34th Annual
Duberstein Bankruptcy
Moot Court Competition
Saturday, February 28, 2026
to Monday, March 2, 2026

# COMPETITION PROBLEM

# 34TH ANNUAL DUBERSTEIN BANKRUPTCY MOOT COURT COMPETITION
# February 28 – March 2, 2026

*American Bankruptcy Institute*
*St. John's University School of Law*
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*American Bankruptcy Institute Law Review*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 2025

IN RE SILVER BULLET, LLC, DEBTOR

ROBERT C. SEGER, UNITED STATES TRUSTEE, REGION 22, PETITIONER

V.

SILVER BULLET, LLC, RESPONDENT.

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THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

1. Whether, under the U.S. Constitution or 11 U.S.C. § 1112(b), a bankruptcy court must dismiss the chapter 11 case of a debtor who is not in financial distress as of the petition date.

2. Whether, under 11 U.S.C. § 1123 and other applicable authority, a bankruptcy court may confirm a chapter 11 plan that grants releases in favor of non-debtor entities through an "opt-out" procedure.

Written by Hon. John T. Gregg and Hon. Paul R. Hage. Judge Gregg is a United States Bankruptcy Judge for the Western District of Michigan. Judge Hage is a United States Bankruptcy Judge for the Eastern District of Michigan. The authors wish to express their gratitude to Kelley M. Donnelly and Katherine M. Osborn for their assistance with the drafting of this year's problem.
The authors express no opinion on the issues presented herein.

Recommended for Full Text Publication

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRTEENTH CIRCUIT**

SILVER BULLET, LLC,

CASE NO. 24-1004

DEBTOR.

______________________________________________/

ROBERT C. SEGER, UNITED STATES TRUSTEE, REGION 22,

APPELLANT

V.

SILVER BULLET, LLC,

APPELLEE.

______________________________________________/

Direct Appeal from the United States Bankruptcy
Court for the District of Moot

Decided: June 10, 2025

Before: Reed, Abbott and Teegarden, Circuit Judges

**OPINION**

**Reed, Circuit Judge:**

This is a mass tort chapter 11 case. It involves allegations that Silver Bullet, LLC (the "Debtor") caused serious injury to individuals while operating so-called hyperscale data centers—giant campuses (some are as large as 150 football fields) that house servers and computing resources—built for artificial intelligence technologies. Although they are becoming increasingly common in this country, hyperscale data centers are controversial. They draw enormous amounts of water and electricity, causing residents of the surrounding communities to complain about rising power bills and water shortages.[1] In the case of the Debtor, far more significant allegations have been raised. Specifically, it is alleged that the Debtor's operations resulted in per- and polyfluoroalkyl substances ("PFAS") and other chemicals being released into the air and water supply and that exposure to such chemicals has caused serious health injuries and even death to workers and members of the local community.

The Debtor filed this case under chapter 11 of the Bankruptcy Code[2] to deal with a veritable tsunami of litigation related to such allegations. Months of negotiations resulted in the Debtor filing a nearly consensual *Plan of Reorganization* (the "Plan") which establishes a trust that promises to pay creditors in full. Such distribution will be funded, in large part, pursuant to a Restructuring Support Agreement (the "RSA") that the Debtor entered into with its corporate parent, Sunspot, Inc. ("Sunspot"). The funds from Sunspot did not come without strings though. In addition to a discharge of all claims against the Debtor, the Plan contemplates broad "consensual" releases of claims held by creditors against Sunspot, its affiliates, professionals, officers, directors, employees, and shareholders (collectively, the "Released Parties").

Notwithstanding the fact that the creditors who voted on the Plan overwhelmingly supported it, Robert C. Seger, the United States Trustee from Region 22 (the "U.S. Trustee"), objected to the Debtor's proposed restructuring on two grounds. First, the U.S. Trustee argued that the Debtor's bankruptcy case must be dismissed because the Debtor is not in financial distress. Thus, the argument goes, the Debtor is not "actually bankrupt" and the case was filed in bad faith. Second, the U.S. Trustee argued that the purportedly consensual releases in favor of the Released

[1] According to recent media reports, each artificial intelligence search uses ten times more electricity than a traditional internet search and the water consumption associated with a single conversation with artificial intelligence is comparable to that in a standard plastic water bottle.

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

Parties are impermissible. Even if consensual releases are permitted in some cases, he posited, here they are not *really* consensual as they were obtained utilizing an "opt-out" procedure instead of requiring creditors to expressly "opt-in" before being deemed to have agreed to such releases.

The Bankruptcy Court for the District of Moot concluded that the Debtor's bankruptcy case need not be dismissed. It also overruled the U.S. Trustee's objection to the Plan and the releases contained therein. The U.S. Trustee timely appealed both determinations. Having considered the compelling arguments of the parties, we affirm the bankruptcy court on both issues.

## **Factual Background and Procedural History**[3]

The Debtor was formed in 1999 for the purpose of constructing regional warehouses and shipping facilities. The Debtor achieved tremendous growth in a short period of time. Indeed, six years after commencing operations, the Debtor was recognized as a leader in its field, gracing the cover of *Wholesale Distributors Monthly*, a national trade newsletter.

In 2006, the Debtor was approached by Sunspot about a new business opportunity. Sunspot is best known for its e-commerce retail platform, Mainstreet, which delivers packages to Americans' doorsteps daily. Guided by its visionary founder and majority shareholder, Sunspot had expanded into various information technology sectors, including cloud computing and digital advertising. With the physical infrastructure of these new ventures in mind, Sunspot contracted with the Debtor for the construction of a state-of-the-art data center. The Debtor completed the first data center for Sunspot in 2008.

The Debtor thereafter implemented "Project Turn the Page," a strategy to transform its business model from general facility construction to comprehensive data center development and management. Project Turn the Page ushered in a new era of success for the Debtor. In only a few

[3] The facts, as set forth herein, have been stipulated to by the parties.

years, the Debtor developed over sixty small footprint facilities for Sunspot and other national IT end-users. It also managed on-site operations at many of these facilities. The Debtor's annual revenues increased exponentially, thereby allowing it to heavily invest in research and development, including proprietary "off-the-grid" power generation and hydro-cooling technology.

In 2015, Sunspot announced plans to aggressively expand by investing in artificial intelligence technology. Recognizing that it would need hyperscale data centers to house servers and other equipment, Sunspot purchased the equity interests of the Debtor in early 2016 for $1.4 billion. Upon the closing of that transaction, the Debtor announced that it would now contract exclusively with Sunspot. Gradually, it divested itself of operational management responsibilities at data centers owned by other end-users. Over the next several years, the Debtor designed, constructed and managed operations at fifty-three hyperscale data center campuses in seventeen states. At each campus, the Debtor entered into a lease with Sunspot. In addition to being its tenant, Sunspot served as the Debtor's secured lender, providing the working capital for the Debtor.

Problems for the Debtor, and by extension Sunspot, surfaced in early 2018. The Debtor received a demand letter sent on behalf of a farmer who resided at and operated a farm adjacent to one of the Debtor's data centers. The farmer asserted that his four-year old daughter had contracted a rare form of terminal cancer due to exposure to high levels of chemicals that, he alleged, were knowingly released into the air and water supply by the Debtor. Concerned with the negative publicity that could result from the demand letter if it were known, Sunspot caused the Debtor to settle the demand prior to the commencement of litigation. In exchange for an immediate payment of $500,000 from the Debtor, the farmer and his family agreed to release any claims they held against the Debtor, Sunspot and any other entity involved with the data center.

Although the settlement agreement contained strict confidentiality provisions, word of the settlement quietly spread throughout the mass tort plaintiffs' bar. Less than a year later, the Debtor was subject to nearly eighty civil actions in state courts throughout the country brought by individuals who worked in, or resided near, one of the Debtor's data centers. Most, but not all, of the lawsuits named Sunspot as a co-defendant.

In 2020, a state court jury determined that the Debtor and Sunspot were jointly and severally liable to a family living approximately one mile from one of the Debtor's data centers. The jury awarded the family $100 million for actual and punitive damages. Contesting both the determination of liability and the damages awarded, the Debtor and Sunspot immediately appealed. While that appeal was pending, the Debtor and Sunspot entered into a confidential settlement agreement with the family that resolved all claims.

The Debtor and Sunspot fared better in other litigation dealing with similar tort claims. Indeed, jury trials were held in three civil actions filed in three different states. The Debtor and Sunspot prevailed in all three cases. Nothing could stop the barrage of litigation though. New actions were commenced throughout the country by neighboring residents, former employees, and even a handful of state attorneys general. With each new action, the Debtor's and Sunspot's legal bills multiplied. Sunspot's experts projected that as many as 50,000 lawsuits could be filed against the Debtor and/or Sunspot over a twenty year period. In early 2022, the Debtor and Sunspot learned that certain plaintiffs were preparing to request class certification.

Concluding that the projected scale of litigation was unsustainable, the Debtor and Sunspot began negotiating the terms of the RSA, which would be entered into in connection with a chapter 11 filing by the Debtor. Among other things, the RSA contemplated that Sunspot would, to the extent that the Debtor's own assets were insufficient to do so: (i) pay expenses incurred by the

Debtor in the normal course of its business, (ii) satisfy all administrative expenses and priority claims, and (iii) fund a trust in an amount sufficient to pay all creditors in full. The Debtor had no obligation to repay the amounts to be funded by Sunspot. Moreover, while retaining its equity interest in the Debtor, Sunspot agreed to waive its $58 million secured claim against the Debtor related to the pre-petition financing that it provided. Finally, the RSA summarily provided that the Debtor's plan would include a broad release in favor of the Released Parties for all claims related to the operations of the Debtor. The RSA was expressly contingent on confirmation of a plan of reorganization (acceptable to Sunspot) incorporating and approving its terms.

The Debtor filed a petition for relief under chapter 11 in the Bankruptcy Court for the District of Moot on September 12, 2022. That day, the Debtor issued a press release announcing that the bankruptcy was commenced solely to deal with "meritless tort litigation" and that, notwithstanding the filing, it was financially healthy, it had a substantial financial commitment from Sunspot in addition to its own ample cash reserves, and it would continue operating and paying its creditors in full in the ordinary course of business. The press release was consistent with the first-day declaration from the Debtor's Chief Financial Officer, Betty Lou Smith, who stated that the Debtor had: (i) $40 million in cash, (ii) no secured indebtedness other than the claim of Sunspot, and (iii) de minimis unsecured debt that it was paying as it came due in the ordinary course of business. The declaration averred that the Debtor was aware of over 20,000 tort claimants who held disputed claims in unknown amounts.[4] Beyond that, the Debtor acknowledged, there were likely many unknown tort claimants.

[4] Soon after the petition date, several tort claimants filed motions for relief from the automatic stay so that prepetition litigation could proceed against the Debtor in other courts. *See* 11 U.S.C. § 362(a), (d). The bankruptcy court declined to grant such motions, citing the infancy of the bankruptcy case. The bankruptcy court also temporarily enjoined (through the plan confirmation date) all litigation against parties who would receive a release through the plan.

The U.S. Trustee appointed an unsecured creditors' committee (the "Committee").[5] Asserting that the Debtor was not truly in financial distress and lacked good faith under section 1112(b) when it filed its bankruptcy petition, the U.S. Trustee and the Committee both filed motions to dismiss the Debtor's case. In advance of the hearing on such motions, the parties agreed to mediate their disputes. At the conclusion of the mediation, the Committee withdrew its motion. The Committee reported that, through mediation, it had gained important concessions from the Debtor related to the claims resolution process that would be managed by the creditors' trust. This included, notably, the right to select the trustee of such trust. The Committee also negotiated an initial, minimum funding amount of $2.5 billion from Sunspot for the creditors' trust.

The U.S. Trustee did not join in the Committee's settlement. The bankruptcy court held a four-day hearing on the U.S. Trustee's motion to dismiss. At that hearing, the U.S. Trustee contended, as a threshold issue, that financial distress is a precursor to subject matter jurisdiction under the United States Constitution. U.S. Const. art. I, § 8. Because the Debtor is an "eminently solvent, thriving, nondistressed entity," the U.S. Trustee argued, it is not eligible for relief as a bankrupt. Separately, the U.S. Trustee argued that a debtor who is not in financial distress lacks good faith and, thus, its case must be dismissed under section 1112(b).

At the conclusion of the hearing, the bankruptcy court denied the U.S. Trustee's motion.[6] The court found, based on testimony presented by the parties, that the Debtor was not in financial distress as of the petition date and that it had the wherewithal to fund its known and anticipated tort liabilities in the near term. Nevertheless, the court held that a bankruptcy court has jurisdiction

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[5] Six of the seven members of the Committee have tort claims against the Debtor. Since the commencement of this bankruptcy case, one Committee member has died from cancer allegedly caused by exposure to chemicals released by the Debtor. A representative of that Committee member's estate now serves on the Committee in his stead.

[6] The U.S. Trustee's motion for leave to file an interlocutory appeal was denied. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 504-05 (2015).

over a bankruptcy case even when a debtor is not in financial distress. The court also held that a lack of financial distress, standing alone, does not mandate dismissal under section 1112(b).

Thereafter, the Debtor filed its 324-page, single-spaced Plan and disclosure statement, which incorporated the terms of the RSA. Under the Plan, claims are channeled into a creditor trust that will be funded by the Debtor and Sunspot. The trustee will be responsible for determining the amount of known and future claims based on various metrics (*e.g.*, severity of injury, proximity to a data center) and paying distributions to creditors at 100% of such amounts as soon as practicable. The trust is the sole forum for determining claims against the Debtor.[7] Finally, unless claimants expressly opt-out, the Plan releases and enjoins "any and all claims" that claimholders "have asserted or might assert in the future against the Released Parties" to the extent that such claims are "related to the Debtor's pre-petition conduct, its estate or this chapter 11 case," with such claims likewise being channeled into the trust.

The bankruptcy court approved the disclosure statement as providing adequate information under section 1125. Relatedly, the court approved the Debtor's plan solicitation procedures, including a six-page, single-spaced form of ballot containing the release language and providing that a party could opt-out of such release by checking a box on the ballot. *See generally* Fed. R. Bankr. P. 3017 and 3018. The bankruptcy court required the Debtor to publish a tombstone notice in three national print and digital newspapers providing basic information about the bankruptcy case, explaining the voting process and the opt-out release, and featuring a QR code that could be used to review the disclosure statement, the Plan and the ballot form.

Every class of creditors that was entitled to vote accepted the Plan. Nevertheless, only about twenty percent of the Debtor's known unsecured creditors submitted a ballot. Of that group,

[7] The trust agreement contemplates a limited appeal right of the trustee's determinations to the district court.

nearly ninety percent did not check the box to opt-out of the releases and, thus, would be bound by such releases upon the court's approval of the Plan. Similarly, known and unknown creditors who did not return a ballot would be bound by the release.

The bankruptcy court held a hearing on confirmation of the Plan. The U.S. Trustee was the only party to object to confirmation, arguing that the releases contained in the Plan were impermissible because a bankruptcy court lacks the authority to grant even consensual releases in favor of third parties. To the extent that such authority does exist, the U.S. Trustee argued, an opt-out procedure does not result in the requisite affirmative consent under applicable law.

The bankruptcy court confirmed the Plan. It held that consensual releases of claims against non-debtors are permissible in extraordinary cases. In the bankruptcy court's view, the present case fits that bill because, among other reasons, claimholders were given the opportunity to opt-out of such releases, Sunspot's significant monetary contribution would result in payment in full of all allowed claims, and the Plan was overwhelmingly supported by creditors who voted.

The U.S. Trustee timely appealed both of the bankruptcy court's rulings.[8] Upon the request of the parties, the questions were certified for direct appeal to this court pursuant to 28 U.S.C. § 158(d)(2)(A).

## **Discussion**

### I. Legal Standard

The parties do not dispute the facts as set forth herein. Rather, the issues that we address in this appeal involve questions of law. Thus, our review is *de novo*. *See, e.g.*, *Fox v. Hathaway (In re Chi. Mgmt. Consulting Grp.)*, 929 F.3d 804, 809 (7th Cir. 2019). Under a *de novo* standard

[8] The parties stipulated to stay the effective date of the Plan pending resolution of these appeals to avoid any potential application of the doctrine of equitable mootness. *See, e.g.*, *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 798-99 (6th Cir. 2016).

of review, the reviewing court decides an issue as if the court were the original trial court in the matter. *See, e.g.*, *Razavi v. Comm'r*, 74 F.3d 125, 127 (6th Cir. 1996).

## II. The Bankruptcy Court Did Not Err in Declining to Dismiss This Case Due to a Lack of Financial Distress

We must first determine, as a threshold issue, whether federal courts have jurisdiction over bankruptcy cases in which debtors are not in "financial distress." The argument advanced by the U.S. Trustee and adopted by our friend in dissent goes like this: because U.S. Const., art. I, § 8, otherwise known as the "Bankruptcy Clause," presupposes that a debtor in bankruptcy will be in financial distress, federal courts lack constitutional jurisdiction when they are not.

We start with the basics. The Bankruptcy Clause provides Congress with the authority to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4; *see* U.S. Const., art. III, § 2 (granting federal courts jurisdiction over cases arising under the laws of the United States). When the Founders drafted and the states ratified the Constitution, they gave to Congress through the Bankruptcy Clause the power to expansively address debtor-creditor relationships. Congress thereafter enacted a statutory scheme that grants subject matter jurisdiction to courts sitting in bankruptcy. 28 U.S.C. § 1334(b); *see* 28 U.S.C. § 157(b); *see also MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298 (2023) (further jurisdictional requirements are imposed in the Bankruptcy Code, but only "if Congress clearly states as much") (citation omitted).

According to the U.S. Trustee, that is all well and good, but only so long as a debtor is "actually bankrupt." Relying on English and Colonial law, the U.S. Trustee proclaims that history and tradition demonstrate that the Framers intended for a debtor to suffer from financial distress as a constitutional prerequisite to relief under any bankruptcy law enacted by Congress. We find the U.S. Trustee's argument misguided. After all, the United States Supreme Court long ago rejected this constitutional interpretation, stating "that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted . . . . " *Cont'l Ill. Nat. Bank & Tr. Co. of Chi. v. Chi., Rock Island & P. Ry. Co.*, 294 U.S. 648, 669 (1935). As if that weren't enough, the Supreme Court clarified that the Bankruptcy Clause should be interpreted "in the light of the acts, and the history of the acts, of Congress which have from time to time been passed on the subject." *Id*. at 670. Such acts have tended to expand rather than narrow access to our bankruptcy system. *Id*. at 669-71. Put another way, the Framers clearly granted to Congress the authority to determine what is, and what is not, the subject of bankruptcies under the Constitution, as long as the laws of the nation are uniform.

The U.S. Trustee suggests that a debtor's lack of financial distress has somehow always been implicit within the Bankruptcy Clause. We disagree for three reasons. First, as the Supreme Court has recognized, the "subject of bankruptcies" is not, and has never been, defined. *Wright v. Union Cent. Life Ins. Co*., 304 U.S. 502, 513 (1938). Why? Because the "subject of bankruptcies" changes over time. *Id*. It is not, as our colleague in dissent would have it, a static concept tethered to an arcane meaning from 1787.[9]

Second, no court, as far as we can tell, has ever relied on the Bankruptcy Clause to deprive a federal court of its jurisdiction when a debtor is not in financial distress. That's probably because there is no mention, express or implied, of financial distress (or even insolvency) anywhere in the Constitution. Instead, the Constitution gives Congress authority "over the whole subject of bankruptcies," meaning that there is no limit on the scope of Congress's authority, beyond the uniformity requirement. *Siegel v. Fitzgerald*, 596 U.S. 464, 473-74 (2022). Contrary to the U.S.

[9] This debate is, in some ways, analogous to the debate regarding the Framers' intentions with respect to the Second Amendment, which provides that "the right of the people to keep and bear Arms, shall not be infringed." *See generally District of Columbia v. Heller*, 554 U.S. 570 (2008).

Trustee's argument, the Bankruptcy Clause is broadly concerned with the relationship between debtors and creditors, not the financial condition of any particular debtor. *See id.*[10]

Finally, even if we were to consider English and Colonial laws, such sources actually confirm that a debtor's financial condition has never been a prerequisite to relief:

> Under 18th-century "English law . . . it mattered not whether the defendant was insolvent or otherwise" because involuntary proceedings were common and initiated by a creditor. And at the dawn of our nation, "the American Colonies, and later the several States, had wildly divergent schemes for discharging debtors and their debts." Nor does the Constitutional Convention provide any basis for [this] interpretation of the Bankruptcy Clause; the "Convention adopted the [Bankruptcy Clause] with very little debate . . . . "

*Bestwall LLC v. Official Comm. of Asbestos Claimants of Bestwall, LLC*, 148 F.4th 233, 244 (4th Cir. 2025) (Agee, J., concurring) (internal citations omitted).

We need not dwell on this issue further. Notwithstanding the policy ruminations of our colleague in dissent,[11] we are quite confident that the bankruptcy court below had the requisite jurisdiction over the Debtor's bankruptcy case.

With our threshold issue resolved, we turn to a more challenging matter – whether the Debtor's case should be dismissed under section 1112(b) because the debtor lacked "financial distress," a term neither defined by, nor appearing anywhere in, the Bankruptcy Code. Courts have consistently deemed a debtor's financial distress to be one of many factors to consider in connection with a motion to dismiss. *See, e.g.*, *Carolin Corp. v. Miller*, 886 F.2d 693, 701 (4th Cir. 1989) (applying two-pronged totality of the circumstances test); *Nat. Land Corp. v. Baker Farms, Inc. (In re Nat. Land Corp.)*, 825 F.2d 296, 298 (11th Cir. 1987) (totality of the

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[10] Because the U.S. Trustee's interpretation adds a jurisdictional barrier, the practical effect would be to require a bankruptcy court to make an independent inquiry in every single bankruptcy case to ensure that a debtor is "actually bankrupt." *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513-51 (2006).

[11] The dissent is nothing more than a veiled attack on Congress's policy decisions. *See Bestwall*, 148 F.4th at 241 n.12. As we have said time and time again, policy matters fall within the purview of Congress, not the courts. *See, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) (citations omitted).

circumstances). However, the Third Circuit Court of Appeals has taken financial distress a step further. Relying on its own precedent, the Third Circuit recently held that when a chapter 11 debtor is not in "apparent" and "immediate" financial distress, its case must be dismissed as a matter of law without considering any other factors. *LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt., LLC)*, 64 F.4th 84, 102 (3d Cir. 2023). As a result of this circuit split, a chapter 11 debtor may be permitted to seek relief in one bankruptcy court but denied that same opportunity in another, even though the two courts may sit only a few miles apart.

We begin, not with section 1112, but with section 109, the provision that establishes a debtor's eligibility for bankruptcy relief. *Toibb v. Radloff*, 501 U.S. 157, 160 (1991). Section 109(d) applies to traditional chapter 11 debtors and tells us that "a person that may be a debtor under chapter 7" is eligible, with limited exceptions, to be a debtor under chapter 11. 11 U.S.C. § 109(d). Although Congress knew how to impose a financial condition on a debtor's ability to seek bankruptcy relief, section 109(d) is completely silent in this regard. *Contrast* 11 U.S.C. § 109(c)(3) *with* § 109(d); *see also Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (court should not read words into the statute). Indeed, the Bankruptcy Code has never required a voluntary chapter 11 debtor to be insolvent before seeking bankruptcy relief, nor for that matter has it ever prescribed a test to determine financial distress. *See, e.g.*, *In re McHugh*, 2025 WL 2779101, at *5 (B.A.P. 10th Cir. Sept. 30, 2025); *cf.* 11 U.S.C. § 303(h) (involuntary cases); *see also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes."). Needless to say, we have serious doubts regarding the Third Circuit's approach, as it would effectively create an obstacle to relief not found anywhere in section 109.

We next turn to the text of section 1112, which provides, in relevant part, that "[e]xcept as provided in . . . paragraph (2) . . . the court *shall . . . dismiss a case . . . for cause. . . .*" 11 U.S.C.

§ 1112(b)(1) (emphasis added). When determining whether cause exists, the Bankruptcy Code instructs courts to examine a non-exhaustive list of factors. 11 U.S.C. § 1112(b)(4); *see* 11 U.S.C. § 102(3). Although the lack of good faith is not expressly included in section 1112(b)(4), it has long been accepted as a basis for dismissal. *See, e.g.*, *In re SGL Carbon Corp.*, 200 F.3d 154, 160-61 (3d Cir. 1999); *In re Victory Const. Co.*, 9 B.R. 549, 551-58 (Bankr. C.D. Cal. 1981).

Rather than defining bad faith, Congress directed a bankruptcy court "to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases." H.R. Rep. No. 95-595, 1st Sess. at 406 (1977); *see In re Northtown Realty Co., L.P.*, 215 B.R. 906, 914 (Bankr. E.D.N.Y. 1998) (Duberstein, C.J.).[12] Most courts have likewise avoided establishing a solitary definition for a lack of good faith, favoring a more flexible, case-by-case, approach. *See In re James Wilson Assocs.*, 965 F.2d 160, 170-71 (7th Cir. 1992).

Seizing on the Third Circuit's decision in *LTL*, the U.S. Trustee argues that unless a debtor is suffering from apparent and immediate financial distress, its case should automatically be dismissed as a bad faith filing. *In re LTL*, 64 F.4th at 104. We are not persuaded, however, that *LTL* is consistent with two principles underlying any reorganization: the preservation of going concern value and the maximization of the distribution to creditors. *See, e.g.*, *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999).[13] These principles are codified in section 1112, which repeatedly directs a bankruptcy court to consider the best interests of creditors and a debtor's reasonable likelihood of rehabilitation.

[12] Pointing to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the dissent contends that a bankruptcy court's discretion was effectively eliminated when Congress replaced the term "may" with the term "shall." 11 U.S.C. § 1112(b) (originally enacted as Act of Nov. 6, 1978, ch. 11, § 1112, 92 Stat. 2630-31). The dissent is mistaken. While a bankruptcy case must now be dismissed *if* cause exists, the bankruptcy court nonetheless retains the discretion to determine what constitutes cause based on the facts and circumstances in each case. *See In re LTL Mgmt., LLC*, 637 B.R. 396, 406 n.8 (Bankr. D.N.J. 2022).

[13] *LTL* never actually states what it means for a debtor to be in apparent and immediate financial distress.

For this reason, we conclude that the standard articulated by the Fourth Circuit in *Carolin* better comports with Congress's statutory construct. A party seeking dismissal of a chapter 11 case must demonstrate that the debtor (i) has no reasonable likelihood of rehabilitation (*i.e.*, the objective futility test), *and* (ii) is actually abusing the bankruptcy process by causing hardship or delay to creditors (*i.e.*, the subjective bad faith test). *Carolin*, 886 F.2d at 700-02. By adopting this standard, we remain faithful to Congress's intent by ensuring that it is a debtor's creditors who have the opportunity to decide through the plan confirmation process whether a debtor is entitled to reorganize under chapter 11. As *Carolin* thoughtfully observed:

> [I]t is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even a remote chance that a reorganization effort so motivated might nevertheless yield a successful rehabilitation. Just as obviously, . . . it is better to risk the wastefulness of a probably futile but good faith effort to reorganize than it is to risk error in prejudging its futility at the threshold.

*Id.* at 701.

Against this backdrop, we turn to the Debtor's case. The Debtor is presently subject to thousands of tort claims in civil actions commenced throughout the country, with tens of thousands more expected in the future. When the Debtor commenced its bankruptcy case, it had already negotiated the RSA which, subject to bankruptcy court approval, contemplated a plan of reorganization that would pay in full *every* allowed claim and which is backstopped by an uncapped funding agreement with a very solvent entity. Thereafter, the Plan was accepted by the overwhelming number of creditors who returned a ballot, evidencing the truly consensual nature of the Debtor's rehabilitation efforts. More to the point and from an objective perspective, the Debtor's prospects for rehabilitation were not just reasonably likely; they were highly probable.

From a subjective perspective, the Debtor sought to advance, not delay, the rights of its creditors. The Plan was designed from the outset to expedite payment to creditors. *See Katchen* *v. Landy*, 382 U.S. 323, 328 (1966) (primary purpose of bankruptcy is prompt administration and settlement of debtor's estate). Likewise, the Debtor's trust distribution procedures ensure, without exception, that similarly situated creditors will receive an equal distribution, one of the fundamental tenets of the Bankruptcy Code. *Begier v. IRS*, 496 U.S. 53, 58 (1990). The import of this is obvious. Absent the Debtor's bankruptcy, mass tort claimants would continue racing to the courthouse to the detriment of all stakeholders.

According to the U.S. Trustee, the Debtor filed its case not for the purpose of preserving the Debtor's estate, but for the purpose of protecting Sunspot. Yes, Sunspot will indirectly benefit. However, Sunspot will do so at an extraordinary financial cost through its funding commitment and the waiver of its sizable claim against the estate. Because of Sunspot's involvement, the Debtor's creditors are assured of payment in full. *See In re BMI Oldco Inc.*, 671 B.R. 215, 221 (Bankr. S.D. Tex. 2025). Without Sunspot's contributions, it is almost certain that the Debtor would have continued its slide into bankruptcy, eventually, at some point, crossing into the realm of "apparent" and "immediate" financial distress. We see no reason to delay the inevitable.

We also cannot overlook the public's interest in ensuring that victims of mass torts are given an opportunity for redress, particularly in instances of systemic harm. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 474 (1974). The Debtor's case involves thousands of mass tort claimants suffering from life-threatening health conditions, with one member of the Committee having passed away since the petition date. How much worse must it become before the Debtor is *distressed enough* to allow it to provide relief to the mass tort claimants? The mass tort claimants need a legal procedure by which they can be compensated for their claims *now*, not at some unknown point in the future when it is too late to for many of them.

Perhaps recognizing that the Debtor's bankruptcy filing is entirely consistent with the policies underlying the Bankruptcy Code, the U.S. Trustee tries a different tack. He suggests that collective proceedings outside of bankruptcy are more appropriate for mass tort disputes of this nature. We disagree. *See generally* Lawrence Ponoroff, *Mass Tort Litigation, Chapter 11, and Good Faith: Let Not Perfect Be the Enemy of Pretty, Pretty Good*, 74 Duke L.J. Online 1 (2024). The Supreme Court has already told us that class actions are ill-equipped to address mass tort litigation. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844-45 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997). The other alternative, multi-district litigation, is equally ineffective due in large part to its inherent delay, thus penalizing mass tort claimants. *See In re LTL* , 637 B.R. at 412. In this case, the Debtor and Sunspot negotiated the RSA around the legal structure that only the Bankruptcy Code can provide; there is simply no viable alternative.

We commend the U.S. Trustee for fulfilling his role as the bankruptcy watchdog. While every chapter 11 case must be scrutinized to ensure that the bankruptcy process is not subject to abuse, we have the utmost confidence that the nation's bankruptcy courts will continue to exercise their discretion under section 1112(b) in an appropriate manner by considering the totality of the circumstances. *See Bullard*, 575 U.S. at 507 ("[B]ankruptcy courts . . . rule correctly most of the time."). We therefore reject the Third Circuit's approach and hold that apparent and immediate financial distress is not a prerequisite to relief under chapter 11.

## III. The Plan's Consensual Opt-Out Releases Are Permissible

Our second issue on appeal concerns third-party releases, matters of great legal and practical significance because they frequently implicate hundreds of thousands of innocent victims and billions of dollars in claims, thus crying out for a nationally uniform approach. Until recently, even *non-consensual* third-party releases were authorized by no fewer than eight circuit courts of appeal. Last year, the Supreme Court effectuated a sea change when, by a 5-4 majority, it held that the Bankruptcy Code does not authorize non-consensual third-party releases. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 227 (2024). The Court was careful to confine the scope of its holding, leaving the issue of *consensual* third-party releases for another day.

That day has come for us and, perhaps not so coincidentally, our colleagues in at least one other circuit court of appeal. *See, e.g.*, *Mercy Health Network, Inc. v. Mercy Hosp.*, 671 B.R. 499 (N.D. Iowa 2025), *appeal docketed*, No. 25-1654 (8th Cir. Apr. 2, 2025). Upon careful consideration, we hold that nothing prohibits a bankruptcy court from confirming a chapter 11 plan that grants consensual third-party releases through an "opt-out" procedure.

Our analysis begins with the statutory text, keeping in mind that it "is to be read as a whole, since the meaning of the statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted). Subject to the mandatory provisions in section 1123(a), section 1123(b)(1)-(5) identifies five specific types of relief that "may" be included in a chapter 11 plan. Section 1123(b)(6) provides a catchall by permitting a plan to include "any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6); *see* 11 U.S.C. § 105(a). Applying the canon of *ejusdem generis*, the Supreme Court reasoned in *Purdue* that because subsections (1)-(5) all concern the relationship between a debtor and its creditors, section 1123(b)(6) must also concern that relationship. 603 U.S. at 217-219. With *Purdue* never far from our minds, we conclude for several reasons that a bankruptcy court may confirm a chapter 11 plan of reorganization containing consensual third-party releases under extraordinary circumstances like those present in this case.

First, *Purdue*'s holding is expressly limited to *non-consensual* releases, as the Court twice explained that its interpretation of section 1123(b)(6) was wholly dependent on the nature of releases specifically at issue in that case. *Id.* at 219-20. The Court went out of its way to distinguish non-consensual third-party releases from those obtained through consent:

> As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.

*Id.* at 226 (internal citation omitted). Given this statement, we fail to understand how *Purdue* can ever be read to prohibit the use of consensual third-party releases.

Second, the Supreme Court previously concluded in *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 549-50 (1990) that a plan provision that altered the rights of third parties against one another was "appropriate" under what is now section 1123(b)(6). *See also Michigan v. EPA*, 576 U.S. 743, 752 (2015) (term "appropriate" must be construed broadly and with flexibility). The Court had every opportunity in *Purdue* to compartmentalize, clarify, or even overrule *Energy Resources*. However, not only did it decline to do so, but it reaffirmed the principles set forth in *Energy Resources* by favorably citing to it "for the proposition that 1123(b)(6) 'confer[s] additional authorities on a bankruptcy court.'" *In re GOL Linhas Aéreas Inteligentes S.A.*, 672 B.R. 129, 163 (Bankr. S.D.N.Y. 2025) (citation omitted). Accordingly, *Energy Resources*' expansive interpretation of section 1123(b)'s catchall provision remains alive and well after *Purdue*.

Third, chapter 11 is replete with consensual forms of relief like the releases at issue in this appeal. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 457 (2017) (chapter 11 plan may provide different treatment "with the consent of the affected parties"). For example, section 1123(a) requires, among other things, that a plan not discriminate unfairly "unless the holder of a particular claim or interest *agrees to a less favorable treatment* of such particular claim or interest." 11 U.S.C. § 1123(a)(4) (emphasis added); *see In re Spirit Airlines, Inc.*, 668 B.R. 689, 701-03 (Bankr. S.D.N.Y. 2025). Similarly, section 1129(a) prefaces the need to satisfy certain claims on the effective date with the introductory provision "[e]xcept to the extent that the holder of a particular claim has agreed to a different treatment . . . ." 11 U.S.C. § 1129(a)(9)(A). Finally, section 363(f)(2), incorporated into section 1123(a)(5)(D), provides for the sale of property of the estate free and clear upon the "consent[]" of an entity with an interest in such property. 11 U.S.C. §§ 363(f)(2), 1123(a)(5)(D). We see no reason why consensual releases under section 1123(b)(6) should be treated any differently.

The U.S. Trustee and the dissent suggest that we have somehow overlooked the limitations set forth in section 524, which describes the effect of a discharge. We disagree. Section 524(e) uses definitional language ("does not") rather than prohibitive language ("may not"). *See* 11 U.S.C. § 102(4). It therefore merely explains what the Bankruptcy Code "does" by default, and not what it can do. *See In re Midway Gold US, Inc.*, 575 B.R. 475, 501-02 (Bankr. D. Colo. 2017). In *Purdue*, the Court relied on a decades' old decision from the Seventh Circuit to distinguish between consensual and non-consensual releases. 603 U.S. at 226 (citing *In re Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993)). As an integral part of its analysis, the Seventh Circuit persuasively explained why a discharge and a consensual release are separate concepts. *In re Specialty Equip.*, 3 F.3d at 1047. We have a hard time believing that the *Purdue* majority was not fully aware of the distinction made in *Specialty Equipment* between a discharge and a release, thereby implicitly endorsing that distinction in full when it cited to it. Because section 524(e) is silent as to the prerogative of a creditor to release a claim against a non-debtor, we are confident that it does not stand in the way of consensual releases.

In the end, what *Purdue* rejected was a "'radically different' power to discharge the debts of a nondebtor *without the consent* of affected nondebtor claimants." 603 U.S. at 205 (citation omitted) (emphasis added). There is nothing "radically different" about a court's power to approve a settlement of claims between consenting parties, an important part of any chapter 11 reorganization. *See* Fed. R. Bankr. P. 9019. Not surprisingly, no court has held, after *Purdue*, that the Bankruptcy Code prohibits consensual third-party releases. We decline to be the first to do so.

With all of that said, we turn to the procedural mechanism by which "consent" can be obtained. Relying on established legal principles, the bankruptcy court overruled the objection of the U.S. Trustee and held that a creditor may manifest consent when it does not "opt-out" of the releases proposed in a plan of reorganization.

Between the majority and the dissent, the *Purdue* Court uses the term "consent" or a derivative thereof over fifty times. In everyday use, the verb "consent" means "to give assent or approval," and the noun, "compliance in or approval of what is done or proposed by another." *Consent*, *Merriam-Webster.com Dictionary* (2025). Legal dictionaries ascribe similar meaning to "consent." The leading legal dictionary, for example, defines "consent" as "a voluntary yielding to what another proposes or desires; agreement, approval, or permission . . . . " *Consent*, *Black's Law Dictionary* (12th ed. 2024). Notably, these definitions require *no affirmative action*, meaning silence can constitute consent.

The Bankruptcy Code itself is consistent with this ordinary meaning. Section 102 provides that when a request for relief is made upon proper notice and no objection or other response is received, the bankruptcy court may grant relief without a hearing. 11 U.S.C. § 102(1)(B)(i); *see In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022) (analogizing opt-out consensual releases to the claims objection process under section 502). We think it is significant that Congress placed this rule in the Bankruptcy Code rather than the Federal Rules of Bankruptcy Procedure. By doing so, Congress conveyed that bankruptcy courts can, using section 102(1), grant *any* relief not prohibited under the Bankruptcy Code, including the opt-out releases proposed by the Debtor, so long as notice is proper.

We find further support for our conclusion in Supreme Court jurisprudence preceding *Purdue*. Addressing the constitutional right to have certain matters adjudicated by an Article III judge, the Court explained that a litigant waives such right when the "litigant or counsel was made aware of the need for consent and the right to refuse it" and does not, in fact, refuse it. *Wellness Intern. Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015) (internal citations omitted); *see also* 28 U.S.C. § 157(c)(2). As long as a litigant's consent is "knowing and voluntary," "actions rather than words" can constitute consent. *Wellness*, 538 U.S. at 684-85 (citation omitted). In the context of class actions, the Court previously approved the use of an "opt-out" procedure to implement consensual third-party releases like those proposed by the Debtor. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The upshot of all of this is that if the opt-out release is "clear and prominent," then a claimant's decision not to opt-out is knowing and voluntary and, thus, consensual. *In re Avianca Holdings S.A.*, 632 B.R. 124, 137-38 (Bankr. S.D.N.Y. 2021).

The dissent asserts that our interpretation suffers from a fundamental flaw, positing that consent must be determined by applying state contract law principles. Not so. Consensual releases are far from standalone contracts. Rather, they are integral components of a reorganization plan, subject to the limitations imposed by federal, not state, law. *See In re GOL Linhas Aéreas*, 672 B.R. at 167-68. Moreover, neither the U.S. Trustee nor the dissent have been able to answer the most important question: which state's law should we apply? From a practical standpoint, we simply cannot perceive how a bankruptcy court would ever undertake choice of law analyses for tens of thousands of creditors in a single bankruptcy case. And as much as we appreciate the Restatement of Contracts and respect its drafters, the fact remains that the Restatement is the law of no state. *See In re Spirit Airlines*, 668 B.R. at 716.

In this case, creditors were provided with a meaningful opportunity to opt out, a mechanism wholly consistent with constitutional due process. *See Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 318-19 (1950). The Committee, in its dual role as estate fiduciary and class representative, not only supported the releases, but actively negotiated their terms. *See In re Roman Cath. Diocese of Syracuse, N.Y.*, 667 B.R. 628, 634 (Bankr. N.D.N.Y. 2024). Without question, the releasing parties were well-represented at the bargaining table. As a result of the prominent disclosures in the Plan and related documents, they were also, quite clearly, provided information that left no doubt about the opt-out process. *See, e.g.*, *In re Indianapolis Downs, LLC*, 486 B.R. 286, 305-06 (Bankr. D. Del. 2013). In the end, one in ten voting creditors opted-out of the releases, a level of participation "which belies the contention that 'opt-out' procedures result in" consent obtained "by inertia." *Shutts*, 472 U.S. at 813.

A final word about policy. If anything, the mass tort aspect of the Debtor's case further counsels in favor of the proposed releases. Here, as in many other mass tort cases, the bankruptcy system has been leveraged to solve crucial collective action problems by leveling the playing field and moving fast to the benefit of all stakeholders. *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. 973, 994-1006 (2023). As we have seen far too many times, class actions and multi-district litigation languish for years or even decades while victims continue to suffer. We are unwilling to endorse such a broken system.

## **Conclusion**

For the foregoing reasons, we AFFIRM the decisions of the bankruptcy court below.

**Teegarden, Circuit Judge, dissenting:**

With its highly troubling rulings today, the majority permits a solvent company and its extremely wealthy corporate parent to use our country's bankruptcy laws—which are intended to be a shield for honest but unfortunate debtors—as a sword against American workers and farmers harmed by their tortious conduct. The Debtor is not a "bankrupt" as that term was understood by our Founding Fathers. Its nearly unlimited access to cash to satisfy its liabilities in full underscores that this bankruptcy filing was undertaken in bad faith. Worse still, the so-called consensual release scheme put forth by the Debtor, which results in numerous creditors unknowingly waiving their claims against Sunspot (who has not subjected itself to the scrutiny of a bankruptcy filing), is not really consensual at all and runs afoul of recent guidance from the Supreme Court. The majority's policy-based rulings are inconsistent with principles long held dear in our nation and represent a mere facsimile of justice to victims of the Debtor's and Sunspot's wrongful conduct. The majority is running against the wind. I dissent.

## I. The Bankruptcy Court Erred When It Failed to Dismiss This Case Due to the Absence of Financial Distress

Our bankruptcy laws were intended to permit honest but unfortunate debtors *in financial distress* to reorganize and obtain a fresh start from their troubles, thereby preserving value by avoiding a liquidation of assets. *See Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). The debtor in this case is no such debtor. As evidenced by a press release that the Debtor itself issued, and as the bankruptcy court below expressly found, this Debtor is financially healthy. It has ample cash reserves, it has access to billions of dollars of additional cash from its parent (one of the most profitable companies in the world),[14] and it has sought bankruptcy protection on the explicit

[14] In 2024, Sunspot generated over $140 billion in revenues. It was number 27 on the Fortune 500 list for 2024, enjoys an "A" investment credit rating and, in recent years, has paid billions of dollars in dividends to its shareholders.

premise that it can and will pay its current and future debts in full. The scheme advanced by the Debtor must not be sanctioned and this case must be dismissed.

First, the Debtor is not a debtor within the original meaning of the Bankruptcy Clause of the United States Constitution, which circumscribes the proper scope of a bankruptcy. *See Bestwall LLC v. Official Comm. of Asbestos Claimants of Bestwall, LLC*, 148 F.4th 233, 247 (4th Cir. 2025) (King, J., dissenting). The Bankruptcy Clause provides, in pertinent part, that Congress shall establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4. The Supreme Court has previously instructed courts to interpret the meaning of the term "bankruptcies" by looking at "[t]he history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution . . . . " *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362-63 (2006). In other words, the Bankruptcy Clause must be construed in a manner consistent with the understanding of the term "bankruptcy" by the Founding Fathers. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535-36 (2022).

History suggests that bankruptcy was very much on the minds of the Founding Fathers,[15] and that they would have understood the term "bankruptcies" to refer to debtors who could not pay their debts. At the time of the Founding, the bankruptcy systems in England and America regulated solely the relationship of debtors who could not pay their financial obligations and their creditors. *See* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 Tenn. L. Rev. 487,

[15] Indeed, many of the Founding Fathers faced significant financial hardship. George Washington needed to borrow money to travel from Mount Vernon to New York City for his presidential inauguration. Thomas Jefferson and Alexander Hamilton both died deeply in debt. James Wilson, a major participant in the drafting of the Constitution and one of the original Associate Justices of the Supreme Court, fled from his creditors and was twice incarcerated in a debtors' prison. And Senator Robert Morris, known as the "Financier of the Revolution" due to the financial support that he provided to the Continental Army, spent over three years in a debtors' prison. *See generally* Bruce E. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (2002).

488, 529-32 (1996) ("Since the seventeenth century, the subject of bankruptcy law has been the relationship between insolvent debtors and their creditors."); *see also* 1 COLLIER ON BANKRUPTCY, ¶ 20.01 (16th ed. 2025) (noting that early American bankruptcy laws focused on the "impecunious debtor" who was imprisoned "because of an inability to pay a debt").

Moreover, the Supreme Court has instructed that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *U.S. v. Sprague*, 282 U.S. 716, 731 (1931). Founding-era dictionary definitions defined a "bankrupt" as one "who cannot pay his debts." William Perry, *The Royal Standard English Dictionary* 51 (1777); *see also* 1 Thomas Sheridan, *Dictionary of the English Language* (4th ed. 1797) (defining "bankrupt" and "bankruptcy" as "[t]he state of a man" who is "in debt beyond the power of payment"). Early American courts used these very definitions when analyzing the scope of the Bankruptcy Clause. *See, e.g.*, *Kunzler v. Kohaus,* 5 Hill 317, 319-32 (N.Y. 1843) ("We say a man is bankrupt when he is unable to pay his debts . . . . Looking thus at the uniform popular acceptation of the word from the earliest times and in all English countries . . . I read the constitution thus: 'Congress shall have power to establish uniform laws on the subject of *any person's general inability to pay his debts* . . . . '") (emphasis added). And courts today continue to look to Founding-era dictionary definitions to ascertain the meaning of constitutional provisions. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014).

A consistent theme in Supreme Court precedent over the years is that bankruptcy is a last resort for debtors who are unable to pay their debts. *See, e.g.*, *Cont'l Ill. Nat. Bank & Tr. Co. of Chi. v. Chi., Rock Island & P. Ry. Co.*, 294 U.S. 648, 670 (1935). During the Great Depression, the Court stated that the primary purpose of our country's bankruptcy laws was:

> [T]o "relieve the honest debtor from *the weight of oppressive indebtedness*, and permit him to start afresh free from the obligations and responsibilities consequent

> upon business misfortunes." This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

*Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (emphasis added) (citations omitted). And as recently as last year, the Supreme Court stated that "[b]ankruptcy offers individuals and businesses *in financial distress* a fresh start to reorganize, discharge their debts, and maximize the property available to creditors." *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268, 272 (2024) (emphasis added).

Because the Debtor is admittedly not a "bankrupt" entity, subject matter jurisdiction is lacking in this case. While it is true that Congress conferred bankruptcy court jurisdiction over all chapter 11 "cases" and "proceedings" under 28 U.S.C. § 1334, it goes without saying that any Congressional grant of jurisdiction must be "[w]ithin constitutional bounds." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). The Constitution circumscribes Congress's grant of jurisdiction by requiring that a putative debtor fit within the Bankruptcy Clause's delineation of a "bankrupt" entity. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424-26 (2021) ("[H]istory and tradition," not just "Congress's say-so," inform "the types of cases that Article III empowers federal courts to consider.") (citations omitted).

Even if the majority is correct in its broad interpretation of the Bankruptcy Clause, there is an alternative basis for dismissal here. "Cause" exists to dismiss this case pursuant to section 1112(b) because it was filed in bad faith. Section 1112(b)(1) provides that where a party in interest requests that a court dismiss or convert a case and "cause" exists for such conversion or dismissal, the court "shall" convert or dismiss the case. Although not one of the enumerated examples of cause set forth in section 1112(b)(4), the circuits agree that a chapter 11 petition is subject to dismissal under section 1112(b) when it is not filed in good faith. *See, e.g.*, *LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt., LLC)*, 64 F.4th 84, 100 (3d Cir. 2023); *Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore Resort, Inc.)*, 235 F.3d 375, 379 (8th Cir. 2000). As the Fifth Circuit explained, "Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings." *Little Creek Dev. Co. v. Comm. Mortg. Corp (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071 (5th Cir. 1986).

Although courts agree that a case should be dismissed for a lack of good faith, a split in the case law exists regarding the standard for such a determination. In *LTL*, one of several recent bankruptcy cases wherein Johnson & Johnson endeavored to address its mass tort liability,[16] the Third Circuit articulated an objective test for what constitutes "good faith" and stated that there are two "particularly relevant" inquiries: whether the filing "serves a valid bankruptcy purpose," and whether the case was filed "merely to obtain a tactical litigation advantage." *In re LTL*, 64 F.4th at 100-01 (citations omitted). A "valid bankruptcy purpose 'assumes a debtor in financial distress'" such that "good faith necessarily requires some degree of financial distress on the part of a debtor." *Id.* at 101 (citations omitted).

I would join the Third Circuit and conclude that good faith is best measured by whether the chapter 11 case serves a valid bankruptcy purpose, which assumes a debtor in financial distress. I agree with those courts that have dismissed chapter 11 petitions filed by financially healthy companies. *See, e.g.*, *In re SGL Carbon Corp.*, 200 F.3d 154, 166 (3d Cir. 1999); *Marsch v. Marsch (In re Marsch*), 36 F.3d 825, 828 (9th Cir. 1994). Such courts have recognized that if a

[16] For a comprehensive analysis of the Johnson & Johnson bankruptcy saga, and the many issues arising therein, see Ralph Brubaker's recent scholarly work on the topic, including *Assessing the Legitimacy of the "Texas Two-Step" Mass-Tort Bankruptcy (Part III): The Constitutional Limits of the Bankruptcy Power*, 44 No. 10 BLL-NL 1 (2024).

petitioner has no need to rehabilitate or reorganize, its petition lacks the valid bankruptcy purpose for which chapter 11 was designed. Or as one court recently noted, "[S]uch petitioners have problems that Congress did not design or intend the Code to fix." *In re Aero Techs., LLC*, No. 22-02890-JJG-11, 2023 WL 3938436, at *15 (Bankr. S.D. Ind. June 9, 2023). While the majority is correct that chapter 11, unlike some other chapters of the Bankruptcy Code, does not contain a solvency requirement for eligibility to be a debtor, *see* 11 U.S.C. § 109(d), surely that cannot mean that all entities—even wildly solvent ones—are entitled to enjoy the many benefits of chapter 11, all to the detriment of their creditors.

In this case, there simply is no valid bankruptcy purpose. The Debtor admittedly is not in financial distress—at least not at this time. It has reported no cash flow problems and has acknowledged that it can satisfy all its known and anticipated liabilities. It is true, of course, that the uncapped funding provided by Sunspot under the RSA is contingent on confirmation of the Plan. But there is nothing to suggest that such financial assistance will not be available outside of bankruptcy. Indeed, the Debtor and its parent are, and will continue to be, closely intertwined. And Sunspot is a co-defendant in most of the lawsuits filed against the Debtor. While pending and future tort claims *may* present the potential for great peril in the future, as we sit here today, financial distress is neither apparent nor immediate enough to justify this filing. *See Baker v. Latham Sparrowbush Assocs. (In re Cohoes Indus. Terminal, Inc.*), 931 F.2d 222, 228 (2d Cir. 1991); *In re Aero Techs.,* 2023 WL 3938436, at *18.

The majority advocates for granting more discretion to bankruptcy courts in deciding whether a chapter 11 case should be dismissed. This argument might have been compelling prior to revisions to the Bankruptcy Code. In 2005, Congress changed the "may" in section 1112(b)(1) to a "shall," thereby significantly curtailing a court's discretion where, as here, cause for dismissal exists. The intent of this revision is clear. *See In re Modanlo*, 413 B.R. 262, 269-70 (Bankr. D. Md. 2009). And the exception to the mandatory dismissal rule set forth in section 1112(b)(2) is inapplicable here because there is absolutely no evidence to suggest that the grounds for dismissing this case will be "cured within a reasonable period." *See* 11 U.S.C. § 1112(b)(2). Fortunately, it is unlikely that the Debtor's solid financial footing will go away any time soon.

Finally, the majority expresses policy concerns, opining that other procedures for dealing with mass tort liabilities are far less effective and efficient than a chapter 11 process. I reject any suggestion that a chapter 11 case is inherently superior to resolution of mass tort claims by an Article III judge using multi-district litigation procedures that were specifically designed to deal with such claims. In any event, if non-bankruptcy alternatives are less than ideal, it is the job of Congress, not the courts, to address such problem. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

This country's bankruptcy laws should not be interpreted in a manner that would permit solvent multinational conglomerates to strategically pose as chapter 11 debtors for purposes of pausing pending litigation, obtaining leverage over tort victims by consolidating their claims in a single, debtor friendly forum and making them wait years for any recovery from a creditors' trust. Such a process denies victims the opportunity to confront the corporate tortfeasor that caused their illnesses in front of a jury and violates fundamental rights guaranteed by the Constitution. *See Ortiz v. Fibreboard*, 527 U.S. 815, 846-48 (1999) (mandatory class action process violated claimants' due process and Seventh Amendment jury-trial rights where the defendant could fully pay all claims); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63 (1989) (bankruptcy "considerations are insufficient to overcome the clear command of the Seventh Amendment," which guarantees a right to a jury trial) (citation omitted); *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (tort claimant's "cause of action is a species of property . . .

deserving of due process protections") (citation omitted). For all these reasons, the Debtor's case should be dismissed.

## II. The Bankruptcy Court Erred in Confirming a Chapter 11 Plan That Grants Releases in Favor of Non-Debtor Entities Through an Opt-Out Procedure

One thing that my colleagues and I agree on is that analysis of this issue begins with *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204 (2024). In that case, the Supreme Court determined that there is no statutory authority for non-consensual non-debtor releases in a chapter 11 plan because section 1123(b) permits only plan provisions which concern the debtor and its relationship with its creditors. *Id.* at 218-19. In doing so, the Court expressly stated that it was not addressing consensual non-debtor releases. *Id.* at 226. Nevertheless, applying *Purdue's* reasoning, even consensual non-debtor releases are invalid as those, too, do not concern the debtor and its relationship with its creditors.

Quite understandably, the primary takeaway from *Purdue* has been the prohibition of non-consensual releases in chapter 11 plans. Several lower courts have since approved consensual releases, summarily stating that *Purdue* said nothing about such releases. However, the Court's analysis was not so narrow.[17] As noted, *Purdue* required some statutory authority for the inclusion of release provisions in a chapter 11 plan. It framed the determinative inquiry regarding the permissibility of a release as whether "it is a provision that a debtor *may* include and a court *may* approve in a reorganization plan." *Id.* at 215. And in the absence of some other statutory provision on point,[18] the Court stated, "Section 1123(b) governs that question." *Id.*

[17] *See generally* Ralph Brubaker, *Taking the Purdue Pharma Decision Seriously: Not Even Consensual Nondebtor Plan Releases Are Permissible (Part I)*, 45 No. 3 BLL-NL-1 (2025).

[18] The only statutory provision even arguably on point actually prohibits releases of non-debtor entities. Section 524(e), which deals with the discharge of debts in bankruptcy, provides that the "discharge of a debt of the debtor does not affect the liability of any other entity" with respect to such debt. 11 U.S.C. § 524(e). In my view, non-debtor releases are the functional equivalent of a debtor discharge. They improperly permit non-debtors, like Sunspot, to obtain the benefits of bankruptcy without bearing its corresponding responsibilities and burdens.

Section 1123(b) provides a laundry list of items that a chapter 11 plan "may" include. *See* 11 U.S.C. § 1123(b)(1)-(5). It then contains a "catch-all" provision providing that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). In *Purdue*, the Court ruled out the first five sub-paragraphs of section 1123(b) as potential bases for the non-consensual release of non-debtor parties, determining that "nothing in those paragraphs authorizes a plan to extinguish claims against third parties, like the [non-debtors], without the consent of the affected claimants, like the opioid victims." *Id*. at 216. The Court then analyzed the catch-all provision in sub-paragraph (6) and determined that it, too, could not authorize the proposed releases. *Id.* at 217-18.

The Court's framework for determining whether a non-consensual non-debtor release provision can be included in a plan is directly applicable to the nearly identical question presented here. As is true for a non-consensual non-debtor release, the only sub-paragraph of section 1123(b) that could authorize a consensual non-debtor release is section 1123(b)(6). But *Purdue* specifically limited 1123(b)(6)'s scope to plan provisions which "concern the *debtor* . . . and its relationship with its creditors." *Id.* at 218. This limitation must necessarily mean that section 1123(b)(6) likewise does not authorize inclusion of consensual non-debtor release provisions in a plan.

The majority erroneously concludes that this limitation of section 1123(b)'s scope applies only to non-consensual releases, relying largely on *dicta* from prior Supreme Court opinions. But unlike *Energy Resources* and *Jevic*, *Purdue* is directly on point. Here, the release provisions in the Plan do not concern the relationship between the Debtor and its creditors; rather they concern the relationship between creditors and Released Parties. If one is to honestly read *Purdue*, then the absence of any authorization for consensual releases in the Bankruptcy Code likewise means that such releases cannot be approved in a chapter 11 plan.

Assuming, *arguendo*, that the majority is correct that consensual non-debtor releases are permissible in a chapter 11 plan, an opt-out procedure like the one in this Plan does not result in consent. In the wake of *Purdue*, many courts have struggled to define what is required for a "consensual" non-debtor release. A split in the case law has arisen regarding whether creditors must expressly opt-in to a non-debtor release or, alternatively, whether consent can be inferred where a creditor fails to opt-out. The opt-out release provision here gives a textbook example of what consent is *not*. It extinguishes tens of thousands of claims against non-debtor entities unless a creditor checks a box on a ballot that, in many cases, it did not receive. In approving the Plan, the majority allows silence to serve as consent. By doing so, it violates black-letter law governing contractual relationships.

Because nothing in the Bankruptcy Code contemplates (much less authorizes) third-party releases of non-debtor entities, basic contract law dictates that any proposal for such a release is an ancillary offer that may only become a contract upon acceptance. *In re Tonawanda Coke Corp.*, 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024); *see also In re Smallhold, Inc.*, 665 B.R. 704, 720 (Bankr. D. Del. 2024) ("And in the absence of some sort of affirmative expression of consent that would be sufficient as a matter of contract law, the creditor's silence in the face of a plan and form of ballot can no longer be sufficient."). Contract law is governed by state law. *See Tonawanda*, 662 B.R. at 222 (rejecting opt-out release provision by applying New York contract law); *cf. Butner v. U.S.*, 440 U.S. 48, 55 (1979). Even if federal common law were to be applied, it "is largely indistinguishable from general contract principles under state common law." *Johnson v. BP Expl. & Prod., Inc. (In re Deepwater Horizon)*, 786 F.3d 344, 354 (5th Cir. 2015).

Whether applying federal or state law, an agreement to release claims—like any contract—requires a manifestation of assent to that agreement.[19] *See* Restatement (Second) of Contracts § 17(1) (A.L.I. 1981). Ordinarily, "an offeror does not have power to cause the silence of the offeree to operate as acceptance." *Id.* at § 69 cmt. a. While there are a few limited exceptions to the general rule that "silence in response to an offer . . . does not constitute acceptance of the offer," *McGurn v. Bell Microproducts, Inc.*, 284 F. 3d 86, 90 (1st Cir. 2002), such exceptions are inapplicable here. Clearly, "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." Restatement (Second) of Contracts § 69 cmt. c (A.L.I. 1981).

The procedure contemplated in the Plan is contrary to these basic principles in that it wrongfully assumes acceptance of the offered releases without an affirmative manifestation of assent from a claimholder.[20] Instead of allowing a creditor to assent by opting-in, the Plan improperly imposes on a claimholder an otherwise non-existent duty to opt-out, whereby his or her silence is deemed to be an acceptance of the releases. This is true whether such claimholder is currently sick, whether he or she voted on the plan, and whether he or she even received a ballot. Many creditors merely had constructive notice of the Plan and its effects. Some, whose injuries have not yet made themselves known, had no notice at all. In this circumstance, silence or inaction simply is not a sufficient basis to infer consent. As one court noted in a similar case, "[c]harging all inactive creditors with full knowledge of the scope and implications of the proposed third party releases, and implying a 'consent' to the third party releases based on the creditors' inaction, is

[19] The issue before us today is simply whether sufficient acceptance was received to create a binding agreement with respect to the Released Parties. However, with respect to Released Parties other than Sunspot, it is also questionable whether sufficient consideration was provided to create a binding agreement.

[20] To accept an offer, one must understand it. It is implausible to assume that a tort victim could read and comprehend a 324-page single-spaced legal document and the accompanying ballot. Understandably, few would even try.

simply not realistic or fair, and would stretch the meaning of 'consent' beyond the breaking point." *In re Chassix Holdings, Inc.*, 533 B.R. 64, 81 (Bankr. S.D.N.Y. 2015).

Of course, it is not unusual in mass tort bankruptcy cases for only a small percentage of creditors to cast ballots on confirmation of a plan. This case is no exception. Here, only twenty percent of the Debtor's known unsecured creditors submitted a ballot and, of that group, ninety percent did not check the box to opt-out. This failure could be for any number of reasons:

> We know from experience that many creditors and interest holders who receive disclosure statements and solicitation materials simply will not respond to them, either because they elect not to read them at all or for other reasons. We also know from experience that a certain number of people will make mistakes in interpreting the procedures that are outlined in the [b]allots . . . . The point is that inattentiveness, inaction and mistake are a known and expected part of the voting process.

*Id.* at 78. Given the foregoing, consent cannot be inferred where no affirmative vote on the plan is made. It strains credulity to say that the eighty percent of the Debtor's known creditors who failed to vote—much less unknown future creditors who never even received a ballot—consented to the Plan's releases. For these individuals, the releases are, in actuality, non-consensual.

In *Smallhold,* Judge Craig T. Goldblatt convincingly rejected the use of opt-out releases with respect to creditors who do not take some affirmative act. Relying on *Purdue*, the court held that consent cannot be gleaned from inaction or default—rather, following a contract model, consent is evidenced only when there is an affirmative act by a creditor. *In re Smallhold,* 665 B.R. at 717-21. The court provided the following hypothetical, which highlights the absurdity of the position adopted by the majority:

> Consider, for example, a plan of reorganization that provided that each creditor who failed to check an "opt out" box on a ballot was required to make a $100 contribution to the college education fund for the children of the CEO of the debtor. . . . [N]o court would find that in these circumstances, a creditor that never returned a ballot could properly be subject to a legally enforceable obligation to make the $100 contribution. But none of the cases that authorizes the opt-out third-party

> release provides any limiting principle that would distinguish the third-party release from the college education fund plan.

*Id.* at 710. Other than, perhaps, policy considerations, I fail to see any distinction between the clearly unenforceable obligation in Judge Goldblatt's hypothetical and the proposed opt-out releases endorsed by the majority today.

Analogies to the "default" model of consent are not persuasive. For a default to be entered in civil litigation, a defaulting party must be provided with adequate notice, usually in the form of a summons served in compliance with the applicable rules of procedure. And the defaulting party need only be concerned about claims brought by the plaintiff listed in the case caption. It need not be concerned about non-parties receiving any type of direct benefit from its default. That is why the type of release provision in the Plan is particularly egregious. While "[i]t is reasonable to require creditors to pay attention to what the debtor is doing in bankruptcy as it relates to the creditor's rights against the debtor . . . a creditor should not expect that [its rights against third partes] are even subject to being given away through the debtor's bankruptcy." *Id.* at 721. Here, it is understandable that claimholders—particularly those without counsel—may have assumed that a package of legal documents that they received related to the bankruptcy case of "In re Silver Bullet" would not impact their claims against Sunspot.

There are, of course, circumstances in which public policy justifies a rule under which people are bound by a proposed action unless they take affirmative steps to note their disagreement. Class actions pursuant to Rule 23(b) of the Federal Rules of Civil Procedure are a well-known example of a situation in which parties may be bound by their own inaction and in which parties will be deemed to be part of a class in the absence of an affirmative opt-out vote. However, in that context there is a public policy that favors the consolidation of similar cases and that justifies the imposition of a rule that binds class members who have not affirmatively opted-out. Moreover, there are unique requirements (numerosity, commonality, typicality, and adequacy of representation) that must be proven to certify a class. *See Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 686 (E.D. Va. 2022). People who fail to respond to class action notices are bound because that is the legal consequence of Rule 23(b).

The situation is different with respect to releases contained in a bankruptcy plan. There is no provision of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure that specifies an opt-out mechanism or a "deemed consent" mechanism with respect to non-debtor releases. The referenced safeguards that exist in a class action are not present. And, as *Purdue* made abundantly clear, there is no general "public policy" in favor of making non-debtor releases applicable to as many creditors as possible, even in the most egregious of mass tort cases.[21]

Regardless of whether it is permissible to include consensual releases in a chapter 11 plan in the wake of *Purdue*, opt-out releases like those proposed in this case cannot be described as consensual. In the absence of some sort of affirmative expression of acceptance that would be sufficient as a matter of contract law, a claimholder's silence cannot be deemed consent. Because the releases set forth in the Plan are imposed in the absence of such an affirmative expression, they are impermissible. Based on the foregoing, I would deny confirmation of the Plan.

[21] The class action analogy also fails as it contravenes Supreme Court precedent which makes very clear that "courts may not 'recognize . . . a common-law kind of class action' or 'create de facto class actions at will.'" *United States v. Sanchez-Gomez*, 584 U.S. 381, 389 (2018) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)).