types of debt listed in section 523(a).

Even if the preamble of section 523 did apply under section 1192, any resulting ambiguity between the two statutes must be decided in favor of section 1192. If possible, every word in a statute must be given meaning by the Court. *See, e.g.*, *Rake*, 508 U.S. at 471. While section 523 does specifically list section 1192 in its preamble, causing some courts to incorrectly hold that

section 523's limit on discharge to only individuals also applies to section 1192. *E.g.*, *In re GFS Indus., L.L.C.*, No. 22-50403-CAG, 2022 WL 16858009, at *3 (Bankr. W.D. Tex. Nov. 10, 2022). However, any reading of section 1192(2) that allows for the preamble of section 523(a) to apply creates an ambiguity because section 1192(2) specifically refers to the kind of debt specified in section 523(a), and specifically does not include the type of debtor. Meanwhile, the preamble of section 523 specifically only applies to individual debtors. When ambiguity exists between the interplay of two statutes, it is a well established principle of statutory construction that "the specific governs the general." *RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Because Respondent filed under subchapter V of chapter 11, any ambiguity between section 523 and section 1192 must be decided in favor of the more specific provision. Of the two, section 1192 is the more specific provision because it only addresses Subchapter V discharges, while section 523 references numerous discharge provisions throughout the Bankruptcy Code.

***2. Similarities With Chapter 12 Suggest That, Under Section 1192, Discharge Exceptions Apply to Both Individual and Corporate Debtors.***

Chapter 12 is instructive in interpreting subchapter V because the two share legislative backgrounds, policy objectives, and language. As such, the interpretation of section 1228(a) that allows both individuals and corporations to be excepted from discharge in cases of bad conduct must be extended to subchapter V and section 1192. Additionally, identical words and phrases in two different statutes typically receive the same meaning. *Hall v. United States*, 566 U.S. 506, 519 (2012). Courts have held this rule of statutory construction to apply chapter 12 case law to subchapter V statutes. *In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020). Therefore, following this tenet of statutory construction and case law leads to the conclusion that section 1192 applies to corporate debtors as well as individuals. *See, e.g.*, *New Venture P'ship v. JRB Consol.* (*In re JRB Consol.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995); *Sw. Ga. Farm Credit, ACA v. Breezy*

*Ridge Farms, Inc.* (*In re Breezy Ridge Farms, Inc.*), No. 09-1011, 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009).

Comparing the legislative inspiration between subchapter V and chapter 12 is instructive when applying chapter 12 caselaw to section 1192. Subchapter V borrows heavily from chapter 12, which applies to small family farms and fishermen with similar statutory debt limits as small business debtors seeking subchapter V reorganization. 11 U.S.C. § 109(f). Additionally, both chapter 12 and subchapter V dispose of the "absolute priority" rule to streamline the reorganization process. *Compare* 11 U.S.C. § 1191(c)(2)(A), (3) (listing the governing rules for a subchapter V proceeding) *with* 11 U.S.C. § 1222 *and* § 1225 (listing the requirements for a confirmation of a chapter 12 plan with no mention of the "absolute priority rule.") Importantly, chapter 12 applies regardless of whether a debtor is an individual or a corporation. *See id.* § 101(18), (19A); *see also, e.g.*, *In re Trepetin*, 617 B.R. at 848. While there are obvious differences between chapter 12 and subchapter V, namely in that chapter V applies to a smaller subset of debtors, the fact remains that the rationale, debt requirements, and ways of streamlining for both are strikingly similar.

Applying two different interpretations to two identically worded statutes from conceptually similar parts of the bankruptcy code would produce absurd results and abrogates the rules of statutory interpretation. *See Hall*, 566 U.S. at 519. When Congress drafted subchapter V, it borrowed heavily from the language of chapter 12 bankruptcy proceedings. *See* 11 U.S.C. § 1228(a) (stating "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."). The preamble of section 523 specifically includes section 1228 as well as section 1192. *Id.* § 523 ("[a] discharge under section . . . 1192, 1228(a), 1228(b) . . . of this title does not discharge an individual debtor from any debt . . . ."). The preamble of section 523 lists both 1228(a) and 1192. It is well established

that section 1228(a) applies to individuals and corporations despite being listed in the preamble of section 523. *In re Cleary Packaging, L.L.C.*, 36 F.4th 509, 516 (4th Cir. 2022) (citing *Breezy Ridge Farms*, 2009 WL 1514671, at *1–2; *In re JRB Consol., Inc.*, 188 B.R. 373. Therefore, to hold that 1192 should only apply to individuals due to being listed in the preamble to section 523 would lead to an absurd result in light of the courts' understanding of section 1228(a). Moreover, when interpreting the same language describing the "debts of the kind specified in [section] 523(a)" found in section 1192, courts have determined that section 1228(a) only references the types of debts listed in section 523(a) and not the type of debtors listed in the section 523 preamble. *E.g.*, *In re JRB Consol., Inc.*, 188 B.R. at 374. As additional support to the case law, various treatises and other government agencies have come to the same conclusion—that in the light of chapter 12 caselaw, section 1192 and the exceptions to discharge in section 523(a) apply to corporations as well as individuals. *E.g.*, 2021 No. 6 Norton Bankr. L. Adviser NL 1 ("[i]t appears that [s]ubchapter V was drafted with the intention to apply the dischargeability exceptions under Bankruptcy Code [section] 523 to corporations"); Internal Revenue Manual 5.9.8.5.1(9) ("[a]ll exceptions to discharge in 11 USC § 523(a) of the Bankruptcy Code apply to the small business debtor.")

***3. Equitable Considerations Favor Exceptions From Discharge For Corporate Bad Actors.***

Corporations should not be able to discharge debts listed under section 523(a) due to fairness and equity considerations. For example, subchapter V allows a small business debtor to confirm a non-consensual plan where the debtor's stakeholders are treated differently than under the absolute priority rule in traditional chapter 11 reorganizations. *In re Cleary Packaging, L.L.C.*, 36 F.4th at 517. Moreover, the types of debts excepted from discharge listed in section 523(a) are the exact types of debts that arise from the kind of bad conduct prevalent among small

corporations. *See*, Association of Certified Fraud Examiners, *Report to the Nations: 2018 Global Study on Occupational Fraud and Abuse*, 20–23 (2018), https://s3-us-west-2.amazonaws.com/acfepublic/2018-report-to-the-nations.pdf. Additionally, the Bankruptcy Code allows courts to take equitable considerations in applying the Code so long as it is consistent with the Code. 11 U.S.C. § 105(a) ("[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title . . ."); *In re W. Real Est. Fund, Inc.*, 922 F.2d 592, 601 (10th Cir. 1990), *modified sub nom. Abel v. West*, 932 F.2d 898 (10th Cir. 1991) ("a bankruptcy court's supplementary equitable powers . . . may not be exercised in a manner that is inconsistent with . . . specific provisions of the Code.").

Any interpretation of section 1192 that limits applicability to individuals removes the exceptions from discharge listed in section 523(a) and places new innocent shareholders at risk due to the abrogation of the absolute priority rule in subchapter V. In traditional chapter 11 reorganizations, the longstanding rule is that corporations must pay all debts in full or subject their equity interests to new shareholders in accordance with the absolute priority rule. *See*, Absolute Priority Rule, Norton Bankr. L. & Prac. 3d Dict. of Bankr. Terms § A05. However, subchapter V eliminates the absolute priority rule with a new and less stringent confirmation requirement. *See* 11 U.S.C. § 1191(c). Therefore, under subchapter V, a debtor's shareholders can keep their stake in a corporation going through bankruptcy without even making a minimal payment to its creditors. When the corporation cannot pay off its debts in full in a subchapter V reorganization and no longer has an obligation to do so due to the elimination of the absolute priority rule, the new shareholders should not have to bear the burden of non-dischargeable debt due to the misdeeds of previous shareholders when they take over the old equity stake.

Disallowing discharge takes away a powerful tool for creditors to hold debtors responsible for their bad acts. While it is theoretically true that a judgment creditor can seek to hold equity shareholders through other means, including state and federal law, these options offer far fewer safeguards to creditors than the Bankruptcy Code. For example, equity owners have many options to avoid paying creditors back, such as selling their companies, avoiding paying themselves distributions, redirecting operating funds to friends and family members, and even filing personal bankruptcy. Moreover, this alternative allows corporate debtors and shareholders to face no repercussions for clearly unethical activity, which is undoubtedly not the purpose of the Bankruptcy Code.

Corporations should not be able to limit their liability for their bad conduct through creative interpretations of the Bankruptcy Code. As previously discussed, section 1192's discharge exceptions apply to corporations and individuals. *See supra* Part II.A. Therefore, it is within the power of the Court under the mandate of the Bankruptcy Code to take equitable considerations into account in making its decision. *See In re W. Real Est. Fund, Inc.*, 922 F.2d at 601. Most importantly, it is crucial to note that a discharge in bankruptcy is not only intended for honest individuals who have fallen on hard times but also for any honest debtor, whether they are an individual or corporation. Following that logic, the Court cannot allow a corporation to hide from responsibility using ambiguities of the code. Indeed, Debtor here engaged in bad conduct, and the Court may take that conduct and the risk of handing Debtor a windfall into account. In the course of its regular business operations, Penny Lane and its corporate parent, Strawberry Fields, knowingly dumped hazardous waste and contaminated the water supply of an entire community. R. at 5. Penny Lane poisoned thousands of community members. *Id.* It also poisoned Ms. Rigby's daughter, who died of leukemia as a result of Penny Lane's reckless waste disposal. *Id.* The Court

should not afford Penny Lane the protections and benefits of the bankruptcy system, particularly those additional benefits reserved for small business debtors where it engaged in such conduct. To do so would be to award Penny Lane a windfall for actions that have had irreparable consequences on the lives of many.

In conclusion, the Court should overturn the Thirteenth Circuit's decision in this case. Instead, the Court should follow the statutory interpretation of section 1192 in *In re Cleary Packaging, L.L.C.* by the Fourth Circuit. The Fourth Circuits decision, which holds that section 1192 applies to both individual and corporate debtors, is supported by the rules of statutory interpretation, relevant case law, and equitable considerations.

## V. CONCLUSION

For the reasons set forth above, the Court should overrule the Thirteenth Circuit where the appellate court affirmed the bankruptcy court's confirmation of Debtor's plan as well as its dismissal of Ms. Rigby's nondischargeability action.