Team 48R

No. 21-0909

IN THE

Supreme Court of the United States

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,

ELEANOR RIGBY, PETITIONER

v.

PENNY LANE INDUSTRIES, INC., RESPONDENT.

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

BRIEF FOR RESPONDENT

JANUARY 19, 2023

TEAM NUMBER 48
COUNSEL FOR
RESPONDENT

QUESTIONS PRESENTED

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

II. May a corporate debtor proceeding under subchapter V of chapter 11 of the Bankruptcy Code, 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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OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 21-0803 and reprinted at Record 2. Both the bankruptcy court and the district court decided in favor of Penny Lane Industries, Inc, Subchapter V Debtor. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of Penny Lane Industries, Inc, Subchapter V Debtor.

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

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

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

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

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

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

(5) provide adequate means for the plan's implementation . . . .

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

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

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

> If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—
>
> (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 Petitioner's attempt to prove the non-dischargeability of her claims against Debtor and Debtor's corporate parent. Petitioner's appeal jeopardizes the bankruptcy courts' authority to confirm chapter 11 plans, threatens the bankruptcy courts' ability to adjust debtor-creditor relationships, and undermines congressional intent for the underlying policy of reorganization in chapter 11, specifically subchapter V.

I. FACTUAL HISTORY

Penny Lane Industries, Inc. (the "Debtor") is a manufacturer of plastic, glass and metal food containers and a wholly owned subsidiary of Strawberry Fields Foods, Inc. ("Strawberry Fields"). R. at 4. Debtor operates a manufacturing facility in the City of Blackbird along the Liverpool River. R. at 5. This case involves allegations that the Debtor knowingly disposed of industrial chemicals and pollutants at its manufacturing facility in Blackbird and, in doing so, contaminated the area's ground water supply. *Id.* While the source of the contamination has not been conclusively determined, Federal and State authorities determined that a sizable groundwater plume[1] exists under the community of Blackbird. *Id.* During the years 2013 through 2017, tens of thousands of Blackbird residents drank and bathed in contaminated water. *Id.* Tragically, exposure to toxins in the contaminated water has been linked to sickness, birth defects and even death in many Blackbird residents. *Id.* As such, many residents of Blackbird and the neighboring

[1] A groundwater plume is created when hazardous substances, pollutants or contaminants are present within an aquifer system. A plume of contaminated ground water may be formed when substances are released into ground water from above the surface. The contaminated plume can spread horizontally, vertically, and transversely through the aquifer system by means of infiltration, migration, interaquifer exchange, and interaction with surface water. This movement of contaminants throughout an aquifer usually, but not always, occurs in the direction of ground water flow.

communities, assert that they have suffered death and serious injuries due to the alleged conduct of the Debtor, which has made this a mass tort chapter 11 case. R. at 3.

Petitioner, Eleanor Rigby ("Ms. Rigby") is a resident of Blackbird. R. at 5. In 2017, Ms. Rigby's four-year old daughter died of leukemia caused by the alleged exposure to pollutants supposedly dumped by the Debtor in years prior. *Id.* After her daughter's untimely death, Ms. Rigby filed suit against the Debtor and Strawberry Fields. *Id.* Ms. Rigby alleged that, for many years, the Debtor disposed of pollutants on its property as a cost saving measure, and that such pollutants made their way from the Debtor's property into the Liverpool River. *Id.* Ms. Rigby further alleged that the Debtor's then Chief Executive Officer, Maxwell S. Hammer ("Hammer"), was aware as early as 2014 that the waste the Debtor was disposing of on its property had contaminated the community's water supply and could potentially cause serious injury to local residents. *Id.* Finally, Ms. Rigby alleges that Strawberry Fields is liable as well because it knew, or should have known, of its subsidiary's alleged misconduct. R. at 6.

Hundreds of similar lawsuits were subsequently filed against the Debtor by residents of Blackbird and the surrounding communities. *Id.* Each of these lawsuits asserted damages related to death or injury caused by exposure to pollutants that had contaminated the local water supply. *Id.* Many of the lawsuits named Strawberry Fields as a co-defendant as well. *Id.*

With respect to the claims, the allegations set forth in these suits are disputed by both the Debtor and Strawberry Fields. *Id.* They assert that any waste dumped on the Debtor's property was disposed of in accordance with the applicable environmental laws and regulations that existed at the time. *Id.* They deny having any knowledge that such waste allegedly infiltrated the groundwater supply. *Id.* Finally, they assert that there is insufficient evidence to link the pollutants found in the water supply to any waste disposed by the Debtor, noting that there are dozens of

other businesses with manufacturing facilities located upstream along the Liverpool River. *Id.* No judicial determination has yet been made regarding the claims asserted against the Debtor or Strawberry Fields in any forum. *Id.*

II. PROCEDURAL HISTORY

Due to the large amount of claims brought against Debtor, the Debtor's long and winding road into bankruptcy started years before the commencement of this case. R. at 4. Facing mounting lawsuits, the Debtor filed this subchapter V chapter 11 case on January 11, 2021. R. at 6. The Debtor owes less than $2 million to its trade creditors. *Id.* Substantially all of the claims in this case are disputed, unliquidated tort claims related to the alleged dumping of pollutants. *Id.* In total, nearly 10,000 claims asserting cumulative damages of nearly $400 million. *Id.*

After Debtor filed this case under subchapter V of chapter 11 of the Bankruptcy Code, months of post-petition mediation resulted in the filing by the Debtor of a nearly consensual *Plan of Reorganization* (the "Plan"), which provides for the creation of a creditors' trust that will make a substantial distribution to creditors. R. at 3-4. Such distribution was funded in large part by the Debtor's corporate parent, Strawberry Fields. R. at 4. In addition to a discharge of all claims against the Debtor, the Plan contemplates broad non-consensual releases of claims held by the Debtor and by third parties against Strawberry Fields. *Id.*

Ms. Rigby filed a complaint seeking a determination that her claim against the Debtor is non-dischargeable pursuant to sections 523(a)(6) and 1192. *Id.* Ms. Rigby also objected to confirmation of the Plan, arguing that bankruptcy courts do not have authority to release third-party claims against non-debtor entities and, therefore, she should be able to pursue her direct

claims against Strawberry Fields notwithstanding any bankruptcy discharge that the Debtor might obtain. *Id.*

The Bankruptcy Court for the District of Moot dismissed Ms. Rigby's non-dischargeability action, concluding that the provisions of section 523 apply only in cases where the Debtor is an individual. *Id.* The court also overruled Ms. Rigby's objection to the Plan, holding that it had authority to approve the releases contained therein. *Id.* Ms. Rigby timely appealed both determinations. *Id.* On appeal, the Court of Appeals for the Thirteenth Circuit affirm the bankruptcy court on both issues. *Id.* Following that decision, Ms. Rigby petitioned for certiorari, which was granted by the Supreme Court of the United States. R. at 2.

STANDARD OF REVIEW

The questions presented are based on statutory interpretation of the Bankruptcy Code[2] and are therefore purely issues of law. Accordingly, the standard of review for this appeal is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly ruled in favor of the Debtor on each issue. First, it correctly held that the bankruptcy court acted within its constitutional and statutory authority to approve the release of claims against third party Strawberry Fields by confirming the Plan. Second, the court correctly held section 523(a) of the Bankruptcy Code applies solely to individual debtors.

Acting with statutory and constitutional authority, the bankruptcy court possessed federal jurisdiction over the case and properly entered its confirmation order. The release of claims against Strawberry Fields was sufficiently related to the Debtor's bankruptcy under 11 U.S.C. § 1334(b).

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

The bankruptcy court's confirmation order was a core proceeding under 28 U.S.C. § 157(b)(2)(L), and the content of the proceeding was integral to the Debtor's reorganization. Moreover, the bankruptcy court did not violate Ms. Rigby's jury trial and due process rights because it did not adjudicate her claim against Strawberry Fields. Rather, it merely approved the global settlement that channeled the claims and settlement funds to the creditors' trust.

Additionally, the bankruptcy court had the power to release the claims against Strawberry Fields under Bankruptcy Code sections 105(a), 1123(a)(5), and 1123(b)(6); as explained below, section 524(e) does not prohibit such a release. Acting under its proper authority and power, the bankruptcy court correctly approved the non-consensual third-party release because the facts of the case clearly pass the substantive tests used by federal circuit courts across the United States. Although the Thirteenth Circuit has not decided on whether non-consensual, third-party releases are permissible, most other circuits agree that such releases are permissible in appropriate, narrow circumstances. As shown below, the circumstances in this case satisfy the tests in these other jurisdictions. For these reasons, this Court should affirm the Thirteenth Circuit court's decision that the bankruptcy court correctly approved the release of claims against Strawberry Fields. Ms. Rigby's appeal seeks to circumvent section 523(a)'s plain meaning in order to persuade the court that a reference in section 1192(2) applies in the context of subchapter V under a non-consensual plan. By this logic, Ms. Rigby asserts that her claim is non-dischargeable pursuant to section 523(a)(6) and section 1192. However, Ms. Rigby's interpretation is incorrect on several grounds.

A consideration of the intended policy and the history of the Bankruptcy Code along with an analysis of the plain language of the statutes demonstrates that Congress intended for section 523(a) to apply solely to individual debtors. When section 523(a) and section 1192 are read in their entirety, the plain meaning of the statutes read in conjunction is unambiguous. Section 523(a)'s

introductory clause specifically references section 1192, which goes to show the Congress considered the interaction of section 1192 and section 523(a). Had Congress intended to stray from well-settled chapter 11 law when it created subchapter V, it would have clearly stated so. Section 523(a)'s reference to section 1192 demonstrates Congress' awareness of how the statutes would interact. Further, 523(a)'s introductory clause specifically states that it does not discharge "an individual debtor." Therefore, a plain language statutory interpretation and a consideration of the intended policy and the history of the Bankruptcy Code establishes that Congress intended for section 523(a) to apply solely to individual debtors.

Next, the legal authority on which Ms. Rigby's argument relies is purely speculative, naïvely erroneous, and stands against the majority of other circuits' interpretation of this particular issue. The chapter 12 cases relied on by the Petitioner assume a transplantation of identical meaning between two chapters of the Bankruptcy Code that have drastically different purposes. Likewise, the Fourth Circuit's decision in *In re Cleary Packaging, LLC* applies a limited statutory interpretation that blatantly ignores the plain meaning of the statutes, their underlying policy, history, and logical application. The application of both of these authorities to the issue at hand is rooted in pure speculation.

This Court should affirm on both issues.

ARGUMENT

I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT BANKRUPTCY COURTS MAY APPROVE THIRD-PARTY RELEASES INCLUDED IN CHAPTER 11 PLANS PURSUANT TO PRECEDENT AND 11 U.S.C. §§ 105, 1123, AND 524.

Chapter 11 reorganization is designed to maximize creditors' recoveries and preserve viable businesses. The Plan would accomplish both here. The primary purpose of reorganization

under chapter 11 is to prevent a debtor from entering into liquidation, which brings with it a loss of jobs and potential misallocation of economic resources. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). This Court should find that Ms. Rigby and the other tort claimants are receiving more under the Plan than they would otherwise be able to receive by prosecuting their claims against the Debtor and Strawberry Fields independent of Debtor's bankruptcy. Indeed, the bankruptcy court found that the $100 million contribution by Strawberry Fields was substantially greater than any probable recovery from Strawberry Fields. R. at 8. Further, the Plan allows the Debtor to continue operating its manufacturing business, which would maintain the substantial jobs provided by the Debtor in the Blackbird community. *Id.* at 12. If the Debtor pursued chapter 7 liquidation instead, that community would see another factory close, and a major employer exit the already economically starved community. *Id.* Thus, confirming the Plan and allowing Strawberry Fields' would be consistent with the purpose behind chapter 11 reorganizations: avoiding chapter 7 liquidation and misuse of economic resources.

Beyond the Plan fitting into the purpose of a reorganization, the Plan follows the language and legislative intent behind sections 1123, 105, and 524 of the Bankruptcy Code. For this reason, this Court should find that the Plan properly released the third-party claims against Strawberry Fields. Section 1123(a)(5) of the Bankruptcy Code requires that a chapter 11 plan "provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Further, section 1123(b)(6) provides that "a plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Meanwhile, a bankruptcy court has the authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 524 lays out the effect of a discharge in bankruptcy. Under this section, "discharge of a debt of the debtor does not affect the

liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). However, as the analysis below will show, section 524(e) simply serves as a reminder that that the debtor's discharge does not by itself release third party claims. Section 524 also provides that asbestos-related chapter 11 plans must meet additional requirements in order to release third-party claims. *See* 11 U.S.C. § 524(g). As shown below, these three sections of the Bankruptcy Code working in tandem provided the bankruptcy court with the authority to grant the release of Ms. Rigby's claims against Strawberry Fields.

a. *The bankruptcy court possessed the jurisdiction, statutory authority, and constitutional authority to release Ms. Rigby's claims against Strawberry Fields, and it did not violate Ms. Rigby's rights to due process or jury trial.*

Ms. Rigby raised several challenges to the bankruptcy court's jurisdiction and its authority to issue the confirmation order confirming the Plan and releasing the claims against Strawberry Fields. R. at 12. This Court should not find Ms. Rigby's arguments persuasive for the following reasons. First, the federal bankruptcy jurisdiction is broad and covers third-party disputes that affect the estate and impact the debtor's options under a reorganization. *See, e.g.*, *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-10 (1995). In *Celotex*, the Court considered whether a release of litigation regarding a bond against Northbrook, a third party to Celotex's chapter 11 bankruptcy, was sufficiently "related to" Celotex's bankruptcy under section 1334(b) of the Bankruptcy Code. *Id.* at 309-10. The Court found that allowing judgment creditors to reach the sureties of Northbrook's bond and, in turn, the debtor's collateral would likely render the settlement of insurance coverage disputes and a feasible plan impossible. *Id.* Therefore, because the section 105 injunction against such judgment creditors pursuing the sureties would settle the insurance coverage disputes with the debtor's insurers—the "linchpin" of the debtor's creation of a feasible plan—the injunction was "related to" Celotex's bankruptcy and was proper. *Id.* The facts in this

case are similar to those found in *Celotex* because of the complex, protracted process of formulating the Plan. Strawberry Fields' $100 million contribution to the creditors' trust was the linchpin of Debtor's formulation of the plan; only after two months of meditation and Strawberry Fields' offer to fund the creditor trust did the stakeholders settle on the Plan. R. at 8. In fact, the bankruptcy court cited Strawberry Fields' contribution as the pivotal contribution that resolved the complex settlement negotiations, led to a satisfactory distribution to creditors, and garnered overwhelming creditor support for the Plan. *See* R. at 10. Additionally, although Ms. Rigby's claims against Strawberry Fields are based on the entity's alleged failings and are not explicitly derivative of her claims against the Debtor, the essence of her claims is the Debtor's alleged conduct, for which Strawberry Fields would likely have indemnification rights and contribution against the Debtor. *See SPV OSUS, Ltd. v. UBS AG*, 882 F.3d 333, 340 (2d Cir. 2018). Therefore, the bankruptcy court had jurisdiction to confirm the Plan and non-consensual third-party release.

The bankruptcy court also had statutory and constitutional authority to issue the confirmation order and third-party injunction. A confirmation order is both a core matter and a fundamental, central aspect of a chapter 11 case's adaptation of the debtor-creditor relationship. *Stern v. Marshall*, 564 U.S. 462 (2011); 28 U.S.C. § 157(b)(2)(L). The dissent points out that under *Stern*, in the absence of consent, a bankruptcy court does not have constitutional authority to render a decision in a pure state law tort claim dispute that was not necessarily resolved in determining a claim against the estate and did not arise from the bankruptcy itself. R. at 27. However, as provided in the later 2015 Supreme Court case *Wellness Int'l Network, Ltd. v. Sharif*, if the matter is core, Congress gave bankruptcy courts the power to hear and render a decision on the proceeding and to enter appropriate orders such as a confirmation order and an injunction regardless of creditor consent. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 670-71 (2015). Even if 28 U.S.C. §

157(b)(2)(O) appears to exclude proceedings involving a state law personal injury tort claim, *Stern* provides that section 157(b)(5)—which would direct such personal injury tort claims to a district court—"does not have the hallmarks of a jurisdictional decree" and is not jurisdictional. *Stern*, 564 U.S. at 462. Additionally, section 157(b)(5)(C)(1) itself provides that "[a] bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." 28 U.S.C. § 157(b)(5)(C)(1). Therefore, even if Ms. Rigby's claims against Strawberry Fields are not a core proceeding as relating to a confirmation order under section 157(b)(2)(L) or 157(b)(2)(O), the court still had jurisdiction to render its findings on Ms. Rigby's claims.

Lending even greater credence to the argument that the category of a core proceeding may indeed be irrelevant to constitutional authority is Third Circuit case *In re Millennium Holdings*, cited by the majority opinion. Instead of the category, the Third Circuit stressed the importance of the content of the proceeding leading to the third-party release. *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 136 (3d Cir. 2019). The Third Circuit laid out three takeaways from *Stern* that mirror many of the dissent's arguments but ultimately show that the bankruptcy court here had constitutional and statutory authority to confirm the Plan. First, even in cases where a bankruptcy court exercises its core statutory authority, it may still violate Article III of the Constitution. *Id.* at 135. Second, a bankruptcy court acts within its constitutional authority when it resolves a matter that is "integral" to restructuring the debtor-creditor relationship. *Id.* The claims-allowance process fits squarely within those matters which are integral to the restructuring of the debtor-creditor relationship. *Id.* at 136. Importantly, such a matter need not arise from the bankruptcy itself in order for the bankruptcy court to have constitutional authority. *Id.* Third, courts should focus not on the category of the core proceeding, but rather the content of the proceeding when deciding on a bankruptcy court's constitutional authority. *Id.* Only matters that do not arise from the

bankruptcy itself or those that would not necessarily be resolved in the claims-allowance process, therefore non-integral to restructuring the debtor-creditor relationship, must be decided by Article III courts rather than bankruptcy courts. *Id.* Applying these three principles to facts similar to those in this case, the Third Circuit found that the bankruptcy court had constitutional authority to confirm a chapter 11 plan containing third-party releases. *Id.* at 137. After agreeing that the bankruptcy court had statutory authority under 28 U.S.C. § 157(b)(2)(L), the court focused its analysis squarely on whether the bankruptcy court was resolving a matter integral to restructuring the debtor-creditor relationship. *Id.* The court affirmed the lower courts' analysis that the bankruptcy court was resolving an integral matter because (1) without the releases, the released parties would not be willing to make any contributions under the chapter 11 plan, and (2) without those contributions, no chapter 11 plan would have been feasible. *Id.* These determinative facts are nearly identical to the case at hand. First, Strawberry Fields agreed to fund the creditors' trust with $100 million only if the bankruptcy court granted it a broad release from all claims. R. at 8. Second, confirmation of a plan would have been unfeasible without Strawberry Fields's contribution. The record makes it clear that the first component of the Plan, five years of the Debtor's net disposable income, alone would not have been able to achieve creditors' desired 30-40 cents on the dollar return. *Id.* Additionally, the stakeholders had been through over two months of protracted negotiations regarding the global settlement and agreed to the Plan only after Strawberry Fields's offer to substantially fund the creditors' trust. *Id.* These facts, under an application of *In re Millennium Holdings*, show that the bankruptcy court was resolving a matter integral to the restructuring of the debtor-creditor relationship here. Thus, under *Stern* and *In re Millennium Holdings*, this Court should find that the bankruptcy court had both statutory authority and constitutional authority to confirm the plan containing the third-party release.

Finally, the bankruptcy court's release of Ms. Rigby's claims against Strawberry Fields did not violate Ms. Rigby's right to due process or to a jury trial. The bankruptcy court made no ruling on the merits of Ms. Rigby's claims, but rather approved the global settlement that funneled the claims and settlement funds to the creditors' trust. R. at 13. Although under *Stern* and *In re Purdue Pharma*, a non-consensual third-party release is a final judgment against the claimant for which a bankruptcy court cannot enter an order that disposes claims against non-debtors, a bankruptcy court may order injunctions barring claims against a debtor's insurers. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir. 1988). In *MacArthur* and many other cases, the court agreed that the debtor's insurance policies and attributable proceeds were "substantial property of the [bankruptcy] estate which will be diminished if and to the extent that third party direct actions against the insurance carriers result in plaintiffs' judgments." *Id.* at 92. *See, e.g.*, *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.),* 788 F.2d 994, 1001-02 (4th Cir. 1986). As the Thirteenth Circuit majority stated, Strawberry Fields likely would have contribution and indemnification rights against the Debtor, satisfying the role of "insurer." R. at 12. It is important to note that not all these cases considered asbestos-related claims against insurers, so the rule is not limited to bankruptcies encapsulating asbestos-related claims. *See Pearl-Wick Corp. v. John Hancock Mutual Life Insurance Co. (In re Pearl-Wick Corp.),* 15 B.R. 143, 148 (Bankr. S.D.N.Y. 1981), *aff'd,* 26 B.R. 604 (S.D.N.Y.), *aff'd,* 697 F.2d 295 (2d Cir. 1982). Therefore, under this interpretation adopted by various jurisdictions, the bankruptcy court's confirmation order which included the injunction barring Ms. Rigby's claims against Strawberry Fields, the debtor's insurer, was proper and did not violate Ms. Rigby's due process or jury trial rights. Finally, this Court should not outweigh the interests of a few creditors like Ms. Rigby over the confirmation of the

Plan which provides for substantial consideration to creditors affected by the alleged mass torts committed by the Debtor.

b. Nearly every circuit besides the Thirteenth Circuit allows for third-party releases in a chapter 11 plan under narrow circumstances, and the facts of this case meet those narrow circumstances.

As provided above, several provisions of the Bankruptcy Code authorized the bankruptcy court to approve the global settlement and confirm the Plan. The dissent largely dismisses the majority's application of sections 105(a), 1123(a)(5), 1123(b)(6), and 524(e) of the Bankruptcy Code, arguing that section 524(e) prohibits non-consensual third-party releases and that sections 105(a), 1123(a)(5), and 1123(b)(6) do not grant bankruptcy courts any substantive rights or special powers granting statutory authority to grant non-consensual third-party releases. R. at 26. However, the dissent's analysis is flawed, and a variety of federal circuit courts agree with the majority's analysis. Further, the facts of this case fit squarely within the "exceptional circumstances" test many of these circuits utilize in affirming bankruptcy courts' granting of non-consensual third-party releases. For these reasons, this Court should affirm the majority opinion.

i. Working in tandem, sections 105(a), 1123(a)(5), and 1123(b)(6) of the Bankruptcy Code granted the bankruptcy court broad authority to utilize equitable measures necessary to approve the non-consensual third-party release.

It is proper to begin with section 105(a) of the Bankruptcy Court because it grants a bankruptcy court equitable powers to implement other provisions of the Bankruptcy Code. The provision authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The majority opinion correctly states that this amounts to bankruptcy courts having broad equitable powers to confirm settlements that contain releases and injunctions such as the global settlement in this case. R. at 14; *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). Sixth Circuit case *In re Dow Corning Corp.*

fully supports the majority's view on section 105(a). Although the court admitted that the Bankruptcy Code does not explicitly prohibit or authorize a bankruptcy court to enjoin a non-consenting creditor's claims against a third-party non-debtor to facilitate a chapter 11 plan, it held that section 105(a) grants a bankruptcy court the power to implement other sections of the Bankruptcy Code. *In re Dow Corning Corp.*, 280 F.3d 648, 656 (6th Cir. 2002). The Supreme Court endorses this view that as courts of equity, bankruptcy courts possess the power to take equitable measures necessary to modify creditor-debtor relationships and implement other sections of the Bankruptcy Code. *See United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990); *Local Loan Co. v. Hunt*, 292 U.S. at 240. Adopting this view, then, if other sections of the Bankruptcy Code allow for a bankruptcy court to confirm a plan that includes a non-consensual third-party release, section 105(a) authorizes the bankruptcy court to do so.

Sections 1123(b)(6) and 1123(a)(5) answer the question of which provisions of the Bankruptcy Code allow for the confirmation of a chapter 11 plan that includes a non-consensual third-party release. 1123(b)(5)'s allowance of a reorganization plan to "include any . . . appropriate provision not inconsistent with the applicable provisions of this title" grants a bankruptcy court considerable discretion to confirm reorganization plans and reorder debtor-creditor relationships. *In re Dow Corning Corp.*, 280 F.3d at 656. Further, when a plan provides for the payment of all claims, a bankruptcy court's decision to enjoin claims against a non-debtor in order to prevent a defeat of reorganization is consistent with a bankruptcy court's primary function. *Id.* Finally, section 1123(a)(5) mandates that a chapter 11 plan provide adequate means for its implementation. 11 U.S.C. § 1123(a)(5). Although here, not all the Debtor's creditors would be paid in full, creditors with allowed claims would receive 30-40 cents on the dollar, far more than what they would have received under a liquidation of the Debtor. R. at 8. Moreover, the more than two-

month long global settlement negotiations indicate that without a confirmation of the Plan and the release of claims against Strawberry Fields, the Debtor's reorganization was likely to be defeated. *Id.* Finally, Strawberry Fields demanded the release in exchange for its $100 million in funding for the creditors' trust, implying that it would hold the funds unless the bankruptcy court accepted the release. *Id.* Therefore, the release of claims against Strawberry Fields was an adequate means for the Plan's confirmation under section 1123(a)(5). For the foregoing reasons, the release of claims against Strawberry Fields is consistent with the bankruptcy court's primary function as authorized by sections 105(a), 1123(b)(6), and 1123(a)(5) of the Bankruptcy Code.

ii. Section 524(e) of the Bankruptcy Code does not prohibit non-consensual third-party releases.

Granting a non-consensual third-party release is not inconsistent with any provision of the Bankruptcy Code. The dissent argues that section 524(e) unambiguously prohibits the release of any third party by a bankruptcy court, while the language in exception section 524(g)(4)(A)(ii) indicates that Congress believed that section 524(g) was creating an exception to the applicable rule of law. R. at 25. On the other hand, the majority insists that the section merely clarifies that the debtor's discharge does not by itself discharge others' claims and that section 524(g) is not an exception to 524(e), instead imposing additional restrictions in asbestos-related bankruptcy cases. R. at 15. In the face of the contrasting opinions in the majority and dissent regarding section 524(e), statutory interpretation is proper. Canons of construction serve as "rules of thumb that help courts determine the meaning of legislation." *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253 (1992). One of these canons states that the Bankruptcy Code should not be read to "erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990) (internal citations omitted). Moreover, the "normal rule of statutory construction is that if Congress

intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S. 494, 501 (1986). Section 524(e) provides that "the discharge of the 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).

With an emphasis on legislative intent and the backing of other federal circuits, the majority's is the correct reading of section 524(e). First, the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits all agree that this language merely explains the effect of a debtor's discharge; it does not prohibit the release of a non-debtor. *See In re Dow Corning Corp.*, 280 F.3d at 657; *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying)*, 780 F.3d 1070, 1076-79 (11th Cir. 2015). Second, if Congress had intended to outright prohibit non-consensual third-party releases, it would have done so explicitly. *Airadigm Comm's., Inc. v. F.C.C. (In re Airadigm Comm's., Inc.)*, 519 F.3d 640, 656 (7th Cir. 2008). The legislative intent behind section 524(h) illustrates that point. The House Report on the enactment of section 524(h) provides, "[T]he special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization." H.R. Rep. No. 103-834 (1994). As shown above, bankruptcy courts have the authority to issue injunctions and order releases under the Bankruptcy Code in sections 105(a), 1123(b)(6), and 1123(a)(5).

Even the Fifth Circuit, which the dissent endorses as a jurisdiction disproving of non-consensual third-party releases, does not agree with the dissent's assertion that section 524(e) precludes non-consensual third-party releases in chapter 11 reorganization plans. In *Republic*

Supply Co., the court held that although courts have construed section 524 to preclude third-party releases, the statute does not by its words preclude a discharge when a bankruptcy court has confirmed it as an integral part of a reorganization plan. *See Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987). As shown above, the release of claims against Strawberry Fields was a crucial reason the stakeholders were able to agree on the global settlement that saw Strawberry Fields contribute $100 million to the creditors' trust. Therefore, this Court should find that the release of claims against Strawberry Fields was proper despite section 524(e).

iii. The facts of this case fit squarely within the "exceptional circumstances" test utilized by many federal circuits, showing that the bankruptcy court's grant of Strawberry Fields's release was proper.

In addition to the bankruptcy court having statutory authority to grant Strawberry Fields's release, the facts of this case satisfy the substantive tests implemented by various circuit courts to approve non-consensual third-party releases. Second Circuit case *In re Metromedia Fiber Network, Inc.* provides multiple examples of the "exceptional circumstances" test employed in the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits to find whether a bankruptcy court had the authority to approve a non-consensual third-party release. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-43 (2d Cir. 2005). The Second Circuit has held that "[i]n bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992). Cases across these listed federal circuits explain what constitutes an "important" part of a debtor's plan: (1) when the estate received substantial consideration; (2) when the enjoined claims were channeled to a settlement fund; (3) when the enjoined claims would indirectly impact the debtor's reorganization "by way of indemnity or contribution;" and (4) when the plan otherwise provided for the full payment of the enjoined

claims. *In re Drexel Burnham,* 960 F.2d at 293; *MacArthur Co. v. Johns–Manville Corp.*, 837 F.2d at 93–94; *In re A.H. Robins Co.*, 880 F.2d at 701. The facts of this case match the circumstances in tests (1)-(3). As noted above, the creditors' trust received a substantial amount from Strawberry Fields: $100 million, which would enable creditors with allowed claims to receive 30-40 cents on the dollar. R. at 8. The Plan would channel those funds and the claims against Strawberry Fields into the global settlement fund. *Id.* at 8-9. Finally, as the majority noted, Strawberry Fields would likely have contribution or indemnification rights against the Debtor if the claims proceeded outside of bankruptcy. *Id.* at 12. In the face of the circumstances of this case overwhelmingly satisfying the "exceptional circumstances" test used across nearly all the federal circuits, this Court should find that the bankruptcy court properly approved the release of claims against Strawberry Fields.

Moreover, the outcome in *In re Metromedia Fiber Network, Inc.* supports adopting this view. In the case, the single finding used to justify the release was that the trust made a "material contribution" to the estate. *In re Millennium Lab Holdings II, LLC.*, 945 F.3d at 143. However, the courts below did not find that the release itself was important to the Plan, the minimum under the *Drexel Burnham* standard for the Second Circuit. *Id.* This outcome contrasts drastically with the present case. The bankruptcy court—and the Thirteenth Circuit majority—found that "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan" without Strawberry Fields's contribution, and the $100 million contribution was far greater than any recovery under a chapter 7 liquidation. R. at 10. The breadth between these circumstances should convince this Court to affirm the Thirteenth Circuit's decision.

iv. Even the federal circuits that largely prohibit non-consensual third-party releases do not enforce a blanket prohibition on these releases.

While the dissent correctly points out that the Fifth, Ninth, and Tenth Circuit largely prohibit non-consensual third-party releases in chapter 11 cases, even these jurisdictions do not have blanket prohibitions on the practice. The Ninth and Tenth Circuits prohibit non-consensual third-party releases, but only in cases not related to asbestos claims. *See In re Lowenschuss,* 67 F.3d 1394, 1401-02, 1402 n. 6 (9th Cir. 1995); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 600-02 (10th Cir. 1990). Additionally, while the Tenth Circuit bars using releases to bar creditor litigation against non-filing co-debtors, guarantors, or obligors, bankruptcy courts in the Tenth Circuit have held that the bar on third-party releases set forth in *Western Real Estate* are not extensive and that section 524(e) of the Bankruptcy Code does not expressly preclude non-consensual third-party releases. *In re Midway Gold US, Inc.*, 575 B.R. 475, 505 (Bankr. D. Colo. 2017). Furthermore, as shown above, the Fifth Circuit endorses the viewpoint that section 524(e) does not prohibit non-consensual third-party releases. These circuits' acceptance of non-consensual third-party releases lends itself against the dissent's argument that the practice is inequitable or that the practice should be prohibited. Therefore, this Court should rule that the release of the claims against third party Strawberry Fields were proper here.

II. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE SECTION 523(A) EXCEPTIONS TO DISCHARGE APPLY ONLY TO INDIVIDUAL DEBTORS.

Ms. Rigby argues that her claim against Debtor is non-dischargeable because corporate debtors do not receive a complete discharge in subchapter V under a non-consensual plan. Her argument rests on the premise that a cross-reference to section 523(a) in the recently enacted section 1192(2) demonstrates that Congress intended for the 21 subcategories of non-dischargeable debts in section 523(a) to apply to chapter 11 debtors in subchapter V cases.

For several reasons, Ms. Rigby's argument is incorrect. First, a consideration of the intended policy and the history of the Bankruptcy Code along with an analysis of the plain language of the statutes demonstrates that Congress intended for 523(a) to apply solely to individual debtors. Second, the legal authority on which Ms. Rigby's argument relies is purely speculative, naïvely erroneous, and stands against the majority of other courts' interpretation of this particular issue.

a. *The underlying policy of the Bankruptcy Code disfavors a determination that section 523(a) applies to corporate debtors.*

To better understand why Ms. Rigby's argument is incorrect, it helps to look at the intended policy of the Bankruptcy Code. The Bankruptcy Code's overarching goal is providing debtors a fresh start, which gives rise to a strong presumption against exceptions to discharge. *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). Thus, discharge exceptions must be strictly construed to give maximum effect to the rehabilitative policy of bankruptcy. *Id.*

When looking at how discharge works in the Bankruptcy Code, it is best to start by looking at chapter 7's discharge provisions. Chapter 7's primary purpose is liquidation. Thus, under chapter 7, no debts of a corporation are discharged, but most debts of an individual are. *See* 11 U.S.C. § 727(a)(1). While most debts of an individual are discharged under chapter 7, there are several exceptions to discharge outlined under section 523(a). *See* 11 U.S.C. § 523(a). Of these 523(a) exceptions to discharge, at least 7 of the categories can only apply to humans. *See*, *e.g.*, 11 U.S.C. §§ 523(a)(5), (15) (domestic support obligations and marital property settlements). Additionally, the introductory language of 523(a) states that discharge under five Bankruptcy Code provisions, including section 1192, does not discharge "an individual debtor" from the type of debts listed in section 523(a). 11 U.S.C. § 523(a). As such, it is quite clear that 523(a)'s exceptions to discharge only apply to individual debtors. This aligns well with chapter 7's primary purpose

of liquidation because it allows individual debtors to obtain a fresh start. Corporations, on the other hand, are merely an aggregation of assets and do not need the same fresh start, as they are being liquidated with no expectation of a continuation of the business.

In the alternative, "…the policy of Chapter 11 is to permit successful rehabilitation of debtors…" NLRB, 465 U.S. at 515. Chapter 11 achieves this rehabilitation of debtors through the creation and confirmation of reorganization plans. 11 U.S.C. § 1129. "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation..." and to promote a continuation of the business. NLRB, 465 U.S. at 524. Accordingly, the purpose of discharge provisions in chapter 7 is very different from the purpose of discharge provisions in chapter 11. Due to this altered purpose, the treatment of discharge provisions under chapter 11 is reversed and nearly a complete discharge is granted for corporations. 11 U.S.C. § 1141. In enacting the Bankruptcy Code, Congress rejected prior law and made a carefully considered decision to grant corporations a complete discharge in chapter 11. *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764–66 (2005). This is because, without this complete discharge, viable corporations simply could not be restructured under the prior law. *Id.* If significant non-dischargeable debts remained as soon as the reorganized company emerged from bankruptcy, chapter 11's purpose of reorganization through the continuation of the business and the restructuring of its debt could not be achieved. *Id.*

The Small Business Reorganization Act of 2019 ("SBRA") enacted a new subchapter V of chapter 11 of the Bankruptcy Code. Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.). The purpose of subchapter V was "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs." H.R. REP. NO. 116-171

(2019). Subchapter V of chapter 11 allows small business debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business…" H.R. REP. NO. 116-171. Thus, subchapter V's purpose is in alignment with the overarching goals of chapter 11, but with an emphasis on what is best for small businesses. The discharge that a debtor receives in a subchapter V case depends on whether a reorganization plan was confirmed consensually or through a cramdown. S*ee generally*, Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* (2020). Discharge for consensual plans under subchapter V are governed by section 1141(d), except for section 1141(d)(5). 11 U.S.C. § 1181(a). However, when the court confirms a cramdown plan, section 1141(d) does not apply, except as provided in section 1192. 11 U.S.C. § 1141(d)(1)(A). Instead, the Debtor receives a discharge under the newly enacted section 1192. 11 U.S.C. § 1192.

Against this setting, Ms. Rigby argues that section 1192(2)'s cross-reference to section 523(a) demonstrate that Congress intended to include approximately two dozen categories of non-dischargeable debts for chapter 11 debtors in subchapter V cases. S*ee generally*, Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* (2020).

b. *A plain language statutory interpretation of both section 523(a) and section 1192 shows that the section 523(a) exceptions to discharge were only intended to apply to individual debtors.*

Ms. Rigby's argument is one that can be easily refuted by basic methods of statutory interpretation. "As with any dispute regarding the application or interpretation of a statute, the first rule of statutory construction is to examine the language of the statute itself." *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871, 875 (Bankr. D. Md. 2021). "When a statute's language is plain, the sole function of

the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

Courts should give effect, if possible, to every clause and word of statute, avoiding any construction which implies that legislature was ignorant of the meaning of the language it selected. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Further, a statute should be construed so that effect is given to all its provisions. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). No part of a statute should be ignored, so as to render it inoperative, superfluous, void or insignificant. *Id.*

Here, the language of section 1192 and 523(a) are quite clear. The plain language and intertwined application of both statutes contradicts Ms. Rigby's interpretation. Section 1192(2) states that under a cramdown confirmation, the discharge does not discharge any debt "of the kind specified in [§ 523(a)]." 11 U.S.C. § 1192(2). However, a reading of section 1192(2) in isolation does not comport with the Supreme Court's suggested process of statutory interpretation. Instead, the statute should be construed to give effect to all its provisions, so that no part of the statute is inoperative. Therefore, in interpreting the meaning of section 1192, one must consider section 523(a), which section 1192(2) plainly cross-references.

The introductory clause of section 523(a) plainly states, "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…." and then goes on to specify 21 subcategories of debt excepted from discharge. 11 U.S.C. § 523(a).

Ms. Rigby asks the court to sever and ignore the introductory clause of 523(a) in its interpretation of section 1192. Her argument instead focuses on the "kind of debt" specified in 523(a), while paying no mind to 523(a)'s introductory clause, which mentions that the title does not discharge an "individual debtor" from any debt of the specific "kinds" mentioned. 11 U.S.C.

§ 523(a). While ignoring the introductory clause is highly convenient for Ms. Rigby, it stands against the Supreme Court's suggested methods of statutory interpretation, which says that a statute should be construed so that effect is given to all its provisions. *Hibbs*, 542 U.S. at 101. When read in its entirety, section 523(a) very clearly applies only to individual debtors. Further, the statute's introductory clause references section 1192, which demonstrates that Congress considered section 523(a)'s interaction with subchapter V cases where section 1192 applied. Isolating an important part of section 523(a), which specifically references its application in 1192, would be ignoring congressional intent for the convenience of the Petitioner. Since section 523(a), which applies only to individual debtors, specifically mentions section 1192, section 523(a) should control.

Aside from section 523(a)'s obvious cross reference to 1192, there are a few other clues that Congress intended for 523(a) to apply only to individual debtors. First, it is important to again note that at least 7 of the categories under 523(a) can only apply to individual debtors. *See*, *e.g.*, 11 U.S.C. §§ 523(a)(5), (15) (domestic support obligations and marital property settlements). Thus, the argument that 1192(2) allows 523(a) to apply corporate debtors blatantly ignores that certain subcategories of 523(a)'s "kinds of debt" are entirely inapplicable to corporate debtors. Secondly, the "kind of debt" must also acknowledge the "kind of debtor" to have a comprehensive interpretation. Isolating the "kind of debt" from the "kind of debtor" ignores an important characteristic of that debt. As explained by the Thirteenth Circuit, "kind" means sharing "common traits," MERRIAM-WEBSTER DICTIONARY (online ed.), and those traits can include the nature of the entity owing the debt. The kind of debt specified in section 523(a) has two common traits: (1) the debtor must be an individual and (2) the obligation must arise out of circumstances specified in one of the subsections.

Therefore, textual analysis and linguistic cannons of construction favor our interpretation. The plain language of section 1192 and section 523(a) when read in conjunction, as Congress intended, leads to the conclusion that the section 523(a) exceptions to discharge apply only to individual debtors. This reading follows the Supreme Court's methods for statutory interpretation by giving meaning to every term of both section 523(a) and section 1192, *see Duncan v. Walker*, 533 U.S. 167, 174 (2002) ("It is [the court's] duty to give effect, if possible, to every clause and word of a statute."). On the other hand, Ms. Rigby's interpretation renders the entire introductory clause of 523(a), including its cross reference to section 1192, irrelevant. Further, our reading avoids interpretation which implies that legislature was ignorant of the meaning of the language it employed in crafting section 1192 and section 523(a). *Montclair*, 107 U.S. at 152. After all, it is the courts' role to determine and carry out the intent of Congress, not to rewrite the laws as the legislature plainly wrote them.

c. *The lack of legislative history for section 1192 shows that Congress likely did not intend for section 523(a) exceptions to apply to corporate subchapter V debtors.*

Although the court need not consult legislative history because the statute is clear and unambiguous, it is worth noting that the legislative history for section 1192 demonstrates nothing that would supports the conclusion that Congress intended to expand the application of section 523(a) to corporate debtors. *In re Satellite Restaurants, Inc. Crabcake Factory USA*, 626 B.R. at 878. The court in *Satellite* found this lack of legislative history to be significant. *Id.* As was already stated above, under chapter 11, the section 523(a) exceptions do not apply to corporate debtors. If Congress intended to make the 523(a) exceptions apply to subchapter V corporations with plans confirmed under section 1191(b), it would have clearly said so in its report. *Id.* This dramatic change from existing Chapter 11 law would not have gone unmentioned in the House Report. Because it was not mentioned, the House Report's explanation that the exceptions are for "any debt

that is otherwise non-dischargeable" confirms Congress' intent to apply existing discharge exceptions in subchapter V cases, not to expand them. H.R. REP. NO. 116-171 (2019).

d. *The legal authorities on which Ms. Rigby's case relies are not only speculative but also incorrectly apply the law.*

Ms. Rigby also relies on a few legal authorities in attempting to advance her argument, including the Fourth Circuit's decision in *Cantwell-Cleary Co. v. Cleary Packaging, LLC*, which looks specifically at this issue, and two chapter 12 cases, which interpret similar language in section 1228(a)(2). *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); *Southwest Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *New Venture P'ship v. JRB Consol. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). Both of the legal authorities on which Ms. Rigby rests her argument are unpersuasive for a number or reasons.

Petitioner's argument with regard to the two chapter 12 cases is that Congress seems to have intended to make the subchapter V cramdown discharge the same as the discharge in chapter 12 because the discharge regarding section 523(a) limitations for non-consensual plans in subchapter V is virtually identical to the discharge regarding section 523(a) limitations in chapter 12. 11 U.S.C. § 1192; 11 U.S.C. § 1228(a). However, this argument is unconvincing and does nothing to further Petitioner's position for a few reasons.

First, the analysis seems to rely on the same misreading of "kind" as Ms. Rigby's primary argument. As stated previously, the "kind of debt" must also acknowledge the "kind of debtor" to have a comprehensive interpretation. Isolating the "kind of debt" from the "kind of debtor" ignores an important characteristic of that debt. The inference that similar terms have identical meanings in different chapters of the Bankruptcy Code is a weak one. *See Dewsnup v. Timm*, 502 U.S. 410

(1992) (rejecting the argument that the same term necessarily has the same meaning in the same section). This is particularly true when one considers the very different purposes of chapter 12 as compared to chapter 11. Chapter 12 chiefly focuses on financially distressed family farmers. As such, chapter 12's coverage of corporations is limited to a very narrow class of family-owned farming corporations, 11 U.S.C. § 101(18), where there is often little practical distinction between the farmer and the corporation. This makes subjecting corporations to the same discharge rules applied to individuals make sense because the corporation is merely an alter ego of the individual farmer. Due to chapter 12's niche application, chapter 12 does not need to distinguish an individual debtor from a corporate debtor in the same way that chapter 11 requires. *United States v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 430-31 (S.D.N.Y. 2014). Unlike chapter 12, subchapter V of chapter 11 includes corporations that are easily distinguishable from any individual. *See Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 2022 WL 16858009, at 7 (Bankr. W.D. Tex. Nov. 10, 2022). Subchapter V covers similar owner-operator corporations and most other non-publicly traded corporations, like the Debtor, where such considerations do not apply. *Id*. Given the different purposes of each chapter, assuming a transplantation of identical meaning is especially inappropriate. Even the court that decided *In re JRB Consol, Inc.,* one of Ms. Rigby's chapter 12 cases, saw this difference and rejects the Petitioner's reading of it. *Id* at 6-7.

Most importantly, however, is that the similar language in section 1228(a)(2) did not originate with chapter 12. Instead, it was borrowed from chapter 13, *See* 11 U.S.C. § 1328. which does not apply to corporations. 11 U.S.C. § 109(e). Therefore, suggesting that Congress used that language to extend the individual discharge exceptions to corporations is illogical - particularly because Congress used very different language in chapter 11 in achieving that goal. Congress does

not make a fundamental change in settled law without clearly signaling its intention. As the Supreme Court stated in *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001), "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *See also Penn. Pub. Welfare Dep't. v. Davenport*, 495 U.S. 552, 563 (1990) ("We will not read the Bankruptcy Code to erode past ... practice absent a clear indication that Congress intended such a departure"). There is no indication in the legislative history that Congress intended such a drastic change. *See* H.R. Rep. No. 116-171 (2019). On the contrary, the House Report suggests no change was intended. *See* H.R. Rep. No. 116-171 (2019). Even further, the plain language of both section 1192 and section 523(a) when read in their entirety does not require the court to go searching for breadcrumbs in the legislative history. The language of section 1192(2) is only ambiguous when one's method of statutory interpretation ignores the plain language of section 523(a).

Ms. Rigby also cites *Cantwell-Cleary Co. v. Cleary Packaging, LLC* as authority for her argument. The U.S. Court of Appeals for the Fourth Circuit in *In re Cleary Packaging, LLC* was the first circuit court to address the issue of whether section 523(a) applied to corporate debtors in the subchapter V context. *In re Cleary Packaging LLC*, 36 F.4th at 513. It held that, pursuant section 1192(2)'s reference of section 523(a), the 21 kinds of debts listed in section 523(a) are excepted from the discharge of all subchapter V debtors with non-consensual plans confirmed under section 1191(b), whether those debtors are individuals or corporations. *Id.* However, in deciding this, the Court in *Cleary* ignored the basic rules of statutory interpretation, a half century of settled doctrine, congressional intent, and the overall underlying policies of the Bankruptcy Code.

Cleary describes the relationship between section 523(a) and section 1192 as "discordant" and "clumsy." *Id* at 517. When the statutes are read to reflect their interpretation, they do appear "discordant" and "clumsy" because the Court in *Cleary* ignores the introductory clause of 523(a), as well as quickly disposes of a half century of doctrine in which it is well settled that 523(a) only applies to individual debtors. *Id.* However, when both of the statutes are read in their entirety and their historical background is considered, the relationship between 523(a) and section 1192 is quite clear, and not at all "discordant" or "clumsy."

In addition to its very limited statutory interpretation, the Court in *Cleary* stated that it based its decision on perceived equitable considerations by concluding that Congress eliminated the complete corporate discharge under non-consensual subchapter V plans to "provide an additional layer of fairness and equity to creditors to balance against the altered priority that favors the debtor." *Id* at 517.

To understand this argument, some background on subchapter V is required. Subchapter V eliminates the absolute priority rule, which had been a major impediment to the reorganization of corporate debtors. Under the absolute priority rule, the owner of a corporation could not retain its ownership under a chapter 11 plan unless all classes of creditors were paid in full or voted to accept the plan, both of which are nearly impossible to achieve. To deal with this roadblock to reorganization, subchapter V replaced the absolute priority rule with a requirement that the debtor must pay into a plan all of its "disposable income" for a period of years if any class of creditors rejects the plan. 11 U.S.C. §§ 1191(b), (c)(2). Accordingly, under a non-consensual subchapter V corporate debtor's plan, the owner is able retain its ownership interest in the corporation without paying creditors in full and over their objection.

Cleary's perceived equitable concerns are grounded in the elimination of the absolute priority rule, which the Court feels creates an imbalance that favors the debtor. *In re Cleary Packaging LLC*, 36 F.4th at 517. In addressing this perceived concern, the Court in *Cleary* speculated congressional intent and established a so-called balance construct based on no support whatsoever. *Id.* As previously stated, the legislative history for section 1192 demonstrates nothing that would support the conclusion that Congress intended to expand the application of section 523(a) to corporate debtors. *In re Satellite Restaurants, Inc. Crabcake Factory USA*, 626 B.R. at 875. The *Cleary* Court took great liberty in couching its conclusions in a fabricated legislative intent that does not actually exist. It is an extreme leap of logic to assume that Congress chose to make the 523(a) exceptions apply to subchapter V corporations with plans confirmed under section 1191(b) without even a slight mention of this intended change, especially considering this change would stand against half a century of existing chapter 11 law.

Further, this so-called balance would only exist if the creditor that is owed an otherwise non-dischargeable debt controlled whether the plan was consensual, but that is not how subchapter V works. The determination of whether a plan is consensual or non-consensual depends on class voting, not the actions of a specific creditor. 11 U.S.C. § 1126. Therefore, there is no imbalance between the debtor and creditor in need of remedy. *Cleary*'s supposed balance construct is rooted in fiction because the holder of an otherwise non-dischargeable claim may be outvoted by other creditors in their class who do not hold non-dischargeable claims. As such, a debt could suddenly become non-dischargeable by happenstance of a completely unrelated class's rejection of the plan. By this logic, whether or not section 523(a) will apply to a subchapter V claim is not based on policy concerns and principles of equity, but on a proverbial flipping of a coin. For these reasons,

Cleary does the opposite of what it sets out to accomplish because it leaves matters of fairness and equity to pure chance.

Therefore, a conclusion opposite of *Cleary* would better promote fairness and equity. A discharge exception does not promote fairness and equity in the corporate non-consensual subchapter V context because in leaving equitable considerations to chance, it does not treat all creditors fairly. If Ms. Rigby's debt is not discharged, then it must be paid in full by the Debtor after it emerges from bankruptcy. That expense reduces the funds available to pay other identical tort claimants and Ms. Rigby will receive a higher distribution than other similarly situated creditors. This outcome stands contrary to the fundamental principles of bankruptcy law. *Howard Delivers Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) ("The Bankruptcy Code aims, in the main, to secure equal distribution among creditors.").

Finally, while the relationship between sections 1192(2) and 523(a) is still debated, a majority of the reported opinions on this issue find that 523(a) does not apply to corporate subchapter V debtors. *See In re GFS Indus., LLC*, 2022 WL 16858009 at 1*; *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022); *Catt v. RTECH Fabrications, LLC (In re RTECH Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *In re Cleary Packaging LLC*, 36 F.4th at 509; *In re Satellite Restaurants, Inc. Crabcake Factory USA*, 626 B.R. at 871.

The consideration of policy in conjunction with the analysis of the plain language of the statutes demonstrates that Congress intended for 523(a) to apply solely to individual debtors. This interpretation aligns with the Bankruptcy Code's overarching principles of fairness and equity and comports with the logical application of the law. Therefore, this Court should rule that section 523(a) applies solely to individual debtors.

CONCLUSION

Chapter 11 of the Bankruptcy Code is designed to maximize the recoveries of creditors and preserve viable businesses. Affirming the courts below would achieve both purposes and allow an equitable reorganization to proceed. For the foregoing reasons, we ask that the Court AFFIRM.