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

JANUARY 19, 2023

TEAM NUMBER 49
COUNSEL FOR PETITIONER

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 United States Court of Appeals for the Thirteenth Circuit's decision can be found at No. 21-0803 and is reprinted at Record 3. The Bankruptcy Court for the District of Moot decided in favor of Penny Lane Industries, Inc. On Appeal, the Court of Appeals for the Thirteenth Circuit affirmed in favor of Penny Lane Industries, Inc.

STATEMENT OF JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

This action requires interpretation of certain provisions of Titles 11 of the United States Code. The sections excerpted below can be found restated in full in the Appendix.

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

> The court shall grant the debtor a discharge of all debts … except any debt—
> (2) of the kind specified in section 523(a) of this title.

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

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

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

STATEMENT OF THE CASE

This case is about preserving the rights of a mass tort victim, as well as creditors, in bankruptcy. Respondent's position is unfaithful to the Bankruptcy Code's statutory provisions, as it seeks to trample on a victim's rights and confer the protections of the Bankruptcy Code to parties who have not submitted themselves to the bankruptcy process.

I. FACTUAL BACKGROUND

Penny Lane Industries, Inc. (the "Debtor") manufactures plastic, glass, and metal food containers, and is based in the City of Blackbird, Moot. (R. at 4.) The Debtor is a wholly owned subsidiary of Strawberry Fields Foods, Inc. ("Strawberry Fields"), a national food company. (R. at 4-5.) Petitioner, Eleanor Rigby ("Ms. Rigby") has resided in Blackbird since 1982. (R. at 5.) The Debtor is alleged to have "knowingly disposed of industrial chemicals and pollutants at its manufacturing facility in Blackbird," and to have contaminated Blackbird's ground water supply. (R. at 5.) Federal and State authorities have concluded that Blackbird's water supply is contaminated. *Id*. Federal studies show Blackbird's residents drank and bathed in water contaminated with toxins between 250 and 3,000 times the permitted level. *Id*. Exposure to these toxins, at these concentrations, are linked to illness, birth defects, and death. *Id*.

In 2017, Ms. Rigby sued the Debtor and Strawberry Fields after her four-year-old daughter's tragic death from leukemia. *Id*. First, she alleged the Debtor dumped pollutants on their property that infiltrated Blackbird's water supply. *Id*. Second, she alleged Maxwell S. Hammer ("Hammer"), the Debtor's former Chief Executive Officer, knew of the contamination since 2014. *Id*. Third, she alleged Strawberry Fields, among other theories, knew or should have known of the Debtor's alleged misconduct. (R. at 6.) Residents of Blackbird and the surrounding communities levied hundreds of similar lawsuits, seeking damages for death or

injury sustained by exposure to the pollutants in the water supply. *Id*. Strawberry Fields is listed as a co-defendant in many of these suits. *Id*. The Debtor and Strawberry Fields deny any wrongdoing, and no judicial determination has been made on these claims. *Id*.

On January 11, 2021, these lawsuits forced the Debtor to file for bankruptcy under subchapter V of chapter 11, which the Debtor is stipulated to qualify for. *Id*. About 10,000 unliquidated tort claims, asserting cumulative damages of almost $400 million, were filed against the Debtor. *Id*. Ms. Rigby filed a $1 million unsecured claim against the Debtor. (R. at 6-7.) To date, this claim is unobjected to and is allowed. (R. at 7.)

After the Debtor's petition for relief, Ms. Rigby initiated an adversary proceeding against the Debtor, asking the bankruptcy court to deem her $1 million claim non-dischargeable per sections 523(a) and 1192(2). *Id*. The Debtor filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, claiming section 523(a)'s non-dischargeability provisions do not apply to business entities. *Id*. The bankruptcy court held even under subchapter V of chapter 11, section 523(a)'s exceptions do not apply to corporations. *Id*.

Over a two-month period, several stakeholders agreed upon a settlement framework memorialized in a *Plan of Reorganization* (the "Plan"). (R. at 8.) The Plan establishes a creditor trust funded by the Debtor's net income for five years and $100 million paid by Strawberry Fields. *Id*. Projections suggest this trust will enable creditors to receive 30-40 cents on the dollar. *Id*. In exchange for their $100 million contribution, the Plan expressly releases and discharges Strawberry Fields from "any and all claims" that third parties "have asserted or might assert in the future against Strawberry Fields" to the extent such claims are "based on or related to the Debtor's pre-petition conduct, its estate, or this chapter 11 case." *Id*. The Plan is non-consensual, meaning it binds parties even if they voted against the Plan. *Id*. Ms. Rigby objected

to the Plan's release of third-party direct claims. (R. at 9.) Norwegian Wood Bank (the "Bank"), a separately classified secured creditor, argued the Plan was not "fair and equitable." *Id*. This objection required confirmation under 1191(b), subchapter V's "cramdown provision." *Id*. Despite these objections, over 95 percent of voting creditors supported the Plan. *Id*.

The bankruptcy court confirmed the Plan, even though it was "an extremely difficult pill to swallow." (R. at 11.) The court held that non-consensual releases of third-party direct claims are permitted in "extraordinary cases." (R. at 10.) The court pointed to the complexity of the case, Strawberry Fields' monetary contribution, creditors' projected recovery, and creditors' support for the Plan as justification for the releases. *Id*. The court found the Plan's proposed distribution is "substantially greater" than under a chapter 7 liquidation, and that $100 million is "substantially greater" than any likely recovery against Strawberry Fields. *Id*. Finally, the court noted there was "no other reasonably conceivable means to achieve the result accomplished by the Plan," and that failing to approve the Plan would likely result in protracted litigation, with attendant risk, cost, and delay. *Id*. The court also overruled the Bank's objection. *Id*.

II. PROCEDURAL HISTORY

The bankruptcy court granted the Debtor's motion to dismiss Ms. Rigby's adversary proceeding and confirmed the Plan. (R. at 7, 10.) Ms. Rigby timely appealed both of the court's rulings. (R. at 11.) Under 28 U.S.C. § 158(d), the disputes were certified for direct appeal to the United States Court of Appeals for the Thirteenth Circuit. On appeal, the Thirteenth Circuit affirmed the bankruptcy court's ruling. Ms. Rigby's petition for a writ of certiorari was granted.

STANDARD OF REVIEW

The issues on appeal are solely questions of law. As such, the standard of review for this appeal is *de novo*. *See, e.g., Texas v. Soileau (In re Soileau)*, 488 F. 3d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

This Court should overturn the Thirteenth Circuit's decision and hold that (1) the bankruptcy court did not have the authority to approve the non-consensual release of direct claims held by third parties against non-debtors, and (2) a corporate debtor proceeding pursuant to section 1192 of the Bankruptcy Code cannot discharge debts specified in section 523(a). Ms. Rigby is entitled to pursue her claims against Strawberry Fields and entitled to seek to have her claim against the Debtor deemed non-dischargeable.

The Court should hold that bankruptcy courts lack the authority to approve releases of direct claims held by third parties against non-debtor affiliates on jurisdictional, constitutional, and statutory grounds. First, non-consensual releases of direct claims do not confer jurisdiction specified under 28 U.S.C. § 1334. Second, there are constitutional constraints on the power of the bankruptcy court to decide "non-core" matters. The bankruptcy court lacks the authority to enter a final order or judgment on such matters. Involuntary releases also violate claimants' constitutional right to Due Process. Third, the relevant statutes of the Bankruptcy Code do not authorize non-debtor, third-party releases. While the Thirteenth Circuit held that this case constituted extraordinary circumstances that permitted the bankruptcy court's release, there is no statutory authority to support such a release outside of the asbestos context.

On the second issue, the Court should hold that debts of the kind specified in section 523(a) of the Bankruptcy Code are non-dischargeable for corporate debtors in a subchapter V proceeding where the reorganization is taking place over the objections of creditors. This is clear from the plain language of section 1192. Reading the language in question as applying solely to individual debtors renders section 1192 and other statutes of the Code nonsensical. Placing section 1192 in the context of other bankruptcy provisions supports the statutory reading that a

corporate debtor may not discharge debt of the kind specified in section 523(a), which relates to torts, fraud, and other willful misconduct of the debtor. Congress wished to provide protections for involuntary creditors who may not otherwise be able to recover the value of their claims under a subchapter V proceeding.

This Court should reverse the Thirteenth Circuit on both issues.

ARGUMENT

This Court should overturn the Thirteenth Circuit's decision that bankruptcy courts possess the authority to approve non-consensual releases of direct claims held by third parties against non-debtors as a part of a chapter 11 plan, and that a corporate debtor proceeding under subchapter V of chapter 11 can discharge debts specified in Section 523(a).

I. A BANKRUPTCY COURT LACKS AUTHORITY TO APPROVE NON-CONSENSUAL RELEASES OF DIRECT CLAIMS HELD BY THIRD PARTIES AGAINST NON-DEBTOR AFFILIATES AS PART OF A CHAPTER 11 PLAN.

The first issue before the Court is whether a bankruptcy court possesses 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. The Court should hold that bankruptcy courts lack the authority to approve such releases on jurisdictional, constitutional, and statutory grounds, and overturn the Thirteenth Circuit's decision.

First, bankruptcy jurisdiction is *in rem* and is limited to the *res* of the estate. *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006). Federal district courts have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising or related to cases under title 11" and refer such proceedings to bankruptcy judges for the district. 28 U.S.C. §§ 157, 1334(b). Second, jurisdictional statutes address the constitutional limitations of Article I bankruptcy courts by dividing the complete bankruptcy jurisdiction created by section 1334 into

"core" and "non-core" components. 28 U.S.C. § 157. For non-core proceedings, bankruptcy judges lack authority to enter any final order or judgement and instead must submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c)(1). Involuntary releases also challenge the fundamental right guaranteed by the Due Process Clause that everyone should have their own day in court. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). Third, the Bankruptcy Code does not authorize non-consensual non-debtor releases in its express text, in its silence, nor does any combination of sections of the Bankruptcy Code, read singly or together, confer generalized or residual powers on a court sitting in bankruptcy. *In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

A. Bankruptcy courts lack jurisdiction to approve non-consensual releases of direct claims held by non-debtor affiliates within a chapter 11 plan.

Bankruptcy jurisdiction is *in rem* and limited to the *res* of the estate. *Katz*, 546 U.S. at 326. 28 U.S.C. § 1334 delineates federal courts' bankruptcy subject matter jurisdiction. District courts have original and exclusive jurisdiction of all cases under title 11. 28 U.S.C. § 1334(a). The district court where a title 11 case is commenced or pending has "exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e). District courts have "original but not exclusive jurisdiction over "civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). District courts may refer all cases arising under, arising in, or related to cases under title 11 to the district's bankruptcy judges. 28 U.S.C. § 157(a).

1. <u>Bankruptcy courts lack *in rem* jurisdiction over non-debtor releases.</u>

A bankruptcy court has *in rem* jurisdiction over the debtor's property and the disposition of that property. *Katz*, 546 U.S. at 362. The district court has "exclusive jurisdiction . . . of all

the property, wherever located, of the debtor as of the commencement of such case, and property of the estate." 28 U.S.C. § 1334(e). A bankruptcy court's *in rem* jurisdiction over estate property does not confer jurisdiction to enjoin claims against a non-debtor that are not derivative of the debtor's tort liabilities. *Johns-Manville Corp. v. Chubb Ind. Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135, 153-154 (2d Cir. 2010); *see also In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 723 (Bankr. S.D.N.Y. 2019) (holding a bankruptcy court lacks *in rem* jurisdiction over third-party claims that are not claims against the estate or estate property).

The bankruptcy court lacks *in rem* jurisdiction to enjoin third parties from enforcing their claims against Strawberry Fields. *Johns-Manville Corp.*, 600 F.3d at 153-154. These third parties allege direct claims against Strawberry Fields pursuant to injuries suffered from Strawberry Fields' own allegedly unlawful actions with respect to polluting Blackbird's waters. (R. at 6.) Strawberry Fields is not a debtor, nor are their assets property of the bankruptcy estate; under the Plan, however, third parties would be enjoined from enforcing non-derivative claims against Strawberry Fields. (R. at 8.) The bankruptcy court lacks *in rem* jurisdiction to enjoin these third-party claims because they are not claims against the estate or estate property. *Aegean Marine*, 599 B.R. at 723; 28 U.S.C. § 1334(e).

2. <u>Non-consensual releases of direct claims held by non-debtor affiliates do not confer "arises under" jurisdiction.</u>

A proceeding "arises under" title 11 if it clearly invokes substantive rights created by bankruptcy law. *In re Housecraft Indus. USA, Inc.*, 310 F.3d 64, 70 (2d Cir. 2002). Direct claims held by third parties against non-debtors, such as claims against Strawberry Fields, are not proceedings that "arise under" the Debtor's bankruptcy case. 28 U.S.C. § 1334(b). This is because the released claims are not invoking substantive rights created by bankruptcy law such as exemption claims or avoidance actions. *Housecraft.*, 310 F.3d at 70.

3. Non-consensual releases of direct claims held by non-debtor affiliates do not confer "arises in" jurisdiction.

A proceeding "arises in" a title 11 case if it could not exist outside of a bankruptcy case, but it is not a cause of action created by the Bankruptcy Code. *In re Midway Gold US, Inc.*, 575 B.R. 475, 517 (Bankr. D. Colo. 2017); *see also Purdue Pharma, L.P.*, 635 B.R. at 83 (noting that parties litigating proofs of claim without contesting personal jurisdiction is an example of "arises in" jurisdiction). A release being placed in a proposed chapter 11 plan does not itself confer "arising in" jurisdiction over such proceedings. *Midway Gold*, 575 B.R. at 519. A bankruptcy court must have an independent statutory basis over third parties' disputes to adjudicate them; a bankruptcy court could acquire "infinite jurisdiction" if a court could gain jurisdiction over any release included in a proposed chapter 11 plan. *Id*.

Third parties' direct claims against non-debtors, akin to those against Strawberry Fields, do not "arise in" the Debtor's bankruptcy case because they can exist outside of a bankruptcy case. *Id*. For example, Ms. Rigby alleges that Strawberry Fields knew, or should have known, that the Debtor was illegally disposing of waste. (R. at 5-6.) Because the non-debtor releases in question neither "arise under" nor "arise in" in the Debtor's bankruptcy cases, approval of the releases must be found as an exercise of the Court's "related to" jurisdiction pursuant to 28 U.S.C. § 1334. *Midway Gold*, 575 B.R. at 519.

4. The non-consensual releases of direct claims against by Strawberry Fields do not confer "related to" jurisdiction.

A proceeding is "related to" a title 11 proceeding if its outcome could conceivably have any effect on the estate being administered in bankruptcy. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984); *see also SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 340 (2d Cir. 2018). So long as the proceeding's outcome could alter the debtor's rights, liabilities, options, or freedom

of action in any way, the proceeding need not be against the debtor or his property for it to be "related to" a bankruptcy proceeding. *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990). While the release of third-party claims against a non-debtor touches the outer limit of the bankruptcy court's jurisdiction, "related to" jurisdiction has been found in the context of many non-debtor releases. *Purdue Pharma, L.P.*, 635 B.R. at 84. Although Congress intended to grant bankruptcy courts "comprehensive jurisdiction" to promote efficiency and expediency, a bankruptcy court's "related to" jurisdiction cannot be limitless. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). A bankruptcy court cannot release claims which have no connection to the property of the debtor's bankruptcy estate or the bankruptcy proceeding's administration. *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 670 (E.D. Va. 2022). Furthermore, releases being exchanged for contributions to an estate is not itself a sufficient basis to confer "related to" jurisdiction, as neither parties' consent nor a plan of reorganization can create subject matter jurisdiction over a dispute. *See In re Combustion Eng'g. Inc.*, 391 F.3d 190, 228 (3d Cir. 2004), as amended (Feb. 23, 2005) (noting bankruptcy jurisdiction cannot be expanded to facilitate a particular reorganization); *see also In re Resorts Int'l, Inc.*, 372 F.3d 154, 161 (3d Cir. 2004) ("The source of the bankruptcy court's subject matter jurisdiction is neither the Bankruptcy Code nor the express terms of the plan. The source is . . . 28 U.S.C. §§ 1334 and 157."); *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 256 (3d Cir. 2003) ("[I]t is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.").

"Related to" jurisdiction does not exist with respect to Strawberry Fields' release. Unlike the claims in *Purdue Pharma, L.P.*, the non-derivative third party claims that are or might be asserted against Strawberry Fields will not plausibly alter the liabilities of the estate or change the amount available for distribution to other creditors. 635 B.R. at 85. For example, even if

Ms. Rigby was successful in her claim against Strawberry Fields alleging that they knew or should have known of the Debtor's alleged misconduct, it is unlikely that the Debtor's liability on similar claims would be impacted because claims alleging negligence are markedly different than claims alleging illegal dumping. (R. at 5-6.) The Plan releases Strawberry Fields for "any and all claims" related to the Debtor's pre-petition conduct, although such claims might lack any relation to the bankruptcy case. *Patterson*, 636 B.R. at 672. Since the release is so broad, hypothetical securities or corporate law claims brought by third parties against Strawberry Fields for matters pursuant to the legal creation or acquisition of the Debtor could be enjoined, even if these claims would have no relation or impact on the Debtor's bankruptcy case or estate. *Id*. at 670. Finally, Strawberry Fields' $100 million contribution to the Debtor's estate is not alone sufficient to create "related to" jurisdiction. (R. at 8.) If it were, any debtor could create subject matter jurisdiction over a non-debtor third party by structuring a plan dependent on contributions. *Combustion Eng'g.*, 391 F.3d at 228. This would be an improper result, no matter how desirable or efficient the outcome may be, because a bankruptcy court's source of subject matter jurisdiction is not the Bankruptcy Code, nor the chapter 11 Plan, but rather 28 U.S.C. §§ 1334 and 157. *Resorts Int'l*, 372 F.3d at 161. A court cannot substitute their policy judgements over the plain meaning of statutes passed by Congress. *Hechinger*, 335 F.3d at 256.

5. Jurisdiction cannot exist over future claims, since no "civil proceeding," as mandated by 28 U.S.C. § 1334, exists.

Via statute, bankruptcy courts have subject matter jurisdiction over "civil proceedings" arising under, arising in, or related to a bankruptcy case. 28 U.S.C. § 1334. When third party releases are proposed, however, courts are often asked to exercise power over potential claims for "which no actual proceeding exists." *Aegean Marine*, 599 B.R. at 723.

The Plan expressly releases and discharges "any and all claims" that third parties "have asserted or might assert in the future against Strawberry Fields" if the claims are "based on or related to the Debtor's pre-petition conduct, its estate or this chapter 11 case." (R. at 8.) Bankruptcy courts lack jurisdiction over the future claims released against Strawberry Fields, (R. at 8.), because future claims do not exist and thus are not "civil proceedings." *Aegean Marine*, 599 B.R. at 723. In effect, the bankruptcy court is being asked to enjoin potential claims without a "civil proceeding," even though a "civil proceeding" is necessary to confer jurisdiction to the court. *Id.* As such, the bankruptcy court lacked jurisdiction to adjudicate the non-debtor releases in question.

B. Bankruptcy courts lack constitutional authority to approve non-consensual releases of direct claims held by non-debtor affiliates within a chapter 11 plan.

Even if "related to" jurisdiction exists, without consent, the bankruptcy court lacked the constitutional authority to render a final decision approving the non-consensual releases. *Purdue Pharma, L.P.*, 635 B.R. at 80. Furthermore, the approval of non-consensual releases of direct claims held by non-debtor affiliates raises due process concerns and does not provide claimants with procedural and substantive rights they normally would have under the Federal Rules of Bankruptcy Procedure. *Aegean Marine*, 599 B.R. at 725.

1. <u>A bankruptcy court lacks constitutional authority to render a final decision approving non-consensual releases of direct claims.</u>

Bankruptcy judges are not appointed in accordance with the requirements of Article III of the Constitution; the President does not nominate bankruptcy judges, the Senate does not confirm bankruptcy judges, and bankruptcy judges do not receive life tenure. *Stern v. Marshall*, 564 U.S. 462, 469 (2011). Since bankruptcy judges are not Article III judges, but rather are Article I

judges, they may not exercise the "judicial power of the United States," other than pursuant to some exception recognized by the Supreme Court. *Id.*

Current jurisdictional statutes address the constitutional limitations on Article I bankruptcy courts by dividing the jurisdiction created by 28 U.S.C. § 1334 into "core" and "non-core" components. 28 U.S.C. § 157. Cases that "arise under" or "arise in" a title 11 case are considered "core" bankruptcy proceedings, and cases that are "related to" title 11 proceedings are "non-core." 28 U.S.C. § 157(b). Bankruptcy courts are required to conduct a claim-by-claim analysis and classify whether claims are "core" or "non-core." *Patterson*, 636 B.R. at 668. A bankruptcy court lacks constitutional authority to enter a final judgement over a proceeding with only "related to" jurisdiction unless all parties consent. *Purdue Pharma, L.P.*, 635 B.R. at 80. Certain precedent suggests bankruptcy courts may confirm a plan containing releases and injunctions because they are "integral to the restructuring of the debtor-creditor relationship." *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 138 (3d Cir. 2019). This interpretation misreads *Stern*, however, as bankruptcy courts only may enter a final judgement in proceedings that "stem[ ] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." 564 U.S. at 499; *see also Purdue Pharma, L.P.*, 635 B.R. at 81 (noting that the correct constitutional question is whether the third-party claims released and enjoined stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process, not whether the release and injunction are "integral to the restructuring of the debtor-creditor relationship"). Finally, a bankruptcy court's order extinguishing and enjoining a non-core claim without an adjudication on the merits "finally determines" that claim; it is equivalent to entering a judgement to dismiss the claim and provides *res judicata* claim preclusion. *Purdue Pharma, L.P.*, 635 B.R. at 82; *see also Stoll v. Gottlieb*, 305 U.S. 165, 171 (holding non-consensual third-

party releases confirmed by final order are entitled to *res judicata* claim preclusion barring any subsequent action bringing a released claim).

As in *Patterson*, the record fails to show that the bankruptcy court "parse[d] the content of the claims that it purported to release" and determined if each claim constituted a core or non-core claim. 636 B.R. at 669. Although the third-party releases bar an incalculable amount of federal and state claims, for "an unspecified time period stretching back to time immemorial," the difficulty of the claim-by-claim classification does not absolve the bankruptcy court of its responsibility to identify whether they have proper authority to rule with finality on each claim. *Id*. at 655, 669. Per Section 157(b), the released claims against Strawberry Fields are "non-core" because the only potential basis for jurisdiction over them is "related to" jurisdiction. 28 U.S.C. § 157(b); *see also Purdue Pharma, L.P.*, 635 B.R. at 79. Although the confirmation of a plan of reorganization is a core function of a bankruptcy court, the non-consensual claims extinguished pursuant to the Debtor's Plan were not "core" claims. *Id.* at 80. The third-party claims Strawberry Fields is released from do not stem from the Debtor's bankruptcy and they cannot be resolved in the claims allowance process. *Stern*, 564 U.S. at 499. Under the expansive release, Strawberry Fields is released from Ms. Rigby' negligence claims, as well as hypothetical corporate and securities law claims regarding the acquisition or creation of the Debtor. (R. at 6, 8.) These claims do not "stem" from the Debtor's bankruptcy, and they cannot be resolved in the claims allowance process. Instead, they must be decided by Article III courts to "preserve the integrity of judicial decisionmaking." *Stern*, 564 U.S. at 484, 497. Furthermore, the bankruptcy court's confirmation of the Plan constitutes a final judgement because it extinguishes claims against Strawberry Fields such that they cannot be adjudicated on the merits. *Patterson*, 636 B.R. at 671. Upon confirmation of the Plan, all provisions therein – including the releases of

Strawberry Fields – became *res judicata* for subsequent parties trying to bring the claims. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009).

2. The non-consensual release of third-parties' direct claims against non-debtors violates due process.

Due process requirements apply in bankruptcy cases. *In re Johns-Manville Corp.*, 551 B.R. 104, 113 (S.D.N.Y. 2016). A cause of action for damages is a property interest protected by due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Involuntary releases result in the taking of property without a formal hearing to ensure the impacted party has received proper compensation. *Aegean Marine*, 599 B.R. at 726. Additionally, the "compensation" provided by proposed releasees is often limited to general contributions to the reorganization process generally, rather than benefits provided directly to the released claimants. *Id*. This is incongruous with the notion that due process requires claimants receive compensation based on the actual value of the property being taken from them. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty, Cal*, 482 U.S. 304, 322 (1987). Finally, a fundamental right guaranteed by the Due Process Clause is the "deep-rooted historical tradition that everyone should have his own day in court." *Ortiz*, 527 U.S. at 846. The Due Process Clause protects litigants from being forced into settlements without consenting. *Id*. at 847.

Strawberry Fields' release took claimants' property without a formal hearing to ensure proper compensation. *Aegean Marine*, 599 B.R. at 726. While Strawberry Fields contributed $100 million to the creditor trust established by the plan, the released claimants were not compensated directly. (R. at 8.) Although these claimants will be channeled into the creditors' trust, (R. at 9.), they will not receive compensation based on the actual value of their claims against Strawberry Fields. *First English*, 482 U.S. at 322. The Plan releases and discharges "any and all claims" that third parties "have asserted or might assert in the future against

Strawberry Fields," provided that the claims relate to the Debtor's pre-petition conduct, its estate, or their chapter 11 case. (R. at 8.) Pursuant to this non-consensual release, claimants will be unable to have their "day in court." *Ortiz*, 527 U.S. at 846. Although due process guarantees the right to decide whether to litigate or settle claims, the released claimants have no choice whether to approve or reject the Plan's release of their direct claims against Strawberry Fields. (R. at 8-9.) These claimants are being forced into non-consensual settlements akin to the mandatory class action settlements deemed violative of due process in *Ortiz*. 527 U.S. at 847. Even if Strawberry Fields' release maximizes creditor returns or facilitates the Debtor's reorganization, (R. at 10.), promoting desirable objectives does not justify the deprivation of due process.

C. The Bankruptcy Code does not authorize non-debtor, third-party releases contained within a chapter 11 plan outside of the asbestos context.

Whether a bankruptcy court is statutorily authorized to release non-consensual, direct claims levied by third parties against non-debtors is a "great unsettled question" that has split the federal Circuits. *Purdue Pharma, L.P.*, 635 B.R. at 37. Although a majority of Circuits permit third-party releases in exceptional circumstances, the "majority of the Circuits that have spoken to the statutory authority question either dismiss the idea that such authority exists or . . . (i) reject the notion that such authority can be found by looking solely to section 105(a) and then (ii) fail to answer the question of where such authority can be found." *Id*. at 105.

The Fifth, Ninth, and Tenth Circuits prohibit third-party releases outside of asbestos cases. *See In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996); *In re W. Real Est. Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990). The Third Circuit has not identified language in the Bankruptcy Code authorizing non-debtor releases. *See Millennium*, 945 F.3d at 133-40 (holding bankruptcy courts possess constitutional authority to approve non-debtor releases); *see also In re*

Cont'l Airlines, 203 F.3d 203, 211 (3d Cir. 2000) ("The Bankruptcy Code does not explicitly authorize the release and permanent injunction of claims against non-debtors" outside of the asbestos context); *Combustion Eng'g.*, 391 F.3d at 190 (holding that section 105(a) does not confer authority to create substantive rights not provided under the Bankruptcy Code). The First, Eighth, and D.C. Circuits have not ruled on the statutory issue. *Purdue Pharma, L.P.*, 635 B.R. at 105. The Fourth and Eleventh Circuits have held that section 105(a) itself authorizes non-debtor releases. *See Nat'l Heritage Found., Inc. v. Highbourne Found., Inc.*, 760 F.3d 344, 350 (4th Cir. 2014); *In re Seaside Eng'g & Surveying*, 780 F.3d 1070, 1076-79 (11th Cir. 2015). The Sixth and Seventh Circuits conclude that together, sections 105(a) and 1123(b)(6) codify bankruptcy courts' "residual authority" enabling non-consensual releases of third-party claims against non-debtors. *Purdue Pharma, L.P.*, 635 B.R. at 105. Finally, the Second Circuit has not found language in the Bankruptcy Code authorizing non-debtor releases. *See Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005) (noting non-debtor releases are not specifically authorized, except for in asbestos cases); *Purdue Pharma, L.P.*, 635 B.R. at 37 (holding the Bankruptcy Code does not statutorily authorize non-consensual non-debtor releases).

Since a bankruptcy court's "power to grant relief to a non-debtor from non-derivative third-party claims 'can only be exercised within the confines of the Bankruptcy Code,'" and there exists no statutory authority for such releases within the Bankruptcy Code outside of the asbestos context, the Court should hold that the bankruptcy court lacked statutory authority to approve Strawberry Fields' releases. *Id*. at 115.

1. <u>11 U.S.C. § 524(e) prohibits non-debtor releases.</u>

Although a debtor's discharge pursuant to a chapter 11 plan is broad, "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 contrasts with section 524(g), which authorizes non-debtor releases exclusively in cases involving injuries from asbestos, "[n]otwithstanding the provisions of section 524(e)." 11 U.S.C. § 524(g). The Fifth, Ninth, and Tenth Circuits hold that section 524(e)'s express language that the debtor's discharge "does not affect the liability of any other entity on, or the property of any other entity for, such debt" prohibits the release of third parties from liability. *Lowenschuss*, 67 F.3d at 1401; *see also W. Real Est. Fund*, 922 F.2d at 600 (noting that Congress did not intend to extend protections under the Bankruptcy Code to "third-party bystanders"); *Pac. Lumber*, 584 F.3d at 252 ("Section 524(e) only releases the debtor, not co-liable third parties). These Circuits view section 524(e) as the general rule, with the phrase "[n]otwithstanding the provisions of section 524(e)" in section 524(g) creating an exception. *Purdue Pharma, L.P.*, 635 B.R. at 104. The natural reading of Section 524(g) suggests Congress intended to create an exception to section 524(e) and authorize non-debtor releases in the asbestos context only. *Id*. at 107. Since "courts must presume that a legislature says in a statute what it means," and the text of section 524 is unambiguous, section 524's legislative history should not factor into its interpretation. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Furthermore, because the plain language of sections 524(e) and (g) prohibit non-debtor releases outside of the asbestos context, "the specific provisions of section 524 displace the court's equitable powers under section 105." *American Hardwoods, Inc., v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 625-26 (9th Cir.1989).

The Plan "expressly releases and discharges" Strawberry Fields from third party claims arising from the Debtor's pre-petition conduct. (R. at 8.) Strawberry Fields' release and discharge is a "permanent injunction that effectively relieves the nondebtor from its own liability to the creditor," which improperly insulates non-debtors in violation of section 524(e). *W. Real*

Est. Fund, 922 F.2d at 600; *see also Lowenschuss*, 67 F.3d at 1401; *Pac. Lumber*, 584 F.3d at 252. Section 524's plain language unambiguously prohibits releasing a non-debtor entity, as a debtor's discharge "does not affect the liability of any other entity." 11 U.S.C. § 524(e). "When the words of a statute are unambiguous . . . [the] 'judiciary inquiry is complete.'" *Germain*, 503 U.S at 253-54 (citations omitted). Even if section 524(e)'s language could be read to explain "the effect of a debtor's discharge" and not to "prohibit the release of a non-debtor*," In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002), reading section 524(e) in the context of section 524(g) clarifies any ambiguity. The common usage of "notwithstanding," as used in section 524(g), is "in spite of," which suggests the injunctions authorized in section 524(g) would generally be barred by section 524(e). 11 U.S.C. §§ 524(e), (g). Although section 524's legislative history might suggest Congress did not envision "that a bankruptcy court could discharge the debts of non-debtors that were not also debts of the debtor," *In re Purdue Pharma, L.P.*, 635 B.R. at 108, this is of no import because unambiguous terms complete the judicial inquiry. *Germain*, 503 U.S at 253-54. Section 524's limitations can be justified through sound policy; only debtors, not "third-party bystanders" such as Strawberry Fields, invoke and submit to the bankruptcy process, and are entitled to its protections. *W. Real Est. Fund*, 922 F.2d at 600. Since section 524(e) prohibits Strawberry Fields' release, the bankruptcy court's equitable power under section 105 is displaced. *American Hardwoods*, 885 F.2d at 625-26.

2. 11 U.S.C. § 105(a) alone does not provide statutory authority.

Courts may "issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In exercising their authority to "carry out" the provisions of the Code, bankruptcy courts cannot take actions inconsistent with other Code provisions. *Law v. Siegel*, 571 U.S., 415, 415 (2014). Any equitable powers of the

bankruptcy courts "must and can only be exercised within the confines of" the Bankruptcy Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Likewise, section 105(a) does not allow bankruptcy courts "to create substantive rights that are otherwise unavailable under applicable law." *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F.3d 86, 92 (2d Cir. 2003); *see also Combustion Eng'g.,* 391 F.3d at 190. The language of section 105(a) "suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective." 2 *Collier on Bankruptcy* ¶ 105.01[1] (16th ed. 2022). Although the Fourth and Eleventh Circuits have approved non-debtor releases relying solely on section 105(a), this reasoning ignores the statute's plain text requiring the court's action to "carry out the provisions of this title," which suggests that section 105(a) can only augment other Code provisions. 11 U.S.C. § 105(a). Also, it overlooks that bankruptcy courts' equitable powers only operate within the Bankruptcy Code, and that the Bankruptcy Code is intended to be "comprehensive." *Ahlers*, 485 U.S. at 206; *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

The bankruptcy court did not possess statutory authority to approve Strawberry Fields' releases pursuant to section 105(a) alone. These releases confer "substantive rights," as they preclude third parties from pursuing legal claims against Strawberry Fields that are connected to the Debtor's pre-petition actions. (R. at 8-9.) Thus, if the Bankruptcy Code does not otherwise authorize such releases, section 105(a) cannot be used to create authorization. *In re Dairy Mart*, 351 F.3d at 92. Even if meaningful creditor distribution and a high probability of reorganization are achieved by Strawberry Fields' releases, (R. at 10.), an exercise of section 105 power must be tied to a specific section of the Bankruptcy Code. 2 *Collier on Bankruptcy* ¶ 105.01[1] (16th ed. 2022). The Fourth and Eleventh Circuits' reasoning should not be adopted because it

contravenes the Bankruptcy Code's plain language, and "courts must presume that a legislature says in a statute what it means." *Germain*, 503 U.S. at 253-54 (1992). Failing to tether section 105(a) to specific Bankruptcy Code provisions would allow bankruptcy courts to acquire seemingly limitless authority; wealthy non-debtor affiliates like Strawberry Fields could regularly "buy peace" via substantial capital contributions, under the guise that the court's approval is "necessary" to approve a plan. 11 U.S.C. § 105(a).

3. <u>11 U.S.C. § 1123(b)(6) does not provide statutory authority.</u>

A plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). First, given the similarities between the provisions, if section 105(a) does not provide substantive authority to approve non-debtor releases, section 1123(b)(6) can "in no way be read to do so." *Purdue Pharma, L.P.*, 635 B.R. at 106. Second, not exempting claims for fraud or willful and malicious conduct from releases is "inconsistent with the applicable provisions" of the Bankruptcy Code because it discharges a non-debtor from debts non-dischargeable by a debtor in bankruptcy. 11 U.S.C. § 1123(b)(6). Corporate debtors are not discharged from debts specified in section 523(a)(2)(A) that are owed to a domestic governmental unit. 11 U.S.C. § 1141(d)(6)(A). Section 523(a)(2)(A) prevents a debtor from discharging "any debt . . . for money, property, services, or . . . credit, to the extent obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2). This language encompasses "any liability arising from money, property, etc., that is fraudulently obtained." *Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998). Also, as discussed above, section 524(e) prohibits non-debtor releases. 11 U.S.C. § 524(e).

Section 1123(b)(6) is "substantively analogous" to section 105(a)'s authorization of "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this

title." *Purdue Pharma, L.P.*, 635 B.R. at 106. Since section 105(a) does not provide independent authority for the bankruptcy court to approve Strawberry Fields' releases, section 1123(b)(6) does not either. *Id*. Furthermore, the Plan's releases are inconsistent with provisions of the Bankruptcy Code, and thus is violative of section 1123(b)(6). Strawberry Fields is released and discharged from "any and all claims" that third parties "have asserted or might assert in the future against Strawberry Fields," so long as such claims are based on or related to the Debtor's pre-petition conduct, its estate or this chapter 11 case." (R. at 8.) The Plan does not except claims for fraud or willful or malicious conduct; if Strawberry Fields themselves were a debtor, liability arising from fraudulently obtained money or property owed to a governmental unit could not be discharged. 11 U.S.C. §§ 523(a)(2), 1141(d)(6)(A). This is an "anomalous situation" where a third-party release's beneficiary receives broader protection than they could obtain in their own bankruptcy case. *Aegean Marine*, 599 B.R. at 726. Additionally, the Plan is inconsistent with section 524(e)'s prohibition on non-debtor releases. 11 U.S.C. § 524(e).

4. <u>11 U.S.C. § 1123(a)(5) does not provide statutory authority.</u>

Section 1123(a)(5) states that a plan of reorganization must "provide adequate means for [its] implementation," and then gives a list of examples for what reorganization plans can include to ensure its implementation. 11 U.S.C. § 1123(a)(5). Each of the listed examples authorizes the court to do something with the debtor's assets, not a third party's assets. *Purdue Pharma, L.P.*, 635 B.R. 108. Section 1123(a)(5) does not confer "any right to have the non-debtors receive a release from non-derivative third-party claims in exchange for a contribution" to the estate. *Id*. Furthermore, section 1123(a)(5) does not enable courts to act in ways the Bankruptcy Code does not otherwise authorize, even if such actions would ensure a plan's implementation. *Id*. at 109. The list provided in section 1123(a)(5) is non-exhaustive, yet it is also bereft of any suggestion

that a debtor can "provide adequate means for the plan's implementation" by any means necessary. 11 U.S.C. § 1123(a)(5); *see also Purdue Pharma, L.P.*, 635 B.R. 109.

Section 1123(a)(5) cannot serve as an independent authorization for Strawberry Fields' releases, even if the releases are "necessary for the Plan's implementation." (R. at 14.) First, contributions by non-debtor parties are not included in section 1123(a)(5)'s list of examples. Second, section 1123(a)(5) does not provide bankruptcy courts with carte blanche power to act outside of the Bankruptcy Code. For example, section 1123(a)(5) would not "authorize a court to enter an order enjoining a bank from suing a non-debtor employee who embezzled funds and then offered them to her bankrupt brother's estate in exchange for a release of all claims a third party could assert against her." *Purdue Pharma, L.P.*, 635 B.R. 109. Like section 105(a), section 1123(a)(5) must "be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective." *In re Dairy Mart*, 351 F.3d at 92.

5. Silence does not confer statutory authorization.

Even if section 524(e), or any other provision of the Bankruptcy Code, does not expressly prohibit non-debtor releases, statutory authority cannot be inferred from Congressional silence. *Purdue Pharma, L.P.*, 635 B.R. at 109. The Bankruptcy Code is designed to be "comprehensive," *RadLAX Gateway Hotel*, 566 U.S. at 645, and reading extratextual elements into the Bankruptcy Code is "the antithesis of comprehensiveness." *Purdue Pharma, L.P.*, 635 B.R. at 110. Involuntarily releasing third-party claims against non-debtors is "an extraordinary thing . . . different . . . from what courts ordinarily do." *Aegean Marine*, 599 B.R. at 723. More than "simple statutory silence" is expected if Congress intends a major departure. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017). Congress would be expected to speak clearly to authorize non-debtor releases. Lastly, where Congress has "deliberately limited a specific

targeted solution (the release of third-party claims against non-debtors) to a specific identified problem (asbestos bankruptcies)," the statutory canon of specific provisions trumping general provisions should apply. *Purdue Pharma, L.P.*, 635 B.R. at 112.

6. Residual statutory authority does not exist for non-debtor releases.

Some Circuits have held that bankruptcy courts possess "residual authority" to approve the releases of third-party claims against non-debtors if the release is "appropriate" and not inconsistent with any Bankruptcy Code provision. *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008). These Circuits cite sections 105(a) and 1123(b)(6) as the source of this "residual authority." *Id*. These Circuits also note that the Supreme Court has recognized that bankruptcy courts possess "residual authority" to approve reorganization plans. *United States v. Energy Resources. Co.*, 495 U.S. 545, 549 (1990).

However, just as sections 105(a), 1123(a)(5), and 1123(b)(6) do not provide bankruptcy courts with authority to order non-consensual releases of third-party claims against non-debtors, the "residual authority" of bankruptcy courts does not exist "untethered to some specific, substantive grant of authority in the Bankruptcy Code." *Purdue Pharma, L.P.*, 635 B.R. at 78; *see also In re Dairy Mart*, 351 F.3d at 92. Two years prior to *Energy Resources*, the Supreme Court held that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Ahlers*, 485 U.S. at 206. The *Energy Resources* decision is consistent with this concept, as the Bankruptcy Code's specific provisions were complied with. *See Purdue Pharma, L.P.*, 635 B.R. at 113. Lastly, *Energy Resources* requires "residual power" not to be applied "inconsistent with the applicable provisions" of the Bankruptcy Code. *Energy Res. Co.*, 495 U.S. at 549. Section 524(e) prohibits non-debtor releases, and thus non-debtor releases may not be granted pursuant to such residual authority.

II. A CORPORATE DEBTOR PROCEEDING UNDER SUBCHAPTER V OF CHAPTER 11 OF THE BANKRUPTCY CODE MAY NOT, PURSUANT TO 11 U.S.C. § 1192, DISCHARGE DEBTS OF TYPES SPECIFIED IN SUBPARAGRAPHS (1) THROUGH (19) OF 11 U.S.C. § 523(A).

This Court should hold that debts of the kind described in section 523(a) of the Bankruptcy Code are non-dischargeable for corporate debtors in a subchapter V proceeding where the reorganization is taking place over the objections of creditors. This specific situation is governed by section 1192 of the Code. 11 U.S.C. § 1192. The plain text of section 1192, as well its context within chapter 11 and the broader Bankruptcy Code, support this result. Accordingly, Ms. Rigby is entitled have her claim against the Debtor deemed non-dischargeable under section 523(a)(6), which provides that debts "for willful and malicious injury by the debtor" cannot be discharged. 11 U.S.C. 523(a)(6).

A. A textual analysis of section 1192 supports the reading that the non-dischargeable debts specified in section 523(a) apply to corporate debtors.

Section 1192 provides the rule for the discharge of debts under a subchapter V proceeding where the plan is "crammed down" over the objections of creditors. The relevant text of section 1192 states that "the court shall grant the debtor a discharge of all debts . . . except any debt . . . of the kind specified in section 523(a) of this title." 11 U.S.C. § 1192. The Court of Appeals for the Thirteenth Circuit found that because section 523(a) specifies that it applies to individual debtors, it cannot also apply to corporate debtors when referenced in section 1192. (R. at 19.) Respectfully, this reading is incorrect. Section 1192's plain language shows that it expands the scope of section 523(a) to also cover corporate debtors in the subchapter V cramdown context. First, section 1192 defines "the debtor" as an individual or a corporation. Second, "of the kind" refers to the types of debts specified in section 523(a), namely debts related to fraud and willful misconduct, not the type of debtor to which the discharge applies.

Third, even if the Court decides that these sections are ultimately applicable to different types of debtors, the application of section 1192 to individual *and* corporate debtors must govern because it is the more specific statute.

1. Section 1192 applies to corporate debtors as well as individual debtors, and an absent limitation should not be read into the statute.

Section 1192 applies to "the debtor," a term encompassing both individual and corporate debtors. 11 U.S.C. § 1192. In subchapter V, "debtor" is defined as "a person engaged in commercial or business activities" and the Bankruptcy Code defines "person" as an "individual, partnership, and corporation." 11 U.S.C. §§ 101(41), 1182(1). Section 1192 does not contain language restricting any subsections to solely individual debtors or solely corporate debtors.

In the parallel discharge provision for typical chapter 11 proceedings, Congress clearly specified that certain subsections apply to "a debtor who is an individual" or "a debtor that is a corporation." 11 U.S.C. §§ 1141(d)(2), (d)(6). The other parts of section 1141(d) that are not clearly labeled as applying to one type of debtor can be assumed to apply both to individual and corporate debtors because they are the subjects of chapter 11 proceedings. In contrast to the specificity of section 1141, section 1192 does not include directives that signal its provisions as applying to individual debtors or corporate debtors specifically. In the absence of language that limits the rule to a particular type of debtor, every provision of section 1192 should be read to apply to both individual and corporate debtors. In interpreting this statute, it would be improper to read in a limitation that is entirely absent from the text. *See Iselin v. United States*, 270 U.S. 245, 251 (1926) ("to supply omissions transcends the judicial function").

In its construction of section 1192, the Court of Appeals argued that section 1192(2) is solely applicable to individuals by cross-referencing part of the introductory text of section 523(a), which labels that provision as applicable to individuals. (R. at 19.) Since section 1192

unambiguously applies to both individual and corporate debtors and was not constructed to clearly signal an application to a particular type of debtor alone, it is erroneous to read in language from a different statute that would limit the scope of section 1192.

2. The "of the kind" language in section 1192 refers to the types of debts, not the type of debtor.

Section 1192 renders non-dischargeable "debt . . . of the kind specified in section 523(a) of this title." 11 U.S.C. § 1192(c). Congress uses "of the kind" as a shorthand for the types of debt specified in subsections (1) to (19) of section 523(a). The Court of Appeals argued that "of the kind" must also encompass the kind of debtor identified in the introductory paragraph of section 523(a) and concluded that section 1192(c) cannot apply to corporate debtors. This expansive reading of "kind" as applying not only to the type of debt, but also to the type of debtor, is at odds with the way that Congress has used this language to refer to section 523(a) in other provisions of the Bankruptcy Code.

Reading "kind" to restrict section 523(a) to individual debtors would render section 1141(d)(6)(A) nonsensical. This section states that "the confirmation of a plan does not discharge a debtor that is a corporation from any debt . . . of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)." 11 U.S.C. § 1141(d)(6). The same introductory text of section 523(a) that "does not discharge any *individual* debtor" applies to paragraph (2)(A) or (2)(B), but Congress clearly intended the types of debt described in these paragraphs to be non-dischargeable for corporate debtors. This suggests section 523(a)'s introductory language should not be overextended into the meaning of debt "of a kind" specified in paragraphs (1) to (19).

Congress references section 523(a) to refer the reader to types of non-dischargeable debts at many points throughout the Bankruptcy Code. *See* 11 U.S.C. §§ 727, 1141, 1228, 1327. As described in the previous paragraph, these references can expand the scope of applicability

beyond the category of individual debtors that are specifically mentioned in the introductory paragraph to section 523(a). Section 1228, which governs discharge under a chapter 12 proceeding and references non-dischargeable kinds of debt in 523(a), also applies to corporations and individuals because individuals and corporations are virtually indistinguishable in the chapter 12 context. *See* 11 U.S.C § 1228; *see also United States v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 430-31 (S.D.N.Y. 2014). In interpreting section 1228 of the Bankruptcy Code, a court observed that "Congress is using the definition of discharge to alter the applicability of § 523" to apply to corporate debtors as well as individuals. *See S.W. Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, No. 08-12038-JDW, 2009 WL 1514671, at *2 (Bankr. M.D. Ga. 2009). Congress uses the specific statute governing discharges to define the type of *debtor* to which the type of non-dischargeable *debts* specified in section 523(a) apply. In the case of section 1192, the statute applies to corporate debtors, as well as individual debtors. The "of the kind" language refers to the types of debts enumerated in section 523(a), and these types of debts are non-dischargeable for corporations as well as individuals.

3. <u>Even if section 523(a) applies to different types of debtors than section 1192, section 1192 should govern as the more specific statute.</u>

This Court may determine that there is a conflict between the two statutes in question, with section 1192 clearly applying to corporate and individual debtors (see 1.a. above) and section 523(a) clearly applying to individual debtors as specified in its introductory text. 11 U.S.C. § 523(a). In the case of two conflicting applications, section 1192 must control because it is the more specific statute. *Kepner v. United States*, 195 U.S. 100, 125, (1904) ("It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling.").

Section 523(a) is a general provision of the Bankruptcy Code that is referenced and modified by other sections of the Code, while section 1192 is the specific statute governing the circumstances at hand: the scope of dischargeable debts for corporate debtors in a subchapter V cram down proceeding. *See Breezy Ridge Farms, Inc.*, 2009 WL 1514671 at *2 (finding that section 1228 controls over section 523(a) because it concerns the specific scope of dischargeable debts under a chapter 12 proceeding).

This principle of statutory construction has also been adopted elsewhere in the Bankruptcy Code. In *Carroll v. Logan*, the court interpreted a specific statute of chapter 13 bankruptcy proceedings that referenced a general statute of the bankruptcy code, finding that a temporal restriction in the general statute did not apply to the more specific statute. *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013). The specific provision, section 1306, referred to property "of the kind specified in" section 541. 11 U.S.C. § 1306. The court described section 541 as "a general provision that provides generic contours for bankruptcy estates" and found that the specific chapter 13 section, which lacked the temporal restriction, should control in the case.

The plain language of section 1192 shows that it applies to corporate debtors. "Of the kind" refers to the type of debt, and to stretch its meaning to include the type of debtor would frustrate the logical meanings of other sections of the bankruptcy code where this language appears. Finally, even if a reference to individual debtors in section 523(a) creates conflicting meanings, the conflict is resolved by the fact that section 1192 must govern as the more specific statute for subchapter V cramdown proceedings.

B. Comparing section 1192 to the rest of the Bankruptcy Code suggests the non-dischargeable debts specified in section 523(a) apply to corporate debtors.

When Congress enacted subchapter V, they could have followed the same rules for the discharge of debts that apply to other chapter 11 proceedings. But instead, they introduced a

specific deviation: a "Special Rule for Discharge" in subchapter V cases proceeding over the objections of creditors (cramdown situations). *See* 11 U.S.C. § 1181(c). This statutory separation raises two important inferences. First, Congress clearly signaled its intent for discharges in the subchapter V cramdown context to function differently than typical chapter 11 discharges. Second, because the Special Rule overwrites section 1141(d)(6) of chapter 11, which prevents debtors from discharging fraudulent debts, this protection logically exists elsewhere in subchapter V.

1. <u>For corporate debtors proceeding under cramdown, Congress intended subchapter V's discharge rule to diverge from chapter 11's discharge rule.</u>

The Court of Appeals contends that section 1192 could not have introduced new non-dischargeable debts for corporate debtors because Congress "does not hide elephants in mouseholes." (R. at 21.) Far from hiding in a mousehole, the proverbial elephant of non-dischargeable debts for corporate debtors is explained in plain sight in the specific discharge provision for subchapter V cramdowns.

In a typical chapter 11 proceeding involving a corporate debtor, the discharge of debt is governed by section 1141(d). This section specifies that corporate debts may be broadly discharged, with the narrow exception that debts linked to fraud are non-dischargeable. *See* 11 U.S.C. § 1141(d)(6). Section 1141(d) governs the discharge of a regular chapter 11 proceeding regardless of whether the reorganization is consensual or is a cramdown. Under subchapter V, consensual proceedings also follow the discharge rule set out in section 1141(d). However, Congress enacted section 1192 to specifically govern cases where a debtor is proceeding under subchapter V over the objections of creditors. Since the non-dischargeable debts outlined in section 523(a) apply to individual debtors under section 1141(d)(2), as well as under section 1192, there is little divergence in how these two parallel rules treat individual debtors. This

suggests that the Special Rule was instead introduced to distinguish the discharge rule for corporate debtors in the subchapter V cramdown context.

Notably, the significant alteration of the general chapter 11 discharge rule is highlighted in the IRS Tax Manual for the Small Business Reorganization Act (which introduced subchapter V to the Bankruptcy Code). The Manual states: "All exceptions to discharge in 11 U.S.C. § 523(a) of the Bankruptcy Code apply to the small business debtor [filing under subchapter V]. 11 U.S.C. § 1192. This is different from a typical corporate Chapter 11 case which has limited exceptions to discharge set forth in 11 U.S.C. § 1141." Internal Revenue Manual, § 5.9.8.5.1(9), available at 2007 WL 9807941, 4. The statutory distinction between the typical chapter 11 rule and the subchapter V discharge rule is readily discernible, undermining the argument that the new non-dischargeable categories of debt for corporate debtors were not deliberately introduced, or were hidden in a "mousehole."

2. The non-dischargeable debts specified in section 523(a) must apply to corporate debtors proceeding under section 1192 to provide necessary protection against corporate fraud.

Under section 1181, the Special Rule for Discharge overwrites the typical chapter 11 rule that prevents corporate debtors from discharging fraudulent debts. *See* 11 U.S.C. §§ 1181(c), 1141(d)(6). Section 1192 operates in place of section 1141(d). Under the statutory construction of section 1192 put forward by the Court of Appeals, corporate debtors could discharge all fraudulent debts through a subchapter V cramdown because they would not be subject to the limitations of corporate discharge contained in section 1141, and none of the discharge restrictions that section 1192 references in 523(a) would apply to corporate debtors either. The better reading is that the fraud exceptions still apply to corporate debtors under subchapter V

cramdown proceedings because they are encompassed within the non-dischargeable debts described in section 523(a), which apply to corporate debtors as well as individuals.

It is illogical to assume that Congress intended to give businesses a loophole to discharge fraudulent debts by filing under subchapter V and proceeding over the objections of creditors. Although subchapter V was intended to make chapter 11 reorganizations easier and faster for qualifying small businesses, there is no support for the position that Congress intended to allow small businesses to avoid fraud protections that were introduced to curtail abuse of the bankruptcy system. *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 760 (2005). Congress did not opt to treat subchapter V cramdowns differently to broaden the range of dischargeable debts to include fraud, but instead intended to broaden the range of *non*-dischargeable debts to include all of the types of debt listed in section 523(a).

C. Comparing section 1192 to chapter 12 of the Bankruptcy Code supports the reading that the non-dischargeable debts specified in section 523(a) apply to corporate debtors.

Subchapter V proceedings were partially based on proceedings under chapter 12 of the Bankruptcy Code, which applies to family farmers and fishermen only. *See In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020). The language of section 1192 is written very similarly to the corresponding provision for discharges under nonconsensual chapter 12 proceedings, where judges have interpreted the types of debt specified in section 523(a) to apply to corporate debtors. *See* 11 U.S.C. § 1228(a); *see also Breezy Ridge Farms, Inc*. 2009 WL 1514671 at *2; *New Venture P'ship. v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). Given the provisions' common origins their similarities in language, section 1192 should also be interpreted in this way. It is rational that both chapter 12 and subchapter V cramdown proceedings should involve a broader range of non-dischargeable debts compared to

typical chapter 11 proceedings. This is because both chapter 12 and subchapter V proceedings abrogate the "absolute priority rule" of the Bankruptcy Code. *See Trepetin,* 617 B.R. at 848. The abrogation of this rule makes it more difficult for unsecured creditors to recover the full amount of their debts, so it is likely that Congress would choose to expand the category of non-dischargeable debts to protect those who involuntarily become unsecured creditors through injury, fraud or other willful misconduct of the debtor.

1. <u>Section 1192 should be interpreted in the same way as section 1228(a), which uses almost identical language.</u>

Section 1228(a), which governs discharges in chapter 12 proceedings, states "debt… of a kind specified in section 523(a)" is non-dischargeable. 11 U.S.C § 1228(a). Since this provision has been interpreted to apply to corporate debtors as well as individual debtors, the same meaning should be given to the almost identical language in section 1192 of the Bankruptcy Code governing subchapter V discharges in cramdowns. *See Hall v. United States*, 566 U.S. 506, 519 (2012) (finding that the same phrases should be constructed to have the same meaning within the same statute). It is particularly relevant to adopt a consistent interpretation here because Congress intended subchapter V proceedings to be based in part on chapter 12 proceedings. *See Trepetin*, 617 B.R. at 848.

Judicial interpretation holding that debts "of a kind specified in section 523(a)" are non-dischargeable for chapter 12 corporate creditors predates the creation of subchapter V. *See Breezy Ridge Farms*, 2009 WL 1514671 (2009); *JRB Consol. Inc.,* 118 BR 373 (1995). If this language had been wrongly interpreted, or if the same wording and interpretation was not suitable for the subchapter V context, this likely would have surfaced during the creation of subchapter V. Subchapter V originated as an extensive 400-page report authored by experts from the American Bankruptcy Institute, suggesting that the parallels in the statute's wording

and interpretation should be considered purposeful and well-informed. *See* Robert J. Keach, and Adam R. Prescott, *Balancing Act: How the Small Business Reorganization Act Facilitates Successful Reorganizations*, 31 No. 6 J. Bankr. L. & Prac. NL Art. 1.

2. <u>Congress intended cramdown discharges under subchapter V to be similar to chapter 12 because both abrogate the absolute priority rule.</u>

The plain language of section 1192, its differences from the typical chapter 11 discharge rule, and its similarity to the chapter 12 discharge rule all support the reading that the types of debt specified in section 523(a) are intended to be non-dischargeable for corporate debtors. The logical rationale for this is that unlike typical chapter 11 proceedings, and like chapter 12 proceedings, subchapter V abrogates the absolute priority rule.

The absolute priority rule is a "bedrock principle of bankruptcy law, under which creditors are entitled to be paid ahead of shareholders in the distribution of corporate assets." *In re LATAM Airlines Grp.*, 620 B.R. 722, 796 (Bankr. S.D.N.Y. 2020). Yet in chapter 12 and subchapter V proceedings, there is no absolute priority rule to help creditors to maximize their recoveries. In these contexts, a reorganization plan can be crammed down on creditors who will not fully recover their claims, even if equity holders retain their stakes and only pay their disposable income for a period of years. 11 U.S.C. §§ 1191(b), (c)(2). Given the shift of power from creditors to debtors without the absolute priority rule, it is unsurprising that Congress would attempt to rebalance the equities by expanding the scope of non-dischargeable debt under these circumstances. *See In re Cleary Packaging, LLC*, 36 F.4th 509, 517 (4th Cir. 2022).

This protection is especially important for tort claimants and other claimants that involuntarily become creditors because of the debtor's bad acts. The type of debts delineated in section 523(a) often are not debts for which creditors can protect themselves via contract. In a typical chapter 11 bankruptcy, these unsecured creditors would have the protection of the

absolute priority rule, making it more likely that they recover in full. If a debtor elects to proceed under subchapter V and then crams down a reorganization plan over creditors, the Bankruptcy Code cannot be fairly construed to allow them to discharge debts related to torts, fraud, and other willful misconduct if they maintain their equity interest. To do so would create a perverse incentive for tortfeasors; they would be incentivized to quickly discharge unliquidated claims under a subchapter V proceeding so that they can maintain their ownership and pay pennies on the dollars to victims.

In the present case, the Debtor knew that it could be inundated with tort judgments from the residents of Blackbird, which would surely increase the value of the Debtor's debt beyond the threshold permitted for a subchapter V proceeding. Rather than choosing to dispute the claim brought by Ms. Rigby, the Debtor quickly filed for reorganization under subchapter V. This was because they sought to benefit from the abrogation of the absolute priority rule and because they assumed that Ms. Rigby's debt would be dischargeable. The crammed-down reorganization plan would leave Strawberry Fields' ownership of the Debtor entirely intact, while only paying Ms. Rigby a fraction of the value of the claim she holds.

This case illustrates why Congress would wish to expand the scope of non-dischargeable debts for corporate debtors operating in the subchapter V cramdown context. The Court of Appeals was critical of the recently decided 4th Circuit decision *In re Cleary Packaging* as being purely driven by equitable concerns. (R. at 21.) Such equitable considerations are not offered here as a standalone rationale for interpreting section 523(a) to apply to corporate debtors under section 1192. Instead, they are offered to reinforce the policy rationale for the interpretation that Congress intended. In enacting section 1192 of subchapter V, Congress diverged from the typical chapter 11 discharge rule and instead adopted a rule akin to chapter 12 because

involuntary creditors require extra protections in the absence of the absolute priority rule to ensure that they can recover what is owed to them.

CONCLUSION

For the reasons set forth, the Court should hold that a bankruptcy court lacks 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 and that a corporate debtor proceeding under subchapter V of chapter 11 may not, under 11 U.S.C. § 1192, discharge the types of debts specified in subparagraphs (1) through (19) of 11 U.S.C. § 523(a).

APPENDIX

11 U.S.C. § 1192. Discharge

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

- **(1)** on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or
- **(2)** of the kind specified in section 523(a) of this title.

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

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

- **(1)** for a tax or a customs duty—
  - **A.** of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title,whether or not a claim for such tax was filed or allowed;
  - **B.** with respect to which a return, or equivalent report or notice, if required—
    - **i.** was not filed or given; or
    - **ii.** was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
  - **C.** with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;
- **(2)** for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
  - **A.** false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
  - **B.** use of a statement in writing—
    - **i.** that is materially false;
    - **ii.** respecting the debtor's or an insider's financial condition;
    - **iii.** on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
    - **iv.** that the debtor caused to be made or published with intent to deceive; or
  - **C.**
    - **i.** for purposes of subparagraph (A)—
      - **I.** consumer debts owed to a single creditor and aggregating more than $800 [originally "$500", adjusted effective April 1, 2022]2 for luxury goods or services incurred by an individual

debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

II. cash advances aggregating more than $1,100 [originally "$750", adjusted effective April 1, 2022]2 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

ii. for purposes of this subparagraph—

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

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

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

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

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

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

(5) for a domestic support obligation;

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

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

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

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

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

A.

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

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

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

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

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

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

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

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

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

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

B. incurred to pay fines or penalties imposed under Federal election law;

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

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

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

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

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

B. a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title; but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

A. is for—

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

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

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

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

ii. any settlement agreement entered into by the debtor; or

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

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

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

(c)

(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and

after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

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

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

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