No. 22-0909

IN THE

Supreme Court of the United States

JANUARY TERM, 2023

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,

ELEANOR RIGBY, PETITIONER

v.

PENNY LANE INDUSTRIES, INC. RESPONDENT.

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

BRIEF FOR PETITIONER

TEAM NUMBER 9
COUNSEL FOR PETITIONER

JANUARY 19, 2023

QUESTIONS PRESENTED

I. Whether a bankruptcy court has the requisite constitutional and statutory authority to extinguish direct claims held by non-debtor third parties against other non-debtor third parties, notwithstanding the absence of consent on behalf of the parties whose claims are being released?

II. Whether a corporate debtor who voluntarily filed in subchapter V of Chapter 11 may discharge debts listed in 11 U.S.C. § 523(a)(1)-(19) despite 11 U.S.C. § 1192's excepting discharge of the "kind" of "debts" specified in § 523(a)?

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The Thirteenth Circuit Court of Appeals' decision is available at No. 22-0909 and reprinted at Record 2. Both the bankruptcy court and the district court decided in favor of Penny Lane Industries, Inc., the Debtor. On appeal, the United Court of Appeals for the Thirteenth Circuit affirmed.

STATEMENT OF JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

This action requires statutory construction of certain provisions of Title 11 of the United States Code. The following sections are also restated in full in the Appendix.

The relevant portion of 11 U.S.C. § 523(a)(6) provides:

> (a) A discharge under section . . . 1141, 1192, 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.

11 U.S.C. § 523(a)(6).

The relevant portion of 11 U.S.C. § 1192(2) provides:

> If the plan of the debtor is confirmed under section 1191(b) of this title, . . . the court shall grant a debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 502 of this title and provided for in the plan, except any debt –
>
> > (2) of the kind specified in section 523(a) of this title.

11 U.S.C. § 1192(2).

STATEMENT OF THE CASE

This appeal arises from Respondent's attempt to inequitably receive the benefits of a discharge without filing for bankruptcy. The respondent's release constitutionally violates the separation of authority between Article I and Article III courts, and further obviates the Bankruptcy Code's various disclosure-related mechanisms. Bankruptcy should not be a door for companies to escape liability for causing cancer, birth defects, killing family members and children, and ruining lives.

I. FACTUAL HISTORY

Penny Lane Industries, Inc. (the "Debtor") is a wholly owned subsidiary of Strawberry Fields, Inc. ("Strawberry Fields"), a cereal and convenience food production company. R. at 4. The Debtor, based in the City of Blackbird, Moot, manufactures plastic, glass, and metal food containers. *Id*. at 4–5. The Debtor faces a "veritable tsunami of litigation" related to allegations that it knowingly disposed of industrial pollutants and chemicals, which subsequently contaminated the ground water supply underneath its manufacturing facility in Blackbird. *Id*. at 3–5.

Federal and State authorities determined that a sizeable groundwater "plume"[1] exists under the City of Blackbird. *Id*. at 5. Studies conducted by the United States Environmental Protection Agency and the Centers for Disease Control and Prevention evidence that from 2013 to 2017, "tens of thousands of local residents drank and bathed in water contaminated with toxins at concentrations" up to 3,000 times the "permitted level." *Id*. Exposure to these toxins has been linked to death, birth defects, and sickness. *Id*. Residents of Blackbird and neighboring

[1] R. at 5., Fn. 2. ("A groundwater plume is created when hazardous substances, pollutants or contaminants are present within an aquifer system . . . The contaminated plume can spread horizontally, vertically, and transversely through the aquifer system by means of infiltration, migration, . . . and interaction with surface water.")

communities (the "Resident Creditors") filed suit against the Debtor, asserting wrongful death and injury damages stemming from the permeation of industrial pollutants in the local water supply. *Id*. at 6. Many lawsuits name Strawberry Fields as a co-defendant. *Id*. One such lawsuit was filed by Blackbird resident Eleanor Rigby ("Ms. Rigby"), who alleges that her four-year old daughter "died of leukemia caused by exposure to pollutants dumped by the Debtor" and that the Debtor's then CEO, Maxwell S. Hammer ("Hammer"), "was aware" that the disposed-of waste was contaminating Blackbird's water supply. *Id*. Ms. Rigby further alleges that the Debtor, as a "cost saving measure," disposed of pollutant which infiltrated the Liverpool River, which runs along the rear of the Debtor's property. *Id*. at 5. Finally, Ms. Rigby asserts liability against Strawberry Fields, claiming "it knew, or should have known, of [the Debtor's] alleged misconduct." *Id*. at 5–6.

In light of the overwhelming number of lawsuits filed against it, the Debtor filed for bankruptcy under subchapter V of chapter 11 of the Bankruptcy Code on January 11, 2021. *Id*. The Debtor currently owes less than $2 million to trade creditors. *Id*. Most of the Debtor's liabilities stem from accruing disputed, unliquidated mass tort claims resulting from the Debtor's alleged pollutant-disposal practices. *Id*. at 6. Approximately "10,000 claims asserting cumulative damages of nearly $400 million" were filed against the Debtor. *Id*. Ms. Rigby's claim is an unsecured claim for $1 million. *Id*. Currently, there are no objections to Ms. Rigby's claim, and it is therefore deemed "allowed" under section 502 of the Bankruptcy Code.[2] *Id.* at 6–7.

The Debtor filed a motion to dismiss Ms. Rigby's complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *Id*. at 7. The Debtor

[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 _."

argued that section 523(a)'s non-dischargeability provisions apply only to individuals. *Id*. The Bankruptcy Court for the District of Moot held in favor the Debtor, finding section 523(a)'s discharge exceptions do not apply where the debtor is a corporation. *Id*. Ms. Rigby timely filed a notice of appeal. *Id*.

The Debtor's subchapter V filing stayed the commencement or continuation of all non-bankruptcy proceedings pursuant to section 362. *Id*. However, all pending litigation against Strawberry Fields was not stayed. *Id*. There is no indication that Strawberry Fields was insolvent at the time of the Debtor's filing. Consequently, the Debtor obtained a temporary injunction precluding litigation against the Debtor's "current and former owners, officers, directors, employees and associated entities," as well as Strawberry Fields. *Id*. at 7–8. This "temporary" injunction has been extended "several times," and no subsequent litigation has been filed against Strawberry Fields. *Id*. at 8.

In mediation, several stakeholders memorialized a plan of reorganization (the "Debtor's Plan" or the "Plan") that provides creditors with allowed claims approximately thirty to forty cents on the dollar. *Id*. The Plan purports to establish a "creditor trust" funded via (a) the Debtor's disposable income for five years, and (b) a $100 million commitment by Strawberry Fields. *Id*. In return for its contribution to the trust, Strawberry Fields demanded a broad release from all claims, including both estate and third-party direct claims. *Id*. The Plan, in compliance with this demand, expressly releases and discharges Strawberry Fields from "any and all claims" that were previously asserted or might be asserted in the future. *Id*. Most notably, the Plan release is "non-consensual," meaning it binds parties regardless of whether they participated in the bankruptcy case or whether they voted in favor of the Plan. *Id.* Further, it precludes all parties

from pursuing claims against Strawberry Fields in relation to the Debtor's pre-petition conduct. *Id*.

While over ninety-five percent of the unsecured creditors voted in favor of the Plan, Norwegian Wood Bank (the "Bank") and Ms. Rigby objected to the Plan. *Id*. at 9. The Bank, a secured creditor that is owed $3.5 million by the Debtor, is a holder of a first priority security interest on the Debtor's manufacturing equipment. *Id*. The Bank objected to the Plan arguing it was not "fair and equitable" as required by sections 1191(b) and 1129(b)(2)(A) as the value of its collateral was "understated." *Id*. Ms. Rigby, an unsecured creditor, objected to the Plan's Confirmation because the non-consensual release of her direct claim against Strawberry Fields was not permissible under "applicable bankruptcy and non-bankruptcy law." *Id*.

II. PROCEDURAL HISTORY

The Bankruptcy Court for the District of Moot overruled the objections and confirmed the Plan. *Id.* at 10. With respect to Ms. Rigby's objection, the court held that the present case was "extraordinary" and thus permitted the releases granted to Strawberry Fields. *Id*. The court reasoned that Strawberry Field's $100 million contribution would eliminate the need for future litigation and guaranteed a "substantially greater" recovery to Creditors than might be had outside of bankruptcy. *Id*. The court further reasoned "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan." *Id*. Considering the Bank's objection, the court found the Plan complied with sections 1129(b)(2)(A) and 1191. *Id*.

Ms. Rigby timely appealed both of the bankruptcy court's rulings. *Id.* at 11. The disputes were certified for direct appeal to the Thirteen Circuit. *Id*. The Thirteenth Circuit likewise affirmed. *Id*.

STANDARD OF REVIEW

The questions presented are based on statutory interpretation of the Bankruptcy Code 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 incorrectly ruled in favor of Strawberry Fields when it held first, that Strawberry Fields was entitled to have any current or future claims against it released as a condition of funding the Debtor's Plan, and second, that Ms. Rigby's claim was dischargeable because section 523(a) exceptions to discharge only apply to individual debtors.

Strawberry Fields intends to reap the benefits of bankruptcy without satisfying the filing threshold that justify those benefits. The nonconsensual release terminated current and future direct claims of liability against a non-debtor without the consent of creditors, namely Ms. Rigby, in a manner analogous to a prototypical discharge. More importantly, in confirming the Debtor's Plan of reorganization, the bankruptcy court terminated claims that implicate state actions and private rights. The constitutional authority to adjudicate state actions and private rights is found solely in Article III courts. Finally, the termination of Ms. Rigby's claims via their channeling into a creditors' trust implicates fundamental due process concerns. Because the channeling operates as an adjudication of her claims, which are a species of property, Ms. Rigby has been denied an opportunity to be heard, and more importantly, her day in court.

Moreover, there are no provisions in the Bankruptcy Code authorizing the involuntary release of non-debtors in this manner. The one statute permitting the adjustment of non-debtor relationships with other non-debtors is in bankruptcies involving asbestos related mass actions. *See* 11 U.S.C. § 524(g). When there is no explicit command of authority permitting the release of

non-debtors outside of section 524(g), bankruptcy courts are not authorized to invoke the equitable authority of section 105(a). The application of section 105 in this case runs contrary to the Supreme Court's holding that an equitable exercise may only be invoked within the confines of the Code. Because the Code does not enumerate any authority for the release of direct claims against non-debtors, equity alone is not enough.

Furthermore, the Thirteenth Circuit incorrectly adopted and applied the non-dischargeability approach because the discharge exceptions apply to corporate debtors in subchapter V cases. The plain language of Section 1192 shows that debts of the kind specified in section 523 apply irrespective of whether the debtor is an entity or an individual. Section 1192 is applicable only in a subchapter V filing and excepts from discharge any debt listed in section 523(a) for a corporation or an individual. *See* 11 U.S.C. §§ 523(a), 1192. Section 1192(2) excepts from discharge any debt "(2) *of the kind* specified in section 523(a)." *See* 11 U.S.C § 1192(2). One of the *kinds of debt* excepted from discharge is a debt caused by the Debtor's willful or malicious injury. *See* 11 U.S.C § 523(a)(6) ("for willful and malicious injury by the debtor to another entity"). The introductory language of section 523 refers to "an individual debtor," which is a "type of debtor," not a *kind of debt. See* 11 U.S.C. § 523(a).

Section 1192 must be read the same way as section 1228 because both sections contain identical language and subchapter V was modeled after chapter 12, which was enacted to simplify reorganization for family farmers and fishermen regardless of whether they were individuals or corporations. *See Cantwell-Cleary Co., Inc. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509, 516 (4th Cir. 2022); *see also* 11 U.S.C. §§ 101(18), 101(19A), 1228, 1192. Similarly, Congress enacted subchapter V to simplify chapter 11 reorganizations for small business debtors and reduce such administrative costs. *Id* at 517. While

the cost of the Debtor's subchapter V filing is non-dischargeability, exempting the Debtor from willful or malicious injury debts does not change the purpose of the Small Business Reorganization Act. Further, a judgment against the Debtor does not render the Appellant's interpretation inequitable.

ARGUMENT

This Court should reverse the Thirteenth Circuit's decision that a bankruptcy court has both constitutional and statutory authority to adjudicate claims involving state law issues between two non-debtors. This Court should also reverse the Thirteenth Circuit's decision and apply section 1192 to this Debtor because section 1192 applies to corporate and individual debtors.

I. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT A BANKRUPTCY COURT HAS BOTH THE CONSTITUTIONAL AND STATUTORY 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

Article III of the Constitution provides that the "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, cl. 1. "When a suit is made of 'the stuff of the traditional actions at common law' . . . and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.* 458 U.S. 50, 90 (1982)) (Rehnquist J., concurring in judgment).

A. The nonconsensual release of Strawberry Fields is a final judgment from the bankruptcy court of non-core claims, thus violating Ms. Rigby's constitutional right to an Article III adjudication.

The non-consensual release of Strawberry Fields infringes on Ms. Rigby's right to an Article III adjudication of her private action consisting of state law claims. Article I bankruptcy courts have subject-matter jurisdiction to adjudicate state-law claims "arising in or related to" a bankruptcy case or related proceedings. 28 U.S.C. § 1334(b). That jurisdictional authority is contingent, however, on whether a matter qualifies as a "core proceeding," *i.e.*, one that "aris[es] in" or "under" Title 11, or a "non-core proceeding," one that is "related to" a debtor's bankruptcy case. *Id.* § 157. This "core/non-core" qualification is a "critical inquiry and [one] ineluctably intertwined with the larger inquiry regarding the constitutional limits on the adjudicatory powers of non-Article III bankruptcy judges." Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L. J 121, 133 (2012).

Section 157(b)(1) of the Bankruptcy Code expounds the jurisdictional nexus of bankruptcy judges in core proceedings. *See* 11 U.S.C. § 157(b)(1). Under section 157(b)(1), a bankruptcy court may "hear and determine" core cases, and "enter appropriate orders and judgments," subject to appellate review by the district court. *Id*. Alternatively, non-core proceedings are governed by section 157(c)(2), which limits the authority of bankruptcy courts to "hear and determine" such proceedings and "enter appropriate orders and judgments," but only "with the consent of the parties to the proceeding." *Id*. § 157(c)(2); *see also Wellness Intern. Network, Ltd. v. Sharif*, 575, U.S. 665, 674 (2015) (finding that entering final orders by Article I courts is permissible is non-core proceedings only where all parties have consented to the court's jurisdiction).

The Supreme Court has clarified that bankruptcy judges may enter final judgments only on claims that either "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499. Conversely, claims not "stem[ming]" from the bankruptcy proceeding, nor "resolvable in the claims allowance process," trigger Article III's adjudicatory protections. *Loveridge v. Hall,* 792 F.3d 1274, 1279 (10th Cir. 2015). Moreover, "non-core claims do not become core simply by virtue of being pursued in the same litigation as core claims." *Pac. Dunlop Holdings v. Exide Techs (In re Exide Techs.)*, 544 F.3d 196, 220 (3d Cir. 2008). A bankruptcy court may not invoke core jurisdiction over nonconsensual, third-party releases "simply because [the] releases are included within a proposed Chapter 11 plan." *In re Midway Gold US, Inc.,* 575 B.R. 475, 519 (Bankr. D. Colo. 2017) (permitting release of claims by debtor, and not the related non-debtor entity, only after evidence of good-faith negotiations between the debtor and the releasees).

In *Stern v. Marshall*, the Supreme Court held that a bankruptcy judge's ruling on a state law claim was offensive to the separation of powers elucidated by the Constitution. *Stern*, 564 U.S. at 485–486. The Court found that while the three branches of government "are not hermetically sealed from one another," an Article I bankruptcy judge's final ruling on a state law claim was reserved for the "judicial Power of the United States[,]" otherwise known as Article III courts. *See id.* at 487. Because the bankruptcy court's ruling was not necessary to determine a proof of claim, nor "integral to the restructuring of the debtor-creditor relationship," the bankruptcy court lacked constitutional authority, reserved for Article III courts, to enter final judgment on the state law claim. *See id*. at 497 (quoting *Langenkamp v. Culp*, 498 U.S.42, 44 (1990)).

Ms. Rigby's claims against Strawberry Fields are state law tort claims between private parties, and wholly independent from bankruptcy's federal scheme. Under *Stern*, Ms. Rigby's claim against Strawberry Fields is a non-core proceeding. It does not "stem" from the Debtor's bankruptcy proceeding. Moreover, there is nothing indicating that Ms. Rigby's claim has any relation to the claims-allowance process. "Congress may not bypass Article III because a proceeding may have *some* bearing on a bankruptcy." *Stern*, 498 U.S. at 499. The Thirteenth Circuit Majority's sole justification for classifying Ms. Rigby's claim as "core" is the idea that the Strawberry Fields' release is a "fundamental central aspect of this chapter 11 case's adjustment of the debtor-creditor relationship" in *Stern v. Marshall*. R. at 12–13. However, "the restructuring of debtor-creditor relations, [a] core bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover . . . damages." *N. Pipeline,* 458 U.S. at 71. Here, the only indication that Strawberry Fields' release is "fundamental" to Ms. Rigby and the Debtor's relationship is Strawberry Fields' contribution to the Plan. *See* R. at 10. However, a third party may not "'purchase immunity" from tort liability by simply agreeing to make a financial contribution to the debtor's settlement with other creditors." *In re CJ Holding Co.,* 597 B.R. 597, 611 (S.D. Tex. 2019) (quoting *In re Midway Gold US, Inc.* 575 B.R. at 519–520).

Similar to *Stern*, where the lawsuit between the debtor and the creditor was vital to the restructuring of their debtor-creditor relationship but was still "non-core," the bankruptcy court here has no power to adjudicate Ms. Rigby's claim. *Stern*, 564 U.S. at 499. The Plan confirmation order constitutes a final judgment of Ms. Rigby's "non-core" claim. Without the consent of all the parties, which is required by section 157(c)(1), the bankruptcy court here was statutorily limited to "submit[ting] proposed findings of fact and conclusions of law" to the

district court. 11 U.S.C. § 157(c)(1). Ms. Rigby has a constitutional right to receive a final judgment from an Article III court. Such an approach is consistent with the separation of powers inherent in section 157's classification structure enacted by Congress. Accordingly, because Ms. Rigby's claims are "non-core," the bankruptcy court lacked the requisite constitutional power to enter final judgment on them.

B. The nonconsensual release of claims held by Strawberry Fields terminates Ms. Rigby's property interest without her consent, or an opportunity to be heard, thus violating her Due Process Rights.

Strawberry Fields is not a debtor, and the "*broad* release from all claims" that third parties "have asserted or might assert" violates the Fifth Amendment's guaranty of due process. R. at 8 (emphasis added). "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V, cl. 3. "The bankruptcy power . . . is subject to the Fifth Amendment." *Louisville Joint State Land Bank v. Radford*, 295 U.S. 555, 589 (1935). "[A] cause of action is species of property" protected by the Fifth Amendment. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982). "[L]egal claims are sufficient to constitute property such that a deprivation would trigger due process scrutiny." *Elliot v. General Motors (In re Motors Liquidation Co.)*, 829 F.3d 135, 158 (2d Cir. 2016). "No bankruptcy law shall be construed to eliminate property rights which existed before [the Bankruptcy Code] was enacted in the absence of an explicit command from Congress. *United States v. Security Indus. Bank,* 459 U.S. 70, 81 (1982).

In the context of nonconsensual third-party releases, one bankruptcy court found that the release:

> "[h]as the effect of a judgment – a judgment against the claimant and in favor of the non-debtor, accomplished without due process. Neither the non-debtor, nor the

> claimant, have an opportunity to present their claims or defenses to the court for determination[.]"

In re Digital Impact, Inc., 223 B.R. 1, 12–13 n.6 (Bankr. N.D. Okla. 1998).

Ms. Rigby's cause of action against Strawberry Fields is a "species of property" protected by the Fifth Amendment. *See Logan*, 455 U.S. at 428; *see also Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950) ("the proceeding is one in which [beneficiaries] may be deprived of property rights and hence notice and hearing must measure up to the standards of due process"); *see also* Jeremy A. Blumenthal, *Legal Claims as Private Property Implications for Eminent Domain*, 36 Hastings Const. L.Q. 373 (2009) ("A lawsuit is property"). The broad channeling of claims into the creditors' trust extinguishes Ms. Rigby's cause of action, rendering her "species" extinct. *See* R. at 9; *see also Logan*, 455 U.S. at 428.

The channeling of Ms. Rigby's claim extinguished her property right. Due process protects "litigants . . . who['ve] never appeared in a prior action" from being "collaterally estopped without litigating the issue," since they've "never had the chance to present their evidence and arguments on the[ir] claims." *Blonder-Tongue Labs., Inc. v. University of Ill. Found*, 402 U.S. 313, 329 (1971). By failing to "rul[e] on the merits of her claim," the bankruptcy court deprived Ms. Rigby of "the opportunity for a hearing on the merits of [her] cause," flouting "constitutional limitations" imposed on the courts along the way. *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958). The release deprives Ms. Rigby of the "deep-rooted historic tradition that everyone should have [their] own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989); *see* R. at 28.

Violating due process principles is grounds for vacating the *res judicata* effect of a bankruptcy court's confirmation order. *See In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993) (vacating bankruptcy court's confirmation order reasoning "we cannot defer to such an order on *res judicata* grounds [as it] would result in a denial of due process in violation of the Fifth Amendment of the [Constitution]"). Though the bankruptcy system is a federal "scheme" that "terminate[s] pre-existing rights," it is still subject to the Due Process Clause of the Fifth Amendment. *See Richards v. Jefferson County,* 517 U.S. 793, 799 (1996); *Radford*, 295 U.S. at 589. Moreover, "[c]hapter 11 plan confirmation procedures are not themselves any sort of due process for [] direct claims." Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 Fordham L.R. 429, 441 (2022). The channeling of Strawberry Fields' claims in bankruptcy is not a merit-based consideration of the claims against them. Strawberry Fields is not entitled to shy away from the requirements demanded by Due Process in the name of "plan confirmation procedures." Ms. Rigby's claim against Strawberry Fields is a distinct property interest protected by due process. The channeling of her claims violated that principle in the name of the Debtor's Plan confirmation order and should be reversed. Ms. Rigby is entitled to have her day in court.

1. <u>The release of Strawberry Fields imposes a mandatory non-opt-out settlement of Ms. Rigby's claim with a non-debtor, in contravention of constitutionally mandated due process principles in non-debtor circumstances.</u>

Strawberry Fields' funding of the Debtor's Plan, contingent on the broad release, cannot circumvent the requirements of Due Process. The Supreme Court has "repeatedly and strongly suggested" that, with claims involving money damages that are compromised via non-debtor release, the "absence of . . . opt out violates due process." Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960, 985 (2022) (citing

Walmart Stores, Inc. v. Dukes, 564 U.S. 338, 362–363 (2011); *see also Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 847–48 (1999)).

"A class action settlement is extremely analogous to the binding distribution scheme effectuated by a confirmed plan of reorganization in [c]hapter 11[.]" Ralph Brubaker, *Back to the Future Claim: Due Process In and Beyond the Mass Tort Reorganization (Part II)*, 35 Bankr. L. Letter, no.1, 11 (Jan. 2015); *see also Matter of American Reserve Corp*, 840 F.2d 487, 489–90 (7th Cir. 1988) (noting the "representative litigation" characteristics of class actions and bankruptcies). In the context of class actions, "predominantly for money damages, [the Supreme Court] has held that absence of notice and opt-out violates due process." *Wal-Mart Stores,* 564 U.S. at 338.

In comparing mass tort consolidation in bankruptcy and the aggregation of claims in class actions, Federal Rule of Civil Procedure section 23(b)(1)(B) permits district courts to certify a class without granting class members the right to opt out of an agreed-upon settlement. *See,* F.R.C.P section 23(b)(1)(B). In *Ortiz v. Fibreboard Corp.*, the Supreme Court limited Rule 23(b)(1)(B) to actions where the fund was "limited," *such as,* where the defendant or fund was insolvent. *Ortiz,* 527 U.S. at 838–41. Here, the Debtor exemplifies a limited fund, and a "major function of bankruptcy law is to provide an orderly mechanism for dividing a limited fund." Levitin, 91 Fordham L. R. at 441. The "whole of the inadequate fund" is "devoted to" claims. *Ortiz,* 527 U.S. at 864. "But the *non-debtor* that benefits from a release is not a limited fund." *Id*. Levitin, 91 Fordham L. R. at 441.

Strawberry Fields is not a limited fund. There is no mention of the breadth of Strawberry Fields' assets, and because they were not subject to the disclosure requirements of bankruptcy, there is no indication of how proportional their $100 million commitment is on their balance

sheet. Both bankruptcy proceedings and class actions mandate certain requirements be met prior to plan confirmation or class certification. *See* Edward Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 Fordham L. R. 361, 363 (2022) ("Access to the [Code's] powerful tool kit is justified by, but also predicated upon, the financial distress of the debtor. Further, to prevent abuse, compliance with chapter 11's process protection is a prerequisite to their use"); *see also* Fed. R. Civ. P. 23(a) (referencing prerequisites such as numerosity, commonality, typicality, and adequacy).

Here, the release of Strawberry Fields via the Debtor's Plan would not satisfy Rule 23(b)(1)(B). Strawberry Fields has not shown that the relevant funds are not limited "independently of the agreement of the parties." *Ortiz*, 527 U.S. at 864. Strawberry Fields' "limited fund" appears shackled only by what they are willing to pay. The bankruptcy court has "given short shrift [to the procedural protections of chapter 11] to serve the imperatives of a 'deal,' [and] the link between maximization and equity [has been] severed." Janger, 91 Fordham L. R. 361, 363.

The release of Strawberry Fields in the Debtor's Plan conforms with none of these due process principles. The release estops all personal injury or wrongful death claims against Strawberry Fields, further binding any potential claimants whether or not they've consented to the release. The failure to affirmatively provide for an "opt-out" clause is precisely what the Thirteenth Circuit Dissent "[took] issue with." R. at 24 n. 22. "Bankruptcy is not meant to be a back door for bypassing the constitutional structures that govern class actions." Levitin, 91 Fordham L. R. 429, 441. Because nonconsensual third-party releases are analogous to class actions in their aggregation of claims, this Court should apply the same principles. The Debtor's

Plan estops, without alternative recourse, Ms. Rigby from asserting her claim against Strawberry Fields, and should be rejected on *Ortiz's* analogous premise.

2. *The lack of an "opt-out" clause, and the binding nature of the Plan's channeling of claims, violates Ms. Rigby's Seventh Amendment rights*

The Seventh Amendment provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States." U.S. Const. amend. XII. "Unless Congress may and has permissibly withdrawn jurisdiction over [a specified] action by courts of law and assigned it exclusively to non-Article III tribunals sitting without juries, the Seventh Amendment guarantees petitioners a jury trial upon request." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 49 (1989). "Legal claims are not magically converted into equitable issues by their presentation to a court of equity." *Id*. at 52 (quoting *Ross v. Bernhard,* 396 U.S. 531, 538 (1970)). A claimant entitled to a final judgment from an Article III judge is additionally entitled to a Seventh Amendment jury trial. *See generally* Brubaker, 86 Am. Bank. L. J. at 150-151.

Ms. Rigby has a constitutional right to final judgment from an Article III court regarding Strawberry Field's release. Where an action must be tried "under the auspices of an Article III court, [] the Seventh Amendment affords the part[y] a right to a jury trial whenever the cause of action is legal in nature." *Granfinanciera,* 492 U.S. at 53. "The [Supreme] Court has construed [the Seventh Amendment] to require a jury trial on the merits in those actions that are analogous to 'Suits at common law.'" *Tull v. U.S.* 481 U.S. 412, 417 (1987).

The Thirteenth Circuit majority opinion stated the "[bankruptcy] court made no ruling on the merits of her claim, but merely approved the global settlement that channeled the claims and the settlement funds to the creditors' trust." This statement runs antithetical to the notion that

when considering common law actions, "[n]o method of adjudication is hinted, other than the traditional common law mode of judge and jury." *N. Pipeline,* 458 U.S. at 90 (Rehnquist, J., concurring).

Channeling Ms. Rigby's common law claim is not equivalent to adjudication by an Article III court. Because her claims are legal, and not equitable in nature, the Seventh Amendment applies. In extinguishing her claim via the Debtor's Plan release, the bankruptcy court deprived Ms. Rigby of her constitutionally guaranteed day in court.

C. The Bankruptcy Code does not provide the requisite authority to release the direct claims held by Strawberry Fields.

Notwithstanding the bankruptcy court's lack of constitutional authority to confirm the Debtor's Plan, the provisions of the Bankruptcy Code further undermine the bankruptcy court's authority to permanently release claims against Strawberry Fields. The Thirteenth Circuit majority opinion relied on sections 105(a), 1123(a)(5), and 1123(b)(6) to authorize the nonconsensual release of Strawberry Fields. R. at 14–15. Those provisions, however, do not permit bankruptcy courts to "create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission do equity." *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d. Cir. 2003).

1. No Code provision explicitly authorizes a bankruptcy court to discharge claims against a non-debtor outside asbestos-related bankruptcies.

Section 524(e) provides that a debtor's discharge "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). "524(e) provides statutory authority for limiting the extension of bankruptcy relief to non-debtors." *In re Combustion Engineering, Inc.*, 391 F.3d 190, 236 n.48 (3d. Cir. 2004). "[T]he Bankruptcy Code does not contemplate a discharge of non-debtors." *In re Coram Healthcare Corp.,* 315 B.R. 321,

335-336 (Bankr. D. Del. 2004). In fact, "it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its protections; Congress did not intend to extend such benefits to third-party bystanders." *In re Western Real Estate Fund.,* 922 F.2d 592, 600 (10th Cir. 1990) (holding non-debtor releases improperly insulate non-debtors in violation of section 524(e)).

Congress, not the courts, has the power to "structure and accommodate the burdens and benefits of economic life." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.* 438, U.S. 59, 83–84 (1978). Congress enacted section 524(g), the sole provision of the Code authorizing non-debtor releases, as an explicit exception to section 524(e)'s statutory bar to discharging debts of a non-debtor. *See* 11 U.S.C. § 524(e). Here, the Strawberry Fields release exterminates "any and all claims" that third parties "have asserted or might assert in the future against Strawberry Fields [.]" R. at 8. However, Congress and the Code are silent as to whether state law tort claims against non-debtors are permissible.

The Supreme Court has held that silence in a statute is more prohibitive than permissive. *See Law v. Siegel,* 571 U.S. 415 (2014). Where a general "prohibition is contradicted by a specific . . . permission" the "specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). The "'general language of a statutory provision . . . will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Id*. at 646 (quoting *Ginsberg & Sons Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). Statutory authority is not concomitant with Congressional silence. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress *explicitly enumerates* certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (emphasis added)).

Moreover, within section 524(g)'s exception provisions, Congress enumerated various procedural protections afforded to those whose claims are released. *See* 11 U.S.C. § 524(g)(4)(B)(i) (allowing non-debtor releases to be approved after the bankruptcy court "appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands"). Here, there is no indication that the bankruptcy court appointed a representative.

Additionally, the Thirteenth Circuit ignored Supreme Court precedent when it stated "[h]ad Congress meant to limit the powers of bankruptcy courts; it would have done so clearly." R. at 15 citing *Airadigm Comm's. Inc., v. F.C.C. (In re Airadigm Comm's. Inc.*), 519 F.2d 640, 656 (7th Cir. 2008)). The release of Strawberry Fields negates congressional intent as the release does not satisfy section 524(g)'s asbestos requirement. *See*, 11 U.S.C. § 524(g). Section 524(g) is the only provision authorizing non-debtor releases and is an explicit exception to section 524(e)'s statutory bar to discharging debts of non-debtor. *See* 11 U.S.C. § 524(e). The Thirteenth Circuit's rationale for excepting Strawberry Fields in this circumstance for section 524(e) is "not to be implied." *See TRW, Inc.*, 524 U.S. at 28. Because no Code provision permits excepting Strawberry Fields and the idiosyncrasies of this case, the bankruptcy court must be reversed to prevent judicial engrafting.

2. *Because no Code provision expressly authorizes the release of direct claims held by Strawberry Fields, the bankruptcy court may not invoke 105(a)'s equitable authority*

Section 105(a) of the Bankruptcy Code provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. 11 U.S.C. § 105(a). "Bankruptcy Courts do indeed have some equitable powers . . . but the scope of a bankruptcy court's equitable power . . . [is] limited to what the Bankruptcy Code itself

provides. *Raleigh v. Ill. Dep't. of Revenue*, 530 U.S. 15, 24-25 (2000). The Supreme Court recently memorialized the limits of section 105(a):

> "Section 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits. That is simply an application of the axiom that the statute's general permission to take actions of a certain type must yield to a specific prohibition elsewhere."

Law v. Siegel, 571 U.S. 415, 421 (2014).

Here, section 105(a) does not provide the authority to discharge and release a non-debtor where the Code *itself* does not provide relief. Invoking section 105(a) to approve a non-debtor release outside of the specifications of section 524(g) would fall outside of the "limit[ations] to what the Bankruptcy Code itself provides." *Raleigh*, 530 U.S. at 24–25. Because an "exercise of section 105(a) must be tied to another [Code] section and not merely to a general bankruptcy concept or objective," the fact that no Code provision exists for permitting non-debtor releases in the context of wrongful death tort claims prohibits the application of section 105(a). *2 Collier on Bankruptcy* ¶ 105.01[1],

Where a general "prohibition is contradicted by a specific . . . permission" the "specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). The "general language of a statutory provision . . . will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Id*. at 646 (quoting *Ginsberg & Sons Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). Statutory authority is not concomitant with Congressional silence. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress *explicitly enumerates* certain exceptions to a general

prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (emphasis added)).

The axiom that section 524(g)'s specific permission to release non-debtors must yield to section 524(e)'s broad prohibition of such releases outside of asbestos cases. *See*, *Law*, 571 U.S. at 421; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 185 (2012) ("the principle behind the general/specific canon" is "[t]he specific provision does not negate the general one entirely"). Because the Code has "carefully calibrated exceptions and limitations," that axiom applies with full force. *Id*. at 24, "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of a contrary legislative intent." *Andrus v. Glover Const. Co.,* 446 U.S. 608, 616–17 (1980). "Put somewhat more directly, [the Supreme Court] would expect to see some affirmative indication of intent if Congress" intended to create "backdoor means to achieve the exact kind of nonconsensual exceptions to Code prohibitions. *Czyzewski v. Jevic Holding Corp.,* 580 U.S. 451, 465 (2017). When Congress includes "express exception[s]" in a statute, the "impli[cation]" is that it intends "*no others*." *Jennings v. Rodriguez*, 138 S.Ct 830, 844 (2018) (emphasis added).

"Implicit authority" for non-debtor releases outside of section 524(g)'s provisional grant "does not reside in the interstices of other vague Bankruptcy Code authorizations[.]" Brubaker, 131 Yale L.J.F. 960, 979–80 ("given that the Bankruptcy Code does not explicitly authorize discharge of a non-debtor's obligations, 'such statutory silence' should be interpreted as *denying* bankruptcy courts any power to authorize' such a non-debtor discharge.'") The Thirteenth Circuit's rationale for excepting Strawberry Fields in this circumstance for section 524(e) is "not to be implied." *See TRW, Inc.*, 524 U.S. at 28.

The release of Strawberry Fields negates congressional intent as the release does not fall within section 524(g)'s explicit requirements. *See*, 11 U.S.C. § 524(g). The Thirteenth Circuit confirmed the Debtor's Plan despite the absence of one Code provision where Congress could have specified "exemptions and exceptions to those exemptions" regarding the broader aspects of non-debtor release. *Law*, 521 U.S. at 424. Section 524(g) specifically authorizes non-debtor releases in asbestos cases. *See* 11 U.S.C. § 524(g). Section 105(a) "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." 2 Collier on Bankruptcy ¶ 105.01[2] (16th ed. 2013). The Thirteenth Circuit relied on section 105(a) to effectuate a result inconsistent with the explicit exception provided for in section 524(g)(4)(A). R. at 14. As such, non-debtor releases cannot be carried solely by section 105(a), barring an explicit command from Congress to the contrary.

II. THE THIRTEENTH CIRCUIT INCORRECTLY ADOPTED AND APPLIED THE NON-DISCHARGEABILITY APPROACH BECAUSE THE PLAIN LANGUAGE OF SECTIONS 1192 AND 523(A)(6) PROVIDE THAT DISCHARGE EXCEPTIONS APPLY TO CORPORATE DEBTORS IN SUBCHAPTER V CASES.

Ms. Rigby's claim is non-dischargeable because the Plan was confirmed non-consensually, and thus the claim asserted by Ms. Rigby, based on the Debtor knowingly dumping harmful chemicals, cannot be exempt from discharge. The proper interpretation of the statutory text of section 1192(2) is to provide discharge to subchapter V debtors, both individuals and corporations in cramdown cases, except with respect to the kinds of debts listed in section 523(a), which includes debts incurred in relation to willful and malicious conduct, like the debt incurred here as a result of the Debtor's chemical dumping.

The Debtor voluntarily elected to file for bankruptcy under subchapter V of chapter 11 as a Small Business Debtor Reorganization, so, treating Ms. Rigby's claim as non-dischargeable is

fair and equitable. *See* 11 U.S.C. § 1181 *et seq.* Electing subchapter V treatment is voluntary and has tradeoffs from the typical chapter 11 reorganization. In response to chapter 11's strict "absolute priority rule," Congress enacted subchapter V "to streamline reorganizations for small business debtors." *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, 514 (4th Cir. 2022); § 1129(b). *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021) (stating that a reason Congress enacted subchapter V was to streamline the bankruptcy process for small business debtors to reorganize and rehabilitate their financial affairs). Under subchapter V, so long as the court finds that the proposed plan is feasible, and the debtor's projectable disposable income is paid to creditors for a 3-to-5-year period, the owner of the subchapter V debtor may retain its equity in the bankruptcy estate. *In re Cleary Packaging LLC, 630 B.R. 466*; 11 U.S.C. § 1191(c)(2)(A), (c)(3). Accordingly, the Debtor very well could have filed under subchapter V as a litigation strategy so that Strawberry Fields would retain its ownership interest in the subsidiary. 11 U.S.C. § 1191(c); *In re Cleary Packaging LLC 630 B.R. 466*.

Unfortunately for the Debtor, as a tradeoff to its voluntary litigation strategy, section 1192 governs discharge because this is a subchapter V case, the Plan was not confirmed consensually, and the Debtor proceeded to confirm the Plan through cramdown. *See* 11 U.S.C. § 1192. In a subchapter V reorganization, section 1141(d) governs discharge so long as the Plan is consensual. 11 U.S.C. § 1141(d)(2). However, once the Bank objected to the Plan, confirmation was no longer consensual. R. at 9. Since the Plan was nonconsensual, and was confirmed under section 1191(b), then section 1192 governs. *See* 11 U.S.C. § 1181(c) ("If a plan is confirmed

under section 1191(b) [of title 11], section 1141(d)… shall not apply, except as provided in section 1192").

In this case, the Bank objected to the Plan arguing it was not "fair and equitable" as required by sections 1191(b) and 1129(b)(2)(A) because the value of its collateral was "understated." R. at 9. Ms. Rigby also objected to the Plan's Confirmation because the non-consensual release of her direct claim against Strawberry Fields was not permissible under "applicable bankruptcy and non-bankruptcy law." *Id.* Therefore, when the creditors objected to the Plan and the Debtor proceeded to confirm the Plan through a cramdown, section 1192, rather than section 1141(d), governed discharge. *See* 11 U.S.C. § 1141(d), 1181(c), 1191(b), 1192.

A. Section 1192 should be interpreted to exempt the claim from discharge because its plain language provides that debts of the kind specified in section 523 apply irrespective of whether the debtor is an entity or an individual.

Ms. Rigby's claim is non-dischargeable because it is a debt caused by the Debtor's malicious and willful injury to Ms. Rigby. The language of section 1192(2) provides discharge to all subchapter V debtors in cramdown cases, except with respect to the categories of debts provided in section 523(a). Consequently, the plain language of section 1192(2) explicitly exempts Ms. Rigby's claim from discharge, because the Debtor's willful or malicious injury is a *kind* of debt specified in section 523(a). The lower court erred in looking beyond the plain language of the Code, which necessitates the result that Ms. Rigby's claim be non-dischargeable. *See* 11 U.S.C. § 1192, 523(a); *see also In re Satellite Restaurants, Inc. Crabcake Factory*, 626 B.R. at 875 (citing *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)) ("[t]he task of resolving the dispute over [the interpretation of a statute] begins where all such inquiries must begin: with the language of the statute itself").

Section 1192 defines the breadth of discharge. *See* 11 U.S.C. § 523(a), 1192. Section 1192 is applicable only in a subchapter V filing and excepts from discharge any debt listed in section 523(a) for a corporation or an individual. *See* 11 U.S.C. § 523(a), 1192. Section 1192(2) excepts from discharge any debt "(2) *of the kind* specified in section 523(a)." *See* 11 U.S.C § 1192(2). One of the *kinds of debt* excepted from discharge is a debt caused by the Debtor's willful or malicious injury. *See* 11 U.S.C § 523(a)(6) (stating "(6) for willful and malicious injury by the debtor to another entity").

The introductory language of section 523 refers to "an individual debtor," which is a "type of debtor," not a *kind of debt. See* 11 U.S.C. § 523(a). In *In re Cleary Packaging LLC*, the court found that the cross-reference from section 1192(2) to section 523(a) referring to a *kind of debt* listed in section 523(a) was a shorthand way for Congress to avoid listing "all 21 types of debts." *See In re Cleary Packaging LLC*, 630 B.R. at 515 (holding that "*the debtors* covered by the discharge language of § 1192(2) – both individual and corporate debtors – remain subject to the 21 *kinds of debt* listed in § 523(a)"). Thus, it is improper to conclude that *individual* is included within the list of section 523(a)'s enumerated debts. *Id.* ("The combination of the terms 'debt' and 'of the kind' indicates that Congress intended to reference only the *list of non-dischargeable debts* found in § 523(a)"). Further, at the time of subchapter V enactment, the published cases addressing the language of section 1228 held that "§ 1228(a) does not incorporate the limiting definition found in the introductory paragraph or § 523(a)." *New Venture P'ship v. JRB Consol. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). The plain language of Section 1192 leads to the conclusion that debts of the kind specified in section 523 are exempt from discharge irrespective of whether the debtor is an individual or a corporation.

Here, Ms. Rigby's claim is a result of the Debtor's willful and malicious conduct and falls under section 523(a)(6)'s exemption from discharge. *See* 11 U.S.C § 523(a)(6). The phrase "willful and malicious," means "an act intentionally committed, without just cause or excuse, in conscious disregard of one's duty that necessarily produces or is almost certain to produce injury" and the requisite intent may be inferred from a totality of surrounding circumstances. *In re Barboza*, 545 F.3d 702 (9th Cir. 2008); *see also In re Dhaliwal*, 630 B.R. 24, 32 (Bankr. S.D. Tex. 2021); *see also In re Dakota*, 284 B.R. 711, (Bankr. N.D. Cal. 2002); *see* 11 U.S.C § 523(a)(6). At the time of Ms. Rigby's injury, the Debtor's Chief Executive Officer, Maxwell S. Hammer ("Hammer") was aware that the waste the Debtor was disposing of on its property had contaminated Blackbird's water supply. R. at 5. Hammer also knew that it could potentially cause serious injury to the residents of Blackbird but instructed the Debtor to dispose the waste anyway. R. at 5; *In re Bolles*, 593 B.R. 832 (Bankr. D.N.M. 2018) (finding that the debtor's misrepresentations about lacking an STD to former girlfriend to be nondischargeable on "willful and malicious injury" theory). Intentionally disposing chemicals to save costs is no excuse for the conscious disregard of one's duty that is almost certain to produce injury. *Id.* Thus, the Debtor's knowingly disposing of pollutants that infiltrated the Liverpool River, that ran along Ms. Rigby's property, is considered willful and malicious conduct towards Ms. Rigby under section 523(a)(6). *Id.*; R. at 5. Therefore, Ms. Rigby's claim cannot be discharged, as it constitutes a debt incurred as a result of the Debtor's "willful and malicious injury." 11 U.S.C. § 523(a)(6).

B. Section 1192 must be read the same way as section 1228 because the sections contain identical language and subchapter V was modeled after chapter 12.

Congress' intent to model subchapter V after chapter 12 supports the notion that section 1192 intended to exempt the kinds of debts listed in 523(a) in the cases of both individual and

corporate debtors. *See A PROPOSAL FOR AMENDING CHAPTER 12 TO ACCOMMODATE SMALL BUSINESS ENTERPRISES SEEKING TO REORGANIZE*, National Bankruptcy Conference, (Jan. 3, 2010) http://nbconf.org/wp-content/uploads/2015/07/NBC-Small-Business-Rept-Dec-17-2009.pdf. Subchapter V was created because chapter 11 was a poor fit for small businesses. *Id.* ("Flaws in the current reorganization process for small businesses: (1) excessive secured creditor influence, (2) monitoring deficits, (3) high costs, (4) obstacles to reorganization"). Chapter 12 has a similar intent, but focuses more narrowly on small businesses owned by family farmers. *See In re Trepetin*, 617 B.R. 841(Bankr. D. Md. 2020) (noting that "The Bankruptcy Code" helps family farmers reorganize their debts and not lose their farms while they face economic difficulty). Chapter 12 also allows small family farmers and fishermen to retain ownership interests in their businesses even if they cannot pay creditors in full. *Id.* This ability to retain ownership interests is also true for subchapter V debtors. *See* 11 U.S.C. §§ 1122(c), 1125(b). There is an inherent close identity under subchapter V between a small business debtor, the small business owner, and the entrepreneur, mirroring the close identity between small businesses or family farms and their respective owners in chapter 12 cases. *See In re Trepetin*, 617 B.R. at 848 ("[s]everal aspects of [s]ubchapter V are premised on the provisions of chapter 12 of the Code for family farmers and fishermen"); *see also A PROPOSAL FOR AMENDING CHAPTER 12 TO ACCOMMODATE SMALL BUSINESS ENTERPRISES SEEKING TO REORGANIZE*, at 11.

In drafting subchapter V, Congress used the same language as chapter 12, intending the language to have the same meaning. *See Hall v. United States*, 566 U.S. 506, 519 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning."). The chapter 12 discharge provision, section 1228, contains the same language as section 1192. *See* 11 U.S.C. § 1228(a)(2), 1192(2). The chapter 12 discharge provision exempts

from discharge "any debt (2) *of a kind* specified in section 523(a)." 11 U.S.C. § 1228(a)(2). Section 1192 uses identical language: it exempts from discharge "any debt (2) *of the kind* specified in section 523(a)." 11 U.S.C. § 1192.

At the time of subchapter V's enactment, courts had grappled with the issue of whether the exemptions in the 523(a) apply to both corporate and individual debtors in chapter 12 cases. *See Southwest Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 WL 1514671 at *2 (Bankr. M.D. Ga. 2009). In the case *In re Breezy Ridge Farms*, the court resolved this issue, and found that, under section 1228, the discharge exemptions found in section 523(a) applied regardless of whether the debtor was a corporate or individual debtor. *Id.* at *2. In coming to this conclusion, the court stated:

> Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a chapter 12 discharge for corporations as well as individuals. Thus it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation.

Id.

In section 1192, like in section 1228, Congress has merely used section 523 as a "shorthand" to define the scope of subchapter V discharge for all debtors, including corporate debtors. *Id*. Even if these provisions were not found to be harmonious, as the *Breezy* court held, the plain language of section 1192 still prevails over section 523. *Id.* This is because "if two provisions may not be harmonized, then the more specific will control over the general." *Id.* (citing *Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 825 (11th Cir. 2003)). Applying this reasoning, the *Breezy* court found section 1228 controls over section 523(a) because the former provision is more specific, applying only in chapter 12 cases, whereas the latter provision, section 523, is broader, in that it is applicable in all bankruptcy cases,

regardless of the chapter. *Id.* Thus, even if section 1192 were found not to be harmonious with section 523(a), section 1192 prevails, as it is specific to subchapter V, while 523(a) applies in all bankruptcy cases. *Id.*

Further, courts assume that Congress is aware of existing law when it passes legislation. *See Hall v. United States*, 566 U.S. 506, 516 (2012); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("[w]e assume that Congress is aware of existing law when it passes legislation."). Therefore, it would run contrary to this notion to find that Congress erred in drafting 1192 when it failed to specify that the debts exempted from discharge under 523(a) applied only to individual debtors. The proper assumption to be made is that Congress was aware of the language of section 523(a), and, in spite of that, still chose to draft section 1192 in a way that omits any distinction between corporate and individual debtors.

In this case, had there been consensual plan confirmation or a usual chapter 11 case, section 1141(d)(2) would apply. Unlike section 1141(d)(2), which uses the language "a discharge under this chapter does not discharge a debtor *who is an individual* from any debt excepted from discharge under section 523" to exempt corporate debtors, section 1192 *does not* use specific language to exempt corporations. *See* 11 U.S.C. § 1141(d)(2) (emphasis added). Section 1192 only uses the language "except any debt (2) *of the kind* specified in 523(a)." *See* 11 U.S.C. § 1192(2) (emphasis added). If the drafters wanted to exclude corporations and small businesses from utilizing the exceptions to 523(a) discharge in subchapter V and in chapter 12, the drafters would not have used the language "*of a kind* specified in" but simply would have said "only individual debts," like they did in section 1192. 11 U.S.C. § 1192. Thus, when reading section 1192 in conjunction with section 523(a), the proper action is to apply the exemptions listed in

523(a) to the Debtor regardless of whether it is a corporate or individual debtor, thereby rendering Ms. Rigby's claim exempt from discharge.

C. Finding that Ms. Rigby's claim is non-dischargeable supports an overarching policy goal of the Bankruptcy Code: to balance creditor protection and debtor relief.

The Court should find that Ms. Rigby's claim is non-dischargeable because to find otherwise would tip the scales in favor of the Debtor so greatly that it runs contrary to the overarching policy goals of the Bankruptcy Code. While the Small Business Reorganization Act provides many privileges to a subchapter V debtor, the overall function of the Bankruptcy Code is to find a balance between creditor protection and debtor relief. *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 340 (Bankr. S.D. Fla. 2020). Notably, subchapter V cases do not require: filing of a disclosure statement, application of the absolute priority rule, or payment of US Trustee fees. *See* 11 U.S.C. § 1183, 1187; *see also Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 2022 WL 16858009 (Bankr. W.D. Tex. Nov. 10, 2022). The most important of the above benefits relates to the absolute priority rule, which requires that claims held by dissenting creditors must be paid in full before any creditors of a lower priority may receive any distribution whatsoever. 11 U.S.C. § 1129(b)(2). This ensures that creditors who dissent to the reorganization plan still have their claims paid. However, in subchapter V cases, there is no such protection of dissenting creditors' claims, and thus a tradeoff to the benefit of the debtor is the inability to discharge debts specified in section 523(a), including debts for bad acts of the organization. 11 U.S.C. §§ 1191(b), 523(a). If a subchapter V debtor has the ability to *both* achieve confirmation through cram down *and* discharge the debts listed in 523(a), dissenting creditors holding 523(a) debts are essentially rendered voiceless in the bankruptcy process, with no little to no recourse. Therefore, to hold that the debts listed in 523(a) can be discharged in a

non-consensual subchapter V plan would have the effect of arming bad actors with a means to further insulate their bad acts and render dissenting 523(a) creditors with little ability to advocate for themselves in the bankruptcy process. Thus, the proper interpretation of sections 1191(b) and 523(a) is to exempt 523(a) debts from discharge because such an interpretation serves the Bankruptcy Code's goal of balancing creditor protection and debtor relief.

D. Finding that Ms. Rigby's claim cannot be discharged produces an equitable result.

Bankruptcy courts are courts of equity with the power to apply flexible remedies. *In re IDC Clambakes, Inc.,* 852 F.3d 50, 59 (1st Cir. 2017). This Court has the flexibility and power to find that Ms. Rigby's claim is nondischargeable. *Id.* Excepting willful and malicious actions from discharge will not fundamentally interfere with the policy of reorganization. This nondischargeability exception from discharge for willful and malicious injuries only apply if the debtor (1) voluntarily chooses subchapter V and (2) proceeds to confirm its plan via cramdown. Both of these choices are within the Debtor's control. If the Debtor decides not to file under subchapter V or files under subchapter V but decides not to confirm the plan with cramdown, then the nondischargeability exceptions do not apply and the Debtor will be able to discharge this liability and no longer remain liable for any debt relating to these pre-petition bad acts. *See* 11 U.S.C. § 1191(b).

This interpretation of section 1192(2) is fair and equitable because in a subchapter V case where the Debtor seeks to confirm its plan through cramdown the small business debtor is given priority over other creditors which ordinarily would violate the absolute priority rule. 11 U.S.C. §§ 1192(2); 1129(b)(2). Under an ordinary chapter 11 plan where creditors have not all consented, the debtor must satisfy the absolute priority rule by paying creditors with higher priority in full before payment is made to lower priority creditors. *See* 11 U.S.C. §

1129(b)(2)(B)(ii); *see also In re Cleary Packaging LLC*, 630 B.R., at 514. When the debtor is able to retain their ownership interest in the company, the cost of retaining such equity is the non-discharge ability of debts incurred by willful and malicious injury. It is only fair that the company should not benefit from the discharge of debts incurred in circumstances of willful and malicious injury. *See* 11 U.S.C. § 523(a)(6); *see also In re Cleary Packaging LLC*, 630 B.R. at 518. Bankruptcy should not be a door for companies to escape liability for causing cancer, birth defects, killing family members and children, and ruining lives.

Even if Ms. Rigby is successful in asserting her claim, she could be stayed from executing her non-dischargeable judgment for up to five years while the Debtor's bankruptcy case is pending. *See* 11 U.S.C. § 362(a); 1192(1); *see also United States v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 422 (S.D.N.Y. 2014) (holding that the creditor may not take steps to collect the debtor unless the automatic stay is terminated); *see also In re Cleary Packaging LLC*, 630 B.R. at 514. In a subchapter V reorganization, there is a three-to-five year period where the debtor's disposable income is paid to creditors, and after that period, the debtor retains its equity in the reorganized bankruptcy estate. *See* 11 U.S.C. §§ 1129(b), 1191(c)(2)(A) and (3). During this period, no creditors may collect from the debtor unless the automatic stay is terminated. *In re Hawker Beechcraft, Inc.*, 515 B.R. at 422. Meaning it is very likely that Ms. Rigby will have to wait even longer to collect damages owed to her from the Debtor. Thus, the interpretation of the text in section 1192(2) provides discharges to subchapter V debtors in cramdown cases except with respect to the kinds of debts listed in section 523(a). This subchapter V corporate debtor, Penny Lane Industries, faces willful and malicious injury claims to Ms. Rigby and others, and this willful and malicious injury claim, a kind of debt listed in section 523(a), is excepted from discharge.

CONCLUSION

The Petitioner respectfully requests that this Court reverse the Thirteenth Circuit's affirmation of the bankruptcy court's ruling. Neither the Bankruptcy Code, nor the Constitution, provide the requisite authority to involuntarily release direct claims held by non-debtors. Affirming otherwise runs contrary to principles of separation of powers, individual due process, and statutory authority. Overturning the Thirteenth Circuit's decision would ensure those principles remain steadfast in Title 11 proceedings, while also blockading bad faith attempts by non-debtors to ruinate the bankruptcy system. Accordingly, the Thirteenth Circuit's holding that bankruptcy courts have the statutory and constitutional authority to extinguish direct claims against non-debtors should be overturned. The Thirteenth Circuit incorrectly adopted and applied the non-dischargeability approach because the Discharge Exceptions apply to corporate debtors in subchapter V cases. The Plain language of Section 1192 is clear that debts of the kind specified in section 523 apply irrespective of whether the debtor is an entity or an individual. Thus, Section 1192 must be read the same as section 1228 because both sections contain identical language and subchapter V was modeled after chapter 12. *See* 11 U.S.C. §§ 1228, 1192. While the cost of the Debtor's subchapter V filing is non-dischargeability, exempting the Debtor from willful or malicious injury debts does not change the purpose of the Small Business Reorganization Act. Further, a judgment against the Debtor does not render the Appellant's interpretation inequitable. For the foregoing reasons, we ask that this Court REVERSE.

APPENDIX

11 U.S.C. § 105. Power of the Court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

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 $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 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 debtors 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 under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such act

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

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

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

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

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

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

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

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

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless

of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);
(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under-

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

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

11 U.S.C. § 524. Effect of discharge.

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

(g) **(4)**

(A)

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

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

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

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

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

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

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

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

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

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

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

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

(aa) the debtor;

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

(cc) a predecessor in interest of the debtor.

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

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

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

11 U.S.C. § 1141. Effect of confirmation.

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)

(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual—

> **(A)** unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;
>
> **(B)** at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—
>
> > **(i)** the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date;
> >
> > **(ii)** modification of the plan under section 1127 is not practicable; and
> >
> > **(iii)** subparagraph (C) permits the court to grant a discharge; and
>
> **(C)** the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—
>
> > (i) section 522(q)(1) may be applicable to the debtor; and
> >
> > (ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B); and if the requirements of subparagraph (A) or (B) are met.

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

> **(A) of a kind** specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or
>
> **(B)** for a tax or customs duty with respect to which the debtor—
>
> > **(i)** made a fraudulent return; or
> >
> > **(ii)** willfully attempted in any manner to evade or to defeat such tax or such customs duty.

11 U.S.C. § 1181. Inapplicability of other sections.

(a) In General. —
Sections 105(d), 1101(1), 1104, 1105, 1106, 1107, 1108, 1115, 1116, 1121, 1123(a)(8), 1123(c), 1127, 1129(a)(15), 1129(b), 1129(c), 1129(e), and 1141(d)(5) of this title do not apply in a case under this subchapter.

(b) Court Authority.— Unless the court for cause orders otherwise, paragraphs (1), (2), and (4) of section 1102(a) and sections 1102(b), 1103, and 1125 of this title do not apply in a case under this subchapter.

(c) Special Rule for Discharge.— If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title.

11 U.S.C. § 1182. Definitions.

(1) Debtor .— The term "debtor"— (A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and (B) does not include— (i) any member of a group of affiliated debtors under this title that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders); (ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m , 78o(d)); or (iii) any debtor that is an affiliate of a corporation described in clause (ii).

11 U.S.C. § 1191. Confirmation of Plan.

(a) TERMS.— The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title [1] are met.

(b) EXCEPTION.— Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(c) RULE OF CONSTRUCTION.—For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:

(1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.

(2) As of the effective date of the plan—

(A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or

(B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

(3)

(A) The debtor will be able to make all payments under the plan; or

(B)

(i) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and

(ii) the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.

(d) DISPOSABLE INCOME.—For purposes of this section, the term "disposable income" means the income that is received by the debtor and that is not reasonably necessary to be expended—

(1) for—

(A) the maintenance or support of the debtor or a dependent of the debtor; or

(B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or

(2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.

(e) SPECIAL RULE.— Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.

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. § 1228. Discharge.

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title, 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 for by the plan, allowed under section 503 of this title, or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) of a kind specified in section 523(a) of this title, except as provided in section 1232(c).

(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1229 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) of a kind specified in section 523(a) of this title, except as provided in section 1232(c).

(d) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if—

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

(e) After the debtor is granted a discharge, the court shall terminate the services of any trustee serving in the case.

(f) The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that—

(1) section 522(q)(1) may be applicable to the debtor; and

(2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).