No. 22-0909

IN THE

Supreme Court of the United States

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,

ELEANOR RIGBY, PETITIONER

v.

PENNY LANE INDUSTRIES, INC., RESPONDENT.

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

BRIEF FOR PETITIONER

TEAM NUMBER 47
COUNSEL FOR PETITIONER

JANUARY 19, 2023

QUESTIONS PRESENTED

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

II. 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).

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The Thirteenth Circuit Court of Appeals' decision is available at No. 20-0803 and reprinted at Record 2. The Bankruptcy Court decided in favor of the debtor, Penny Lane Industries, Inc. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of the debtor, Penny Lane Industries, Inc.

STATEMENT OF JURISDICTION

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

RELEVANT STATUORY PROVISIONS

This action requires statutory construction of certain provisions of Title 11 of the United States Code.

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, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process

The relevant portions of 11 U.S.C. §§ 524 (e) and (g) 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.
>
> (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

(2)(b)(i)(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

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. § 1192 provides:

> If the plan of the debtor is confirmed under section 1191(b)… the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—
>
> (2) of the kind specified in section 523(a) of this title.

STATEMENT OF THE CASE

This appeal arises from Respondent's attempt to release its parent company from being pursued by the Petitioner and others for claims that are unrelated to the Respondent's chapter 11 reorganization plan, and to declare such debts fully dischargeable. Respondent's attempt to release its parent company from such claims is incompatible with the Bankruptcy Code, and seeks to afford the Bankruptcy Court a level of discretion that is not permitted by the Code.

I. FACTUAL HISTORY

Penny Lane Industries, Inc. (the "Debtor") is a wholly owned subsidiary of Strawberry Fields. Record 4. Strawberry Fields produces cereal and other convenience foods under several well-known brands, including the Debtor, which are sold in supermarkets nationwide. Id. at 5.

In 2017, Eleanor Rigby (the "Petitioner"), a citizen of Blackbird since 1982, filed suit against the Debtor and Strawberry Fields for the death of her four-year old daughter who died of leukemia. Id. In her lawsuit, the Petitioner alleged that her daughter's leukemia and, ultimately, her death, were caused by exposure to chemicals and pollutants that had been dumped by the Debtor at its manufacturing facility in Blackbird. Id. The Petitioner alleged that the Debtor had been disposing of pollutants on its property as a cost saving measure, and that the pollutants had made their way into the Liverpool River, which runs along the Debtor's property. Id. Further, the Petitioner alleged that the Debtor's then Chief Executive Office, Maxwell S . Hammer ("Hammer") knew for several years that the Debtor had contaminated the community's water supply with the waste it was disposing of on its property, and that this contamination could cause serious injury to those who lived nearby. Id. The Petitioner also alleges that Strawberry Fields is just as liable as the Debtor is because it knew, or should have

known , of the Debtor's alleged misconduct. Id. at 6.

Hundreds of other lawsuits alleging death or injury caused by exposure to pollutants from the contaminated local water supply were also filed against the Debtor, and many name Strawberry Fields as a co-defendant. *Id.* While both the Debtor and Strawberry Fields deny these allegations, no judicial determination has yet been made regarding the claims asserted. *Id.*

In light of the hundreds of lawsuits filed against it, the Debtor filed a Subchapter V chapter 11 case on January 11th, 2021 (the "Petition Date"). *Id.* Upon the filing of its petition, all pending litigation against the Debtor, as well as Strawberry Fields, was temporarily stayed pursuant to section 362 of the Bankruptcy Code. *Id.* at 8. The litigation against Strawberry Fields was stayed pursuant to an injunction issued by the Bankruptcy Court, which found that the injunction was appropriate to facilitate a global settlement between Strawberry Fields, the Debtor, and a number of ad hoc creditor groups. *Id.* The injunction issued by the Bankruptcy Court stayed numerous pending cases against the Debtor and Strawberry Fields, including the Petitioner's claim against the Debtor and Strawberry Fields. *Id.*

Following the temporary injunction issued by the Bankruptcy Court, several stakeholders negotiated a settlement that was memorialized in the Debtor's chapter 11 reorganization plan (the "Plan"). *Id.* While the Petitioner participated in the mediation process, she did not join in the settlement that was ultimately reach. *Id.* at n.7. Pursuant to the Plan, a creditor trust was to be established that would be funded with both the Debtor's disposable income for the next five years, as well as $100 million from Strawberry Fields. *Id.* at 8. Based on the contributions from both the Debtor and Strawberry Fields, is its estimated that the creditors with allowed claims, which includes the Petitioner's $1 million claim, will receive between thirty (30) to forty (40) cents on the dollar. *Id.*

As part of its agreement to provide funding for the Plan, Strawberry Fields demanded release from all claims against it, including those from the Debtor's bankruptcy estate and third-party direct claims. *Id.* As a result of Strawberry Fields demand, the Plan provided for the "release and discharge of '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 release of claims against Strawberry Fields is non-consensual, and binds parties regardless of whether they participated in the bankruptcy or how they voted for the Plan. *Id.* Ultimately, the release would preclude any party from pursuing any claim against Strawberry Fields that is related to the Debtor's pre-petition conduct and, instead, those claims will be channeled into the creditor's trust. *Id.* at 9.

Despite the nonconsensual releases, over ninety-five (95) percent of creditors who submitted ballots voted to confirm the Plan. *Id.* Amongst the votes of confirmation were two notable objections, the Petitioner and Norwegian Wood Bank. Following a four-day confirmation hearing, the Plan was confirmed. *Id.*

II. PROCEDURAL HISTORY

A few weeks after the Petition Date, the Petitioner commenced an adversary proceeding against the Debtor whereby she sought to have her claim against the Debtor deemed non-dischargeable pursuant to sections 523(a) and 1192(2) of the Code. *Id.* at 7. In particular, the Petitioner alleged that her claim was non-dischargeable pursuant to section 523(a)(6), which excerpts any debt for "willful and malicious injury by the debtor or another entity or to the property of another entity" from discharge. *Id.*; 11 U.S.C. § 523(a)(6). In response to the Petitioner's adversary proceeding, the Debtor filed a Rule 12(b)(6) motion to dismiss for failure

to state a claim upon which relief can be granted, and argued that section 523(a) was not applicable to business entities. *Id.* at 7. The Bankruptcy Court ruled in favor of the Debtor and granted the Debtor's motion to dismiss on the grounds that section 523(a) does not apply to corporate debtors. *Id.*

Following the Bankruptcy Court's dismissal of the Petitioner's adversary proceeding, the Petitioner timely appealed (Case No. 21-0803) to the United States Court of Appeals for the Thirteenth Circuit. *Id.* Upon appeal, the Thirteenth Circuit decided on both the Petitioner's claim that section her claim was non-dischargeable pursuant to section 523(a)(6), as well as her claim that the Plan's nonconsensual release of third-party direct claims against Strawberry Fields was not permissible under both bankruptcy and non-bankruptcy law. *Id.* at 9. The Thirteenth Circuit affirmed the findings of the Bankruptcy Court, holding that 1.) nonconsensual releases of third-party direct claims is permissible pursuant to sections 105 (a) and 524 (e) of the Bankruptcy Code and 2.) that the provisions of 523 (a) are not applicable to corporate debtors. *Id.* at 12-13, 15, and 23.

On appeal, the Petitioner respectfully asks this Court to now consider the two questions presented to the Thirteenth Circuit 1.) whether nonconsensual releases of third-party direct claims are permissible as part of a chapter 11 reorganization and 2.) whether the provisions of section 523 of the Bankruptcy Code are applicable to corporate debtors.

STANDARD OF REVIEW

Where the parties to this case do not dispute the facts as stated above, the issues to be addressed by this Court are questions of law. Therefore, the proper standard of review is *de novo*. *See, e.g.*, *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit incorrectly held that nonconsensual releases of third-party direct claims are permissible as part of a debtor's chapter 11 reorganization plan pursuant to sections 105(a) and 524(e). Further, the Thirteenth Circuit also incorrectly held that section 523(a) does not apply to corporate debtors.

Section 524(e) states that a 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). This language is unambiguous, as the section expressly states that it applies only to discharges of the debtor and the debtor alone. *Id.* Further, section 524(g), the exception to section 524(e), is also unambiguous in that it expressly permits nonconsensual releases of third-party direct claims only in cases that pertain to the presence of or exposure to asbestos. 11 U.S.C. § 524(g)(2)(B)(i)(I). Where the language of a statute is unambiguous, it is the duty of the court to apply and enforce the statute as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*., 530 U.S. 1, 6 (2000). Because the language of sections 524(e) and (g) is unambiguous, the Court should apply and enforce the statutes as they are written. If section 524(e) and (g) are to be applied as written, then the Bankruptcy Court does not the authority to approve the nonconsensual releases of third-party direct claims as part of the Debtor's Plan because, 1.) the claims pertain to Strawberry Fields, which is not a debtor in the instant bankruptcy case and 2.) the claims against Strawberry Fields do not pertain to the presence of or exposure to asbestos.

Further, because sections 524(e) and (g) are unambiguous, the Bankruptcy Court should not be permitted to use its broad, equitable power pursuant to section 105(a) as a means to approve the nonconsensual releases. While section 105(a) empowers the Bankruptcy Court to issue any order, process, or judgement that is necessary to carry out the provisions of the

Bankruptcy Code, it may not be carried out in a manner that is inconsistent with other provisions of the Code. 11 U.S.C. § 105(a); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 601 (10th Cir. 1990). If the Court were to authorize the Bankruptcy Court to approve the nonconsensual releases as part of the Debtor's Plan pursuant its broad, equitable powers set forth in section 105(a), then section 105(a) would be used in a way that is contradictory to the express provisions of sections 524(e) and (g).

Not only do the nonconsensual releases contradict the relevant provisions of the Bankruptcy Code, but permitting such releases would be directly contradictory to the Due Process clause of the United States Constitution. Pursuant to the Due Process clause, a party who stands to be deprived of their life, liberty, or property may not be deprived without notice and opportunity for a hearing. U.S. Const. Amdt. 14 § 1; *Patterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. 641, 653 (E.D. Va. 2022) (*quoting Funetes v. Shevin*, 407 U.S. 67, 80 (1972)). In the instant case, the Petitioner stands to be deprived of her property, her claim against Strawberry Fields. While the Petitioner has had the opportunity to participate in the mediation and negotiation process, the nonconsensual releases apply to all who have pre-petition claims against Strawberry Fields, regardless if those parties participated in the bankruptcy process or not. Record at 8. This means that if the nonconsensual releases were approved, potentially hundreds of parties who have claims against Strawberry Fields, but were not noticed about the Debtor's bankruptcy, would be deprived of their claims without notice or an opportunity for a hearing. If these parties are to be deprived of their claims via the nonconsensual releases, then the Debtor's Plan would be in direct contradiction to the Due Process clause of the United States Constitution. U.S. Const. Amdt. 14 § 1; *Patterson*, 636 B.R. at 653 (*quoting Funetes*, 407 U.S. at 80).

Not only are the nonconsensual releases prohibited per the Due Process clause, but the

Bankruptcy court has neither constitutional nor statutory authority to approve such releases and adjudicate the Petitioner's claim. Bankruptcy Courts are Article I courts of limited jurisdiction. *See Stern v. Marshall*, 564 U.S. 462, 484 (2011). Therefore, the Bankruptcy Court's purview is limited only to cases that either arise under title 11 or, those cases that are federal in nature and are part of a core bankruptcy proceeding. *Id.*; *In re Midway Gold US, Inc.*, 575 B.R. 475, 517 (Bankr. Colo. 2017); 28 U.S.C. § 1334(b). In the instant case, the Petitioner's claim against Strawberry Fields does not flow from any statutory scheme which would permit the Bankruptcy Court to have purview over it. Therefore, the Bankruptcy Court does not have the authority to adjudicate the Petitioner's claim via the approval of the nonconsensual releases as part of the Plan.

The Bankruptcy Court further attempts to use sections 1123(a)(5) and (b)(6) as a means to justify the nonconsensual releases. Section 1123(a)(5) grants the Bankruptcy Court authority to authorize a plan to, "provide adequate means for the plan's implementation." While section 1123 (b)(6) authorizes a plan to contain, "any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. §§ 1123(a)(5) and (b)(6). The Bankruptcy Court has interpreted these sections to mean that, because Strawberry Fields is funding the Plan, sections 1123(a)(5) and (b)(6) permit the Bankruptcy Court to authorize the nonconsensual releases against Strawberry Fields on the basis that Strawberry Fields is providing a majority of the funding for the Plan. However, the mere fact that Strawberry Fields is funding the Plan is, by itself, insufficient to allow for releases that otherwise are inconsistent with other provisions of the Bankruptcy Code. *In re Purdue Pharma*, 635 B.R. 26, 109 (S.D.N.Y. 2021).

The Bankruptcy Court also attempts to justify the nonconsensual releases on the grounds that the "extraordinary" and "rare" circumstances surrounding Strawberry Field's funding of the

Plan permit such releases that would otherwise be inconsistent with the Code. However, tests from the Circuit Courts, as applied to the instant case, demonstrate that the Debtor's case does not fall into the category of "extraordinary" or "rare" cases as to warrant approval of the nonconsensual releases. *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 212-213 (3d Cir. 2000); *In re Midway Gold, US Inc.*, 575; *In re Master Mortg. Inv. Fund Inc.*, 168 B.R. 930, 935 (Bankr. W.D. MO 1994); *In re Dow Corning Corp*, 280 F.3d 648, 658 (6th Cir. 2002).

The Thirteenth Circuit also incorrectly held that the non-dischargeability provisions of section 523(a) of the Bankruptcy Code are not applicable to corporate debtors receiving a discharge under a non-consensual plan under section 1192 of Subchapter V.

While the plain language of sections 1192 and 523(a) are unambiguous when read independently, tension arises when the sections are read in conjunction as they appear to be in conflict with one another. At its core, the issue is whether the plain language of section 1192 or section 523(a) controls under a non-consensual Subchapter V plan of reorganization.

Section 523(a), in relevant part, provides that "[a] discharge under section… 1192… of this title does not discharge an individual debtor . . .." *See* 11 U.S.C. § 523(a).

Section 1192 in turn states, "[i]f the plan of the debtor is confirmed under section 1191(b)… the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt… of the kind specified in section 523(a) of this title." *See* 11 U.S.C. § 1192. Meaning, Subchapter V debtors confirming a non-consensual plan may receive a discharge of all debts except debts of the kind listed in section 523(a).

While section 1192's language broadens the exceptions to discharge of debts listed in section 523(a) to both individual and corporate debtors, 523(a)'s prefatory language limits exceptions to discharge solely individual debtors.

Based on the text of section 1192, and the Subchapter V definition of a debtor under section 1182, the plain language of section 1192 applies to both corporate and individual debtors, without modifying the language, as is done in other sections of the Bankruptcy Code. *See* 11 U.S.C. § 727(a)(1); 11 U.S.C. §§ 1141(d)(2), (6).

Taken in conjunction with section (2) of 1192, corporate and individual debtors are discharged of all debts, except of the kind specified in section 523(a). Congress uses the language "of the kind" to incorporate by reference a list of 21 kinds of debts enumerated in section 523(a), not subject section 1192 debtors to the constraints of section 523(a) rule.

Although this interpretation is claimed to make section 523(a)'s cross-reference to section 1192 in the prefatory superfluous, this is incorrect as individual debtors under section 1192 are still subject to the entire text of section 523(a).

Finally, the best indication of Congress' direct intent lies with the interpretation that Chapter 12 debtors, corporations and individuals, are excepted from discharging debts of a kind specified in section 523(a); section 1192 was crafted using nearly identical language in the areas at debate. Courts are to presume that Congress is aware of the law and its interpretations when it passes legislation. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). While drafting Subsection V, Congress is presumed to know that the Chapter 12 discharge, section 1228(a), was interpreted to except both corporate and individuals from discharging debts of a kind specified in section 523(a). Congress chose to use nearly identical language, utilizing the individual Chapter definitions of debtors to apply to the

section 523(a) reference, without limiting or modifying the debtor applicability, as Congress has done throughout other Bankruptcy provisions. Given the nearly identical language, and the similarity in departure of structure and purpose of other Bankruptcy Codes, to section 1228(a), Congress intended the interpretation of section 1192(2) to be the same as section 1228(a).

While courts and constituents want for specificity in interpretation, that want is unnecessary here as section 1192 is clear and unambiguous, and Congress drafted the provision to be interpreted in line with the Chapter 12's discharge provision, which is that Congress provided a narrow exception to discharge of certain debts for both corporations and individuals.

This Court should reverse on both issues.

ARGUMENT

I. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT NONCONSENSUAL RELEASES OF THIRD-PARTY DIRECT CLAIMS AGAINST NON-DEBTORS ARE PERMISSIBLE PURSUANT TO 11 U.S.C. §§ 105(A) AND 524(E).

A. The plain language of section 524(e) of the Bankruptcy Code does not permit nonconsensual releases of third-party direct claims against non-debtors.

The Bankruptcy Court and the Respondent rely on Section 524(e), along with section 105(a), to permit the nonconsensual releases of third-party direct claims as part of the Debtor's chapter 11 reorganization plan. Where section 524(e) is does not speak to such a power of the Bankruptcy Court, the Court relies on section 105(a), which bestows upon it any powers the court deems necessary to carry out the provisions of the Bankruptcy Code, as a means to empower it to approve such releases under section 524(e). 11 U.S.C. § 105(a). However, there is no need for the Bankruptcy Court to go as far as construing section 105(a) to empower it to permit such a release under section 524(e) because the plain language of section 524(e) expressly disallows the Court's approval of the nonconsensual releases of third-party direct claims in the instant case.

Section 524(e) states that a 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). The language of the section is unambiguous in that it only permits the Court to determine releases of liability as it relates to the *debtor*. 11 U.S.C. § 524(e). When the language of a statute is unambiguous, it is the duty of both this Court and the Bankruptcy Court to apply and enforce the statute as written. *Hartford Underwriters Ins. Co.*, 530 U.S. at 6. In the instant case where the Petitioner seeks to bring a non-bankruptcy claim against Strawberry Fields; Strawberry Fields is not the debtor in this case, it is merely the parent company of the Debtor and has offered to fund the Plan. Therefore, pursuant to the unambiguous language of section 524 (e), the Bankruptcy Court was not permitted to approve nonconsensual releases of third-party direct claims, such as that held by the Petitioner, against Strawberry Fields.

Further, section 524(g), which acts as an exception to section 524(e), is also unambiguous in its language and, therefore, should be applied and executed as written. *Id.* Pursuant to section 524(g), the only exception to section 524(e) is for claims related to asbestos cases, "the requirements for this subparagraph are that the injunction is to be implemented . . .to assume the liabilities of a *debtor* which . . . . has been named as a defendant . . . in actions seeking recovery for damages allegedly caused by the *presence of or exposure to asbestos*." 11 U.S.C. § 524(g)(2)(B)(i)(I) (emphasis added). The language of both sections 524(e) and (g) is clear; the Bankruptcy Court was not authorized to approve nonconsensual releases of third-party direct claims where 1.) such claims were not made against the Debtor and 2.) where such claims were not related to the presence of or exposure to asbestos.

Because the language of section 524(e) and its exception, 524(g), are unambiguous, the Bankruptcy Court need not use section 105(a) as a means to obtain the authority to approve such

releases. Section 105(a) empowers the Bankruptcy Court to, "issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). However, the Bankruptcy Court's equitable powers pursuant to section 105(a) may not be exercised in a manner that is inconsistent with other, more specific, provisions of the Code. *In re Western Real Estate Fund, Inc.*, 922 F.2d at 601. In the instant case, the Bankruptcy Court utilized section 105(a) in a manner inconsistent with the plain language of sections 524(e) and (g) by using the section to empower itself to approve nonconsensual releases of third-party direct claims, which are inconsistent with the unambiguous language of sections 524(e) and (g). Section 524(e) is unambiguous in that it only permits such releases in the case of the *debtor*, which Strawberry Fields is not. Further, its exception in 524(g) is unambiguous in that it only permits the releases that the Bankruptcy Court now seeks to allow only in asbestos related cases. 11 U.S.C. §§ 524(e), (g). Permitting the Bankruptcy Court to utilize the broad, equitable powers bestowed upon it by section 105(a), would be inconsistent with sections 524(e) and (g) and, therefore, the Bankruptcy Court should not be permitted to exercise its powers set forth in section 105(a) as a means to permit nonconsensual releases of third-party direct claims that are prohibited by sections 524(e) and 524(g).

B. The Petitioner would be deprived of her notice and due process rights under the Constitution if the Court were to permit the approval of the nonconsensual releases of third-party direct claims against Strawberry Fields as part of the Plan.

It is well established that where a party's rights are to be affected, the party must first be given notice and an opportunity to be heard. *Patterson*, 636 B.R. at 653 (quoting *Funetes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)). The Debtor's Plan proposes that all third-party direct claims against Strawberry Fields be released and that the Plan be binding on all parties, regardless if they participated in the bankruptcy case or not. Record at 8. While the

Petitioner was able to participate in the mediation and negotiation process of the Plan, Strawberry Fields potentially has hundreds of other claims against it that are to be brought by parties that did not participate in the bankruptcy process. This means that those parties whose claims are released and did not get to participate in the process received neither notice or an opportunity to be heard as required by the Constitution. *Id.*; U.S. Const. Amdt. 14, § 1. Further, denying not only the Petitioner, but hundreds of others access to the courts and to have their grievances against Strawberry Fields heard directly contradicts the principle that access to the courts is the foundation of orderly government. *Patterson*, 636 B.R. 641 at 653 (*quoting Cromer v. Kraft Foods N. Am. Inc.*, 390 F.3d 812, 817 (4th Cir. 2004)).

Where bankruptcy courts are Article I courts, the Bankruptcy Court does not have the power to adjudicate claims that fall within the purview of Article III courts. *Stern*, 564 U.S. at 484. As was the case in *Stern v. Marshall* where the plaintiff's claim arose under state common law and did not flow from any federal scheme, the Petitioner's claim against Strawberry Fields arises under state common law and is not federal in nature. *Stern*, 564 U.S. at 487. Therefore, the Bankruptcy Court, which is a federal court of limited jurisdiction, does not have either the statutory or constitutional authority to adjudicate the Petitioner's claim. 28 U.S.C. § 1334(b); *In re Midway Gold US, Inc.* 575 B.R. at 517. Based on the nature of the Petitioner's claim and the nature of Strawberry Fields, which is not a federal entity, no such federal claim exists as to permit the Bankruptcy Court to have jurisdiction over the Petitioner's claim. In the absence of such authority, the Bankruptcy Court had no statutory or constitutional authority that would have given it the power to adjudicate the Petitioner's claim via the approval of the releases of third-party direct claims.

C. Strawberry Field's contribution of funds to the Debtor's Plan is insufficient justification to warrant the approval of nonconsensual releases of third-party direct claims against it.

The Respondent and Bankruptcy Court rely upon section 1123(a)(5) as a means to authorize the nonconsensual releases of third-party direct claims against Strawberry Fields. Section 1123(a)(5) grants the Bankruptcy Court authority to authorize a plan to, "provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Both the Respondent and Bankruptcy Court interpret section 1123(a)(5) to mean that the Bankruptcy Court is empowered to authorize any plan which provides adequate means for the plan's implementation, such as the Debtor's Plan, which is almost entirely funded by its parent company, Strawberry Fields. However, the mere fact that Strawberry Fields is providing a majority of the funding for the Debtor's Plan is insufficient justification for the nonconsensual releases of third-party direct claims against it. *In re Purdue Pharma, L.P.*, 635 B.R. at 109.

In the 2021 case, *In re Perdue Pharma, L.P.* Purdue Pharma, the debtor, filed for chapter 11 bankruptcy after thousands of lawsuits were filed against it in relation to the opioid crises, which was primarily attributed to Perdue's drug, OxyContin. *Id.* at 34. Perdue's filing automatically stayed any pending litigation against it pursuant to section 362 of the Bankruptcy Code, and a stay was also placed on litigation against certain non-debtors that were affiliated with Perdue. *Id.* at 35; 11 U.S.C. §362. Amongst the non-debtors who benefited from stayed litigation were members of the Sackler family, who were owners of Perdue. *Id.* at 35. Under the watchful eye of a skilled bankruptcy judge, as well as two mediators, Perdue and its creditors eventually negotiated a plan which would afford billions of dollars for the resolution of both private and public claims, as well as fund opioid relief and education programs. *Id.* The plan was eventually approved by a super majority and the Bankruptcy Court. *Id.* However, there were

many states and individuals who objected to the plan on the grounds that the plan would provide release of direct claims for willful misconduct against members of the Sackler family, none of whom were actual members to the bankruptcy case. *Id.* at 36. As a result, the Sackler family began withdrawing money from Perdue which greatly diminished its solvency cushion. *Id.* As a result, Perdue's proposed nonconsensual releases of third-party direct claims against the Sackler family were attacked, with those who opposed the plan arguing that the Bankruptcy Court lacked the constitutional authority and jurisdiction to approve such releases, while those who were in favor of the plan argued that the Bankruptcy Court undoubtedly had the jurisdiction to impose such releases, as they were crucial for the success of the plan. *Id.* at 36-37.

The District Court for the Southern District of New York held that there was neither explicit nor implicit statutory authority as to warrant such releases, " . . . the Bankruptcy Code does not authorize such non-consensual, non-debtor releases: not in its express text; not in its silence; and not in any section or sections of the bankruptcy code . . ." *Id.* at 37-38. The court further held that section 1123(a)(5) did not give the Bankruptcy Court authorization to approve certain, otherwise prohibited, parts of plan simply to ensure funding for a plan. *Id.* at 109.

The instant case is incredibly similar to the recent *Perdue Pharma* case. In both cases, companies, in the face of mounting litigation, filed for chapter 11 reorganization plans that were to be funded by non-debtor company owners. Similarly, the Debtor in the instant case argues that the nonconsensual releases of third-party direct claims against Strawberry Fields is crucial for the success of the Plan since Strawberry Fields is providing a majority of the funding for the plan. However, as was stated by the district court in the *Perdue* case, there is no express or implicit text that authorizes such releases, nor do the provisions of section 1123(a)(5) authorize

the Bankruptcy Court to approve such releases on the grounds that doing so will secure funding for a plan.

Based on the recent holdings of the *Perdue* case, the Bankruptcy Court in the instant case has no statutory authority, either expressed or implicit, to authorize the nonconsensual releases of third-party direct claims against Strawberry Fields. Further, the Bankruptcy Court in the instant case may not authorize such releases on the grounds that doing so will ensure funding for the Debtor's Plan. *Id.*; 11 U.S.C. § 1123(a)(5).

The Debtor also justifies the nonconsensual releases of third-party direct claims against Strawberry Fields based on the provisions set forth in section 1123(b)(6). Section 1123(b)(6) authorizes a plan to contain, "any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). However, similar to the ruling in the *Perdue* case in regards to section 1123(a)(5), section 1123(b)(6) does not confer any substantive authority upon the Bankruptcy Court to approve nonconsensual releases of third-party direct claims where such releases are inconsistent with other provisions of the Bankruptcy Code. *In re Purdue Pharma, L.P*, 635 B.R. at 106. In the instant case, the approval of such nonconsensual releases of third-party claims is inconsistent with the provisions of sections 524(e) and (g).

The language of sections 524(e) and (g) is unambiguous, and provides only for such releases as it relates to the debtor. 11 U.S.C. § 524(e). The only exception stated in the Bankruptcy Code is for cases involving claims for the presence of or exposure to asbestos. *Id.* at (g). In the instant case, the claims that the Plan seeks to release fall into neither permissible category. The claims that the Plan contemplates releasing pertain to the Debtor's parent company, Strawberry Fields, who is not a debtor to the bankruptcy case. Further, none of the claims against Strawberry Fields involve the presence of or exposure to asbestos. As such,

approval of such releases, even to ensure the Plan is funded, would be inconsistent with the Bankruptcy Code. *In re Purdue Pharma, L.P.*, 635 B.R. at 106.

D. The Debtor's chapter 11 case does not present "extraordinary circumstances" as to warrant the approval of the nonconsensual releases of third-party direct claims.

Several circuit courts have held that nonconsensual releases of third-party direct claims should only be permitted in extraordinary or rare circumstances. *In re Continental Airlines*, 203 F.3d at 212-213; *In re Midway Gold, US Inc.*, 575 B.R. at 503. Each circuit has its own factors that it considers when determining whether a case presents such extraordinary or rare circumstances. *In re Midway Gold, US Inc.*, 575 B.R. at 503. Courts in the First and Eighth Circuits utilize factors set forth in *In re Master Mortgage Fund, Inc*, to determine whether a case is so extraordinary as to permit nonconsensual releases of third-party direct claims. *Id.* The factors set forth in In re Master Mortgage Fund, Inc. include: (1) There is an identity of interest 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 assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization. Without it, there is little likelihood of success; (4) A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has "overwhelmingly" voted to accept the proposed plan treatment; (5) The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction. *In re Master Mortg. Inv. Fund Inc.*, 168 B.R. at 935. Meanwhile, the Second and Seventh Circuits have found that nonconsensual releases of third-party claims are only permitted when, "truly unusual circumstances" exist and where approval of the release is terms is important to the success of the plan. *In re Midway Gold, US Inc.*, 575 B.R. at 504.

Further, the Seventh Circuit went on to say that such releases should only be allowed where the "release is necessary for the reorganization and appropriately tailored to the claim . . . and does not include willful misconduct." *Id.* (*quoting In re Airadigm Comms., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008)). The Second, Fourth, Sixth, and Eleventh Circuits follow a test similar to that of the First and Eighth, using factors set forth in *In re Dow Corning Corp*, which looked to the following factors to determine if nonconsensual releases were permitted: (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. *In re Dow Corning Corp*, 280 F.3d at 658. Whichever test may be used, the Plan in the instant case does meet the requirements of an extraordinary or rare case that would permit approval of the nonconsensual releases as part of the Plan.

With respect to the *Master Mortgage Fund* factors, the fifth factor, that the plan provides for payment of all or substantially all of the claims of classes affected by the injunction, is not met. *In re Master Mortg. Inv. Fund Inc.*, 168 B.R. at 935. While it is true that the Plan would channel any claim affected by the injunction into a creditor's trust, there is no way of telling whether payment will be sufficient to pay either all or substantially all claims of classes affected

where there is the potential that not all those who are affected are even aware that they have a claim or that their right to bring such a claim is being terminated by the Plan. The Second and Seventh circuit test is not met either, where there are allegations of willful misconduct against Strawberry Fields. *In re Airadigm Comms., Inc.*, 519 F.3d at 657. Further, the test used by the Second, Fourth, Fifth and Sixth Circuits is not met either where the Plan does not provide an opportunity for those who chose not to settle, such as the Petitioner, to recover in full. *In re Dow Corning Corp*, 280 F.3d at 658.

Where none of the tests laid out by any of the Circuits is fully satisfied, the Debtor's Plan is not so extraordinary or rare as to authorize the Bankruptcy Court to approve the nonconsensual releases of third-party direct claims against Strawberry Fields.

II. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT THE NON-DISCHARGEABILITY PROVISIONS OF 11 U.S.C. § 523(A) ARE NOT APPLICABLE TO CORPORATE DEBTORS RECEIVING A DISCHARGE UNDER A NON-CONSENSUAL PLAN UNDER 11 U.S.C. § 1192 OF SUBCHAPTER V.

Subchapter V of Chapter 11 of the Bankruptcy Code was enacted in 2019 "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs." Hon. Paul W. Bonapfel, A Guide to the Small Business Reorganization Act of 2019, 2 (2020) (updated 2022) (citing H.R. Rep. No. 116-171, at 1 (2019)). Compared to a traditional Chapter 11 reorganization, Subchapter V reduces the overall complexity of filing, eases administrative expenses, provides an easier road to plan confirmation for small businesses, and promotes consensual plans to minimize contested confirmation. In addition to the procedural and expense benefits, Subchapter V eliminated the "absolute priority rule." 11 U.S.C. § 1191(b). Subchapter V replaced the absolute priority rule with the requirement that the debtor pay all of its disposable income for a period of three to five years if any class of creditors rejects the plan. 11 U.S.C. §§ 1191(b), (c)(2). The elimination of the absolute priority rule enables Subchapter V debtors to

retain their equity interests even if the unsecured creditors do not accept the debtor's plan of reorganization. *See* 11 U.S.C. § 1191(c).

For both corporate and individual debtors, confirmation of a plan under Subchapter V may be done consensually under section 1191(a) or non-consensually under 1191(b). *See* 11 U.S.C. §§ 1191(a), (b). While a consensual plan follows the traditional Chapter 11 discharge rules under section 1141, with several exceptions, non-consensual plan discharge occurs under the new Subchapter V discharge provision section 1192. *Id*.

To balance the reduction in creditor rights resulting from the elimination of the absolute priority rule under a non-consensual plan, Congress drafted section 1192 to retain the fundamental principles of fairness and equity. Mirroring the discharge provisions in section 1228(a) of Chapter 12, section 1192 excepts from discharge debts the types of debts listed in section 523(a) for both corporate and individual debtors.

Given the traditional application of section 523(a) to only individual Chapter 11 debtors, courts are split if the prefatory language in section 523(a) supersedes the debtor inclusive language of Subchapter V's section 1192. Based on the text of section 1192, the statutory scheme of Subchapter V, and the principles of fairness and equity, the proper interpretation of section 1192 is both corporate and individual debtors may not receive a discharge from debts of the type listed in section 523(a).

Although the language of 1192(2) is clear and unambiguous on its face, statutory interpretation must be applied to discern the underlying meaning of section 1192 and to resolve any perceived tension with the preamble of section 523(a).

A. Under the context of a Subchapter V non-consensual plan, the text of section 1192 unambiguously excepts from discharge the debts listed in section 523(a) for both corporate and individual debtors.

While the plain language of sections 1192 and 523(a) are unambiguous when read independently, tension arises when the sections are read in conjunction as they appear to be in conflict with one another. At its core, the issue is whether the plain language of section 1192 or section 523(a) controls under a non-consensual Subchapter V plan of reorganization. While section 1192's language broadens the exceptions to discharge of debts listed in section 523(a) to both individual and corporate debtors, 523(a)'s prefatory language limits exceptions to discharge solely individual debtors. Based on the clear text of section 1192, and supported by the context of Subchapter V, Congress intended the kinds of debts listed in section 523(a) to apply to both corporate and individual debtors in the narrow circumstances of section 1192.

The starting point in interpreting sections 1192 and 523(a) is discerning their plain meanings. In doing so, we must examine "'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

Section 523(a), in relevant part, provides that "[a] discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor . . .." *See* 11 U.S.C. § 523(a).

Section 1192 in turn states, "[i]f the plan of the debtor is confirmed under section 1191(b)… the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt… of the kind specified in section 523(a) of this title." *See* 11 U.S.C. § 1192. Meaning, Subchapter V debtors confirming a non-consensual plan may receive a discharge of all debts except debts of the kind listed in section 523(a).

Subchapter V contains its own definition of a "debtor" in section 1182. Section 1182 defines a debtor as "a person engaged in commercial or business activities" with debt less than $7,500,000 and that at least 50 percent of the debt arose from the commercial or business activities of the debtor. 11 U.S.C. § 1182. The term "person" includes individuals, partnerships and corporations. 11 U.S.C. § 101(41).

Based on section 1182's definition of a debtor, section 1192's use of "debtor" applies to both corporate and individual debtors. Reported opinions on both sides of this issue agree that section 1192 applies to both corporate and individual debtors. *See Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 514-15 (4th Cir. 2022) ("We thus conclude that § 1192(2) provides for the discharge of debts for both individual and corporate debtors."); *See also Avion Funding, LLC v. CFS Indus., LLC (In re GFS Indus., LLC)*, No. 22-50403, 2022 WL 168582209, at *7 (Bankr. W.D. Tex. Nov. 10, 2022) ("[I]t is evident that the term 'debtor' in § 1192 encompasses corporations, not just individuals.").

Importantly, section 1192's use of debtor is not restricted by any modifying language; the only restriction contained in section 1192 is language limiting the types of debts excepted from discharge, not the types of debtors. *See* 11 U.S.C. § 1192. By Congress leaving the reference to only debtors, the text of section 1192 is interpreted to apply to both corporate and individual debtors.

As both sides of the opinion agree that 1192 applies to both corporate and individual debtors, the second key phrase in interpreting section 1192 is "debt of the kind." Section 1192 excepts from discharge "any debt… of the kind specified in section 523(a)." 11 U.S.C. § 1192(2). The ordinary meaning of the word "kind" means "a group united by common traits or interests: CATEGORY." *Kind*, Merriam-Webster.com Dictionary, https://www.merriam-

webster.com/dictionary/kind (last visited Jan. 14, 2023). As applied to the language in section 1192(2), the phrase "of the kind" refers to the category items listed in section 523(a), here a list of non-dischargeable debts. When combined with the word "debt," section 1192 is simply referencing the kinds, or categories, of debts listed in section 523(a) without incorporating any other language section 523(a) contains.

In support of this interpretation, the Fourth Circuit held that Congress intended to reference only the list of non-dischargeable debts found in section 523(a), using a shorthand method to avoid listing 21 types of debts in the text of section 1192. *In re Cleary Packaging, LLC)*, 36 F.4th at 515.

Based on Subchapter V's definition of a debtor encompassing both corporate and individual debtors, and the lack of any language modifying the kinds of debtors section 1192 applies to, the text in section 1192 applies to both corporate and individual debtors. As a result, section 1192(2)'s incorporation of the kinds of debts listed in section 523(a) is broader, making the 523(a)'s exceptions to discharge applicable to a debtor under section 1192 without distinguishing between the type of debtor.

The court in *Avion*, along with the Thirteen Circuit majority opinion, suggest if Congress intended the list of debts in section 523(a) to be applicable to corporate debtors, Congress would have explicitly done so. *In re GFS Indus., LLC*, 2022 WL 168582209, at *10. They support this notion by citing that Congress specifically limited the language of section 1141(d)(2), (6) to individual and corporate debtors, respectively, and that the lack of specificity in section 1192 suggests that Congress intended for the prefatory language in section 523(a) to govern section 1192(2). *See* 11 U.S.C. § 1141(d)(2), (6). This is unpersuasive for two reasons.

First, the inverse of the courts' arguments bears equally true; if Congress intended to limit section 1192 to only individuals, they just as easily could have included language stating that section 1192(2) only applied to individual debtors as Congress did in sections 1141(d)(2) ("[a] discharge under this chapter [11] does not discharge a debtor *who is an individual* from any debt excepted from discharge under section 523 of this title.") (emphasis added) and section 727(a)(1) ("[t]he court shall grant the debtor a discharge, unless… the debtor is not an individual."). *See* 11 U.S.C. § 1141(d)(2); 11 U.S.C. § 727(a)(1). By Congress not adding modifying or limiting language as they have in sections 1141(d)(2), (6) and 727(a)(1), the presumption is in favor of Congress intending to keep section 1182's debtor definition as both individuals and corporations in its application to section 523(a) because Congress could have added modifying language as they have in other Code sections.

Second, Congress mirrored the language of Chapter 12's discharge provision, section 1228, that has nearly identical language as section 1192 in regard to exception of debts under section 523(a). *See* 11 U.S.C. § 1228(a)(2) (under section 1228, if the debtor makes all plan payments… the court shall grant the debtor a discharge of all debts provided for by the plan … except any debt … of the kind specified in section 523(a)). When drafting, Congress is presumed to be aware of existing law. *See*, *e.g.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984) ("Congress is presumed to be aware of judicial interpretations of a statute."); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("[w]e assume that Congress is aware of existing law when it passes legislation."). Prior to the enactment of Subchapter V, two cases, *In re JRB Consolidated* and *In re Breezy Ridge Farms, Inc.*, held that the exclusion of section 523(a) debts applied equally to corporations and to individuals despite the lack of language specifying which type of debtor section 523(a) applied to. *See Southwest Ga. Farm Credit, ACA v. Breezy Ridge*

Farms, Inc. (In re Breezy Ridge Farms, Inc.), No. 08-12038, 2009 WL 1514671, at *5 (Bankr. M.D. Ga. 2009); *New Venture Partnership v. JRB Consolidated (In re JRB Consolidated)*, 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995).

Given the nearly identical language excepting section 523(a) debts to corporate and individual debtors in Chapter 12 and Subchapter V, and Congress is presumed to be aware that Chapter 12 corporate debtors are subject to the discharge exceptions in section 523(a), Congress' act in maintaining the inclusive definition of debtor in section 1192(2) supports the interpretation that Congress intended section 523(a) to apply to both corporate and individual debtors.

Although some courts find section 1192 to be ambiguous in its application, the plain language of section 1192, and the context in which section 1192 was drafted, is clear in that the definition of a debtor, as used in section 1192, applies to both corporate and individual debtors, and Congress chose not to include modifying language in section 1192(2)'s applicability to section 523(a) as Congress intended the language to operate as it does under section 1228(a) of Chapter 12.

B. Excepting corporate debtors from discharge debts of the kind specified in 523(a) does not render section 523(a)'s cross-reference to section 1192 superfluous.

Even though section 1192(2) applies to both individuals and corporate debtors based on Subchapter V's definition of a debtor, some courts hold that if section 1192(2) is held to except from discharge the debts of section 523(a), then the cross-reference of section 1192 in the preamble of section 523(a) would be rendered superfluous.

Additionally, the Thirteenth Circuit majority opinion infers that because section 1192 is specifically referenced in the introductory language of section 523(a), section 1192(2)'s exception to discharge for debts "of a kind specified in section 523(a)" must apply only to individual debtors, otherwise section 1192's cross-reference would be superfluous.

Section 523(a) states, "[a] discharge under section… 1192… of this title does not discharge an individual debtor from any debt…" 11 U.S.C. § 523(a).

The majority of opinions on this issue hold that the language limiting application of section 523(a) to individual debtors supplants the definition of debtor in section 1182, as both corporations and individuals, and to not do so would render 523(a)'s prefatory superfluous when combined with section 1192. *See In re GFS Indus., LLC*, 2022 WL 168582209, at *10-11 ("Because § 523(a) unequivocally applies to only individuals, the language of § 1192(2) does not empower § 523(a) to cast a wider net than the text of § 523(a) permits…. [t]hus, in order to determine which debtors § 1192(2) refers, one must look to the language of § 523(a), which unequivocally applies only to individuals."); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, No. 21-31500, 2022 WL 1110072, at *4 (Bankr. E.D. Mich. April 13, 2022) ("[T]he first sentence of § 523(a) clearly limits the denial of discharge to 'an individual debtor'… [b]ecause Defendant LAI is a corporation and not an individual debtor, actions under § 523(a) are not applicable to it."); *Catt v. RTECH Fabrications, LLC (In re RTECH Fabrications, LLC)*, 635 B.R. 559, 566 (Bankr. D. Idaho 2021) ("§ 523(a)'s discharge exceptions only apply to an individual debtor and § 1192(2)'s reference to § 523(a) does not expand its applicability to entity debtors."); *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871, 876 (Bankr. D. Md. 2021) ("[T]he 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.").

While on the face of the issue, it would appear that the cross-reference to section 1192 is rendered meaningless if corporate debtors are interpreted to apply to section 523(a), but as seen in section 1228(a)(2)'s interpretation, the cross-reference still has meaning.

The court in *In re JRB Consolidated* held that there is no inconsistency between section 1228's broader application of all debtors and the limited application of section 523(a) because "the language of § 1228(a) is not inconsistent with § 523(a) as individual debtors are still subject to the § 523(a) exceptions." *In re JRB Consolidated*, 188 B.R. at 374. The court further supported this rationale by separating the language and purpose of section 1228 and section 523(a). While individual debtors are still subject to the rule of section 523(a), the definition of a debtor under section 1228, and the language "debts of the kind," are limited to the subparagraphs of section 523(a) (the debts). *Id*. Under this interpretation, both Code sections are given meaning in their respective capacities.

Given the nearly identical language between section 1228(a)(2) and section 1192(2), the holding remains true in that individual debtors under section 1192 are beholden to the prefatory language in section 523(a), providing meaning to section 1192's reference in section 523(a). Under this interpretation, both Code sections are given meaning. Section 1192(2) incorporates the debts listed in section 523(a) for corporate debtors, while individual debtors remain beholden to section 523(a)'s exceptions whether read through section 1192 or through section 523(a)'s preamble. This conclusion is supported by the rule that "identical words and phrases within the same statute should normally be given the same meaning." *Hall v. United States*, 566 U.S. 506, 519, 132 S. Ct. 1882, 182 L. Ed. 2d 840 (2012).

Although the interpretation of the relationship between sections 1228(a) and 523(a) are widely accepted, dissenting courts still do not recognize the applicability of section 1228 to section 1192. *See In re GFS Indus., LLC*, 2022 WL 168582209, at *9-12, *14-17 (while the court rejects Subchapter V corporate debtors exceptions to discharge under section 523(a), the court also acknowledges that the same language applies in a Chapter 12 case). Even if this court finds

that the two provisions cannot be harmonized, section 1192 should control because it is more specific as it only applies in the narrow circumstance of a non-consensual Subchapter V discharge, whereas section 523(a) applies in Chapters 7, 11, 12 and 13 of the Bankruptcy Code. *See Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 825 (11th Cir. 2003) ("Provisions within a statute are read to be consistent whenever possible. If the two provisions may not be harmonized, then the more specific will control over the general.").

C. Given the elimination of the absolute priority rule, fairness and equity dictate that corporate debtors should not be excepted from discharge the debts specified in section 523(a).

Lastly, the purpose of section 1192 plays a key role in supporting the interpretation that corporate debtors are not excepted from discharge the debts specified in section 523(a). This exception comes under the narrow circumstances of a non-consensual discharge in Subchapter V. Under a consensual plan, debtors receive a discharge under the traditional Chapter 11 discharge provision, section 1141. Under a consensual plan, all creditor classes are required to approve the debtor's plan of reorganization. *See* 11 U.S.C. § 1191; 11 U.S.C. § 1129. While not every single creditor may approve the plan, the specific class of claims has accepted the terms of the reorganization. Under a traditional Chapter 11, creditors have the protection of the absolute priority rule, ensuring that they will receive the most value on their claim at the cost of the debtor losing their equity interest.

While creditors in a consensual Subchapter V plan do not have the protection of the absolute priority rule, it is unnecessary as the classes accept the plan, inferring that they are either made whole and are fine with the debtor retaining their equity interest or they accept that they are likely getting the most value for their claim under the plan presented. The negotiating dynamic under a traditional Chapter 11 cramdown significantly shifts in a non-consensual

Subchapter V plan. Creditors in a Subchapter V cramdown must accept the debtor's payment of all disposable income for a period of three to five years, while the debtor retains their equity and returns to business as usual after this period. While traditional principles of fairness and equity still dictate the confirmation of a non-consensual plan, these principles are loosened so long as the debtor can feasibly make payments under the plan, leaving little room for creditors to use their negotiating leverage to maximize their recovery. Although both Chapter 11 and Subchapter V recognize the importance of allowing debtors to reorganization their obligations and receive a fresh start, the Bankruptcy Code also recognizes the loss that creditors incur as a result of this fresh start principle.

In light of eliminating one of the most powerful statutory tools a creditor has in bankruptcy, Congress recognized that some types of debts should not be dischargeable or debtors will take advantage of the "system" to the detriment of creditors. In finding a balance between the objectives of bankruptcy and the realities of the world, Congress chose to except from discharge a narrow set of liabilities, including fraudulent activity, death and intentional injuries, monies owed to governmental entities, and other categorically similar liabilities.

While excepting from discharge debts of a kind specified under section 523(a) is a novel shift under a Chapter 11 scheme, Congress recognized that by providing the benefits in retaining equity after bankruptcy, certain creditor claims, based in a moralistic purpose, should be expected to go forward unscathed by the rules of the Bankruptcy Code.

CONCLUSION

The Thirteenth Circuit was ultimately incorrect in its decisions to 1.) approve the nonconsensual releases of third-party direct claims against Strawberry Fields pursuant to sections

105(a) and 524(e) of the Code and 2.) to hold that section 523 does not pertain to corporate debtors.

The language of section 524(e) is unambiguous in that it only applies to discharges of the *debtor*. 11 U.S.C. § 524(e). Section 524(e)'s only exception, 524(g) , is also unambiguous in that the only exception to section 524(e) are cases which pertain to the presence of or exposure to asbestos. 11 U.S.C. § 524(g)(2)(B)(i)(I). Neither condition is present in the instant case and, in the face of unambiguous statutory language, the Court should apply the statute as written and not permit the Bankruptcy Court to use its broad, equitable powers under section 105(a) to approve the nonconsensual releases that are otherwise inconsistent with section 524(e). 11 U.S.C. § 524(e); *In re Western Real Estate Fund, Inc.*, 922 F.2d at 601.

Further, approval of such releases would be contradictory to the Due Process clause of the United States Constitution, where approval of the releases would deprive many who have claims against Strawberry Fields their right to notice and opportunity for hearing. U.S. Const. Amdt. 14 § 1; *Patterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. 641 at 653. Aside from the Due Process violation, Bankruptcy Courts, which are courts of limited jurisdiction, do not have authority to adjudicate claims that either do not arise under Title 11 or, are otherwise part of a core bankruptcy proceeding. 28 U.S.C. § 1334(b); *In re Midway Gold US, Inc.*, 575 B.R. at 517; *See Stern v. Marshall*, 564 U.S. at 484 . In the instant case, the Petitioner's claims against Strawberry Fields do not flow from a federal scheme which would permit the Bankruptcy Court to adjudicate such claims via the approval of the nonconsensual releases.

No statutory nor constitutional provision exists such to grant the Bankruptcy Court authority to approve nonconsensual third-party releases of direct claims against Strawberry Fields. It is insufficient justification that an party may be released from claims against it simply

because that party is providing funding to the Plan. *In re Purdue Pharma*, 635 B.R. at 109. Further, the instant case is not "extraordinary" or "rare" as to warrant the approval of nonconsensual releases of third-party claims against Strawberry Fields. *In re Continental Airlines*, 203 F.3d at 212-213; *In re Midway Gold, US Inc.*, at 575; *In re Master Mortg. Inv. Fund Inc.*, 168 B.R. 935; *In re Dow Corning Corp*, 280 F.3d at 658.

Additionally, the Thirteenth Circuit was incorrectly held that corporate debtors under a section 1192 non-consensual plan are not excepted from discharge from the debts of the kind specified in section 523(a). Congress intended for Subchapter V to provide a narrow circumstance in which excepts debts of the kind under section 523(a) from discharge for both corporate and individual debtors to balance the benefit to debtors for retaining their equity interests upon discharge. Section 1192 is unambiguous in that its use of "debtor" applies to both corporate and individual debtors, without being modified or limited as applied in sections 727(a)(1) and 1141(d)(2), (6), and section 1192(2)'s reference to section 523(a) was used as shorthand to incorporate the list of debts already enumerated under section 523(a), without subjecting the provision to the prefatory language of section 523(a). This interpretation harmonizes both sections as section 523(a)'s reference to section 1192 is not left superfluous as the section still governs individual debtors in compliance with the section's purpose.