No. 23-12342

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BENSHOT, LLC
Appellant

v.

2 MONKEY TRADING, LLC and
LUCKY SHOT USA, LLC
Appellees

On Direct Appeal from the United States Bankruptcy Court
Middle District of Florida, Orlando Division

Chapter 11 Case No. 6:22-bk-04099-TPG
Adversary Proceeding No: 6:23-ap-00007-TPG

APPELLANT'S OPENING BRIEF

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No. 23-12342

BENSHOT, LLC v. 2 MONKEY TRADING, LLC

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons and entities as described in the 11th Cir. R. 26.1-2 have an interest in the outcome of this case:

2 Monkey Trading, LLC

BenShot, LLC

The Honorable Tiffany P. Geyer

Ingalls, Douglas M.

Ingalls, Lynne M.

Lowndes, Drosdick, Doster, Kantor, and Reed P.A.

Lucky Shot USA, LLC

Nardella & Nardella, PLLC

Porter III, L. William, Esq.

Provenzale, Michael S., Esq.

Smith, Keenan David, Esq.

Sykes, Jonathan Michael, Esq.

Wolfgram, Ben

Wolfgram, Bruce

There is no publicly traded company or corporation that has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested by BenShot because the issue on appeal is a pure question of law which may be adequately addressed by the parties' briefings.

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JURISDICTIONAL STATEMENT

This appeal challenges the Bankruptcy Court's *Order Granting Defendants' Motion to Dismiss Amended Complaint For Failure To State A Claim Pursuant To Fed. R. Civ. P. 12(b)(6)* ("***Dismissal Order***"), entered on April 28, 2023. App. 18-02. The Bankruptcy Court initially asserted jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I) and 11 U.S.C. § 523 as the underlying adversary proceeding concerned the dischargeability of debt and thus was a "core proceeding." App. 18-18. The Dismissal Order disposed of all of the parties' claims in the adversary proceeding, thus it was a final order pursuant to 28 U.S.C. § 158(a). App. 18-02. BenShot's *Notice of Appeal and Statement of Election* was filed on May 12, 2023, fourteen (14) days after entry of the Dismissal Order. App. 18-01. Pursuant to Federal Rule of Bankruptcy Procedure 8002(a), this appeal is timely filed.

BenShot filed its *Motion to Certify Order for Direct Appeal Pursuant to 28 U.S.C. §158* (App. 18-03.) on May 26, 2023, which the Bankruptcy Court granted on June 12, 2023 (App. 18-36). Thereafter, on June 23, 2023 BenShot filed its *Petition for Leave for Direct Appeal from The United States Bankruptcy Court for the Middle District of Florida, Orlando Division* (Case No. 23-90015, Dkt. 1), which this Court granted on July 19, 2023 (Case No. 23-90015, Dkt. 10). Thus, the Eleventh Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(d)(2).

STATEMENT OF THE ISSUES FOR REVIEW

Whether the exception to discharge for debts "of the kind specified in section 523(a) of this title" contained in 11 U.S.C. § 1192(2) applies to all Subchapter V debtors or only individual debtors?

APPLICABLE STANDARD OF REVIEW

The issue before the Court is a pure question of law, and accordingly, the standard of review is de novo. In re Sublett, 895 F.2d 1381, 1383 (11th Cir. 1990).

STATEMENT OF THE CASE

I. INTRODUCTION

This appeal involves the interpretation of the Small Business Reorganization Act ("***SBRA***"). The SBRA was enacted in 2019 and created the new Subchapter V of Chapter 11. Subchapter V was designed to streamline the Chapter 11 plan confirmation process for certain small business debtors. Shortly after the SBRA went into effect, the Coronavirus Aid, Relief and Economic Security Act ("***CARES Act***") expanded eligibility under the SBRA. As a result of the CARES Act, eligibility for Subchapter V was greatly expanded from only small business debtors with aggregate noncontingent liquidated secured and unsecured debts of less than $2,725,625, to those with such debts of up to $7,500,000. 11 U.S.C. § 1182.

Subchapter V made significant changes to Chapter 11 reorganizations for small businesses, including eliminating the absolute priority rule; thus, allowing the

owner of a Subchapter V debtor to retain its equity interest even though creditors are not paid in full. Among other changes, the SBRA also permits a debtor to confirm a plan of reorganization over creditors' objections without an impaired accepting class. *See generally*, 11 U.S.C. §§ 1181; 1191. Particularly, relevant to this appeal, the SBRA added Section 1192 to the Bankruptcy Code, governing the discharge applicable to all debtors under Subjection V, both individual and corporate. In relevant part, Section 1192 of the Bankruptcy Code provides that if the debtor's plan is confirmed under Section 1191(b) of the Code (which permits confirmation over the objection of impaired creditors – commonly referred to as "cram down"), the Bankruptcy Court shall grant the debtor a discharge of all debts ... except any debt "*of the kind specified in section 523(a) of this title*." 11 U.S.C. § 1192(2) (emphasis added). Section 523(a), in turn, lists twenty categories of debts that are not dischargeable, however its preamble provides that "[a] discharge under section 727, 1141, 1192[,] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt" thereafter listed.

Based on the language of Section 1192(2) of the Bankruptcy Code,[1] BenShot asserted that in a Subchapter V case, Section 1192(2) excepts from discharge debts "of the kind specified in section 523(a)," regardless of whether the debtor is an

[1] All references to the Bankruptcy Code refer to Title 11 of the United States Code.

individual or non-individual debtor. App. 18-18. Accordingly, 2 Monkey Trading, LLC ("***2 Monkey***") and Lucky Shot USA, LLC ("***Lucky Shot***" and with 2 Monkey, "***Debtors***"), who are limited liability companies, cannot receive a discharge of debts "of the kind specified in section 523(a)." Subsection (6) of 11 U.S.C. § 523(a) is relevant here. That provision excepts from discharge "any debt… for willful and malicious injury by the debtor to another entity or to the property of another entity." As discussed *infra*, BenShot asserts the debt owed to it meets this standard based upon, *inter alia*, a jury finding from a pre-bankruptcy trial that the Debtors "act[ed] maliciously toward BenShot, LLC, or in an intentional disregard of BenShot, LLC's rights." App. 18-13, p.2. Respectfully, BenShot contends that the Bankruptcy Court for the Middle District of Florida erred in finding that 11 U.S.C. § 523(a)(6) does not apply to the Debtors here "[b]ecause Defendants are limited liability corporations, [therefore] the exceptions to discharge in § 523(a) do not apply." App. 18-02, p.5.

II. FACTUAL BACKGROUND

BenShot is a family-owned business which invented and started selling a series of unique and distinct drinking glass designs consisting of a projectile embedded in the side of a drinking glass via an indentation in the glass. App. 18-18, ¶¶5, 9-10, 12. BenShot's products are solely made in the USA. App. 18-18, ¶9. The Debtors subsequently promoted, sold, and distributed drinking glass products

embedded with ammunition, including products similar to that of BenShot; however, the Debtors imported substantial portions of their product from China and mislabeled the final product as made in the USA. App. 18-18, ¶¶13-37. The extent to which the Debtors imported products is unknown because of the deletion of emails by the Debtors during the course of pre-bankruptcy litigation, for which they were later sanctioned. App. 18-18, ¶¶41-45; App. 18-23.

In that pre-bankruptcy litigation, BenShot sued the Debtors for violations of the Lanham Act and violations of unfair competition under Wisconsin common law in the United States District Court for the Eastern District of Wisconsin in the case styled *BenShot, LLC v. Lucky Shot USA LLC, 2 Monkey Trading LLC, and Douglas Ingalls*, Case No.: 18-CV-1716 (the "***Wisconsin Action***"). App. 18-18, ¶8. Following a jury trial held in October 2022, a jury found for BenShot on all its claims. App. 18-18, ¶¶52-54; App. 18-22. As a result, a judgment was entered in favor of BenShot and against 2 Monkey and Lucky Shot, which included punitive damages. App. 18-26. Judgment was also entered against the Debtor's principal, Mr. Douglass Ingalls. App. 18-26. Now of particular relevance here, in response to Question 5 of the *Special Verdict*, the jury found that the Debtors "act[ed] maliciously toward BenShot, LLC, or in an intentional disregard of BenShot, LLC's rights." App. 18-22, p.2. No appeal of that judgment was taken.

III. PROCEDURAL BACKGROUND

Shortly after the Judgment in the Wisconsin Action was entered, the Debtors filed voluntary petitions under Subchapter V of Chapter 11 with the Bankruptcy Court. App. 18-18, ¶3. BenShot then filed a Complaint commencing an adversary proceeding against the Debtors, seeking a determination from the Bankruptcy Court that the sums awarded to it by the jury in the Wisconsin Action were non-dischargeable pursuant to 11 U.S.C. § 1192(2) and 11 U.S.C. § 523(a)(6) as a willful and malicious injury. App. 18-10. The Complaint was subsequently amended on February 14, 2023. App. 18-18. The Debtors filed a motion to dismiss, arguing, *inter alia*, that BenShot failed to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), as the only count BenShot asserted was pursuant to 11 U.S.C. § 523(a)(6), which cause of action can only be maintained against individual debtors. App. 18-27. BenShot responded (App. 18-28), the Debtors replied and filed supplemental authority (App. 18-29 and 18-30), and the Court conducted a hearing on April 19, 2023 (App. 18-31). After taking the issue under advisement, the Court entered its Dismissal Order on April 28, 2023, dismissing BenShot's Amended Complaint with prejudice. App. 18-02. The Dismissal Order held that "[b]ecause Defendants are limited liability corporations, the exceptions to discharge in § 523(a) do not apply." App. 18-02, p.5.

BenShot timely appealed (App. 18-01) and moved for certification of its appeal to this Court pursuant to 28 U.S.C. § 158 (App. 18-03). The Bankruptcy Court granted BenShot's motion and certified a direct appeal of its Dismissal Order to this Court pursuant to 28 U.S.C. § 158(d)(2)(A)(i). App. 18-36. This Court subsequently granted BenShot's petition to accept this appeal pursuant to 28 U.S.C. § 158(d)(2). Case No. 23-90015, Dkt. 10.

SUMMARY OF THE ARGUMENT

The law is clear that when interpreting a statute, the plain meaning governs, and if the plain meaning is clear, it is conclusive. 11 U.S.C. §1192(2) is clear that it applies to all Subchapter V debtors and prohibits from discharge debts "of the kind specified in section 523(a)." As already determined by other courts, the plain meaning of the phrase "of the kind" is that it modifies the word "debt" without regard to the identity of the person who has incurred that debt. Had Congress intended otherwise, it could easily have said so, as it has done in many other portions of the Bankruptcy Code.

The addition of a cross-reference to Section 1192 contained within Section 523, described by Congress as a mere "conforming amendment," does not change this result. Instead that cross-reference completes an already extant list of cross-references to all of the other dischargeability provisions of the Bankruptcy Code. As courts have not interpreted those cross-references as imbuing meaning within the

substantive dischargeability provisions that they reference, the Bankruptcy Court below erred in doing so here.

Moreover, while BenShot respectfully submits that the inquiry must end with the plain language of 11 U.S.C. §1192(2), even if the Court were to consider cannons of statutory construction, such as the surplusage cannon, the general/specific cannon, and the cannon against absurdities, each supports BenShot's position that 11 U.S.C. §1192(2) applies to all Subchapter V debtors, individual and corporate alike. Finally, comparisons to Chapter 12, as well as scholarly and practical commentary all support BenShot's position.

As the Bankruptcy Court's ruling – that "[b]ecause Defendants are limited liability corporations, the exceptions to discharge in § 523(a) do not apply" (App. 18-02, p.5.) – contravenes the plain meaning of 11 U.S.C. § 1192(2) and the intent of Congress, this Court should reverse the Bankruptcy Court's Dismissal Order, hold that the exception to discharge for debts "of the kind specified in section 523(a) of this title" contained in 11 U.S.C. § 1192(2) applies to all Subchapter V debtors, and remand this case to the Bankruptcy Court for further proceedings.

ARGUMENT

I. THE HISTORY OF SUBCHAPTER V SUPPORTS REVERSAL

The creation of Subchapter V by the SBRA, and its subsequent expansion through the CARES Act, tilted the playing field in small business reorganization

cases, giving much more power to debtors and much less to creditors. By way of example, a plan of reorganization under Subchapter V may be confirmed even without any impaired class of creditors accepting the plan (as was the case here). 11 U.S.C. § 1191(b). Even if a creditor is unhappy with the plan proposed by a debtor, under Subchapter V a creditor is not permitted to file a competing plan. 11 U.S.C. § 1189(a). As further discussed *infra*, this concept was borrowed from Chapter 12. See 11 U.S.C. § 1221. Additionally, and perhaps most significantly,[2] Subchapter V eliminates the absolute priority rule, which requires each respective class of interest holders to be paid in full prior to the next class being paid. 11 U.S.C. § 1129(b). As a debtor's equity interests are of lower priority under the Bankruptcy Code than that of its creditors, under Chapter 11 all creditors would have to be paid in full for the equity holders to retain their interests. That is no longer the case under Subchapter V – "[t]hus, the owners of a Subchapter V debtor are able to retain their equity in the bankruptcy estate despite creditors' objections." In re Cleary Packaging, LLC, 36 F.4th 509, 514 (4th Cir. 2022). That is precisely what occurred here, as Subchapter V allowed the equity holders of these Debtors to retain their ownership and (absent a favorable ruling in this appeal) discharge millions of dollars of debt while paying

[2] See In re Maharaj, 681 F.3d 558, 573 (4th Cir. 2012) (finding that to abrogate the absolute priority rule would be a "sea change.").

their creditors only cents on the dollar; something they could not do but for Subchapter V. Indeed, there is no corresponding concept in a traditional Chapter 11 case; rather as further discussed *infra*, that concept was also borrowed from Chapter 12. See 11 U.S.C. § 1225(b).

The logic supporting the elimination of the absolute priority rule was that the strong identity between equity holders and a small business did not warrant separate treatment; however, Congress balanced that benefit to the small business debtor with creditor protections preventing the discharge of certain debts, including, as is the case here, those arising from willful and malicious injury. 11 U.S.C. § 1192(2); 11 U.S.C. § 523(a)(6); In re Cleary Packaging, LLC, 36 F.4th at 517 ("Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered priority that favors the debtor."); In re Seven Stars on the Hudson Corp., 618 B.R. 333, 340 (Bankr. S.D. Fla. 2020) (citations omitted) ("the overall purpose and function of the Bankruptcy Code is to strike a balance between creditor protection and debtor relief.").

Importantly, many of the exceptions to discharge contained in 11 U.S.C. § 523 relate to "bad acts" – like tax evasion, false pretenses, false representations, fraud, willful and malicious injury, etc. When the absolute priority rule applies, as it does in traditional Chapter 11 cases, if these debts are not paid in full, then the

debtor's owners (who were likely responsible for those "bad acts") cannot retain their interests in the debtor. As such, the post-bankruptcy debtor will have new ownership which, understandably, should not be saddled with the "bad act" debt of the prior owners. However, in Subchapter V, the elimination of the absolute priority rule allows the debtor's owners to retain their interests, even if creditors are not paid and even if their very own "bad acts" created those debts. As discussed *infra*, Congress did not intend that result.

While these differences support reversal of the Dismissal Order, this Court's inquiry necessarily must start with the plain language of the statute to be construed – 11 U.S.C. § 1192(2). Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992). BenShot respectfully submits that the plain language of 11 U.S.C. § 1192(2) requires reversal of the Dismissal Order.

II. THE PLAIN LANGUAGE OF 11 U.S.C. §1192 SUPPORTS REVERSAL

11 U.S.C. § 1192 was added to the Bankruptcy Code as part of Subchapter V; it provides as follows:

> **§ 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. § 1192 (emphasis added).

Significantly, 11 U.S.C. § 1192 applies to all debtors who are eligible under Subchapter V, without distinction between individual and corporate debtors. Eligibility for Subchapter V is prescribed by 11 U.S.C. § 1182, which defines a debtor under Subchapter V as "a person engaged in commercial or business activities… 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… not less than 50 percent of which arose from the commercial or business activities of the debtor." In turn, "[t]he term 'person' includes individual, partnership, and corporation." 11 U.S.C. § 101(41). The term "corporation" includes limited liability companies. 11 U.S.C. § 101(9)(A). Thus, both individuals and business entities (such as the Debtors) are eligible for Subchapter V provided that they meet the other requirements of 11 U.S.C. § 1182.

It logically follows, then, that if Congress had intended to apply portions of 11 U.S.C. § 1192 only to individuals, it would have said so. As discussed *infra*, it has in many other instances. However, 11 U.S.C. § 1192 does not differentiate

between individual and corporate debtors whatsoever, despite applying to both such Subchapter V debtors. Instead it provides that in a plan confirmed under Section 1191(b), the court shall not discharge debts "of the kind specified in section 523(a)" without any limitation as to the type of debtor. Thus, the plain meaning of this provision requires an interpretation that it applies to all Subchapter V debtors, individual and corporate alike. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive.").

While reaching the opposite conclusion, the courts in In re GFS Indus., LLC, 647 B.R. 337 (Bankr. W.D. Tex. 2022) and In re Satellite Restaurants Inc. Crabcake Factory USA, 626 B.R. 871 (Bankr. D. Md. 2021), seemed to agree with this logic. "Had Congress included a phrase in § 1192(2) explicitly stating that the list found in § 523(a) applies to all debtors proceeding in Subchapter V, then the interpretation would be straightforward." In re GFS Indus., LLC, 647 B.R. at 342–43. "If Congress had not added the Section 1192 discharge to the preamble of Section 523(a), the Plaintiffs may very well have been correct that Section 1192, standing on its own, would have resulted in the discharge exceptions applying to all debtors, individual or non-individual." In re Satellite Restaurants Inc. Crabcake Factory USA, 626 B.R. at 876. However, these cases improperly go beyond the logical conclusion that by its plain language, Section 1192 applies to all eligible Subchapter V debtors, individuals and corporations alike. There was no need for Congress to explicitly state

that 11 U.S.C. § 1192 applied to all Subchapter V debtors – it already did so by defining who is an eligible Subchapter V debtor and then applying 11 U.S.C. § 1192 to all such debtors.

In concluding that debts "of the kind specified in Section 523(a)" do not apply to corporate debtors in the Dismissal Order, the bankruptcy court adopted the reasoning of In re Hall, 651 B.R. 62 (Bankr. M.D. Fla. 2023), which ruling was issued just prior to its hearing. App. 18-2, p. 3. The decision of In re Hall (and thus the decision of the Dismissal Order on appeal), turned on the language of the preamble paragraph to Section 523, which provides, that "[a] discharge under section 727, 1141, **1192**[,] 1228(a), 1228(b) or 1328(b) of this title does not discharge *an individual debtor* from any debt... (emphasis added). Id. at 68. In re Hall held that "Subchapter V corporate debtors that receive a discharge under § 1192 are not subject to § 523(a)" based upon its reasoning that "the SBRA amended the language of § 523(a) to add a reference to § 1192. If Congress intended for § 523(a) exceptions to apply to corporations receiving a discharge under § 1192, then this addition was unnecessary. The theory advanced by Nutrien Ag and the Fourth Circuit would render that addition superfluous and violate a canon of statutory construction." Id. at 68-69 (internal citations omitted). The Dismissal Order adopts this logic. App. 18-02, p.4. The decisions in In re GFS Indus., LLC, 647 B.R. 337,

342 (Bankr. W.D. Tex. 2022),[3] In re Rtech Fabrications, LLC, 635 B.R. 559, 564 (Bankr. D. Idaho 2021), and In re Satellite Restaurants Inc. Crabcake Factory USA, 626 B.R. 871, 876 (Bankr. D. Md. 2021) similarly turned on the preamble to § 523, rather than the plain language of 11 U.S.C. § 1192 itself.

Respectfully, however, these rulings start in the wrong place. Section 523(a) does not govern the scope of a discharge available to a Subchapter V debtor, Section 1192 does. Thus, the logical starting place for any statutory interpretation is Section 1192, not Section 523(a). This is precisely where the Fourth Circuit began in In re Cleary Packaging, LLC, 36 F.4th at 515, to wit:

> To address the question, we begin by focusing on § 1192(2) as the provision specifically governing discharges in a Subchapter V proceeding and on the scope of its incorporation of § 523(a). Section 1192(2) excepts from discharge "any *debt ... of the kind* specified in section 523(a)." 11 U.S.C. § 1192(2) (emphasis added). The section's use of the word "debt" is, we believe, decisive, as it does not lend itself to encompass the "kind" of *debtors* discussed in the language of § 523(a). This is confirmed yet more clearly by the phrase modifying "debt"— i.e., "of the kind." Thus, 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). As the U.S. Government's amicus brief notes, this interpretation of "of the kind" is in line "with the ordinary meaning of the word 'kind' as 'category' or 'sort.'" (Citing American Heritage Dictionary of the English Language (online ed.) ("'[a] group of individuals or instances sharing common traits; a category or sort'"); Merriam-Webster Dictionary (online ed.) ("'a group united by common traits or interests: CATEGORY'")). In short, while § 523(a) does provide that discharges under various

[3] An appeal of In re GFS Indus., LLC, is currently pending in the Fifth Circuit, Case No. 23-50237.

> sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of § 1192(2) — i.e., both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a).

See, also, In re Duntov Motor Company, Adversary No. 21-04030 (Bankr. N.D. Tex, August 26, 2021) (holding "that § 1192(2) applies to except from discharge *debts of the kind* specified in § 523(a) for *all* debtors that are eligible under Subchapter V…") (emphasis in original); In re Tonka Int'l Corp., Adversary No. 20-04064 (Bankr. E.D. Tex, September 16, 2020 ("Section 1192, by its terms, expands the exclusion from discharge of debts of a kind specified in § 523(a) 'beyond debtors who are individuals to include all subchapter V debtors.'").[4]

Further supporting the Fourth Circuit's decision in In re Cleary Packaging, LLC, is the even more recent decision of Bartenwerfer v. Buckley, 598 U.S. 69 (2023). In Bartenwerfer, the United States Supreme Court interpreted Section 523(a)(2)(A) of the Bankruptcy Code, which excepts from discharge "any debt for money 'obtained by... fraud.'" Id. at 72. At issue there was whether Ms.

[4] As neither In re Duntov Motor Company, nor In re Tonka Int'l Corp., are presently available on Westlaw, true copies thereof are being filed contemporaneously herewith pursuant to Federal Rule of Appellate Procedure 32.1.

Bartenwerfer could discharge debt arising from Mr. Bartenwerfer's fraud, in which she did not actively participate, but which was imputed to her. Id. at 73. Holding that she could not discharge the debt, the Court noted that "[w]ritten in the passive voice, § 523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it." Id. at 72. The same logic applies to 11 U.S.C. § 1192(2). As noted *supra*, that provision excepts from discharge debts "of the kind" specified in Section 523(a), and it does so in the passive voice. No specification is made in 11 U.S.C. § 1192(2) as to who owes the debt, and thus the proper construction of that provision ignores the identity of the debtor entirely. Bartenwerfer, 598 U.S. at 75 ("Passive voice pulls the actor off the stage."); Id. at 76 (citing B. Garner, Modern English Usage 676 (4th ed. 2016)) ("the passive voice signifies that 'the actor is unimportant' or 'unknown'"). Accordingly, debts of the kind specified in Section 523 are nondischargeable under Section 1192(2), regardless of whether the debtor who owes that debt is an individual or a business entity.

While In re Hall, 651 B.R. at 68, criticized In re Cleary Packaging, LLC for relying "upon the rule of construction that a specific provision controls over a general provision where the two provisions conflict," it is apparent that In re Cleary Packaging, LLC only did so as a secondary explanation of its decision. As quoted above, the primary (and dispositive) reasoning of In re Cleary Packaging, LLC is predicated on the plain meaning of 11 U.S.C. § 1192. Neither the court in In re

Cleary Packaging, LLC nor this Court need go further to reach its decision. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (internal citations omitted). As held in In re Cleary Packaging, LLC the plain meaning of 11 U.S.C. § 1192 is that "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)" and thus "*the debtors* covered by the discharge language of § 1192(2) — *i.e.*, both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a)." Id. at 515.

This result is further compelled by the words Congress chose not to use. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) ("the usual rule [is] that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'") (citations omitted); see also, Bartenwefer, 598 U.S. at 78. In a "traditional" Chapter 11, 11 U.S.C. § 1141(d) governs the dischargeability of debt. As in Subchapter V, both individuals and corporate entities are eligible for "traditional" Chapter 11. 11 U.S.C. § 109(d). However, when Congress drafted 11 U.S.C. § 1141(d), it specified the instances when certain provisions applied only to individual Chapter 11 debtors. See 11 U.S.C.

§ 1141(d)(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") (emphasis added); 11 U.S.C. § 1141(d)(5) ("[in] a case in which *the debtor is an individual*—…confirmation of the plan does not discharge any debt…"). Congress drew no such distinction in 11 U.S.C. § 1192.

Rather, Congress clearly and intentionally chose not to apply those provisions to a non-consensual Subchapter V case. First, in 11 U.S.C. § 1181(a), Congress specified that Section 1141(d)(5) – one of the two provisions specifically applicable an individual Chapter 11 debtor – does "not apply in a case under this subchapter." Second, in 11 U.S.C. § 1181(c), Congress specified that "[i]f 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." Section 1192 only makes reference to Section 1141(d)(1)(A), thus, Section 1141(d)(2) – the other provision specifically applicable an individual Chapter 11 debtor – does not apply in the case of a non-consensual Subchapter V confirmation under Section 1191(b) either. Accordingly, the decision of Congress to not draw a distinction between types of debtors in 11 U.S.C. § 1192, and to specifically provide that the two provisions of Section 1141(d) that specifically pertain to individual debtors do not apply in a non-consensual Subchapter V confirmation case, compels the conclusion that 11 U.S.C. § 1192 applies to all debtors. Sosa, 542 U.S. at 712. If Congress intended to limit Section

1192(2) to individual debtors, it would have done so by simply including the phrase "when the debtor is an individual," as it included similar language in 11 U.S.C. § 1141(d)(2) and 11 U.S.C. § 1141(d)(5). It did not do so. Instead, Congress defined who is an eligible Subchapter V debtor and applied 11 U.S.C. § 1192 to all such debtors, individual and corporate alike. Even more tellingly, Congress deliberately chose not to apply either 11 U.S.C. § 1141(d)(2) or 11 U.S.C. § 1141(d)(5) – which are applicable to individuals only – to a non-consensual Subchapter V confirmation case, thus demonstrating its intent to apply 11 U.S.C. § 1192 universally.

III. THE PREAMBLE OF 11 U.S.C. § 523 DOES NOT ALTER THE PLAIN MEANING OF 11 U.S.C. § 1192

As noted, *supra*, the decision of In re Hall (and thus the decision of the Dismissal Order on appeal), turned on the language of the preamble paragraph to Section 523, which provides, that "[a] discharge under section 727, 1141, **1192**[,] 1228(a), 1228(b) or 1328(b) of this title does not discharge *an individual debtor* from any debt... (emphasis added). Id. at 68. In re Hall specifically reasoned that "[i]f Congress intended for § 523(a) exceptions to apply to corporations receiving a discharge under § 1192, then this addition [adding reference to Section 1192 to Section 523] was… superfluous" and violative of "a canon of statutory construction." Id. at 68-69 (internal citations omitted). The Dismissal Order adopts this logic. App. 18-02, p.4. This analysis, however, is flawed as it overlooks an equally plausible reason for the inclusion of Section 1192 in the preamble of Section

523 which does not render the reference superfluous. When presented with two plausible constructions of a statute, one of which renders portions superfluous and one of which imbues meaning to all provisions, the latter should be chosen. Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004) ("Where there are two ways to read the text… applying the rule against surplusage is, absent other indications, inappropriate. We should prefer the plain meaning since that approach respects the words of Congress.").

Instead of being superfluous, the reference to Section 1192 in the preamble of Section 523 is better seen as completing the references in Section 523 to all of the other discharge provisions of the Bankruptcy Code. Every chapter of the Bankruptcy Code has its own discharge provision, and none of them is 11 U.S.C. § 523. Section 727 governs Chapter 7 discharges, Section 1141 governs "traditional" Chapter 11 discharges, Section 1228 governs Chapter 12 discharges, and Section 1328 governs Chapter 13 discharges. If Section 1192 was not included in the preamble of Section 523(a), while every other discharge provision of the Bankruptcy Code was included, then more ambiguity would be created, not less, as all of the other discharge provisions were already listed. However, while all being listed in the preamble to Section 523; not all of those discharge provisions apply only to individual debtors. Each has different contours. Section 727 does not apply to corporations. 11 U.S.C. § 727(a)(1). Section 1141 specifies particular debts which individuals may not

discharge and particular debts which corporations may not discharge. 11 U.S.C. § 1141(d) (2), (5), (6). Section 1328 does not apply to corporations at all, who are ineligible to be debtors under Chapter 13. 11 U.S.C. § 109(e). Accordingly, the references to these provisions in Section 523 are also superfluous.

Both Section 727(b) and Section 1328(c) incorporate Section 523, but discharges under Chapters 7 and 13 are already only available to individuals, so Section 523(a)'s references to Sections 727 and 1328 are entirely redundant. Similarly, Section 523(a) references Section 1141, but Section 1141 specifies certain debts which are not dischargeable by individuals *and* other debts which are not dischargeable by corporations. Thus, at best, application of the surplusage cannon is not helpful in supplying meaning; nor is it an absolute rule. Barton v. Barr, 140 S. Ct. 1442, 1453 (2020) ("redundancies are common in statutory drafting… [and] [s]ometimes the better overall reading of the statute contains some redundancy.") (citations omitted); Lamie v. U.S. Tr., 540 U.S. at 536 ("Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute."). However, it is clear that when Congress wants to distinguish between corporate and individual discharges, it does so. It has not done so in 11 U.S.C. § 1192.

Furthermore, this interpretation puts weight upon on the language of 11 U.S.C. § 523 that it cannot bear. The reference in Section 523 to Section 1192 was

added by the SBRA. The legislation adopting the SBRA, H.B. 3311, 116th Cong. § 4 (2019), described the addition of Section 1192 to the preamble of Section 523 as a "conforming amendment." Moreover, that addition was one of dozens of such conforming amendments and is both immediately preceded and immediately followed in that legislation by other conforming amendments adding references to the provisions of the newly created Subchapter V to lists of other related provisions contained elsewhere in the Bankruptcy Code. H.B. 3311, § 4(a)(5)-(12). Such a change was so insignificant that in the official bill summary prepared by the Congressional Research Service,[5] Section 4 of H.B. 3311 – containing the conforming amendments – is not even mentioned at all.

Reading such an extreme meaning into this reference – one that directly contradicts the plain meaning of 11 U.S.C. § 1192(2) – is not justified. "Congress does not make 'radical—but entirely implicit—changes' through 'technical and conforming amendments.'" Cyan, Inc., 138 S. Ct. at 1071 (citations omitted). To do otherwise, "reads too much into a mere 'conforming amendment.'" Id. It logically follows that when the plain meaning of a provision such as 11 U.S.C. § 1192(2) is clear on its face, a mere conforming amendment, not even to that statute, but to

[5] Available at: https://www.congress.gov/bill/116th-congress/house-bill/3311 (last visited October 4, 2023).

another statute entirely, should not change its meaning. This is particularly the case when the conforming amendment at issue is one of several which merely add cross-refences to the newly created statutes in other portions of the Bankruptcy Code which already contain cross-references to other chapters of the Bankruptcy Code. Thus, the preamble of 11 U.S.C. § 523 does not alter the plain meaning of 11 U.S.C. § 1192, which must govern.

IV. CANNONS OF CONSTRUCTION SUPPORT REVERSAL

While BenShot asserts that the plain meaning of 11 U.S.C. § 1192 controls, and is dispositive of this appeal, other courts have considered and applied cannons of statutory construction to aid their rulings. First, as discussed and rejected *supra*, several courts have relied upon the surplusage cannon.[6] Second, In re Cleary Packaging, LLC, 36 F.4th at 515 (4th Cir. 2022) and other courts have discussed the general/specific cannon, "that the more specific provision should govern over the more general." Third, as briefly discussed in In re Cleary Packaging, LLC, 36 F.4th at 516, the cannon of construction that courts should construe statutes to avoid absurd results is also useful in interpreting these statutes.

[6] See also, In re Off-Spec Sols., LLC, 651 B.R. 862 (B.A.P. 9th Cir. 2023); In re Hall, 651 B.R. 62, 68 (Bankr. M.D. Fla. 2023); In re GFS Indus., LLC, 647 B.R. 337, 343 (Bankr. W.D. Tex. 2022); In re Lapeer Aviation, Inc., 2022 WL 1110072, at *2 (Bankr. E.D. Mich. Apr. 13, 2022); In re Satellite Restaurants Inc. Crabcake Factory USA, 626 B.R. 871, 876 (Bankr. D. Md. 2021).

The general/specific cannon provides that "[i]f the two provisions may not be harmonized, then the more specific will control over the general." In re Bateman, 331 F.3d 821, 825 (11th Cir. 2003). "What counts for application of the general/specific canon is not the *nature* of the provisions' prescriptions but their *scope*." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 648 (2012) (emphasis in original.) Of the two provisions at issue, Section 1192 has the more specific scope, and thus must control. Section 1192 applies only to Subchapter V cases, and even more specifically, to that subset of Subchapter V cases in which confirmation is granted non-consensually. 11 U.S.C. § 1191(b). On the other hand, Section 523 is much more general. As discussed *supra*, it is applicable to all chapters of the Bankruptcy Code. "This Court has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." Varity Corp. v. Howe, 516 U.S. 489, 511 (1996). The Dismissal Order, however, does just that, applying the general provision, Section 523, to undermine the plain meaning of the specific provision, Section 1192.

The holding of the Dismissal Order, taken to its logical conclusion, also creates an absurd result where it is more beneficial for a Subchapter V debtor to confirm a plan non-consensually than to confirm a consensual plan. That interpretation is inconsistent with the cannon of interpretation that courts are to avoid

absurd results in interpreting statutes. See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Under the Bankruptcy Court's interpretation, a corporate Subchapter V debtor which confirms a plan non-consensually will be discharged of all of the types of debts listed in Section 523(a), including debts for fraud. However, the discharge applicable to a consensual Subchapter V confirmation under 11 U.S.C. § 1191(a) is prescribed by Section 1141 of the Bankruptcy Code. In re Off-Spec Sols., LLC, 651 B.R. at 866, n.6 (B.A.P. 9th Cir. 2023). That provision, however, excepts a corporate debtor from discharge of debts owed to the government arising from fraud, false statements, and tax fraud. 11 U.S.C. § 1141(d)(6). Thus, a debtor with fraud liability to the government would be able to discharge those debts in a non-consensual Subchapter V plan, but not in either a consensual Subchapter V plan or a "traditional" Chapter 11 plan. This absurd result cannot abide. Griffin, 458 U.S. at 575. Even the court in In re Off-Spec Sols., LLC, 651 B.R. 862, 871, n.10,[7] noted that "[w]e too are puzzled by this result" as the court would expect these debts "to be nondischargeable for corporate debtors regardless of whether confirmation is

[7] An appeal of In re Off-Spec Sols., LLC, is currently pending in the Ninth Circuit, Case No. 23-60034.

consensual or nonconsensual."

It thus appears implausible that Congress would have intended to set up a statutory scheme under Subchapter V that incentivizes nonconsensual confirmation, when the overall tenor of the Bankruptcy Code, and in particular Subchapter V, is to seek consensual confirmation. See, e.g., In re 218 Jackson LLC, 631 B.R. 937, 946 (Bankr. M.D. Fla. 2021) ("subchapter V encourages the confirmation of a consensual plan."); 11 U.S.C. § 1183(b)(7) (making it a duty of the Subchapter V Trustee to "facilitate the development of a consensual plan of reorganization."). Yet, under the Dismissal Order's interpretation, this is precisely the result – a nonconsensual confirmation is broader (and thus preferable to a debtor) than a consensual confirmation; thus, incentivizing nonconsensual confirmation. This also sets up the further illogical possibility that an unscrupulous corporate Subchapter V debtor could actively solicit votes *against* its own plan so it could discharge otherwise non-dischargeable debts owed to the government. This simply cannot be the state of the law. Instead, the correct interpretation must be that these debts are still non-dischargeable even under a non-consensual plan pursuant to Sections 1192(2) and 523(a).

V. INTERPRETATIONS OF CHAPTER 12 SUPPORT REVERSAL

In one of the very first opinions concerning Subchapter V, the United States Bankruptcy Court for the District of Maryland noted its similarity to Chapter 12,

including eliminating the absolute priority rule and permitting equity holders to retain their equity interests over the objection of unpaid creditors. In re Trepetin, 617 B.R. 841, 848 (Bankr. D. Md. 2020). There, the Bankruptcy Court explained:

> Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference. See Michael C. Blackmon, Revising the Debt Limit for "Small Business Debtors": The Legislative Half-Measure of the Small Business Reorganization Act, 14 Brook. J. Corp. Fin. & Com. L. 339, 344–45 (2020) (summarizing the history of SBRA and some of the work of the American Bankruptcy Institute and the National Bankruptcy Conference that underlies the act). Subchapter V is designed to reduce identified barriers to small business reorganizations. See id. (including the reports cited therein); see also supra notes 7 and 8. Nevertheless, with respect to the 90-day filing deadline, not only does the same language appear in sections 1189(b) and 1221 but both processes also remove the absolute priority rule as a confirmation standard. See COLLIER, supra at ¶ 1221.01[2] n. 10. This additional similarity between Subchapter V and chapter 12 further supports applying a consistent standard to a requested extension of the 90-day deadline for filing a Subchapter V or a chapter 12 plan.

Id. The basis of Subchapter V in Chapter 12 is also noted in the House Judiciary Committee's report on the SBRA. H.R. Rep. No. 116-171 (2019). That report specified that "[t]he principal features of H.R. 3311 consist of the following: (1) requiring the appointment of an individual to serve as the trustee in a chapter 11 case filed by a small business debtor, who would perform many of the same duties required of a chapter 12 trustee…" Id. at 4.

> Chapter 12's discharge provision, found at 11 U.S.C. § 1228(a), provides that

a discharge thereunder discharges all debt except, *inter alia*, any debt "of a kind specified in section 523(a) of this title, except as provided in section 1232(c)." This mirrors the language of 11 U.S.C. § 1192(2), which excepts from discharge debts "of the kind specified in section 523(a) of this title." In turn, 11 U.S.C. § 523 provides that that "[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..." (emphasis added). Yet unlike the Bankruptcy Court's determination in the Dismissal Order on appeal, case law under Chapter 12 has routinely found that a "Chapter 12 discharge does not include debts of the kind specified in § 523(a), regardless of whether the debtor is an individual or a corporation." Southwest Georgia Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.), No. 09-1011, 2009 WL 1514671 at *3 (Bankr. M.D. Ga. May 29, 2009). In Breezy Ridge, the Bankruptcy Court for the Middle District of Georgia explained that "§ 523 does not define the breadth of a discharge. Instead, it limits the initial discharge parameters set forth in §§ 727, 1141, 1228, and 1328." Id. at *1. The Breezy Ridge court went on to explain that "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. Even if the two provisions could not be harmonized, § 1228 would

control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter." Id. at *2.

The same holding was reached in In re JRB Consol., Inc., 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995) - that the phrase "debts of a kind specified in section 523(a) of this title" in 11 U.S.C. § 1228 applies equally to the discharge of individual and corporate debtors. The In re JRB Consol., Inc., court held that: "Chapter 12, on the other hand, contains a specific provision in § 1228(a) which says "the debtor" gets a discharge "except" for debts "of the kind" specified in § 523(a). There is no… specific separate section referring to individual debtors. The language of § 1228(a) is not inconsistent with § 523(a) as individual debtors are still subject to the § 523(a) exceptions. But, § 1228(a) is broader in that its language is inclusive of all debtors—individuals, partnerships, and corporations." As the language of Subchapter V's discharge provision mirrors that of Chapter 12's discharge provision, case law interpreting Chapter 12 should govern. In re Trepetin, 617 B.R. 841, 848 n. 14 (Bankr. D. Md. 2020).

As noted in In re Duntov Motor Company, Adversary No. 21-04030 (Bankr. N.D. Tex, August 26, 2021), "the JRB and Breezy Ridge Farm decisions were issued in 1995 and 2009, respectively—long before Congress enacted the SBRA. Yet Congress chose to use language in § 1192(2) that is identical to the language used in § 1228(a). Had Congress been dissatisfied with the JRB and Breezy Ridge Farm

application of §§ 523(a) and 1228(a), it would logically follow that Congress would not have then used identical language when enacting §1192(2).” Id.at 7.

These holdings further point out the fallacy of relying upon the preamble of Section 523(a) to ascribe meaning to Section 1192(2). The very same preamble also references Section 1228(a), which in turn uses language which mirrors that of Section 1192(2) – exempting from discharge debts of a/the kind specified in Section 523(a). Courts have routinely held that Section 1228(a) applies equally to individual and corporate debtors. By the very same logic, so too must Section 1192(2). Moreover, that result is consistent with the basis of Subchapter V in Chapter 12, as they share many other similarities including, *inter alia*, the abrogation of the absolute priority rule, the inability of creditors to propose competing plans, and the ability of a debtor to confirm a plan even if its creditors reject it.

CONCLUSION

Subchapter V should not permit the discharge of debts arising from willful and malicious injuries and other bad acts over the objections of the very parties who have been injured, allowing the debtor to wholly escape responsibility for its actions. It is inequitable to allow existing equity-holders to retain their equity interests, pay creditors pennies on the dollar, yet permit the discharge of debts based on the willful and malicious injuries caused by those very equity holders.

On its face, the plain language of Section 1192 applies to all debtors, individual and corporate alike. The inquiry can, and should, stop there. However, even taking it further, the applicable cannons of statutory construction support the same conclusion. Furthermore, the intent of Congress in creating Subchapter V was to balance the benefits given to small business debtors, such as the abrogation of the absolute priority rule, the inability of creditors to file competing plans, and the ability of a debtor to confirm a plan without an impaired accepting class, among others, with the protections given to creditors that in a non-consensual confirmation, debts of the kind specified in Section 523(a) of the Bankruptcy Code would be excepted from discharge, regardless of whether the debtor is an individual or non-individual debtor.

Scholarly and practical commentary on Subchapter V has also widely concluded that Subchapter V debtors, both individual and corporate, may not discharge "debts of the kind specified in section 523(a)." See Norton on Bankruptcy, 2021 No. 6 Norton Bankr. L. Adviser NL 1 ("It appears that Subchapter V was drafted with the intention to apply the dischargeability exceptions under Bankruptcy Code § 523 to corporations."); William L. Norton III & James B. Bailey, The Pros and Cons of the Small Business Reorganization Act of 2019, 36 Emory Bankr. Dev. J. 383, 386 (2020) ("One negative for small business debtors is that Subchapter V makes applicable the nondischargeability provisions of § 523(a) thus preventing a

corporate debtor from discharging fraud, tax, and other nondischargeable claims."); Internal Revenue Service Manual, Section 5.9.8.5.1(9), 2007 WL 9807941 ("All exceptions to discharge in 11 USC 523(a) of the Bankruptcy Code apply to the small business debtor. 11 USC 1192(2)."); but see, Hon. Paul W. Bonapfel, Guide to the Small Business Reorganization Act of 2019 (reaching the opposite conclusion). Moreover, the Official Bankruptcy Forms 309F (the Notice of Chapter 11 Bankruptcy Case for Corporations or Partnerships under Subchapter V) and 425A (the Official Plan of Reorganization for Small Business Under Chapter 11) provide that Section 523 exceptions apply to non-individual small business debtors.

For the foregoing reasons, Appellant requests that this Court reverse the Bankruptcy Court's Dismissal Order, hold that the exception to discharge for debts "of the kind specified in section 523(a) of this title" contained in 11 U.S.C. § 1192(2) applies to all Subchapter V debtors, and remand this case to the Bankruptcy Court for further proceedings consistent therewith.

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I HEREBY CERTIFY that on October 10, 2023 I electronically filed the foregoing with the Clerk of Court by using the Case Management/Electronic Case Filing ("CM/ECF") system which will send a notice of electronic filing, and I will complete service of the foregoing to all parties indicated on the electronic filing receipt.

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