PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3210

In re MILLENNIUM LAB
HOLDINGS II, LLC., et al.,
Debtors

OPT-OUT LENDERS,
Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-17-cv-01461)
District Judge: Leonard P. Stark

Argued
September 12, 2019

Before: CHAGARES, JORDAN,
and RESTREPO, *Circuit Judges*.

(Filed December 19, 2019)

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OPINION OF THE COURT

JORDAN, *Circuit Judge*.

We are asked whether the Bankruptcy Court, without running afoul of Article III of the Constitution, can confirm a Chapter 11 reorganization plan containing nonconsensual third-party releases and injunctions. On the specific, exceptional facts of this case, we hold that the Bankruptcy Court was permitted to confirm the plan because the existence of the releases and

injunctions was "integral to the restructuring of the debtor-creditor relationship." *Stern v. Marshall*, 564 U.S. 462, 497 (2011) (internal quotation marks and citation omitted). We further conclude that the remainder of this appeal is equitably moot, and we will therefore affirm the decision of the District Court.

I. BACKGROUND

The debtors before the Bankruptcy Court and District Court were Millennium Lab Holdings II, LLC ("Holdings"), its wholly-owned subsidiary, Millennium Health LLC, and RxAnte, LLC, a wholly-owned subsidiary of Millennium Health LLC, all of which we will refer to collectively as "Millennium." Millennium (as reorganized), along with certain of its direct and indirect pre-reorganization shareholders, specifically TA Millennium, Inc. ("TA"), TA Associates Management, L.P., and James Slattery,[1] are the Appellees in this matter.

Millennium provides laboratory-based diagnostic services. In April 2014, it entered into a $1.825 billion credit agreement with a variety of lenders, including a variety of funds and accounts managed by Voya Investment Management Co. LLC and Voya Alternative Asset Management LLC which, for convenience, we will

[1] Slattery was the founder of Millennium, has served in high-level positions in the company, and established trusts "for the benefit of himself and/or members of his family [and which] own approximately 79.896 percent of the stock of [Millennium Lab Holdings, Inc.][,]" a substantial pre-reorganization shareholder of Millennium. (App. at 981.)

refer to collectively as "Voya." Ultimately, Millennium used the proceeds from the 2014 credit agreement to refinance certain of its then-existing financial obligations and to pay a nearly $1.3 billion special dividend to its shareholders.

In March 2015, following a several-year investigation that dated back to at least 2012, the U.S. Department of Justice ("DOJ") filed a complaint in the United States District Court for the District of Massachusetts against Millennium, alleging violations of various laws, including the False Claims Act. Less than a month earlier, the Center for Medicare and Medicaid Services ("CMS") had notified Millennium that it would be revoking Millennium's Medicare billing privileges, the lifeblood of Millennium's business. In May 2015, Millennium reached an agreement in principle with the DOJ, CMS, and other government entities to pay $256 million to settle various claims against it.

Shortly thereafter, however, Millennium concluded that it lacked adequate liquidity to both service its debt obligations under the 2014 credit agreement and make the required settlement payment to the government. Millennium thus informed the 2014 credit agreement lenders of the government's claims and the decision to settle, prompting the formation of an ad hoc group of lenders, of which Voya was a member, to begin working with Millennium and its primary shareholders, TA and Millennium Lab Holdings, Inc. ("MLH"), to negotiate a transaction that would allow the company to satisfy the settlement requirements and restructure its financial obligations. As those negotiations progressed, the

ad hoc group began suggesting that there were potential claims against MLH and TA relating to the 2014 credit agreement, including a lack of disclosure regarding the government's investigation into Millennium's business. Millennium, MLH, TA, and the ad hoc group began discussing how to resolve those potential claims.

While negotiating with the ad hoc group, Millennium informed the government that it could not pay the $256 million settlement without restructuring its other financial obligations. The government ultimately set a deadline of October 2, 2015, "by which the Company was required to finalize a proposal supported by the prepetition lenders and the Equity Holders[.]" (App. at 2231.) That deadline was later pushed to October 16 in exchange for, among other things, a $50 million settlement deposit to be paid for by Millennium and guaranteed by MLH and TA.

On October 15, 2015, Millennium, its equity holders, and the ad hoc group – Voya excepted – entered into a restructuring support agreement (the "Restructuring Agreement" or "Agreement"), which provided for either an out-of-court restructuring or a Chapter 11 reorganization of Millennium's business. Under the Agreement, MLH and TA agreed to pay $325 million, which would be used to reimburse Millennium for the $50 million settlement deposit, pay the remainder of the $256 million settlement, and cover certain of Millennium's fees, costs, and working capital requirements. The Agreement also required Millennium's equity holders, including MLH and TA, to transfer 100% of the equity interests in Millennium to the company's

lenders. Voya would receive its share of equity in the deal. In exchange, MLH, TA, and various others were to "receive full releases" for themselves and related parties regarding all claims arising from conduct that occurred before the Restructuring Agreement, including anything related to the 2014 credit agreement, and, in the case of a Chapter 11 reorganization, those individuals and entities covered by the Restructuring Agreement were to "be subject to a bar order, an injunction and related protective provisions" to enforce the releases. (App. at 518.) As a result of the Restructuring Agreement, Millennium was able to enter a final settlement with the government on October 16, 2015, which required payment of the settlement deposit in October and payment of the remainder of the settlement by December 30, 2015.

The Restructuring Agreement was reached only after intensive negotiations. Indeed, the negotiations were described by participants as "highly adversarial[,]" "extremely complicated[,]" and at "arm's-length," and in those negotiations "the parties all were represented by sophisticated and experienced professionals." (App. at 2229-30.) MLH and TA rejected the ad hoc group's suggestion of potential claims against them. "[P]rior to substantive negotiations commencing, it did not appear that [MLH and TA] had signaled a willingness to pay even any portion of the proposed . . . settlement." (App. at 2230.) Rather, they were only "willing to consider a tender of their equity ownership of the Company in exchange for broad general releases[.]" (App. at 2230.)

From at least mid-August 2015, negotiations took place "on an almost daily basis[.]" (App. at 2231.) Before September 30, however, and despite "extensive negotiations between the Equity Holders and the Ad Hoc Group during the prior months, the Equity Holders' last and 'best' offer was, in addition to turning over the Company's equity to the Lenders, $275 million[,] and the Ad Hoc Group . . . had demanded a $375 million contribution[.]" (App. at 2232-33.)

The impasse was broken during the negotiation session that occurred on September 30. That session was viewed as "do or die" for Millennium and as having "decisive implications for the lenders and the equity" because, if the October 2 deadline was not met, the government would revoke Millennium's Medicare billing privileges. (App. at 2231-32.) In the last event, MLH and TA increased their offer to $325 million, and the ad hoc group of lenders agreed to the revised terms. According to an individual involved in the negotiations, that deal – later embodied in the Agreement – was "the best possible deal achievable" and left nothing else "on the table[.]" (App. at 2233.)

The release provisions MLH and TA obtained in exchange for their contribution, were, in short, "heavily negotiated among the Debtors, the Equity Holders and the Ad Hoc Group" and necessary to the entire agreed resolution. (App. at 2234.) They "were specifically demanded by the Equity Holders as a condition to making the[ir] contribution" and, without them, MLH and TA "would not have agreed" to the settlement. (App. at 2234.) The contribution was, of course, also necessary

to induce the lenders' support of the Agreement. Thus, as stated by both the Bankruptcy Court and District Court after careful fact finding, the deal to avoid corporate destruction would not have been possible without the third-party releases.

After entering into the Restructuring Agreement, the parties thereto initially sought to reorganize Millennium out of court, and "over 93% of the Prepetition Lenders by value" agreed to do so. (App. at 1205.) That, however, was not enough. Voya held out, and Millennium filed its petition for bankruptcy in November 2015. It submitted to the Bankruptcy Court a "Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, LLC, et al." that reflected the terms of the Restructuring Agreement.[2] (App. at 407.) The plan contained broad releases, including ones that would bind non-consenting lenders such as Voya, in favor of Millennium, MLH, and TA, among others. Those releases specifically covered any claims "arising out of, or in any way related to in any manner," the 2014 credit agreement. (App. at 416.) To enforce the releases, the plan also provided for a bar order and an injunction prohibiting those bound by the releases from commencing or prosecuting any actions with respect to the claims released under the plan.

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[2] The plan was later amended to eliminate a disputed provision that is not at issue in this appeal.

Voya objected to confirmation of the plan.[3] It explained that it intended to assert claims against MLH and TA for what it said were material misrepresentations made in connection with the 2014 credit agreement. In Voya's view, at the time of the credit agreement, Millennium knew of the legal scrutiny it was under by the government but made "affirmative representations . . . which specifically indicated that there was no investigation pending that could result in a material adverse situation[,]" and Millennium further represented that it was not doing anything potentially illegal. (App. at 1309.) Voya thus asserted that it had significant legal claims against Millennium and Millennium's equity holders, that the releases of the equity holders were unlawful, and that the Bankruptcy Court lacked subject matter jurisdiction to approve them.

The Bankruptcy Court overruled Voya's objections and confirmed the plan on December 14, 2015.[4] Voya then appealed to the District Court, arguing, among other things, that the Bankruptcy Court lacked the constitutional authority to order the releases and injunctions. In response, the Appellees, all of whom are named as released parties in the confirmed plan,

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[3] The United States Trustee objected as well. Those objections are not at issue on appeal.

[4] A few days earlier, on December 9, 2015, Voya had filed suit against TA, MLH, and various affiliates in the District Court asserting RICO, RICO conspiracy, fraud and deceit, aiding and abetting fraud, conspiracy to commit fraud, and restitution claims. That case has been stayed pending the present litigation. *ISL Loan Tr. v. TA Assocs. Mgmt., L.P.*, No. 15-cv-1138 (D. Del.) (D.I. 11).

moved to dismiss, pressing especially that the case is equitably moot. The District Court, however, remanded the case for the Bankruptcy Court to consider whether it – the Bankruptcy Court – had constitutional authority to confirm a plan releasing Voya's claims, in light of the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011).

On remand, the Bankruptcy Court wrote a detailed and closely reasoned opinion explaining its conclusion that it had constitutional authority. It said that *Stern* is inapplicable when, as in this instance, the proceeding at issue is plan confirmation, and that, even if *Stern* did apply, the limitations imposed by that precedent would be satisfied. Voya appealed and the Appellees moved again to dismiss the matter as equitably moot.

The District Court, in an equally thoughtful opinion, affirmed the Bankruptcy Court's ruling on constitutional authority, reasoning, in relevant part, that *Stern* is inapplicable to plan confirmation proceedings. The Court then dismissed the remainder of Voya's challenges as equitably moot because the releases and related provisions were central to the reorganization plan and excising them would unravel the plan, and because it would be inequitable to allow Voya to benefit from the restructuring while also pursuing claims that MLH and TA had paid to settle. Finally, in the alternative, the District Court reasoned that, even if the Bankruptcy Court lacked constitutional authority to confirm the plan, and even if the appeal were not equitably moot, the District Court itself would affirm

the confirmation order by rejecting Voya's challenges on the merits.

This timely appeal followed.

II. DISCUSSION[5]

The Parties press a number of arguments, but we need only address two: first, whether the Bankruptcy Court had constitutional authority to confirm the plan releasing and enjoining Voya's claims against MLH and TA; and second, whether this appeal, including Voya's arguments that the release provisions violate the Bankruptcy Code, is otherwise equitably moot. Because the answer to both of those questions is yes, we will affirm.

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[5] While the Bankruptcy Court's authority is at issue, it had jurisdiction to consider this dispute pursuant to 28 U.S.C. §§ 157, 1334. The District Court had jurisdiction under 28 U.S.C. §§ 158(a), 1334, and we have jurisdiction under 28 U.S.C. §§ 158(d), 1291. *U.S. Tr. v. Gryphon at Stone Mansion, Inc.*, 166 F.3d 552, 553 (3d Cir. 1999); *In re Semcrude, L.P.*, 728 F.3d 314, 320 (3d Cir. 2013). "In reviewing the Bankruptcy Court's determinations, we exercise the same standard of review as did the District Court. We therefore review the Bankruptcy Court's legal determinations *de novo* and . . . its factual determinations for clear error." *In re Wettach*, 811 F.3d 99, 104 (3d Cir. 2016) (citations and internal quotation marks omitted). "We review the [District] Court's equitable mootness determination for abuse of discretion." *In re Semcrude*, 728 F.3d at 320.

A. The Bankruptcy Court Possessed the Constitutional Authority to Confirm the Plan Containing the Release Provisions

Voya's primary argument is that, under the reasoning of *Stern v. Marshall*, the Bankruptcy Court lacked the constitutional authority to confirm a plan releasing its claims.[6] To explain why we disagree, we first consider the reach of *Stern* and then how the decision applies here.

i. The Reasoning and Reach of *Stern v. Marshall*

In *Stern*, the son of a deceased oil magnate filed an adversary complaint in bankruptcy court against his stepmother for defamation and also "filed a proof of claim for the defamation action, meaning that he sought to recover damages for it from [the] bankruptcy estate."[7] 564 U.S. at 470. The dispute was part of a long running battle over the oil magnate's estate, and the stepmother – who was the debtor in bankruptcy – responded to the defamation claim by asserting truth as

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[6] The parties also contest whether the constitutionality of the Bankruptcy Court's decision is a threshold issue that must be decided before assessing equitable mootness. Since we conclude that the Bankruptcy Court possessed constitutional authority, we need not decide whether there is a set order of operations.

[7] Both the litigation culminating in the Supreme Court's *Stern* decision, and the *Stern* decision itself, received significant public attention based on the litigants' identities. The stepmother was the late Vickie Lynn Marshall, widely known as Anna Nicole Smith. The stepson was the late E. Pierce Marshall, son of the deceased oil magnate, J. Howard Marshall II.

a defense and filing her own counterclaim for tortiously interfering with a gift (*i.e.*, a trust of which she would be the beneficiary) that she had expected to receive from her late husband. *Id.* The bankruptcy court granted summary judgment for the stepmother on the defamation claim and then, after a bench trial, ruled in her favor on the tortious interference counterclaim. *Id.*

The main issue before the Supreme Court was whether the bankruptcy court had the authority to adjudicate the counterclaim. The Court first decided that the bankruptcy court was statutorily authorized to do so. *Id.* at 475-78. It said that bankruptcy courts may hear and enter final judgments in what the bankruptcy code frames as "core proceedings," and the Court further ruled that the counterclaim was such a proceeding because, under 28 U.S.C. § 157(b)(2)(C), "core proceedings include 'counterclaims by the [bankruptcy] estate against persons filing claims against the estate.'" *Stern*, 564 U.S. at 475.

Nevertheless, the Supreme Court concluded that the bankruptcy court's actions violated Article III of the U.S. Constitution. *Id.* at 482. Quoting *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment), the Court reasoned that, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern*, 564

U.S. at 484. The bankruptcy court had gone beyond constitutional limits when it "exercised the 'judicial Power of the United States' in purporting to resolve and enter final judgment on a state common law claim[.]" *Id.* at 487.

The Supreme Court went on to explain that the counterclaim also not did fall within the "public rights" exception to the exercise of judicial power contemplated by Article III. Under the public rights exception, Congress may constitutionally allocate to "legislative" – *i.e.*, non-Article III – courts the authority to resolve disputes that arise "in connection with the performance of the constitutional functions of the executive or legislative departments[.]" *Id.* at 489 (citation omitted). Although acknowledging that the exception is not well defined, the Court explained that it is generally limited to "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority." *Id.* at 490. The Court had little difficulty concluding that the stepmother's counterclaim, which arose "under state common law between two private parties," and, at best, had a highly tenuous connection to federal law, did not "fall within any of the varied formulations of the public rights exception[.]" *Id.* at 493. But the Court made clear that it had never decided and was not then deciding whether "the restructuring of debtor-creditor relations is in fact a public right." *Id.* at 492 n.7 (citation omitted).

The Supreme Court also rejected the stepmother's argument that her counterclaim could be decided in bankruptcy court because the stepson had filed a proof of claim. *Id.* at 495. In doing so, though, the Court interpreted two of its previous opinions as concluding that matters arising in the claims-approval process could be adjudicated by a bankruptcy court. *Id.* at 495-97. The Court said that *Katchen v. Landy*, 382 U.S. 323 (1966), stood for the proposition that a "voidable preference claim" could be decided by a bankruptcy adjudicator "because it was not possible for the [adjudicator] to rule on the creditor's proof of claim without first resolving the voidable preference issue." *Stern*, 564 U.S. at 496. It further observed that its decision in *Langenkamp v. Culp*, 498 U.S. 42 (1990) (per curiam), was "to the same effect" and had concluded "that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because *then* [*i.e.*, after the creditor's claim has been filed,] 'the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship.'" *Stern*, 564 U.S. at 497 (second alteration in original) (citation omitted). The Court distinguished that situation from the dispute before it in *Stern* because there was little overlap between the debtor-stepmother's tortious interference counterclaim and the creditor-stepson's defamation claim and "there was never any reason to believe that the process of adjudicating [the] proof of claim would necessarily resolve [the] counterclaim." *Id.* Finally, it explained that, "[i]n both *Katchen* and *Langenkamp,* . . . the trustee bringing the preference action was asserting a right of

recovery created by federal bankruptcy law[,]" but the stepmother's counterclaim was "in no way derived from or dependent upon bankruptcy law; it [was] a state tort action that exist[ed] without regard to any bankruptcy proceeding." *Id.* at 498-99. The Court concluded by saying "that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case[.]" *Id.* at 499. In language central to the issue before us, the Court said, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.*

Stern makes several points that are important here. First, bankruptcy courts may violate Article III even while acting within their statutory authority in "core" matters. *Cf. Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 30-31 (2014) (describing "*Stern* claims" as "claim[s] designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter"). Thus, even in cases in which a bankruptcy court exercises its "core" statutory authority, it may be necessary to consider whether that exercise of authority comports with the Constitution.

Second, a bankruptcy court is within constitutional bounds when it resolves a matter that is integral to the restructuring of the debtor-creditor relationship. The *Stern* Court relied on *Katchen* and *Langenkamp* as examples of a bankruptcy court's constitutionally appropriate adjudication of claims. Of particular note, and as quoted earlier, the Court in discussing *Langenkamp*

said that it held there that a particular "claim can be heard in bankruptcy when the . . . creditor has filed a claim, because *then* 'the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship.'" *Stern*, 564 U.S. at 497 (alteration in original) (citation omitted). In other words, the Court concluded that bankruptcy courts can constitutionally decide matters arising in the claims-allowance process, and they can do that because matters arising in the claims-allowance process are integral to the restructuring of the debtor-creditor relationship.[8] *Id.* at 492 n.7, 497 (citations omitted).

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[8] Again, and as noted on page 15 *supra*, we recognize that the Supreme Court declined to determine whether, as a general matter, "restructuring of debtor-creditor relations is in fact a public right." *Stern*, 564 U.S. at 492 n.7 (citation omitted). Thus, the Court's conclusion that bankruptcy courts can decide matters integral to the restructuring of debtor-creditor relations may not have been grounded in public rights doctrine. Indeed, Chief Justice Roberts, the author of *Stern*, has suggested as much. *Cf. Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting) ("Our precedents have also recognized an exception to the requirements of Article III for certain bankruptcy proceedings. When the Framers gathered to draft the Constitution, English statutes had long empowered nonjudicial bankruptcy 'commissioners' to collect a debtor's property, resolve claims by creditors, order the distribution of assets in the estate, and ultimately discharge the debts. This historical practice, combined with Congress's constitutional authority to enact bankruptcy laws, confirms that Congress may assign to non-Article III courts adjudications involving 'the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power.'" (internal citations omitted)). We need not identify the theory behind the Supreme Court's conclusion, however, because, regardless, "we are bound to follow [the Court's] teachings[.]" *St.*

Furthermore, the Supreme Court made it clear that, for there to be constitutional authority, a matter need not stem from the bankruptcy itself. That is evident from its declaration of a two-part disjunctive test. The Court said that "the question [governing the extent to which a bankruptcy court may constitutionally exercise power] is whether the action at issue stems from the bankruptcy itself *or would necessarily be resolved in the claims allowance process*." *Id.* at 499 (emphasis added).

The third take-away from *Stern* is that, when determining whether a bankruptcy court has acted within its constitutional authority, courts should generally focus not on the category of the "core" proceeding but rather on the content of the proceeding. The *Stern* Court never said that *all* counterclaims by a debtor are beyond the reach of bankruptcy courts. Rather, it explained that those that do not "stem[] from the bankruptcy itself or would [not] necessarily be resolved in the claims allowance process" (and therefore would not be integral to the restructuring of the debtor-creditor relationship) must be decided by Article III courts. *Id.* at 497, 499. And, the Court looked to the content of the debtor's counterclaim in applying that test. It compared the factual and legal determinations necessary to resolve the tortious interference counterclaim to those necessary to resolve the defamation claim to assess whether the counterclaim would necessarily be resolved in the claims-allowance process, and it

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Margaret Mem'l Hosp. v. NLRB, 991 F.2d 1146, 1154 (3d Cir. 1993).

looked to the basis for the counterclaim to determine whether it stemmed from the bankruptcy itself.[9] *Id.* at 498-99.

In sum, *Stern* teaches that the exercise of "core" statutory authority by a bankruptcy court can implicate the limits imposed by Article III. Such an exercise of authority is permissible if it involves a matter integral to the restructuring of the debtor-creditor relationship. And, in determining whether that is the case, we can consider the content of the "core" proceeding at issue.

ii. The Bankruptcy Court Had Constitutional Authority Under *Stern*

Applying the foregoing principles to the case at hand leads to the conclusion that the Bankruptcy Court possessed constitutional authority to confirm the plan containing the release provisions. The Bankruptcy Court indisputably had "core" statutory authority to confirm the plan. *See* 28 U.S.C. § 157(b)(2)(L) ("Core proceedings include, but are not limited to . . . [,] confirmations of plans[.]"). The question is whether, looking to the content of the plan, the Bankruptcy Court was resolving a matter integral to the restructuring of

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[9] To be sure, the Supreme Court made clear that the claims-allowance process – a core proceeding under 28 U.S.C. § 157(b)(2)(B) – is per se integral to the restructuring of the debtor-creditor relationship and, therefore, that the category of proceeding is controlling in that context. *Stern*, 564 U.S. at 497-99. But we have no guidance as to whether any other categories of core proceedings might be treated similarly.

the debtor-creditor relationship.[10] The only terms at issue are the provisions releasing and enjoining Voya's claims.

Those provisions were thoroughly and thoughtfully addressed by the Bankruptcy Court. It held that "[t]he injunctions and releases provisions are critical to the success of the Plan" because, "[w]ithout the releases, and the enforcement of such releases through the Plan's injunction provisions, the Released Parties [would not be] willing to make their contributions under the Plan" and, "[a]bsent those contributions, the Debtors [would] be unable to satisfy their obligations under the USA Settlement Agreements [*i.e.*, the settlement with the government] and no chapter 11 plan [would] be feasible and the Debtors would likely [have] shut down upon the revocation of their Medicare enrollment and billing privileges." (App. at 24; *see also* App. at 3596, 3598 (the Bankruptcy Court stating that "it is clear that the releases are necessary to both obtaining the funding and consummating a plan" and that "[w]ithout [MLH and TA's] contributions, there is no reorganization").) Those conclusions are well supported by the record. (App. at 1575-80, 2230, 2233-35; D. Ct. D.I. 25-2, at *233-34.) Indeed, the record makes abundantly clear that the release provisions – agreed to only after extensive, arm's length negotiations – were absolutely required to induce MLH and TA to pay

[10] The Appellees argue that a bankruptcy court can always constitutionally confirm a plan. We have our doubts about so broad a statement but we do not need to address it to decide this case.

the funds needed to effectuate Millennium's settlement with the government and prevent the government from revoking Millennium's Medicare billing privileges. Absent MLH and TA's payment, the company could not have paid the government, with the result that liquidation, not reorganization, would have been Millennium's sole option. Restructuring in this case was possible only because of the release provisions.

To Voya, that point is irrelevant.[11] Voya contends that *Stern* demands an Article III adjudicator decide its RICO/fraud claims because those claims do not stem from the bankruptcy itself and would not be resolved in the claims-allowance process. It asserts that the limiting phrase from *Stern, i.e.*, "necessarily be resolved in the claims allowance process[,]" cannot be stretched to cover all matters integral to the restructuring. (Opening Br. at 31.) In that regard, Voya argues that an assertion that something is "integral to the restructuring" is really "nothing more than a description of *the claims allowance process.*" (Reply Br. at 13.)

That argument fails primarily because it is not faithful to what *Stern* actually says. Had the *Stern* Court meant its "integral to the restructuring" language to be limited to the claims-allowance process, it would not have said that a bankruptcy court may decide a matter when a "creditor has filed a claim, because *then*" – adding its own emphasis to that word – "the ensuing preference action by the trustee become[s]

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[11] In fact, Voya does not even argue in its briefing that the release provisions were not integral to the restructuring.

integral to the restructuring of the debtor-creditor relationship." 564 U.S. at 497 (alteration in original). That phrasing makes clear that the reason bankruptcy courts may adjudicate matters arising in the claims-allowance process is because those matters are integral to the restructuring of debtor-creditor relations, not the other way around. And, as the Appellees correctly observe, *Stern* is not the first time that the Supreme Court has so indicated. In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) – a case that the *Stern* Court viewed as informing its Article III jurisprudence, 564 U.S. at 499 – the Court answered first whether an action arose in the claims-allowance process and only then whether it was otherwise integral to the restructuring of debtor-creditor relations. *See Granfinanciera*, 492 U.S. at 58 ("Because petitioners here . . . have not filed claims against the estate, respondent's fraudulent conveyance action does not arise 'as part of the process of allowance and disallowance of claims.' Nor is that action integral to the restructuring of debtor-creditor relations.").[12] If the first step in that analysis were all

[12] Voya makes two additional arguments regarding the proper interpretation of *Stern:* that courts of appeals have interpreted *Stern* as centered on the claims-allowance process, and that the phrase "integral to the restructuring" is not supported by the Supreme Court's public rights jurisprudence. As to the former, we are not convinced that the out-of-circuit cases Voya cites are inconsistent with our reading of *Stern. Stern* on its face governed in those cases, so, unlike here, the courts had no need to extract a principle beyond *Stern*'s plain terms. *See In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1279 (10th Cir. 2015) (concluding that *Stern* provided "all the guidance we need to answer this appeal" because the case involved the assertion that state law legal malpractice claims against the bankruptcy trustee by clients of the

trustee in his capacity as an attorney should be heard in bankruptcy court simply because the malpractice claims were "factually 'intertwined' with the bankruptcy proceedings"); *In re Fisher Island Invs., Inc.*, 778 F.3d 1172, 1192 (11th Cir. 2015) (holding that *Stern* did not apply to bar bankruptcy court adjudication of a claim where, among other things, that claim "was 'necessarily resolve[d]' by the bankruptcy court through the process of adjudicating the creditors' claims" (alteration in original) (citation omitted)); *In re Glob. Technovations Inc.*, 694 F.3d 705, 722 (6th Cir. 2012) (holding that a bankruptcy court's resolution of one issue was permissible under *Stern* because it was not possible to rule on a proof of claim without deciding the issue, and concluding that the bankruptcy court could decide a second issue that could have been necessary to ruling on a proof of claim but turned out not to be because the court did "not believe that *Stern* requires a court to determine, in advance, which facts will ultimately prove strictly necessary"); *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 564-65 (9th Cir. 2012) (holding that a bankruptcy court could not resolve a fraudulent conveyance action similar to that in *Granfinanciera* – which the *Stern* Court made clear could not have been adjudicated by a bankruptcy court – because it "need not necessarily have been resolved in the course of allowing or disallowing the claims against the . . . estate"); *In re Ortiz*, 665 F.3d 906, 909, 912, 914 (7th Cir. 2011) (concluding that claims could not be decided by a bankruptcy court because the case essentially matched *Stern*); *see also In re Ortiz*, 665 F.3d at 914 ("Non-Article III judges may hear cases when the claim arises 'as part of the process of allowance and disallowance of claims,' or when the claim becomes 'integral to the restructuring of the debtor-creditor relationship[.]' " (citations omitted)). Voya also cites our decision in *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242 (3d Cir. 1994), but that decision predates *Stern* and offers no insight into how best to interpret it.

Voya's second argument, that the rule we adopt today would not comport with the Supreme Court's public rights doctrine, similarly is unavailing. As already noted (*see supra* n. 8), the precise basis for the Court's "integral to the restructuring" conclusion is unstated, and does not necessarily flow from the Court's public rights jurisprudence.

that was relevant, the second step would not have been taken.

Voya also raises a "floodgate" argument, saying that, if we allow bankruptcy courts to approve releases merely because they appear in a plan, bankruptcy courts' powers would be essentially limitless and that an "integral to the restructuring" rule would mean that bankruptcy courts could approve releases simply because reorganization financers demand them, which could lead to gamesmanship. The argument is not without force. Setting too low a bar for the exercise of bankruptcy court authority could seriously undermine Article III, which is fundamental to our constitutional design.[13] It is definitely not our intention to permit any action by a bankruptcy court that could "compromise" or "chip away at the authority of the Judicial Branch[,]" *Stern*, 564 U.S. at 503, and our decision today should not be read as expanding bankruptcy court authority.

Nor should our decision today be read as permitting or encouraging the hypothetical gamesmanship that Voya fears will now ensue. Consistent with prior decisions, we are not broadly sanctioning the permissibility of nonconsensual third-party releases in bankruptcy

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[13] Before the founding, "[t]he colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.' " *Stern*, 564 U.S. at 483-84 (quoting The Declaration of Independence ¶ 11). Since ratification, Article III has served a crucial role in our "system of checks and balances" and "preserve[s] the integrity of judicial decisionmaking[.]" *Id.* (citation omitted).

reorganization plans. Our precedents regarding non-consensual third-party releases and injunctions in the bankruptcy plan context set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted, and suggest that courts considering such releases do so with caution. *See In re Global Indus. Techs., Inc.*, 645 F.3d 201, 206 (3d Cir. 2011) (en banc) (explaining that suit injunctions must be "both necessary to the reorganization and fair"); *In re Continental Airlines, Inc.*, 203 F.3d 203, 214 (3d Cir. 2000) ("The hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, and specific factual findings to support these conclusions[.]"). Although we are satisfied that both the Bankruptcy Court and District Court exercised appropriate – indeed, exemplary – caution and diligence in this instance, nothing in our opinion should be construed as reducing a court's obligation to approach the inclusion of nonconsensual third-party releases or injunctions in a plan of reorganization with the utmost care and to thoroughly explain the justification for any such inclusion.

In short, our holding today is specific and limited. It is that, under the particular facts of this case, the Bankruptcy Court's conclusion that the release provisions were integral to the restructuring was well-reasoned and well-supported by the record.[14]

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[14] At oral argument, counsel for Voya candidly acknowledged that this is "not the usual case." https://www2.ca3.uscourts.gov/oralargument/audio/18-3210InreMilleniumLabHoldings.mp3 (Oral Arg. at 15:03-07.)

Consequently, the bankruptcy court was constitutionally authorized to confirm the plan in which those provisions appeared.[15]

B. The Remainder of the Appeal Is Equitably Moot

Voya next argues that the District Court erred in concluding that the remaining issues on appeal are equitably moot. Again, we disagree.

"'Equitable mootness' is a narrow doctrine by which an appellate court deems it prudent for practical reasons to forbear deciding an appeal when to grant the relief requested will undermine the finality and reliability of consummated plans of reorganization." *In re Tribune Media Co.*, 799 F.3d 272, 277 (3d Cir. 2015). At bottom, "[e]quitable mootness assures [the estate, the reorganized entity, investors, lenders, customers, and

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[15] The parties disagree as to whether the Bankruptcy Court's decision to confirm the plan even implicates *Stern* and Article III. Voya argues that *Stern* deprived the Bankruptcy Court of jurisdiction because the release provisions in the confirmed plan of reorganization constituted a "final judgment" on the merits of Voya's state law claims against Millennium. The Appellees respond that *Stern* is inapplicable here, or at least readily distinguishable, because there is a distinction between a court approving the settlement of claims and adjudicating claims on the merits. According to the Appellees, the Bankruptcy Court only did the former when it approved the plan of reorganization. Our conclusion that the Bankruptcy Court's actions were constitutionally permissible assumes *Stern*'s application. Accordingly, it ultimately is irrelevant to our decision whether or not the Bankruptcy Court issued a "final judgment" on Voya's underlying claims against Millennium, and we do not address that dispute.

other constituents] that a plan confirmation order is reliable and that they may make financial decisions based on a reorganized entity's exit from Chapter 11 without fear that an appellate court will wipe out or interfere with their deal."[16] *Id.* at 280.

An equitable mootness analysis proceeds by asking two questions: "(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *Id.* at 278. Voya concedes that the plan here is substantially consummated, so we focus on the second question. Answering it shows that the appeal is indeed equitably moot.

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[16] One of the benefits of bankruptcy is its ability "to aid the unfortunate debtor by giving him a fresh start in life[.]" *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *see In re Trump Entm't Resorts*, 810 F.3d 161, 173-74 (3d Cir. 2016) ("A Chapter 11 reorganization provides a debtor with an opportunity to reduce or extend its debts so its business can achieve longterm viability, for instance, by generating profits which will compensate creditors for some or all of any losses resulting from the bankruptcy."). Equitable mootness allows that benefit to be realized by, among other things, encouraging an end to costly and protracted litigation based on arguable blemishes in a reorganization plan. *Cf. In re Tribune*, 799 F.3d at 288-89 (Ambro, J., concurring) ("Without equitable mootness, any dissenting creditor with a plausible (or even not-so-plausible) sounding argument against plan confirmation could effectively hold up emergence from bankruptcy for years (or until such time as other constituents decide to pay the dissenter sufficient settlement consideration to drop the appeal), a most costly proposition.").

Granting Voya the relief it seeks would certainly scramble the plan. As the District Court explained, "[t]he Bankruptcy Court found [Voya's] releases were central to the Plan and, far from being clearly erroneous, [that conclusion] is strongly supported by uncontroverted evidence in the record." (App. at 374.) The Bankruptcy Court observed, based on unrefuted evidence, that the "third-party releases, *all of them,* . . . [were] required to obtain the funding for this plan" (App. at 3594 (emphasis added)); that "the releases [were] necessary to . . . consummating a plan" (App. at 3596); and that "[w]ithout [TA and MLH's] contributions, there is no reorganization." (App. at 3598.) The release provisions, carefully crafted through extensive negotiations, served as the cornerstone of the reorganization and, hence, of Millennium's corporate survival. Notably, the confirmed plan contains a severability provision stating, "no alteration or interpretation [of the plan] can . . . compel the funding of Settlement Contribution if the conditions to such funding set forth in the [Restructuring Agreement] have not been satisfied" (App. at 142), and the Restructuring Agreement, in turn, says that the settlement contribution is contingent on "*a full and complete* release of . . . the Released Parties" and an injunction to enforce the release. (App. at 196 (emphasis added).) As the Bankruptcy Court recognized, all of the releases were essential to the plan.

But even if some subset of the release provisions could be deemed non-essential, it would not be Voya's. Voya loaned more than $100 million to Millennium

through the 2014 credit agreement. Its lawsuit raises several claims based on that loan, including RICO, fraud, and restitution claims.[17] The restitution claim alone seeks "restitution of [Voya's] funds," among other relief (App. at 2355), and presumably the other claims seek damages based on the loan amount, trebled for the RICO claims. Opening MLH, TA, and their related parties to well over $100 million in liability, above the $325 million that was negotiated and paid to settle those same claims, would completely undermine the purpose of the release provisions. And again, based on the intense, arm's length negotiations, those provisions were included because they were essential to obtaining the payment that allowed Millennium's survival. Given the centrality of the release provisions to the reorganization, excising them would undermine the fundamental basis for the parties' agreement.

Furthermore, any do-over of the plan at this time would likely be impossible and, even if it could be done, would be massively disruptive. Since the plan was confirmed, Millennium has paid the government, has "completed numerous complex restructuring and related transactions," and has distributed common stock to the lenders under the 2014 credit agreement. (App. at 6195, 6199.) In addition, "unsecured creditors [have

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[17] MLH and TA are named as defendants only as to the restitution count. But defendants on all counts are alleged to be close affiliates of MLH and TA. Importantly, defendant TA Associates Management is alleged to control TA, and MLH is alleged to be the effective alter ego of defendant James Slattery. All counts in the complaint are directed against TA Associates Management, Slattery, or both.

been] paid the full amount of their allowed claims" (Supp. App. at 3); Millennium's lender and equity base has changed dramatically; the company has sold off RxAnte; and it "has entered into more than two million commercial transactions, many of which are with new counter-parties." (Supp. App. at 5.) It is inconceivable that these many post-confirmation developments could be unwound, particularly those involving the government.

In that same vein, the relief that Voya seeks would seriously harm a wide range of third parties. If the plan could somehow be unwound and Millennium put back in its pre-confirmation position, the interests and expectations of Millennium's new lenders and equity holders – who certainly invested in reliance on the reorganization – would be wholly undermined. RxAnte's acquiror would in turn have to unwind that acquisition; contracts and transactions with counter-parties would be scuttled; and the status of Millennium and all of its employees and contractors would obviously be placed in severe jeopardy.

Our decision in *In re Tribune* is on point. There, a confirmed plan contained provisions settling certain claims by the estate against various parties connected with a leveraged buyout of the debtor. *In re Tribune*, 799 F.3d at 275-76. The appellant, a creditor, conceded that the plan was substantially consummated but argued that the relief it sought – reinstatement of settled causes of action – would not fatally harm the plan or third parties. *Id.* at 277, 280. We thought otherwise and said that allowing the suits barred by the settlement

"would knock the props out from under the authorization for every transaction that has taken place, thus scrambling this substantially consummated plan and upsetting third parties' reliance on it." *Id.* at 281 (citations and internal quotation marks omitted). We observed that the settlement was "a central issue in the formulation of a plan of reorganization" and that "allowing the relief the appeal seeks would effectively undermine the Settlement (along with the transactions entered in reliance on it) and, as a result, recall the entire Plan for a redo." *Id.* at 280-81. It was plain that third parties would be harmed because, among other things, "returning to the drawing board would at a minimum drastically diminish the value of new equity's investment[,]" which "no doubt was [made] in reliance on the Settlement[.]" *Id.* at 281. That same reasoning applies with great force in this case.[18]

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[18] Voya tries to distinguish *In re Tribune* by arguing that the appellant there sought to scuttle the settlement provisions in their entirety, unlike here. But eliminating the release provisions as to Voya would have the same effect as eliminating the release provisions in their entirety: the plan would fall apart.

Voya also points us to several other decisions it views as demonstrating that we have "found bankruptcy appeals not to be equitably moot where, as here, a party merely seeks revival of discrete released claims that would not otherwise upset a confirmed plan." (Opening Br. at 51.) The cases it highlights, however, unlike the matter now before us, all involved release provisions that were not central to the plans at issue. *See In re Semcrude*, 728 F.3d at 324 (holding that a case was not equitably moot because, among other things, granting the requested relief "would [not] upset the [settlement] or . . . cause the remainder of the plan to collapse" and the amounts involved in the suit would not "destabilize the financial basis of the settlement"); *In re PWS Holding Corp.*, 228

Voya raises several unpersuasive arguments challenging the District Court's equitable mootness decision. In spite of all the evidence, it contends that striking the release provisions only as to it would not cause the plan to collapse. It says that the remainder of the plan would stay in place, including the release provisions as to other parties, given that the other lenders consented. According to Voya, nothing in the plan would authorize MLH and TA to demand the return of their contribution if the release provisions were stricken, and it claims that, in fact, the plan anticipates "just such a scenario and gives [MLH and TA] . . . the ability to access insurance coverage and/or indemnification from Debtors (capped at $3 million) for defense costs." (Opening Br. at 50.) But, as explained above, striking the release provisions as to Voya would certainly undermine the plan. That the plan provides for "insurance coverage and/or indemnification" as a contingency does not change that. As previously noted, the plan says that the settlement payment, the very payment on which Millennium's viability as a going concern depended, could not be compelled absent full and complete releases from *all* of Millennium's pre-bankruptcy lenders, including Voya.

F.3d 224, 236 (3d Cir. 2000) (rejecting an equitable mootness argument where "[t]he releases (or some of the releases) could be stricken from the plan without undoing other portions of it"); *In re Continental Airlines*, 203 F.3d at 210 (rejecting an equitable mootness challenge because, among other things, "[n]o evidence or arguments [were] presented that Plaintiffs' appeal, if successful, would necessitate the reversal or unraveling of the entire plan of reorganization").

Voya next argues that granting it relief will not disturb legitimate third-party expectations. As to that point, it declares that MLH and TA's reliance interests do not count, "both because they are relying on the Plan to obtain unlawful nonconsensual releases to which they are not legally entitled and because they are sophisticated parties who were intimately involved in constructing the Plan and fully aware of the appellate risks when they allowed it to be consummated." (Opening Br. at 53.) But, besides the circularity of its reasoning, Voya's position misses the mark, as it ignores the fact that numerous other third parties, including Millennium's new post-bankruptcy equity holders and lenders, would be harmed significantly by any effort to unwind the plan.

Voya also raises a series of arguments claiming that it would be fair to strike the releases as to it while not returning any of MLH and TA's contribution and without requiring Voya to return any of the value it obtained by way of the reorganization.[19] Each of those

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[19] Voya says that that course of action would not be inequitable because it did not receive any consideration for releasing its claims; that the plan gave MLH and TA the right to insist that plan consummation be delayed until all appeals were exhausted, and they instead assumed the risk of an adverse ruling; that, "prior to the bankruptcy, [MLH and TA] were willing to make the same $325 million contribution in the context of an out-of-court restructuring, even if they did not receive releases from non-consenting Lenders holding up to $50 million (subject to increase) of aggregate principal term loan balance" (Reply Br. at 9); that MLH and TA attempted to leverage Millennium's distress to obtain the release provisions; and that MLH and TA were aware at

arguments is a non-starter. Voya wants all of the value of the restructuring and none of the pain. That is a fantasy and upends the purpose of the equitable mootness doctrine, which is designed to prevent inequitable outcomes. *Cf. In re PWS Holding Corp.*, 228 F.3d 224, 235-36 (3d Cir. 2000) ("Under the doctrine of equitable mootness, an appeal should be dismissed . . . *if the implementation of that relief would be inequitable.*" (emphasis added)). "Equity abhors a windfall." *US Airways, Inc. v. McCutchen*, 663 F.3d 671, 679 (3d Cir. 2011), *vacated on other grounds*, 569 U.S. 88, 106 (2013); *Prudential Ins. Co. of Am. v. S.S. Am. Lancer*, 870 F.2d 867, 871 (2d Cir. 1989). Voya would receive a windfall – at the substantial and uncompensated expense of MLH and TA – if we were to let it avoid the release provisions without requiring it to return the value it obtained through the reorganization consummated on the basis of those release provisions and without allowing MLH and TA to recover their contribution. Voya's arguments also fail by their own terms. The question of whether Voya received consideration for the releases is a merits question, not an equitable mootness one. *See In re United Artists Theatre Co.*, 315 F.3d 217, 227 (3d Cir. 2003) (explaining that non-consensual releases must be given in exchange for fair consideration, among other things). And, regardless of formal consideration, it would still be inequitable to let Voya retain the benefits of the settlement and still have the right to sue. *See In re Tribune*, 799 F.3d at 281 ("When

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the time they obtained the release provisions that our precedents regarding such provisions were unclear.

determining whether the case is equitably moot, we of course must assume [the appellant] will prevail on the merits because the idea of equitable mootness is that *even if* [the appellant] is correct, it would not be fair to award the relief it seeks.").

In the end, the operative question for our equitable mootness inquiry is straightforward: would granting Voya relief fatally scramble the plan and/or harm third parties. The answer is clearly yes.[20] Granting Voya's requested relief would lead to profoundly inequitable results, and the District Court did not abuse its discretion in concluding that the appeal was equitably moot.

III. CONCLUSION

For the foregoing reasons, we will affirm the decision of the District Court.

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[20] Nothing in our opinion should be read to imply that review of reorganization plans involving third-party releases will always or even often be barred as equitably moot and therefore effectively unreviewable. Again, our holding today is specific and limited to the particular facts of this case.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3210

In re MILLENNIUM LAB
HOLDINGS II, LLC., et al.,
Debtors

OPT-OUT LENDERS,
Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-17-cv-01461)
District Judge: Leonard P. Stark

Argued
September 12, 2019

Before: CHAGARES, JORDAN,
and RESTREPO, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of Delaware and was argued on September 12, 2019. On consideration whereof,

It is now hereby ORDERED and ADJUDGED by this Court that the Order of the District Court entered on September 21, 2018, is hereby AFFIRMED. All of the above in accordance with the opinion of the Court. Costs shall be assessed against the Appellant.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: MILLENNIUM LAB HOLDINGS II, LLC, *et al.*, Debtors.	:	Chapter 11 Bankr. Case No. 15-12284-LSS (Jointly Administered)
OPT-OUT LENDERS, Appellants, v. MILLENNIUM LAB HOLDINGS II, LLC, *et al.*, TA MILLENIUM, INC., and JAMES SLATTERY, Appellees.	:	Civ. No. 17-1461-LPS

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OPINION

(Filed Sep. 21, 2018)

STARK, U.S. District Judge:

I. INTRODUCTION[1]

On December 14, 2015, the Opt-Out Lenders (together "Voya"),[2] appealed the order (B.D.I. 195)[3] ("Confirmation Order"), entered by the Honorable Laurie Selber Silverstein, Bankruptcy Judge for the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court"), confirming the above-captioned debtors' Amended Prepackaged Joint Plan of Reorganization (B.D.I. 182) (as amended, the "Plan"). *See In re Millennium Lab Holdings, II, LLC*, Civ. No. 16-110-LPS D.I.

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[1] The Court has considered and found helpful the following secondary sources: Ben H. Logan, *A New Millennium of Article III Analysis: Which Court – a Bankruptcy Court or a District Court – Must Decide Whether to Confirm a Plan that Contains a Nonconsensual Third-Party Release? (Part I)*, 37 BANKR. LAW LETTER NO. 12 (December 2017) & *(Part II)* 38 BANKR. LAW LETTER NO. 1 (January 2018); Ralph Brubaker, *A Case Study in Federal Bankruptcy Jurisdiction: Core Jurisdiction (or Not) to Approve Non-Debtor "Releases" and Permanent Injunctions in Chapter* 11, 38 BANKR. LAW LETTER NO. 2 (February 2018); Eamonn O'Hagan, *On a "Related" Point: Rethinking Whether Bankruptcy Courts Can "Order" the Involuntary Release of Non-Debtor, Third-Party Claims*, 23 Am. Bankr. Inst. L. Rev. 531 (2015).

[2] Appellants included within the defined term "Voya" are set forth on Exhibit A to the Opt-Out Lenders' Notice of Appeal. (B.D.I. 478)

[3] The docket of the Chapter 11 cases, *In re Millennium Lab Holdings II, LLC, et al.*, Case No. 15-12284-LSS (Bankr. D. Del.), is cited herein as "B.D.I. ___." Citations to pages of Appellants' Appendix (D.I. 30) are referenced as "A___."

1 ("2016 Appeal"). Millennium Lab Holdings II, LLC, and its affiliated reorganized debtors (collectively, the "Debtors"), joined by certain Equity Holders,[4] moved to dismiss the 2016 Appeal as moot.[5] On March 20, 2017, the Court issued a Memorandum Opinion and Order denying the motion to dismiss and remanding to the Bankruptcy Court to consider whether it had the constitutional authority to approve the releases contained in the Plan. *See In re Millennium Lab Holdings, II, LLC*, 242 F. Supp. 3d 322, 337-38, 340 (D. Del. 2017) ("Memorandum Opinion"). On October 3, 2017, Judge Silverstein issued an opinion, *In re Millennium Lab Holdings II, LLC*, 575 B.R. 252 (Bankr. D. Del. 2017) ("Remand Opinion"), which held that the Bankruptcy Court had constitutional authority to approve the releases as part of confirmation of the Plan and further held that Voya had forfeited and waived any challenge to the Bankruptcy Court's constitutional authority.

On October 16, 2017, Voya appealed the Remand Opinion (D.I. 1); as part of its appeal, Voya also seeks to reassert the issues it had raised in its 2016 Appeal. The Debtors have again moved to dismiss the appeal on the basis of equitable mootness (D.I. 23, 24) ("Motion to Dismiss").

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[4] The Equity Holders who would fund the Plan are non-debtor Millennium Lab Holdings, Inc. ("MLH"), non-debtor TA Millennium, Inc., TA Associates Management, L.P., James Slattery, and Howard Appel (collectively, the "Equity Holders").

[5] *In re Millennium Lab Holdings, II, LLC*, Civ. No. 16-110-LPS, at D.I. 6.

The parties have fully briefed the Motion to Dismiss (D.I. 23, 24, 25, 35, 38) and the merits of the appeal of the Remand Opinion (D.I. 31, 32, 42). On July 12, 2018, the Court heard oral argument on both the Motion to Dismiss and the merits. (D.I. 52) The parties subsequently submitted supplemental briefing. (D.I. 48, 49, 50, 51)

For the reasons stated below, the Court (i) affirms the Remand Opinion with respect to the Bankruptcy Court's constitutional authority to approve the Plan releases, (ii) dismisses as equitably moot all other issues raised on appeal by Voya in connection with the Confirmation Order, and (iii) holds, in the alternative, that the Confirmation Order is affirmed.

II. BACKGROUND

A. Plan Confirmation

The background of the Chapter 11 cases is set forth in detail in the Court's prior Memorandum Opinion.[6] Voya's[7] appeal of the Confirmation Order concerns

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[6] *Millennium*, 242 F. Supp. 3d at 328-36.

[7] Appellants are investment funds and accounts managed by Voya Investment Management Co. LLC and Voya Alternative Asset Management LLC. Appellants were lenders of approximately $106.3 million of aggregate principal amount of senior secured debt issued in April 2014 pursuant to a $1.825 billion senior secured credit facility (the "Credit Facility") which was governed by a credit agreement dated April 16, 2014 (the "Credit Agreement") among, *inter alia*, Debtors Millennium Lab Holdings II, LLC ("Holdings") and Millennium Health, LLC, f/k/a Millennium Laboratories, LLC ("Millennium"), and several other lenders.

a matter of some controversy: the approval of non-consensual third-party releases (i.e., the involuntary extinguishment of a non-debtor, third-party's claim against another non-debtor, third party) as part of a Chapter 11 plan of reorganization.

The day before the plan confirmation hearing, Voya filed a civil action in this Court (the "RICO/fraud action"), which is stayed pending the outcome of this appeal.[8] Voya's complaint asserts RICO and common law fraud claims (collectively, the "RICO/fraud claims") against certain defendants who are "Released Parties"[9] under the Plan.[10] The claims arise out of loans made

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[8] *ISL Loan Tr. v. TA Assocs. Mgmt., L.P.*, Civ. No. 15-1138-LPS (D. Del).

[9] The Released Parties under the Plan are non-debtor Millennium Lab Holdings, Inc. ("MLH"), non-debtor TA Millennium ("TA") (together with MLH, hereinafter referred to as the "Non-Debtor Equity Holders"), James Slattery, and Howard Appel. (Civ. No. 16-110-LPS, D.I. 14 at A15, Art. 1.143 (Plan))

[10] The Plan provided the basis for the continuation of the Debtors' business. Specifically, the Plan provided for a $325 million contribution by the Non-Debtor Equity Holders, consisting of $178.75 million from MLH and $146.25 million from TA. The funds were used as follows: $256 million to fund Millennium's settlement of the DOJ claims (*see Millennium*, 242 F. Supp. 3d at 329-30), $50 million to pay certain lenders in exchange for their early commitment to support Millennium's restructuring, and $19 million for operating capital. (Civ. No. 16-110-LPS D.I. 14 at A92, A94, A169-A170) In exchange for the $325 million contribution, the proposed Plan provided the Non-Debtor Equity Holders with full releases and discharges of any and all claims against them and related parties – including any claims brought directly by non-Debtor lenders such as Appellants – and including claims relating to the $1.3 billion special dividend that had been paid to the Non-Debtor Equity Holders while the Debtors were in the

under the Credit Agreement, Voya's participation in those loans, and Millennium's inability to repay them. (*See e.g.*, A2012)

Voya raised a litany of objections to confirmation of the Plan.[11] In pre-confirmation briefing, it appeared that Voya was challenging the Bankruptcy Court's lack of constitutional authority, albeit in a section asserting the Bankruptcy Court's lack of subject matter

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midst of the DOJ Investigation. (*See* B.D.I. 195-1, Plan at Art. X at H-K; Civ. No. 16-110-LPS D.I. 14 at A2208) The proposed Plan provided no ability for parties to "opt out" of the third-party releases, meaning the releases would be granted upon confirmation of the Plan regardless of whether a creditor consented. (*See* Plan, Art. X at H-K) The proposed Plan also permanently enjoined Appellants from commencing or prosecuting claims released pursuant to the Plan against MLH, TA, or their Related Parties (as defined in the Plan). (*See id.*)

[11] In addition to various objections regarding the content and adequacy of the Disclosure Statement, Voya argued that the Bankruptcy Court lacked either "arising in" or "related to" subject matter jurisdiction to approve the nonconsensual third-party release contained in the Plan. (*See* B.D.I. 122 at 17-25; B.D.I. 174 at 4-9) Voya further asserted that, even if the Bankruptcy Court had subject matter jurisdiction, the proposed approval of the releases under section 105(a) of the Bankruptcy Code would contravene other sections of the Bankruptcy Code, including section 524(e), so the Bankruptcy Court lacked statutory authority to approve the release provisions. (*See* B.D.I. 122 at 26-28) Voya further argued that the Plan could not be confirmed unless it permitted creditors to opt out of the third-party release (*see id.* at 29-31) – and, even if the Plan were so amended, exceptional circumstances did not exist to justify limiting the liability of a non-debtor to another non-debtor under Third Circuit law. (*See id.* at 31-32) (citing *In re Continental Airlines*, 203 F.3d 203, 213 n. 9 (3d Cir. 2000) ("*Continental II*"))

jurisdiction.[12] (*See* B.D.I. 122 at 17) In response to this argument, Debtors accused Voya of reading *Stern*[13] too broadly, countering that "*Stern* leaves intact [the Bankruptcy Court's] constitutional authority" to approve the third-party releases. (*See* B.D.I. 131 at 17-19) Debtors argued that courts have rejected *Stern* challenges regarding the Bankruptcy Courts' constitutional authority, including in connection with the consideration and approval of nonconsensual third-party releases in a plan. (*See id.* at 17-18) Debtors argued that confirmation of the Plan is "a unitary omnibus civil proceeding for the reorganization of all obligations

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[12] Voya's brief included the following:

> The jurisdiction of the Bankruptcy Courts is statutorily defined, and is confined to the boundaries of that statutory definition. *Stern v. Marshall*, 131 S. Ct. 2594, 2603 (2011) (noting that Bankruptcy Courts may only "hear and enter final judgments in all core proceedings arising under title 11, or arising in a case under title 11"); *see also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 (2015) (observing that "bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts"); 28 U.S.C. § 157(a). Rather, Bankruptcy Courts may only enter final judgments on non-core matters with the consent of the affected parties. *Wellness*, 135 S. Ct. at 1949. Because the Third-Party Release would impact direct, non-bankruptcy claims held by non-Debtors against other non-Debtors and which would not trigger the Court's jurisdiction, the Court does not have ***jurisdiction*** to approve the Third-Party Release without the consent of the Third Party Releasing Parties. [Voya] ha[s] not given such consent.

(B.D.I. 122 at 17) (emphasis added)

[13] *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

of the debtor and disposition of all its assets" unique to bankruptcy and "not an adjudication of the various disputes it touches upon." (*See* B.D.I. 131 at 18) (quoting *In re Charles Street African Methodist Episcopal Church of Boston*, 499 B.R. 66, 99 (Bankr. D. Mass. 2013))

In a bench ruling on December 11, 2015, the Bankruptcy Court overruled Voya's objections to the nonconsensual third-party releases and confirmed the Plan. (*See* B.D.I. 206, 12/11/15 Hr'g. Tr.) Addressing Voya's subject matter jurisdiction arguments, the Bankruptcy Court held that it had, at the very least, "related to" subject matter jurisdiction over the claims based on contractual indemnification and fee advancement obligations that satisfied the *Pacor*[14] test under Third Circuit law. (*See id.* at 13:1-15:22) The Bankruptcy Court further noted that "*Stern v. Marshall* does not change the conclusion that this Bankruptcy Court has ***jurisdiction***":

> The holding in *Stern* was meant to be a narrow one; one that does not, quote, "meaningfully change the division of labor" between the Bankruptcy Court and the District Court. To this end, debtors cite cases rejecting a *Stern* challenge, regarding the Bankruptcy Court's ***constitutional authority*** to consider approval of third-party releases in a plan, including Judge Drain's decision in *MPM Silicone[s]*, but not any decisions in this district. These Courts may be correct. But

[14] *Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984).

> because of the necessities of this case, I have not had time to address that argument. But I need not do so, given my finding that I have related-to jurisdiction. Having decided I have jurisdiction, I now turn to whether third-party releases are appropriate in this case. . . .

(*See id.* at 15:23-16:13 (emphasis added))[15] Thus, while the Bankruptcy Court's confirmation ruling included a finding that it had "related to" subject matter jurisdiction over the claims, its ruling, if any, on constitutional authority was unclear. The Bankruptcy Court then turned to whether the third-party release was fair and necessary to the reorganization, applying five factors articulated in *Master Mortgage*[16] and ultimately returning to the *Continental* hallmarks. (*See id.* at 17:9-26:14) Having found the releases were fair and necessary to the reorganization, the Bankruptcy Court entered the Confirmation Order. (B.D.I. 195)

B. 2016 Appeal of Plan Confirmation Order

On the same day, Voya filed its appeal of the Confirmation Order along with a motion for stay pending appeal (B.D.I. 204) ("Stay Motion"). The Stay Motion

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[15] The Plan Confirmation Order simply stated that the Bankruptcy Court had jurisdiction under 28 U.S.C. § 1334(a) to approve the injunction, bar order, exculpation, and releases set forth in Article X of the Plan. (*See* Civ. No. 16-110-LPS D.I. 14, Plan Confirmation Order at A2094)

[16] *See* B.D.I. 206, 12/11/15 Hr'g Tr. at 17:9-24:18 (referring to *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)).

was subsequently denied by the Bankruptcy Court. (B.D.I. 227, 232)[17] Voya did not seek a stay in this Court or the Third Circuit, and the Debtors filed a notice of the occurrence of the Plan's effective date on December 18, 2015 (the "Effective Date"). (B.D.I. 229) The Reorganized Debtors filed a motion to dismiss the appeal as equitably moot (Civ. No. 16-110-LPS D.I. 6, 7, 8), which the parties briefed along with the merits of the appeal (*id.* at D.I. 13, 24, 31). Following oral argument (*id.* at D.I. 44), the Court issued the Memorandum Opinion.

The Memorandum Opinion declined to rule on the motion to dismiss the appeal as equitably moot in light of the constitutional issue raised. *See Millennium*, 242 F. Supp. 3d at 337-38. The Memorandum Opinion remanded the case to the Bankruptcy Court to consider whether, or clarify its ruling that, it had constitutional authority to approve the non-consensual release of Voya's claims, and to conduct any further proceedings the Bankruptcy Court might deem just and necessary. *See id.* at 340.

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[17] In the bench ruling, the Bankruptcy Court stated:

> As I found at confirmation, this is a package deal. The releases were necessary to induce the equity holders to make their three-hundred-and-twenty-five-million-dollar payment to the debtors, and to induce the ad hoc [lender] group's support of the [RSA] and the plan. Without the releases, there will be no cash contribution available to pay the government settlements, and the lenders, including Voya, would not receive the equity of the company, valued at in excess of $900 million.

(B.D.I. 232, 12/18/15 Hr'g Tr. at 14:20-15:3)

C. Remand Opinion

On remand, Judge Silverstein ordered the parties to submit supplemental briefing on the constitutional issue and on whether Voya had waived any arguments. *See Millennium*, 575 B.R. at 289. Following this supplemental briefing, Judge Silverstein issued the Remand Opinion. It is comprehensive and well-reasoned.

In the Remand Opinion, Judge Silverstein "reject[ed] Voya's expansive reading of *Stern*, which not only applies *Stern* outside of the narrow context in which it was made, but far beyond the holding of any court, and which would, if accepted, dramatically change the division of labor between the bankruptcy and district courts." *Id.* at 255-56. Judge Silverstein began the Remand Opinion with a thorough examination of *Stern's* limited context[18] and narrow holding. The

[18] As the Bankruptcy Court explained:

> In *Stern*, Vickie Lynn Marshall filed a chapter 11 bankruptcy case in the Central District of California. Prior to filing her bankruptcy petition, Vickie, who was the third wife of the elderly and very wealthy J. Howard Marshall, filed suit in Texas state probate court ("Texas Litigation") against Pierce Marshall, J. Howard's son, for tortious interference with an *inter vivos* gift. In the Texas Litigation, Vickie asserted that Pierce had fraudulently induced J. Howard to exclude Vickie from J. Howard's living trust (and, later, his will) even though, Vickie asserted, J. Howard meant to give her one-half of his estate.
>
> Pierce initiated an adversary proceeding in Vickie's bankruptcy case seeking both damages for defamation and a declaration that the defamation claim was nondischargeable under 11 U.S.C. § 523(a). Pierce also filed a proof of claim for damages due to

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defamation. Vickie defended Pierce's defamation claim in the adversary proceeding and filed a counterclaim for tortious interference with the gift she believed J. Howard sought to give her. Vickie's counterclaim appeared to mirror, at least in part, the state law complaint she filed in the Texas Litigation.

The bankruptcy judge entered orders in the adversary proceeding all in Vickie's favor. As to Pierce's defamation claim, the judge granted summary judgment for Vickie, thus denying Pierce any recovery. After a bench trial on Vickie's counterclaim for tortious interference, the bankruptcy judge awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages. In the meantime, the judge in the Texas Litigation presided over a jury trial and entered judgment in favor of Pierce on his defamation claim.

In post-trial proceedings, Pierce re-asserted an argument that Vickie's counterclaim was not a core proceeding and thus the bankruptcy judge was limited to submitting proposed findings of fact and conclusions of law to the district court for review *de novo* on that claim. The bankruptcy court rejected Pierce's argument finding that counterclaims are core based on § 157(b)(2)(C). On appeal the district court disagreed holding that while Vickie's counterclaim fell within the literal language of § 157(b)(2)(C), the Supreme Court's decision in *Marathon* precluded the court from holding that "any and all" counterclaims are core. Eventually, the Ninth Circuit agreed with the district court's legal conclusion, holding that "a counterclaim under § 157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the Code only if the counterclaim is so closely related to a [creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." The Supreme Court granted certiorari.

Millennium, 575 B.R. at 264-265 (footnotes omitted).

Remand Opinion explains that it was in the context of *Stern*'s discussion of *Katchen*,[19] *Langenkamp*,[20] and *Granfinanciera*[21] – all lawsuits brought by trustees seeking affirmative recoveries (*id.* at 266) – that the Supreme Court announced a disjunctive test (the "Disjunctive Test") for whether a bankruptcy judge can enter a final order on a trustee's counterclaim:

> Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself ***or*** would necessarily be resolved in the claims allowance process.

Stern, 131 S. Ct. at 2618 (emphasis added). In *Stern*, Vickie's counterclaim for tortious interference with an alleged gift failed the Disjunctive Test, as it did not "stem" from the bankruptcy itself – it did not derive from bankruptcy law and it existed without regard to the bankruptcy proceeding – and it was not necessarily resolved in the claims allowance process, as there never existed a reason to believe that the process of ruling on Pierce's defamation claim would necessarily resolve Vickie's counterclaim. *See Millennium*, 575 B.R. at 266-67.

As Judge Silverstein explained, under the "Narrow Interpretation" of *Stern*, a bankruptcy court lacks constitutional authority to enter a final judgment on a

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[19] *Katchen v. Landy*, 382 U.S. 323 (1966).

[20] *Langenkamp v. Culp*, 498 U.S. 42 (1990).

[21] *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. *Id.* at 268. The Narrow Interpretation finds support in the Supreme Court's own characterization of the holding and its statement: " '[w]e do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute.' " *See id.* (quoting *Stern*, 131 S. Ct. at 2620). Under the "Broad Interpretation" of *Stern*, Judge Silverstein explained, "a bankruptcy judge cannot enter a final judgment on all state law claims, all common law causes of action or all causes of action under state law." *Id.* at 268-69. The Broad Interpretation finds support in the varying language used in *Stern* that did not consistently limit the discussion to a "Vickie-type" counterclaim. *Id.* Under either interpretation, it is clear that *Stern* was decided in the context of "a state law claim or counterclaim brought by the debtor-in-possession or trustee." *Id.* at 269. That is, as Judge Silverstein explained, "*Stern* is limited to claims based on state law that are commenced in the context of traditional civil litigation, or generically 'Debtor/Trustee v. Defendant.' " *Id.*

Judge Silverstein concluded that the Judges in this District who have expressed a view have consistently applied the "Narrow Interpretation." *Id.* at 269; *see also id.* at 269-70 (describing Judge Walrath's view as expressed in *In re Wash. Mut. Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011), *vacated in part*, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012), as "Broadest Interpretation").

Judge Silverstein noted that the parties had pointed the Court to only two *post-Stern* cases addressing the constitutionality of bankruptcy judges entering final orders confirming plans containing third-party releases: *Charles Street* and *MPM Silicones*.[22] Judge Silverstein found both of these cases supported her conclusion that, unlike the "action" in *Stern*, the "operative proceeding" before her was confirmation of the Plan. Plan confirmation is an enumerated core proceeding, meaning, she felt, the Bankruptcy Court clearly had statutory authority. As to constitutional authority, under either the Narrow Interpretation or the Broad Interpretation, *Stern*, in the view of Judge Silverstein, was inapplicable:

> Adopting the Narrow Interpretation, *Stern* is inapplicable as confirmation of a plan is not "a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." Adopting the Broad Interpretation, the same is true; *Stern* is inapplicable as confirmation of a plan is not a state law claim of any type. Under both of these interpretations, then, my constitutional analysis stops. My inquiry is limited to the statutory framework, and I can enter a final order confirming Millennium's Plan as a constitutional matter.

575 B.R. at 271.

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[22] *In re MPM Silicones, LLC*, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015), *aff'd in part, rev'd in part*, 874 F.3d 787 (2d Cir. 2017).

Even under the Broadest Interpretation, the Remand Opinion concluded, the outcome is the same. In *Washington Mutual*, Judge Walrath did not import *Stern*'s Disjunctive Test into plan confirmation proceedings: rather, Judge Walrath "tailored her constitutional argument to the proceeding in front of her." *Id.* at 270. "To the extent a *Stern* analysis requires a specific look at releases (and it is not clear that it does), those releases must comply with applicable provisions of the Bankruptcy Code":

> Courts that permit releases in appropriate circumstances often look to §§ 1129(a)(1), 1123(b)(6), and 105. Courts that do not permit releases often cite § 524(e). Regardless, courts are interpreting federal law. As the Seventh Circuit held, whether these releases are legally permissible is a matter the bankruptcy court has the power to determine. In the Third Circuit, nonconsensual third party releases are permissible in plans of reorganization if they meet the *Continental* standard of fairness and necessity to the reorganization.

Id. at 272 (internal footnotes omitted). Judge Silverstein further noted that consideration of the factors against which a third-party release is measured compel the bankruptcy judge to examine the terms of the plan or reorganization, the outcome of the solicitation of the plan, and the necessity of the release to the success of the plan. *Id.* "These factors do not ask the bankruptcy judge to examine or make rulings with respect to the many claims that may be released by virtue of the third party releases. An order confirming a plan

with releases, therefore, does not rule on the merits of the state law claims being released." *Id.*

The Remand Opinion further noted that, even if the Bankruptcy Court were to import *Stern*'s Disjunctive Test into its analysis, those factors would be satisfied:

> [I]f I were going to import the *Stern* Disjunctive Test into Millennium's plan confirmation proceeding, it would be closer to the Debtors' analysis. First, however, I would conclude that confirmation of the Plan, as the operative proceeding, satisfies the first standard articulated in the Disjunctive Test. For all of the reasons set forth above, I would find that the Plan (and/or the releases) "stem(s) from the bankruptcy case" and thus I can, consistent with the Constitution, enter a final order confirming Millennium's Plan. Second, I would also conclude that the confirmation of the Plan satisfies the second standard articulated in the Disjunctive Test. As I already found, the releases were integral to confirmation and thus integral to the restructuring of the debtor-creditor relationship. Thus, the releases would be "necessarily resolved in the confirmation process" or "necessarily resolved in the process of restructuring the debtor-creditor relationship."
>
> Finally, even under the Voya Interpretation, on the facts of this case I would determine that the RICO Lawsuit was "necessarily [] resolved in the claims allowance process." As previously discussed, the Plan settlements

> were comprehensive in nature. The settlements provided for the contribution of $325 million in exchange for the releases by the Debtors and third parties (including Voya), the settlement with the USA Settling Parties, as well as the allowance and treatment of claims under the Existing Credit Agreement. The settlement was global in nature: the claims under the Existing Credit Agreement were "Allowed," but only in the context of the Plan funded by the Non-Debtor Equity Holders, which required the third party releases. Voya held such a claim, and so its claim was "Allowed" by virtue of the Plan. As third party releases were essential to the allowance of those claims, the RICO Lawsuit was necessarily resolved in the claims allowance process.

Id. at 275 (footnotes omitted).

The Bankruptcy Court noted that a final order on a core issue that may have a preclusive effect on a third party lawsuit does not necessarily violate *Stern*. *See id.* at 275-76. The Bankruptcy Court further determined, after a thorough review of the record and supplemental briefing, that even if it lacked constitutional authority to enter a final order confirming the Plan, Voya had forfeited the right to contest the Bankruptcy Court's authority by not raising that argument. *See id.* at 288-95. Finally, the Bankruptcy Court determined that, even if Voya was entitled to a hearing on the merits of the RICO/fraud action in the context of confirmation, Voya waived that right as well. *See id.* at 296-98.

III. JURISDICTION

The Court has jurisdiction over all final judgments, orders, and decrees pursuant to 28 U.S.C. § 158(a)(1). An order confirming a plan of reorganization is a final order. The Remand Opinion clarifies the basis for the Bankruptcy Court's rulings in the Confirmation Order.

In conducting its review of the issues on appeal, this Court reviews the Bankruptcy Court's findings of fact for clear error and exercises plenary review over questions of law. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). The Court must "break down mixed questions of law and fact, applying the appropriate standard to each component." *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992).

IV. CONTENTIONS

Voya argues that the Bankruptcy Court erred in concluding that it had constitutional authority to enter the Confirmation Order approving non-consensual third-party releases over Voya's objection. (*See* D.I. 31) Voya contends that the Bankruptcy Court was required to apply *Stern*'s Article III Disjunctive Test to its RICO/fraud claims and, had it done so, it would have concluded that Voya's RICO/fraud claims do not satisfy that test. (*Id.* at 14-18)

Conversely, Debtors argue that the Remand Opinion properly concluded that *Stern*'s narrow holding had

no effect on the Bankruptcy Court's authority to approve such releases in the context of plan confirmation. (*See* D.I. 32 at 19-20) Unlike the bankruptcy court in *Stern*, which conducted a bench trial and ruled on the merits of a state law claim, the Bankruptcy Court here determined only that the bankruptcy-specific standards for approving nonconsensual releases in a plan were satisfied. (*See id.* at 2, 14-15) When claims are "integral" to core bankruptcy processes, Debtors argue, the Bankruptcy Court has constitutional authority to extinguish them. (*See id.* at 17) According to the Debtors, while that ruling may have impaired Voya's claims, the ruling does not adjudicate the merits of those claims. (*See id.*) Moreover, Debtors contend, Voya consented to the Bankruptcy Court's constitutional authority to enter a final order confirming the Plan, thus repeatedly waiving the constitutional arguments Voya raises here. (*See id.* at 18)

Notwithstanding any merits of the appeal, Debtors again move to dismiss the appeal as equitably moot. (D.I. 24 at 11-17) Debtors argue that the Plan has been substantially consummated since the Effective Date, effectuating a complete change of ownership and control of the successor Reorganized Debtors; substantially all transfers of property contemplated by the Plan have been completed; and other substantial distributions under the Plan have been made and are continuing. (*See id.* at 11-12) Debtors contend that Voya failed to exhaust its opportunities to seek a stay of the Confirmation Order, and cannot now ask the Court to unwind the global settlement and releases that serve

as the foundation of the Plan while retaining the full benefit of the $325 million settlement contribution. (*Id.* at 12-16) In the view of Debtors, the relief sought in the appeal threatens both to fatally scramble the Plan and significantly harm third parties who have justifiably relied on the Plan Confirmation Order. (*See id.* at 17-19)

Conversely, Voya argues that the Court should strike the releases and injunction from the Plan as applied to Voya so that its RICO/fraud action may proceed here. (D.I. 35 at 4) Voya contends that the relief sought in the appeal is limited and consists solely of modifying the Plan to strike the non-consensual releases of Voya's (and only Voya's) claims against other non-debtors (and the accompanying Plan injunction), which would neither fatally scramble the Plan nor harm any third parties who have justifiably relied on these Plan provisions. (*See id.* at 17-19) Voya urges that these releases can be struck without any ripple effect or injury to third-parties, with the exception of the Equity Holders. (*See id.*) To Voya, regardless of the outcome of the appeal, the Plan, as well as the myriad transactions executed under its auspices, will remain in place, and, according to Voya, the Debtors' business will continue as it has since the Plan was confirmed. (*See id.* at 1-2)

V. DISCUSSION

A. Debtors' Procedural Argument

As an initial matter, Debtors argue that because equitable mootness turns on whether this Court can equitably provide Voya ***any*** relief, that analysis should precede any ruling on the merits of Voya's arguments, including any arguments Voya may make under *Stern*. (*See* D.I. 24 at 10)[23] According to Debtors, *Stern*'s holding that bankruptcy courts lack constitutional authority to adjudicate certain claims on a final basis is not a threshold issue for this Court. (*See id.*) Voya disagrees, arguing that because its appeal "implicates the Bankruptcy Court's constitutional power to act, under well-established Supreme Court precedent, this Court is obligated to first decide whether the Bankruptcy Court had such power before considering whether the appeal should be dismissed under the judge-made equitable mootness doctrine." (D.I. 35 at 9)

This Court has already declined to consider dismissal of the appeal based on the judge-made equitable mootness doctrine prior to considering the constitutionality of the Bankruptcy Court's ruling below. *See Millennium*, 242 F. Supp. 322 at 337-38. Case law addressing jurisdiction, as opposed to constitutional authority, is consistent with this approach. As Voya persuasively argues:

> In the analogous context of Article III standing – a component of Article Ill's "case" or

[23] Following oral argument, supplemental briefing was filed on this issue. (*See* D.I. 48, 49)

"controversy" requirement and prerequisite to the constitutional exercise of the "judicial power of the United States" – the Supreme Court has twice held that an appellate court, before it decides any other issue presented by the appeal, must first verify that the plaintiff had Article III standing sufficient to confer on the lower court power to hear the case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-104 (1998); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986). The Supreme Court grounded this requirement in the "inflexible" rule, itself a product of separation of powers concerns and Article Ill's limitations on federal court power, that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[.]'" *Bender*, 475 U.S. at 541 (quotation omitted); *see also Steel Co.*, 523 U.S. at 94 (same) (quotation omitted). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95 (quotation omitted). In other words, this threshold jurisdictional inquiry is necessary because a federal court must initially determine in every case whether it, ***and any lower court whose decision it is reviewing***, "is authorized" to act pursuant to the Constitution and federal statutes. *See Bender*, 475 U.S. at 541; *see also Steel Co.*, 523 U.S. at 101 (same) (citation omitted). . . . That the constitutional defect may technically not

> be jurisdictional does not matter if it goes to the very power of the lower court to act consistent with Article III and separation of powers principles.

(D.I. 35 at 9-10)

Even if Voya's argument is incorrect, Debtors did not contest this approach prior to remand. (*See* Civ. No. 16-110-LPS D.I. 44, 10/7/16 Hr'g Tr. at 46:19-47:5) Thus, the Court perceives no reason to now change course on this procedural issue.

B. Debtors' Waiver Argument

Debtors argue that Voya waived and/or forfeited the argument that the Bankruptcy Court lacked constitutional authority to approve the releases in the confirmation proceedings below. (*See* D.I. 32 at 52-59) On remand, the Bankruptcy Court directed the parties to brief, *inter alia*, whether the Bankruptcy Court's lack of authority to approve any release of Voya's RICO/fraud claims was raised by Voya in plan confirmation briefing. The Remand Opinion contains an alternative holding that Voya both forfeited and waived any constitutional adjudicatory authority objection to the Bankruptcy Court's ability to enter a final order confirming the plan. *See Millennium*, 575 B.R. at 288-95.

Voya argues that it consistently maintained throughout the Chapter 11 proceedings that the merits of its RICO/fraud claims, which have been at all times pending in this Court, were not before the Bankruptcy

Court and could not be decided there. (*See* D.I. 31 at 9-10) Voya further contends that, under Third Circuit law, a *Stern* argument cannot be waived. (*See id.* at 9) (citing *In re Linear Electric Company, Inc.*, 852 F.3d 313, 320 n.32 (3d Cir. 2017)) Conversely, Debtors assert that Voya not only failed to raise its constitutional authority argument during the confirmation proceeding, but also affirmatively consented – on multiple occasions – to the Bankruptcy Court's authority to enter a final order on the proceeding, and went so far as to expressly disclaim the constitutional authority argument. (*See* D.I. 32 at 52-59)

Voya's *Stern* argument does appear in its confirmation briefing (*see* B.D.I. 122 at 17) and the Debtors responded to it (*see* B.D.I. 131 at 17-18). Subsequently, however, it appears that Voya indicated it was no longer pressing the argument. (*See e.g.*, A2580) (Voya stating it had "cited *Stern* ***solely*** for the proposition that the [Bankruptcy] Court's jurisdiction is subject to ***statutory*** boundaries, not to assert" constitutional authority argument regarding Releases) (emphasis added) On the other hand, Debtors never argued in the 2016 Appeal, prior to remand, that Voya had waived or forfeited the constitutional authority argument below. (*See* Civ. No. 16-110-LPS D.I. 7, 24, 33)

Because the Court is affirming the Bankruptcy Court's holding that it had constitutional authority to grant the releases contained in the Plan, the Court need not decide whether also to affirm on the Bankruptcy Court's alternate basis for its decision. Hence, other than stating that this Court is ***not*** affirming on

the basis of forfeiture or waiver, the Court is *not* resolving whether Voya did forfeit and/or waive its constitutional argument.

C. Constitutional Authority to Approve the Releases

Nonconsensual third party releases are not *per se* impermissible in this Circuit. In *Continental*, the Third Circuit reviewed case law on nonconsensual third party releases, including cases holding that such releases were *per se* impermissible, before stating: "[t]he hallmarks of permissible nonconsensual releases – fairness, necessity to the reorganization, and specific factual findings to support these conclusions – are all absent here," *Continental II*, 203 F.3d at 214. As Judge Silverstein noted in her Certification Opinion,[24] these *Continental II* hallmarks have been referenced in numerous appellate decisions since 2000. *See*, *e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000) (discussing *Continental II*, and noting "[w]e [the Third Circuit] did not treat § 524(e) as a per se rule barring any provision in a reorganization plan limiting the liability of third parties"); *In re United Artists Theatre Co. v. Walton (In re United Artists Theatre Co.)*, 315 F.3d

[24] The Bankruptcy Court certified for direct appeal to the Third Circuit the issue of "whether a bankruptcy court has the authority to grant nonconsensual third party releases over objection." *See In re Millennium Lab Holdings II, LLC, et al.*, 543 B.R. 703 (Bankr. D. Del. 2016) ("Certification Opinion"). On February 22, 2016, the Third Circuit denied Appellants' petition for permission to appeal pursuant to 28 U.S.C. § 158(d)(2). The 2016 Appeal was docketed in this Court days later, on February 26, 2016.

217, 227 (3d Cir. 2003) ("The 'hallmarks of permissible non-consensual releases' are 'fairness, necessity to the reorganization, and specific factual findings to support these conclusions.' Added to these requirements is that the releases 'were given in exchange for fair consideration.'") (internal citations omitted). In *Global Industrial*, the Third Circuit expressly adopted the *Continental* hallmarks in its holding. *See In re Global Industrial Technologies, Inc.*, 645 F.3d 201, 206 (3d Cir. 2011).

In the prior Memorandum Opinion, this Court stated it was persuaded by Voya's argument that the Plan's releases, which permanently extinguished Voya's RICO/ fraud claims, was tantamount to adjudication of those claims on their merits, *See Millennium*, 242 F. Supp. 3d at 339. The Court further stated that the view that *Stern*'s constitutional limitations on a bankruptcy judge's power should apply as much to plan confirmation as to any other bankruptcy-related proceeding was a view having much superficial appeal. *See id.* On remand, Judge Silverstein carefully articulated why the Court should not have been so persuaded.

1. *Stern*'s Article III Disjunctive Test

Voya argues that the Bankruptcy Court erred in concluding that it had constitutional authority to release and enjoin Voya's claims as part of the Plan, notwithstanding that plan confirmation is a constitutionally core proceeding. (D.I. 31 at 19) To Voya, the fact

that the Bankruptcy Court entered a final judgment disposing of Voya's claims in the context of an order confirming a reorganization does not insulate that judgment from analysis under *Stern*'s Article III test. According to Voya, *Stern* holds that Article III authorizes bankruptcy courts to adjudicate and enter final judgment on claims that (i) "stem[] from the bankruptcy itself" or (ii) "would necessarily be resolved in the claims allowance process" – a standard that the RICO/ fraud claims do not meet. *Stern*, 131 S. Ct. at 2618; *see also* 11 U.S.C. § 502 (setting forth statutory process for "allowance of claims or interests"). According to Voya, regardless of whether the Bankruptcy Court had constitutional authority to enter final judgment on the issue of plan confirmation, it had no authority under Article III to enter a final judgment on Voya's claims through approval of the releases: "Voya's claims are the 'action' the Bankruptcy Court needed constitutional authority to adjudicate, which it did not have." (D.I. 31 at 24) Thus, according to Voya, the relevant inquiry is not whether plan confirmation is core, but whether the other proceedings – that is, the RICO/fraud claims – affected by plan confirmation are core.

Conversely, Debtors argue that the only relevant proceeding before the Bankruptcy Court was plan confirmation, not each and every proceeding that may be affected by plan confirmation. (*See* D.I. 32 at 28) Debtors argue *Stern* did not address any other types of proceedings listed in § 157(b)(2) and did not address whether a bankruptcy court's ability to "hear and

determine" a constitutionally core proceeding is limited by the ***effects*** the court's order might have on related non-core proceedings. (*See id.* at 24) According to Debtors, all that *Stern* concluded was "that Congress, in one isolated respect, exceeded" Article III's limitations by giving bankruptcy courts "authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." (*Id.*) (citing *Stern*, 131 S. Ct. at 2620)

As the Bankruptcy Court points out, even if it were ever appropriate to import *Stern*'s Disjunctive Test into a context other than a state law cause of action filed by a debtor or trustee, Voya does not point to anything in *Stern*, or cases interpreting *Stern*, suggesting that the pertinent action is something other than the operative proceeding before the bankruptcy judge – which, here, is plan confirmation. The Court agrees with Judge Silverstein's conclusion that "*Stern* did not address, either expressly or by implication, any context other than counterclaims," nor did it "announce a broad holding addressing every facet of the bankruptcy process." *Millennium*, 575 B.R. at 274.

Judge Silverstein reasoned in the alternative that even if the Bankruptcy Court were required to import *Stern*'s Disjunctive Test into another context, here the "action" at issue – the plan confirmation proceeding – would satisfy the factors. *See id.* at 275. Even under Voya's interpretation, "on the facts of this case I would determine that the RICO Lawsuit was 'necessarily [ ] resolved in the claims allowance process' " and that "the Plan (and/or releases) 'stem[med] from the

bankruptcy itself.'" *Id.* Voya argues these conclusions were erroneous. (*See* D.I. 31 at 29-30) To Voya, "[t]he only connection between the Releases and the allowance of certain claims against the estate is that they are both contained in the same Plan – because that is what the Debtors and other parties wanted (over Voya's objection)." (*Id.* at 31) Voya also disputes the Bankruptcy Court's conclusion that "the releases were integral to confirmation and thus integral to the restructuring of the debtor-creditor relationship." (D.I. 31 at 32) Anyway, in Voya's view, while "satisfying that standard might be sufficient to provide 'related to' jurisdiction, it does not provide constitutional authority." (*Id.*) According to Voya, nothing in *Langenkamp, Katchen, Stern* or any other Supreme Court opinion suggests that actions are "integral to the restructuring of the debtor-creditor relationship" where the actions would not necessarily be resolved as part of the claims allowance process. (*Id.* at 33)

As further explained below, the Court concludes that the Bankruptcy Court was correct in holding that plan confirmation is the operative proceeding, and in holding that *Stern* did not require application of the Disjunctive Test in the context of plan confirmation. Therefore, it is not necessary for the Court to determine whether the Disjunctive Test would be satisfied in this case.

2. Preclusive Effect on Third Party Action

In the Remand Opinion, Judge Silverstein discusses *In re AOV Indus.*, 792 F.2d 1140, 1145 (D.C. Cir. 1986), in which the D.C. Circuit approved confirmation of a plan that included nonconsensual third party releases. In *AOV*, the party challenging the plan relied on *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion), to argue that because the claims released by the plan were only "related" to the bankruptcy, the bankruptcy court lacked constitutional authority to confirm a plan that released those claims. The *AOV* court rejected this argument, holding that confirmation proceedings are "at the core of bankruptcy law," and that while a confirmation order "may have an impact on claims outside the scope of the immediate proceedings, we do not read *Marathon* and its progeny to prohibit all bankruptcy court decisions that may have tangential effects." *AOV*, 792 F.2d at 1140.

Voya distinguishes *AOV* on the grounds that the release there would have only "tangential effects" on the released claims, while the Plan here "directly extinguishes a third-party claim through a final judgment." (D.I. 31 at 28 n.7) This contention is unavailing. As Debtors correctly note, *AOV* concerned releases of claims, which presumably ***released*** claims, and did not just tangentially affect them. The Bankruptcy Court cites numerous other cases which support its conclusion that determining whether a bankruptcy court has constitutional authority to issue a final order on a proceeding requires looking ***at the proceeding*** –

here, the confirmation plan proceeding – not on its incidental effects – which, here, would be its impact on Voya's RICO/fraud claims.[25]

The Court agrees with the conclusion reached by the Bankruptcy Court.

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[25] *See Millennium*, 575 B.R. at 282 (citing *In re Linear Elec. Co.*, 852 F.3d 313, 319-20 (3d Cir. 2017) (considering claims alleging violations of automatic stay and concluding "the Bankruptcy Court could constitutionally determine whether the liens violated the automatic stay," even if doing so extinguished state law rights); *In re Lazy Days' RV Center Inc.*, 724 F.3d 418, 423 (3d Cir. 2013) (rejecting Stern challenge to bankruptcy court order that effectively resolved pending state law contract claim between two non-debtors)). *See also Fisher Island Invs., Inc. v. Solby+Westbrae Partners (In re Fisher Island Invs., Inc.)*, 778 F.3d 1172, 1192 n.13 (11th Cir. 2015) (holding bankruptcy court had constitutional authority to resolve state-law claim because "[t]he bankruptcy court necessarily had to determine" issue for bankruptcy process to continue, and even if state-law issue was "not generally a core issue, the facts of this case make it core"); *Hart v. Heritage Bank (In re Hart)*, 564 F. App'x 773, 776-77 (6th Cir. 2014) (holding *Stern* did not preclude entry of final order by bankruptcy judge even though that order would appear to indirectly preclude certain state law claims); *Charles Street*, 499 B.R. at 99 (holding that while Chapter 11 plan might implicate numerous claims, including claims affected by plan's third-party releases, "the merits of" such claims "are not in controversy" and "[c]onfirmation of a plan is not an adjudication of the various disputes it touches upon"); *MPM Silicones*, 2014 WL 4436335, at *2 (concluding that court "continue[d] to have the power . . . on a Constitutional basis under *Stern v. Marshall*" to confirm plan with third party releases because "[t]he issues all involve fundamental aspects of the adjustment of the debtor/creditor relationship").

3. Adjudication on the Merits

The Bankruptcy Court found no support for Voya's argument that the Confirmation Order approving the Plan's release and injunction was an adjudication on the merits of Voya's claims. *See Millennium*, 575 B.R. at 283-85. Voya argues that entry of the Confirmation Order containing releases constitutes a final adjudication of its RICO/fraud action, and under *Stern*, those claims "are the 'action' the Bankruptcy Court needed constitutional authority to adjudicate." *Id.* For support, Voya cites *CoreStates*[26] and *Digital Impact*[27] – but, as the Remand Opinion points out, neither of these cases examines a bankruptcy judge's constitutional power to enter an order.[28] Voya has conceded that no case

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[26] *CoreStates Bank N.A. v. Huls Am., Inc.*, 176 F.3d 187 (3d Cir. 1999).

[27] *In re Digital Impact, Inc.*, 223 B.R. 1 (Bankr. N.D. Okla. 1998).

[28] The Court viewed these cases as supporting Voya's position prior to remand, but neither case is controlling. As the Bankruptcy Court points out, the creditor in *CoreStates*, 176 F.3d at 196-97, argued that its contract claim against another creditor should not be barred by a confirmation order because, under *Marathon*, the bankruptcy court lacked constitutional authority to finally adjudicate the claim. Because the claim was at least "related to" the bankruptcy, and thus "could have been brought as a non-core 'related' proceeding during the confirmation proceeding," the Third Circuit held that the confirmation order could have preclusive effect on that claim. *Id.* at 196-97. Voya cited *Digital Impact* for its statement that the release before it was "equivalent to issuing a final judgment" in favor of the released party, which the Court found persuasive in the Memorandum Opinion. *See Millennium*, 242 F. Supp. 3d at 339. However, as the Bankruptcy Court observed, *Digital Impact* was a "pure jurisdictional case" in which the "judge found that she did not have even 'related to'

explicitly states that a confirmation order containing a release is a final judgment on the released claims. (A5531)

Debtors argue that Voya's view of the confirmation proceeding ignores the "fundamental difference between approval of a settlement of claims" – or approval of a plan that releases claims – "and a ruling on the merits of the claims." (D.I. 32 at 36) (internal quotation marks omitted) Prior to remand, this Court was also persuaded by Appellant's argument that the Plan's release, which permanently extinguished the RICO/fraud claims, was tantamount to resolution of those claims on the merits against Voya. *See Millennium*, 242 F. Supp. 3d at 339. According to the Debtors, the Bankruptcy Court correctly concluded that when a bankruptcy or Article III court confirms a plan with releases, it applies bankruptcy-specific law and adjudicates only that core proceeding, not the underlying claim. *See Millennium*, 575 B.R. at 272 (citing 11 U.S.C. §§ 105(a), 1123(b)(6), 1129(a)(1)).

The Court agrees with Judge Silverstein's observation regarding the real nature of this dispute: "[t]aking the position that third party releases in a plan are equivalent to an impermissible adjudication of the litigation being released is, at best, a substantive

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jurisdiction over any potential/theoretical third party litigation against [the released party] because the outcome of that litigation would not have any effect on the administration of the estate." *Millennium*, 575 B.R. at 283. Voya conceded on remand that *Digital Impact* did not hold that a plan's release of a claim is constitutionally equivalent to adjudication of that claim. (*See* A5531)

argument against third party releases, not an argument that confirmation orders containing releases must be entered by a district court." *Millennium*, 575 B.R. at 283. As Debtors point out, Voya's real disagreement is with the Third Circuit's precedent in *Continental II* – which, like many circuits, concluded that third party releases may be approved when certain standards are met. Voya's constitutional arguments fail.

D. Equitable Mootness of Remaining Issues on Appeal

Prior to remand, Debtors had argued that the appeal must be dismissed as equitably moot. The Court declined to consider this contention prior to determining whether a constitutional defect in the Bankruptcy Court's decision deprived that court of the power to issue that decision. *See Millennium*, 242 F. Supp. 3d at 337-38. Satisfied that no constitutional defect exists, the Court will consider the Motion to Dismiss.

Equitable mootness is a judge-made abstention doctrine which finds applicability in the limited context of an appeal following the confirmation of a plan of reorganization by a bankruptcy court. *See In re SemCrude*, 728 F.3d 314, 317 (3d Cir. 2013). "Once effective, reorganizations typically implement complex transactions requiring significant financial investment." *Id.* Notwithstanding an aggrieved party's statutory right to appeal, and a federal court's "virtually unflagging obligation" to exercise the jurisdiction conferred

on it, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), in some circumstances, granting the relief requested in the appeal "would disrupt the effected plan or harm third parties," *SemCrude*, 728 F.3d at 317. Parties seeking to dismiss an appeal as equitably moot contend that "even if the implemented plan is imperfect, granting the relief requested [in the appeal] would cause more harm than good." *Id.* In light of the responsibility of federal courts to exercise their jurisdictional mandate, the Third Circuit has cautioned that an appellate court must "proceed most carefully before dismissing an appeal as equitably moot." *Id.* at 318. "Before there is a basis to forgo jurisdiction, granting relief on appeal must be almost certain to produce a perverse outcome – chaos in the bankruptcy court from a plan in tatters and/or significant injury to third parties. Only then is equitable mootness a valid consideration." *Id.* at 320 (internal citations and quotation marks omitted).

In *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (*en banc*) (hereinafter, "*Continental I*"), the Third Circuit established five prudential factors to be considered in determining whether to dismiss an appeal of a bankruptcy order as equitably moot: "(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments." More recently, to reduce

uncertainty in applying *Continental I*'s "interconnected and overlapping" factors, *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 168 (3d Cir. 2012), the Third Circuit collapsed these five factors into a two-step inquiry, *see In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015). The Court must assess: "(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *SemCrude*, 728 F.3d at 321.

Debtors, as the parties seeking dismissal of the appeal on equitable mootness grounds, bear the burden of proving that, weighing these factors, dismissal is warranted. *See id.* Because dismissal of an appeal over which the Court has jurisdiction "should be the rare exception and not the rule," any such dismissal must "also be based on an evidentiary record, and not speculation." *Id.*

1. Obtaining a Stay and Substantial Consummation

Substantial consummation is defined in the Bankruptcy Code to mean the:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the

> business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2). "Satisfaction of this statutory standard indicates that implementation of the plan has progressed to the point that turning back may be imprudent." *SemCrude*, 728 F.3d at 321.

"Whether a plan has been substantially consummated often depends . . . on whether a stay has been issued." *Id.* at 322. Here, Voya sought from the Bankruptcy Court a stay pending appeal of the Confirmation Order; however, relief was denied, and Voya did not exhaust its remedies by seeking a stay in an appellate court. The Third Circuit has held that, "[b]ecause of the nature of bankruptcy confirmations, . . . it is obligatory upon appellant . . . to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from." *Nordhoff Invs., Inc. v. Zenith Electronics Corp.*, 258 F.3d 180, 186-87 (3d Cir. 2001) (internal quotations marks and citations omitted). Debtors argue that Voya's failure to fully exhaust its opportunities for a stay pending appeal by applying for stay relief in this Court, while retaining all of the benefits of the Plan, was a strategic choice, and weighs in favor of equitable mootness and dismissal. (*See* D.I. 24 at 20) (citing *Mac Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002) ("Although [appellant] initially

applied to the bankruptcy court for a stay, its request was denied, and it chose neither to appeal to the district court nor to seek an independent stay in the district court or in this court. By making that strategic choice, [appellant] allowed the reorganization plan to go into effect, taking the risks that attended such a decision.") Voya responds that its decision not to appeal the Bankruptcy Court's denial of the stay motion is irrelevant, as "the relief it seeks does not threaten the plan of reorganization's existence." (D.I. 25 at 20 n.13) (citing cases) Voya adds that the Equity Holders waived the non-appealability requirement, allowing Debtors to consummate the Plan, despite knowing of the risk that this Court or the Court of Appeals could strike the releases after the Equity Holders had made their $325 million contribution. (*See* D.I. 35 at 6, 13) In such circumstances, Voya insists, equity favors Voya and not dismissal of its appeal. (*See id.* at 6-7 n. 7 & 13)

While a plan's substantial consummation often depends on whether a stay has been issued, "neither the Bankruptcy Code nor any other statute predicates the ability to appeal a bankruptcy court's ruling on obtaining a stay." *SemCrude*, 728 F.3d at 322. "Though Appellants would have been wise to seek a stay to stop the prospect of equitable mootness in its tracks, their statutory right to appeal, as noted, is not premised on their doing so." *Id.* at 323. Here, then, Voya's failure to obtain a stay does not weigh in favor of either party.

Nevertheless, it is agreed by both sides that the Plan is substantially consummated. (*See* D.I. 52, 7/12/18 Hr'g Tr. at 12:6-11; 24:7-9) The record supports this finding.[29] Thus, Debtors have met their burden to show satisfaction of the elements of § 1101(2) of the Bankruptcy Code and have further carried their burden of establishing that the Plan has been substantially consummated.

2. Success of the Plan and Harm to Third Parties

"If [the substantial consummation] threshold is satisfied, a court should continue to the next step in the analysis. It should look to whether granting relief will require undoing the plan as opposed to modifying it in a manner that does not cause its collapse." *SemCrude*, 728 F.3d at 321. "It should also consider the extent that a successful appeal, by altering the plan or otherwise, will harm third parties who have acted reasonably in reliance on the finality of plan

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[29] Debtors have submitted evidence that since the Effective Date: the Equity Holders have honored their obligation to pay $325 million; equity ownership and control of the Debtors has been completely restructured and changed; the Reorganized Debtors assumed management of the Debtors' property and business operations; a series of significant and complex financing and operational transactions have been effectuated pursuant to the Plan; hundreds of millions of dollars of settlement payments have been made in connection with government settlements pursuant to the Plan; settlement agreements have been executed and effectuated; and governmental investigations and litigations have ceased or been dismissed with prejudice. (*See* Civ. No. 16-110-LPS, D.I. 8 (Hardaway Decl.) at ¶¶ 8-9; Keane Decl. ¶¶ 5-12)

confirmation." *Id.* (citing *Continental II*, 203 F.3d at 210; *Continental I*, 91 F.3d at 562). For the reasons stated below, the Court concludes that (i) Voya seeks to strike the Plan's releases, which would severely undermine the Plan and necessarily harm third parties; (ii) the Court cannot equitably strike the releases solely as to Voya's RICO/fraud claims while allowing Voya to keep its share of the Equity Holders' contribution; and (iii) because it is unclear what other practicable relief would permit Voya to pursue its claims against the Equity Holders, the appeal meets the criteria for equitable mootness.

a. Modification of the Plan to Strike the Releases

The parties agree that the relevant question is not whether the Court has the legal power to excise the Plan's releases but whether it may equitably do so. (*See* 7/12/18 Hr'g Tr. at 7:4; 13:1-12; 15:3-15:8; 19:13-20:11; 33:24-34:6) Debtors argue that the Bankruptcy Court's findings, based on uncontroverted evidence, were clear that confirmation of the Plan, and the reorganization and preservation of the Debtors' business as a going concern, was not possible without the global settlement and $325 million settlement contribution paid by the Equity Holders in exchange for the releases granted to them under the Plan. To Debtors, then, it would be inequitable to allow Voya to keep its share of the Equity Holders' contribution yet allow claims against the Equity Holders to go forward; thus, the Court cannot equitably strike the Equity Holders'

releases without ordering the return of their $325 million contribution, which forms the economic basis for the reorganization. Debtors further assert that granting such relief would cause difficult (perhaps impossible), time-consuming, and unmanageable problems regarding the retroactive revocation of the settlements, including with governmental regulators, that allowed the Debtors to survive as a going concern.

Debtors liken the situation here to that confronted by the Third Circuit in *Tribune*, which dismissed an appeal as equitably moot.[30] In *Tribune*, 799 F.3d at 276, the appellants sought "modification of the confirmation order to reinstate the LBO-Related Causes of Action that the [plan] Settlement resolved so that the claims [could] be fully litigated or re-settled." The *Tribune* Court dismissed, as equitably moot, the appeal seeking to sever the plan settlement releases because "allowing the relief the appeal seeks would effectively undermine the Settlement (along with the transactions entered in reliance on it) and, as a result, recall the entire Plan for a redo." *Id.* at 281. Debtors argue the relief sought by Voya here would likewise undermine the global settlement, which the Bankruptcy Court found to be the "centerpiece of the plan" because without the global

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[30] The *Tribune* decision also addresses a second, separate appeal of the confirmation order by a trustee that was found not to be equitably moot, where the relief requested by the trustee involved only a minor intercreditor dispute (e.g., solely regarding the allocation of distributions between two classes of creditors), the relief sought was not central to the plan, and there was "no chance that [an allocational] modification would unravel the Plan." *Tribune*, 799 F.3d at 282-83.

settlement, there would have been no operating business (or going concern value) to administer in a reorganization. (D.I. 24 at 10)

Voya asserts that if the releases were really the Plan's centerpiece, there would be a "provision allowing for a complete unwind" of the Plan in the event the releases were stricken on appeal. (*See* D.I. 35 at 14). But the Plan contains no such provision.

Voya has not identified any case holding that a provision should be viewed as integral to a plan only where the parties specify that, if the provision does not survive appellate scrutiny, the plan must be dissolved. Here, as the Debtors point out, such a provision likely would have been impossible, as the DOJ had leveled a "credible threat to destroy the Company" if the government was not paid $256 million by December 31, 2015, and it seems inconceivable that the parties to the Plan could ever force DOJ later to return settlement payments. (*See* D.I. 38 at 5-6)

Debtors argue that a successful appeal, which would result in striking the releases and unwinding the Plan, will harm third parties that have justifiably relied on the Plan, including (i) parties to the global settlement who consummated that settlement; (ii) the Debtors' unsecured creditors, who were granted recoveries otherwise unavailable absent the global settlement and Plan; (iii) the Debtors' vendors, customers, and approximately 1,200 employees, who benefit from the Reorganized Debtors operating as a going concern; and (iv) market participants and investors trading in

and relying upon the securities and debt issued pursuant to the Plan. (D.I. 24 at 18) Voya counters that no legitimate third party reliance interests will be harmed if the releases are stricken, and the only parties who stand to lose anything from a successful appeal are the non-debtor tortfeasors who defrauded Voya. (D.I. 35 at 17)

The Court agrees with Debtors that the releases cannot equitably be excised as they were the very centerpiece of the Plan. The Bankruptcy Court made a specific finding that the releases were the inducement for the Equity Holders' $325 million contribution, and without this contribution, there could not have been the reorganization from which Voya benefitted. "Without the releases, there will be no cash contribution to pay the government settlements, and the lenders, including [Voya], would not receive the equity of the company, valued at in excess of $900 million." (12/11/15 Hr'g Tr. at 22) The releases shared an "integral nexus" with feasibility of the Plan: ***but for*** the Equity Holders' $325 million contribution, there would have been no plan of reorganization, and ***but for*** the third-party releases, the Equity Holders would not have made the $325 contribution. *Continental I*, 91 F.3d at 564. Excising the releases in this particular Plan would "knock the props out from under the authorization of every transaction that has taken place" pursuant to the Plan. *Tribune*, 799 F.3d at 281.

If unwound, third parties who reasonably relied on Plan confirmation would be injured. Voya has conceded that third parties have engaged in "myriad

transactions" pursuant to the Plan. (*See* D.I. 35 at 1; *see also* D.I. 25 (Keane Decl.) at ¶¶ 5-12) The revocation of the global settlement would certainly "require a sufficient redistribution of assets to destabilize the financial basis of the settlement." *SemCrude*, 728 F.3d at 324. The Court agrees with Debtors that third parties, most of whom are not participating in this appeal, have relied upon the global settlement and Plan confirmation and will be harmed if the Confirmation Order is reversed or vacated.

b. Modifying the Plan to Strike the Releases Solely as to Voya's RICO/ Fraud Claims

Voya argues that *Tribune* is distinguishable because appellants in that case sought to revoke a settlement under the applicable plan "in its entirety," whereas Voya seeks only to strike a component of the Plan. (*See* D.I. 35 at 16) According to Voya, "the relief sought consists solely of excising from the Plan the unlawful non-consensual releases of and injunction against Voya's (and only Voya's) RICO and state law fraud claims against other non-debtor third parties," relief which can be granted without undermining the global settlement or returning the Equity Holders' contribution. (*See id.* at 1) Voya argues that the Third Circuit has held, on several occasions, that appeals are not equitably moot where, as here, "a party merely seeks revival of discrete released claims that would not otherwise upset a confirmed plan." (*Id.* at 14)

Voya points out that the Equity Holders received a release of $1.8 billion dollars in claims in exchange for their $325 million contribution, and the RICO/fraud action asserts only $316 million in claims. Thus, were the Court to strike the release of Voya's RICO/fraud claims, the Equity Holders would still have received substantial value for their contribution under the Plan. Voya further argues that nothing in the Plan gives the Equity Holders the right to demand the return of their $325 million monetary contribution following Plan consummation if the non-consensual releases and injunction are struck on appeal. (*See id.* at 5, 12-13) Indeed, Voya argues, the Plan even contemplates what should occur if the releases are stricken, as it provides $3 million of insurance to help the Equity Holders cover the costs of defending litigation brought by parties like Voya. (*See id.* at 13-14 citing A1722)

The Court is not persuaded that it could, as a practical matter, limit its relief solely to striking the releases relating to Voya's RICO/fraud claims. The Bankruptcy Court found those releases were central to the Plan and, far from being clearly erroneous, is strongly supported by uncontroverted evidence in the record. For instance, the Bankruptcy Court found the releases to be the "centerpiece of the plan," stating that the "unrefuted evidence is that the third-party releases . . . [were] required to obtain the funding for this plan," the releases were necessary to consummate the Plan, and that without the Equity Holders' $325 million payment, "there is no reorganization." (12/11/15

Hr'g Tr. at 11-12, 21-25) These findings were based on the testimony of five witnesses, none of whom did Voya choose to cross-examine.

It follows from the centrality of the releases to the Plan that taking the releases out of the Plan would necessarily lead to the unraveling of the Plan. Among other things, the Court would have to permit the Equity Holders to seek to reclaim their contributions made pursuant to the Plan. Voya seeks to keep its share of the settlement consideration received under the consummated Plan while also pursuing the very claims against the Equity Holders that they paid to settle. Particularly given the central importance of the releases to the Plan – and to Debtors' ongoing viability and, thus, to creditors' (including Voya's) recoveries – this would not be an equitable outcome.

Notwithstanding the Bankruptcy Court's unrefuted findings, Voya argues striking the releases is justified because the releases were unlawful, and the Equity Holders, despite paying $325 million for the releases, were never entitled to them in the first place. The Court is not persuaded by Voya's equitable arguments. (*See* D.I. 35 at 18) (citing *Tribune*, 799 F.3d at 278) Voya objected to the Plan's releases, and the Bankruptcy Court overruled the objection, in accordance with the Bankruptcy Court's application of controlling Third Circuit precedent and based upon specific findings of fact supporting the fairness of the releases and their necessity to the Debtors' reorganization.

The Court's decision is not inconsistent with cases in this circuit holding that plan releases in other contexts may be disturbed on appeal without implicating equitable mootness concerns. Unlike those cases, the uncontroverted evidentiary record here clearly establishes the central, critical nature of the challenged relief and the urgencies that required the parties to finalize negotiations and proceed to confirmation before a looming life-or-death deadline for the Debtors.

c. Other Practicable Relief

The Court is persuaded that, upon consideration of the Third Circuit's two-part inquiry, and the uncontroverted evidence, the Debtors have carried their burden of demonstrating that each factor is supported by the evidentiary record and that dismissal of this appeal is required to avoid the collapse of the Plan and harm to third parties. However, the Court is also mindful of the Third Circuit's guidance in *Tribune*: "[W]hen a court applies the doctrine of equitable mootness, it does so with a scalpel rather than an axe. To that end, a court may fashion whatever relief is practicable instead of declining review simply because full relief is not available." *Tribune*, 799 F.3d at 278 (internal quotation marks and citation omitted). The Court has carefully considered the specific relief sought on appeal and whether some form of partial or other relief may be fashioned with respect thereto. Voya ultimately seeks to pursue its RICO/fraud claims against the Equity Holders. This could only occur if the Court eliminates the Plan's releases (and injunction). Voya has not

articulated how any other form of partial or other relief is available for the Court to consider.[31]

E. Remaining Issues on Appeal

As explained above, the Court is affirming the Remand Opinion with respect to the Bankruptcy Court's constitutional authority and is dismissing all other issues on appeal as equitably moot. In the alternative, were the Court to have reached contrary conclusions on constitutional authority and/or equitable mootness, the Court would also affirm the Confirmation Order by rejecting on the merits the other issues raised on appeal by Voya.[32] Although Voya did not proceed in the manner it should have to be certain to preserve all of the issues it had initially raised in the 2016 Appeal,[33]

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[31] Because the Court finds that the appeal must be dismissed as equitably moot, the Court does not reach Debtors' additional argument that the Appeal is constitutionally moot. (*See* D.I. 24 at 17 n.20)

[32] The Court provides this alternative analysis because of the high burden that exists for equitable mootness, the parties have devoted a great deal attention to these additional issues, and the appeal has been pending for quite a while.

[33] Debtors are generally correct that "a party cannot preserve an appellate argument by merely 'trying to incorporate arguments' it made 'somewhere else.' " (D.I. 32 at 3) (citing *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 816 (3d Cir. 2016)) Among other things, Voya's practice is inconsistent with the page limits imposed on briefs. A strong argument can be made that issues Voya briefed only in the 2016 Appeal – and to which it did not devote any portion of its briefing in the current appeal – have been waived. Nonetheless, because the Court does have full briefing on these issues (from the pre-remand briefing), the Memorandum Opinion did not indicate the status of those issues, and there

the Court will treat Voya's appellate issues as neither waived, nor forfeited, and will address them now.

1. Subject Matter Jurisdiction

Voya argued that the Bankruptcy Court erred in determining that it had subject matter jurisdiction over Voya's RICO/fraud claims. Under the Third Circuit's decision in *Pacor*, the Bankruptcy Court has "related to" jurisdiction over third-party claims if the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. *See Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). The Bankruptcy Court based its decision on the fact that defendants in the RICO/fraud action are indemnified under the Debtors' operational agreements.

Voya argues that the indemnification obligations do not automatically state a right to indemnification because its RICO/fraud claims are outside the scope of the indemnification obligations, as they arise in fraud and intentional conduct. Indemnification of such intentional conduct, according to Voya, would be prohibited by applicable law. Debtors respond that Voya is ignoring the Debtors' contractual obligations to advance defense costs to the indemnified released parties before any final determination on the merits and without regard to the substance of the underlying putative claims against them. *See*, *e.g.*, *In re Lower Bucks Hosp.*, 488

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appears to have been confusion among the parties as to how the appeal would proceed post-remand, the Court will treat the issues as not having been waived.

B.R. 303, 315-16 (E.D. Pa. 2013) (finding "related to" subject matter jurisdiction where debtor was required to assume defense costs prior to any finding of liability).

The Court agrees with Debtors. As the Bankruptcy Court stated, "to find that the indemnification obligations do not have any conceivable effect on the debtors, I need to assume that Voya will be successful in its lawsuit or any lawsuit it might bring. And I also need to assume that it wouldn't subsequently amend its claims to include non-fraud-related causes of action. The[] cases cited by Voya . . . do not address these issues." (12/11/15 Hr'g Tr. at 14:20-15:1)

2. Statutory Authority to Approve the Releases under *Continental II* and the *Master Mortgage* Factors

Voya's remaining arguments concern the Bankruptcy Court's statutory authority to approve the Plan releases under the Bankruptcy Code. Courts that permit releases in appropriate circumstances often look to §§ 1129(a)(1),[34] 1123(b)(6),[35] and 105.[36] *See Global Indus.*, 645 F.3d at 206 (citing *Continental II* and

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[34] 11 U.S.C. § 1129(a)(1) (providing court shall confirm plan only if "plan complies with the applicable provisions of this title").

[35] 11 U.S.C. § 1123(b)(6) (plans may "include any other appropriate provision not inconsistent with the applicable provisions of this title").

[36] 11 U.S.C. § 105(a) ("The court may issue any order process, or judgment that is necessary to carry out the provisions of this title.").

noting that, under Third Circuit precedent, to show appropriateness of injunction of claims under § 105(a) requires showing with specificity that injunction is necessary to reorganization and is fair). In its analysis, the Bankruptcy Court made specific findings as to the *Master Mortgage* factors but ultimately returned to the *Continental II* hallmarks of "fairness, necessity to the reorganization." (12/11/15 Hr'g Tr. 16:12-26:14) On appeal, Voya argues that the Bankruptcy Court's findings do not satisfy the *Master Mortgage* factors, which are:

> (1) an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (2) substantial contribution by the non-debtor of assets to the reorganization; (3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success; (4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and (5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

168 B.R. at 935. However, the *Master Mortgage* factors, while helpful guideposts, are not controlling; also, they are not "an exclusive list of considerations, nor are they a list of conjunctive requirements," *Id.*; *see also In re 710 Long Ridge Road Operating Co., II, LLC*, 2014 WL 886433, at *14 (Bankr. D.N.J. Mar. 5, 2014) (holding

Master Mortgage guideposts are "not considered requirements for the approval of third-party releases, but . . . may be instructive to the court"); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) (deciding whether to grant third party release "is not a matter of factors and prongs"). As noted above, the Third Circuit's decision in *Continental II*, 203 F.3d at 214, sets forth the controlling standard for approval of non-consensual releases.

Nonetheless, Voya argues "the facts of this case" do not satisfy three of the five guideposts set forth *Master Mortgage*: (i) identity of interest; (ii) substantial contribution by the released party; and (iii) payment of "all, or substantially all" of the affected classes' claims. (*See* Civ. No. 16-110 D.I. 13 at 40-51) Debtors contend that even if the *Master Mortgage* guideposts were requirements in the Third Circuit (they are not), and even if all of the guideposts needed to be satisfied (they do not), the Bankruptcy Court's extensive findings upon the substantial and uncontroverted record below nevertheless satisfy each of the *Master Mortgage* guideposts, including the three argued by Voya on appeal. (Civ. No. 16-110-LPS, D.I. 24 at 45-54). The Court agrees with Debtors.

a. Identity of Interest

Voya argues that the Bankruptcy Court erred in finding an "identity of interest" between the defendants in the RICO/fraud action and the Debtors under the *Master Mortgage* factors. (*See* Civ. No. 16-110 D.I.

13 at 46-47) In the Court's view, the Bankruptcy Court correctly found that each of the Equity Holders, like the other released parties under the Plan, were covered by the Debtors' indemnification, advancement, and defense obligations. (*See* 12/11/15 Hr'g Tr. at 18) Thus, claims brought against the released parties may be viewed as suits against the Debtors, or at minimum as suits that threaten to deplete the Debtors' assets, which is sufficient here to establish identity of interest. *See In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070, 1079-80 (11th Cir. 2015) (finding identity of interest between debtor and released parties, who were debtor's key employees, where debtor would deplete its assets defending released parties against litigation); *see also In re MAC Panel Co.*, 2000 WL 33673757, at *11 (Bankr. M.D.N.C. Feb. 24, 2000) (finding identity of interest exists where releasees have potential indemnification claims against debtor).

Voya counters that the causes of action it asserts for fraud and willful misconduct are not indemnifiable. However, the Bankruptcy Court found that the Debtors are obligated to advance defense costs without regard to the type or substance of Voya's claims. *See* 12/11/15 Hr'g Tr. at 14-15; *see also Nat'l Heritage Found. Inc. v. Behrmann*, 2013 WL 1390822, at *5 n.9 (E.D. Va. Apr. 3, 2013) (recognizing identity of interest may arise out of advancement obligations). Moreover, Voya's position incorrectly presumes it will prevail on each of its speculative claims. (*See* 12/11/15 Hr'g Tr. at 14-15)

b. Substantial Contribution

Voya argues the Bankruptcy Court erred in finding that the Equity Holders are making a "substantial contribution" to the reorganization under the *Master Mortgage* factors. (*See* Civ. No. 16-110-LPS D.I. 13 at 47-51) The Bankruptcy Court considered the uncontroverted record and found that the Released Parties, including the defendants to the RICO/fraud complaint, contributed substantial assets to the reorganization. (*See* 12/11/15 Hr'g Tr. at 19) (detailing contributions of defendants, including TA, MLH, Slattery, Appel, and related parties) On appeal, Voya questions the "quantum" of contributions by Slattery and Appel; characterizes the Equity Holders' contributions as payments but "not truly a contribution" or payment of "actual assets;" and insists the Equity Holders' agreement to forego valuable legal rights (e.g., to object to the plan or settlement) was merely a "forfeiture of their equity holding." (Civ. No. 16-110-LPS D.I. 13 at 47-50) However, as Debtors correctly argue, Voya waived its argument regarding the "quantum" of contributions by Slattery and Appel by failing to raise it below and failing to provide any evidentiary basis in support. The Bankruptcy Court's finding of substantial contribution by the Equity Holders was based on the uncontroverted record and testimony of five witnesses. Voya did not cross-examine those witnesses or submit competing evidence on this point. (12/11/15 Hr'g Tr. at 21) (noting record on substantial contributions was "unrebutted" and "unrefuted") Even had Voya properly raised this argument

in the Bankruptcy Court, the record provides no basis to disturb the Bankruptcy Court's ruling.

c. Payment for All or Substantially All of the Claims in the Affected Class

Voya challenges the Bankruptcy Court's findings regarding whether there is payment of "all, or substantially all," class 2 claims. (*See* Civ. No. 16-110-LPS D.I. 13 at 40) Voya asserts error in the Bankruptcy Court's holding that the pertinent inquiry is "whether [Voya] received reasonable [or fair] compensation in exchange for the release." (A2401) Debtors contend that the Plan provides for "all or substantially all" affected claims to be paid as it "provides for payments to all classes of claims in excess of the liquidation value of those claims." (*See* Civ. No. 16-110-LPS D.I. 24 at 51-52) (citing cases and explaining "factor five is met because the nonconsenting parties [received] more than they would in a liquidation"); *see also In re Condustrial, Inc.*, 2011 WL 3290389, at *5-6 (Bankr. D.S.C. Aug. 1, 2011) (explaining impacted class would receive payment of "all or substantially all" as "the [p]lan provide[d] for the releasing parties to receive payment in an amount in excess of any funds they would receive from an orderly liquidation of the [d]ebtor").

Here, the Bankruptcy Court found, among other things, that payments and distributions to be made to class 2 creditors under the Plan dwarfed any recoveries for class 2 claims in a wipeout liquidation. (*See*

12/11/15 Hr'g Tr. at 25-26) Specifically, the Court found:

> [T]he contributions [of the released parties] . . . facilitate[d] distributions to creditors, including those in Class 2, . . . [and] those distributions are enormously greater in a reorganization, versus a liquidation.
>
> [T]he contributions made by [the Equity Defendants] are absolutely essential to the reorganization of this debtor. ***Without the contributions, there is no reorganization.*** While Voya would have me speculate as to other options, I do not see one. CMS will revoke the debtors' license, and there will be no ongoing business if payment is not made to the [government] by December 30th.
>
> [T]here is an ***enormous disparity between the reorganization value and the liquidation value of this company***. . . . Without this settlement, this case turns into litigation. Inherent in that litigation is the uncertainty of success, expenses and delay in obtaining recoveries. ***Over 90 percent of the creditors prefer recoveries from an ongoing business.*** [And] [a]ll parties were at the table in the negotiation in this settlement contained in a plan.

These findings were not clearly erroneous. The *Master Mortgage* factor is satisfied.

In sum, then, Voya's arguments provide no basis to disturb the Bankruptcy Court's conclusion that the

Plan releases were necessary to the reorganization and fair.

VI. CONCLUSION

For the reasons explained above, the Court affirms the Remand Opinion with respect to the Bankruptcy Court's constitutional authority to approve the Plan's releases, and grants the Motion to Dismiss all remaining issues on appeal as equitably moot. Alternatively, the Court affirms the Confirmation Order with respect to all remaining issues raised on appeal. A separate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: MILLENNIUM LAB HOLDINGS II, LLC, *et al.*, Debtors.	:	Chapter 11 Bankr. Case No. 15-12284-LSS (Jointly Administered)
OPT-OUT LENDERS, Appellants, v. MILLENNIUM LAB HOLDINGS II, LLC, *et al.*, TA MILLENIUM, INC., and JAMES SLATTERY, Appellees.	:	Civ. No. 17-1461-LPS

ORDER

(Filed Sep. 21, 2018)

At Wilmington, this 21st day of September, 2018, for the reasons set forth in the accompanying Memorandum issued this date, IT IS HEREBY ORDERED that:

1. The Remand Opinion is AFFIRMED with respect to the Bankruptcy Court's constitutional authority to approve the Plan releases.

2. With respect to all other issues raised on appeal by Voya in connection with the Confirmation

Order and Remand Opinion, the appeal is DISMISSED as equitably moot,

3. Alternatively, the Confirmation Order is AFFIRMED.

4. The Clerk is directed to CLOSE Civ. No, 17-1461-LPS.

/s/ Leonard P. Stark
HON. LEONARD P. STARK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In Re:	Chapter 11
Millennium Lab Holdings II, LLC, et. al.,	Case No. 15-12284 (LSS)
Debtors.	(Jointly Administered).

OPINION

(Filed Oct. 3, 2017)

On December 14, 2015, I entered an order confirming a plan of reorganization for then-debtors Millennium Lab Holdings II, LLC and certain of its affiliates ("Millennium" or "Debtors").[1] The plan provided for third party releases in favor of various non-debtor entities, including, as relevant here, certain of the Debtors' equity holders who contributed $325 million to the estate as part of a settlement contained in the plan. At the confirmation hearing, I overruled the objection filed by Voya,[2] which did not assent to the third party

[1] The Debtors are Millennium Lab Holdings II, LLC, Millennium Health, LLC and RxAnte, LLC.

[2] Voya, also known as the Opt-Out Lenders, means ISL Loan Trust; ISL Loan Trust II; NN (L) Flex – Senior Loans; NN (L) Flex – Senior Loans Select; Voya CLO 2012-1, Ltd.; Voya CLO 2012-2, Ltd.; Voya CLO 2012-3, Ltd.; Voya CLO 2012-4, Ltd.; Voya CLO 2013-1, Ltd.; Voya CLO 2013-2, Ltd.; Voya CLO 2013-3, Ltd.; Voya CLO 2014-1, Ltd.; Voya CLO 2014-2, Ltd.; Voya CLO 2014-3, Ltd.; Voya CLO 2014-4, Ltd.; Voya CLO 2015-1, Ltd.; Voya High Income Floating Rate Fund; Voya Prime Rate Trust; Voya Senior Income Fund; Voya Floating Rate Fund; Axis Specialty Limited; California Public Employees' Retirement System; The

releases and found that the Debtors had met their burden of proof to show that the releases were warranted under *Continental.*[3] Voya appealed. Now, on remand from the district court, I have been asked to "consider whether, or clarify [my] ruling that, [I, as a] Bankruptcy Court had constitutional adjudicatory authority to approve the nonconsensual release of Appellants' direct non-bankruptcy common law fraud and RICO claims against the Non-Debtor Equity Holders."[4] I conclude that I did.[5] In so concluding, I reject Voya's expansive reading of *Stern*,[6] which not only applies *Stern* outside of the narrow context in which it was made, but far beyond the holding of any court, and which would, if accepted, dramatically change the division of labor between the bankruptcy and district courts.

City of New York Group Trust; Medtronic Holdings Switzerland GMbH; New Mexico State Investment Council; Voya Investment Trust Co. Plan for Employee Benefit Investment Funds-Voya Senior Loan Trust Fund; and Voya Investment Trust Co. Plan for Common Trust Funds-Voya Senior Loan Common Trust Fund.

[3] *Gillman v. Continental Airlines* (*In re Continental Airlines*), 203 F.3d 203 (3d Cir. 2000).

[4] *See Opt-Out Lenders v. Millennium Lab Holdings II, LLC* (*In re Millennium Lab Holdings II, LLC*), No. 16-110-LPS, 2017 WL 1032992, at *14 (D. Del. Mar. 20, 2017) ("Remand Decision"). The "Non-Debtor Equity Holders" are TA Associates Management, L.P., T.A. Millennium, Inc., Millennium Lab Holdings, Inc., James Slattery and Howard J. Appel.

[5] To answer the district court's inquiry directly, I did not previously rule on my constitutional adjudicatory authority to enter a confirmation order approving nonconsensual releases.

[6] *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

Because I find that I had constitutional adjudicatory authority to approve, in a final order, the nonconsensual third party releases, I need not strike the nonconsensual release of Voya's claims from the confirmation order, nor make and submit to the district court additional proposed findings of fact and conclusions of law regarding the final disposition of Voya's RICO claims. Even if I am wrong, however, I still would not do so. Not only did Voya forfeit and/or waive any argument that I did not have constitutional adjudicatory authority to enter the confirmation order by not raising it at the confirmation hearing or at any time prior to entry of the order confirming the plan, Voya also independently waived its right to any trial on the merits of its RICO claims in the context of confirmation. Thus, to the extent that it is ever appropriate to have a hearing on the merits of claims being released by third parties in connection with confirmation—as opposed to, or in addition to, a hearing on the merits of the releases themselves or any settlement in which they are contained—Voya made a calculated decision not to put the merits of its RICO claims at issue during the confirmation hearing. I will not consider the merits now.

BACKGROUND[7]

A. The Confirmation Hearing

On November 10, 2015, the Debtors filed voluntary petitions under chapter 11 of title 11 of the United States Code[8] together with their prepackaged plan of reorganization ("Plan") and accompanying disclosure statement.[9] The filing was the culmination of a seven-month process in which Millennium entered into multiple settlements, including a terms sheet with the United States and certain individual states, and a restructuring support agreement with both an ad hoc group of bondholders and the Non-Debtor Equity Holders. After an attempted out-of-court restructuring effort failed to garner the required support, the Debtors filed their bankruptcy petitions.

The Plan provided for a global resolution of claims related to the Debtors' April 2014 $1.825 billion senior secured credit facility, the proceeds of which funded a $1.3 million dividend to Millennium's equity holders, paid off certain debt and provided for working capital. As part of the lender group, Voya funded $106.3 million of the loan. Under the Plan, in exchange for an Allowed

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[7] The background of this case is discussed in my Bench Ruling (defined *infra*) and in *In re Millennium Lab Holdings II, LLC*, 543 B.R. 703 (Bankr. D. Del. 2016). I discuss here only background necessary to address the questions on remand.

[8] 11 U.S.C. §§ 101–1532 (2012) ("Bankruptcy Code").

[9] Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, LLC, et al., Nov. 10, 2015, D.I. 14; Disclosure Statement for Prepackaged Plan of Reorganization ("Disclosure Statement"), Nov. 10, 2015, D.I. 15.

Claim (that is, a claim allowed under § 502 of the Bankruptcy Code), each lender, including Voya, received its pro rata share of: (i) a new $600 million term loan; (ii) 100% of the beneficial ownership interests of the reorganized Debtors; and (iii) any recoveries from a trust created to pursue the Debtors' retained causes of action.

On December 10, 2015, I held a combined hearing on confirmation of the Plan and the adequacy of the Disclosure Statement. Prior to that hearing, Voya filed two objections.[10] Voya did not object to the overall compromise embodied in the Plan, which allowed the claims of all bondholders, brought $325 million into the estate (permitting the Debtors to reorganize and make the distributions required under the Plan) and included releases of both debtor and third party claims against the Non-Debtor Equity Holders. Instead, Voya only objected to the inclusion in the Plan of releases of claims that creditors, including Voya, might assert against the Non-Debtor Equity Holders and an accompanying bar order and injunction. As to the releases, Voya made the following

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[10] Memorandum of Law of the Opt-Out Lenders in Opposition to (I) Approval of the Disclosure Statement, (II) Approval of the Class 2 Ballot, and (III) Confirmation of the Prepackaged Joint Plan of the Reorganization of the Millennium Lab Holdings II, Dec. 4, 2015, D.I. 122 ("Initial Confirmation Objection"); Supplemental Memorandum of Law of the Opt-Out Lenders in Opposition to (I) Approval of the Disclosure Statement, (II) Approval of the Class 2 Ballot, and (III) Confirmation of the Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, et al. ("Supplemental Confirmation Objection"), Dec. 9, 2015, D.I. 174.

arguments: (i) that I did not have subject matter jurisdiction to grant nonconsensual third party releases; (ii) that third party releases are impermissible; (iii) that the Plan must permit parties to opt-out of the releases; and, in any event, (iv) that the releases did not meet the *Continental* standard. To crystalize its claims against the Non-Debtor Equity Holders, the day before the confirmation hearing, Voya filed a complaint asserting RICO and common law fraud claims against those entities in the United States District Court for the District of Delaware (the "RICO Lawsuit"), which remains pending before the Honorable Gregory M. Sleet.[11]

On December 11, 2015, I issued a bench ruling[12] confirming the Plan and addressing all of the issues raised by the parties, save one. As part of that ruling, I held that, at the very least, I had "related to jurisdiction."[13] I made this ruling because Voya argued (relying on *Combustion Engineering*[14]) that I did not have subject matter jurisdiction over the RICO Lawsuit, which was fatal to my ability to grant the third party releases as to Voya. I also stated that *Stern* did not change my conclusion on Voya's jurisdictional argument. At no time before I ruled did Voya argue that I lacked constitutional adjudicatory authority to enter a confirmation order containing releases or to otherwise

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[11] *ISL Loan Tr. v. TA Assocs. Mgmt., L.P.*, Case No. 15-1138 (D. Del.) (GMS).

[12] Bench Ruling, Dec. 11, 2015, D.I. 206 ("Bench Ruling").

[13] Bench Ruling Hr'g Tr. 13:1–2.

[14] *In re Combustion Eng'g*, 391 F.3d 190 (3rd Cir. 2004).

enter a final order approving the nonconsensual releases in the Plan.

As part of my Bench Ruling, I informed the parties that (i) I was not in a position to rule on the bar order provision, as it had not been the subject of argument and I had not, independently, had a chance to fully understand it; and (ii) I had not yet reviewed the proposed form of confirmation order. After some discussion, I agreed that the parties could submit further briefing on the bar order provision and continued the hearing. But, before the conclusion of the hearing, the staff attorney for the Office of the United States Trustee commented on the proposed form of order and asked me to pay particular attention to paragraph LL, which she said contained detailed proposed findings on the injunctions and releases. I then asked: "Does any other party have [a] question or clarification they need to make on the record?"[15] As reflected in the transcript, there was no response. The hearing was then recessed until December 15.

Prior to the continued hearing, the Debtors filed a letter on the docket informing me that, with the consent of Voya and all other necessary parties, the bar order provision was deleted from the Plan.[16] The letter also informed me that: (i) Voya had no further objections to the Plan that had not been ruled upon; and (ii) the Office of the United States Trustee believed that

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[15] Bench Ruling Hr'g Tr. 35:25–36:2.

[16] Letter Regarding Form of Proposed Confirmation Order, Dec. 14, 2015, D.I. 194.

the findings in paragraph LL of the proposed order regarding releases should be stricken in favor of a reference to the Bench Ruling, and the Debtors disagreed. After considering the letter, on December 14, 2015, I entered an order confirming the Plan.

B. The Appeal and the Request for Certification to the Third Circuit

That same day, Voya filed its Notice of Appeal[17] together with an emergency motion requesting certification of a direct appeal to the Third Circuit[18] and a motion for stay pending appeal.[19] Voya argued that a direct appeal would "enable the Third Circuit to clarify two crucial legal issues that remain undetermined in this Circuit: whether nonconsensual releases of

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[17] Notice of Appeal of Findings of Fact, Conclusions of Law and Order (I) Approving the (A) Prepetition Solicitation Procedures, (B) Forms of Ballots, (C) Adequacy of Disclosure Statement Pursuant to Sections 1125 and 1126(c) of the Bankruptcy Code, and (D) Form and Manner of Notice of Combined Hearing and Commencement of Chapter 11 Cases, and (II) Confirming the Prepackaged Joint Chapter 11 Plan of Reorganization of Millennium Lab Holdings II, LLC, et al., Dec. 14, 2015, D.I. 202 ("Notice of Appeal").

[18] Opt-Out Lenders' Emergency Motion for Certification of Direct Appeal to the United States Court of Appeals for the Third Circuit Pursuant to 28 U.S.C. § 158(D)(2), Dec. 14, 2015, D.I. 203 ("Certification Motion").

[19] Motion of the Opt-Out Lenders for Stay Pending Appeal of Order Confirming Amended Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, LLC, et al., Dec. 14, 2015, D.I. 204 ("Stay Motion").

non-debtors' direct claims against other non-debtors are permissible and if so, under what circumstances."[20]

Thereafter, Voya filed its Statement of the Issues on Appeal[21] identifying the following questions.

> 1. Can Bankruptcy Courts exercise "related to" jurisdiction over a non-debtor's direct claims against other non-debtors for fraud and other willful misconduct on the basis of contractual indemnification agreements by the debtor of the other non-debtors that expressly and/or as a matter of law preclude indemnification for acts of fraud, wilfull [sic] misconduct, and violations of the Racketeer Influenced and Corrupt Organization (RICO) Act?
>
> 2. Do Bankruptcy Courts have the authority to release a non-debtor's direct claims against other non-debtors for fraud and other willful misconduct without the consent of the releasing non-debtor?
>
> 3. Assuming *arguendo* that Bankruptcy Courts do have authority to release a non-debtor's direct claims against other non-debtors for fraud and other willful misconduct without the consent of the releasing non-debtor, what standard of law governs the

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[20] Certification Motion ¶ 5.

[21] Designation of Record and Statement of Issues on Appeal Pursuant to Fed. R. Bankr. P. 8009(A), Dec. 28, 2015, D.I. 246 ("Voya's Statement of Issues on Appeal").

> approval of such releases where no consideration is paid for the release?
>
> 4. Can services performed by a debtor's directors, officers, and employees in connection with the debtor's reorganization constitute a financial contribution to the debtor's estate?
>
> 5. Can a financial contribution made by a non-debtor to a debtor's estate be a financial contribution also made "on behalf of" other, and otherwise non-contributing, non-debtors?
>
> 6. Assuming *arguendo* that the Bankruptcy Court (a) properly determined that it had subject-matter jurisdiction and legal authority to release the non-debtor Opt-Out Lenders' direct claims against other non-debtors for fraud and other willful misconduct without the Opt-Out Lenders' consent and (b) applied the correct legal standard to its review of such releases, did the Bankruptcy Court err in concluding that the facts of this case warranted such a release?

At no time before me on the Stay Motion or the Certification Motion did Voya argue that the appeal involved a question of my constitutional authority to enter a final order confirming the Plan.

C. The Remand Decision

On March 20, 2017, the district court issued its Memorandum Opinion remanding the case for further proceedings. As the district court explained in the Remand Decision:

> It is unclear to what extent the Bankruptcy Court had the opportunity to consider what is now the main issue on appeal—the Bankruptcy Court's authority post-*Stern* to enter a final order discharging Appellants' non-bankruptcy claims against non-debtors without Appellants' consent—given the lack of time and attention the parties ascribed to this issue in their briefing and arguments below. What is clear is that the Bankruptcy Court had no occasion to explain its reasoning on this issue.[22]

Accordingly, the district court remanded the bankruptcy case for further proceedings on the following:

> 1. To consider whether, or clarify [my] ruling that, [I, as a] Bankruptcy Court had constitutional adjudicatory authority to approve the nonconsensual release of Appellants' direct non-bankruptcy common law fraud and RICO claims against the Non-Debtor Equity Holders.
>
> 2. If not, to submit proposed findings of fact and conclusions of law regarding the final disposition of these claims through the Confirmation Order, or, alternatively, to strike the nonconsensual release of Appellants' claims from the Confirmation Order.[23]

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[22] Remand Decision at *10.

[23] Remand Decision at *14.

The parties made their submissions on remand and, on July 27, 2017, I heard extensive argument. The matter is now ripe for decision.

D. The Parties' Positions

On remand, the parties each proffer their interpretation of *Stern*. Voya asserts its application of *Stern* to this matter is "straightforward." But, at argument on remand, Voya's counsel admitted that no party has ever articulated its position.[24]

Voya posits that in analyzing whether I have constitutional adjudicatory authority to enter a final order confirming a plan containing nonconsensual third party releases, I should:

- either ignore or consider irrelevant that I am presiding over confirmation of a plan;[25]
- consider the operative proceeding before me for *Stern* purposes to be the RICO Lawsuit;[26]

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[24] **Mr. Redburn:** I'm not sure anybody has really actually articulated this issue in the way it's being articulated to this Court before.

Oral Argument on Remand, Hr'g Tr. 101:24–102:1, July 27, 2017, D.I. 456 ("Oral Argument on Remand"). *See generally* discussion at Oral Argument on Remand, Hr'g Tr. 100:21–102:1.

[25] Oral Argument on Remand, Hr'g Tr. 117:14–18.

[26] **Mr. Redburn:** It goes back to what I said earlier in the argument which is that for *Stern* purposes the analysis takes place at the level of the claims to which judgment is

- apply *Stern* to the RICO Lawsuit; and
- hold that *Stern* prevents the bankruptcy court from entering a final order on confirmation because the RICO Lawsuit does not stem from the bankruptcy itself, nor must it necessarily be resolved in the claims allowance process.

Voya further asserts that *Stern* stands for the proposition that because Voya chose to filed its RICO Lawsuit in the district court, Voya has an absolute right to have the merits of its claims determined in the context of that civil lawsuit. Voya asserts that granting the third party releases over its objection constitutes an "adjudication" of the RICO Lawsuit, which is prohibited so neither the bankruptcy court nor the district court can enter a confirmation order containing releases. Indeed, Voya argues that no court can enter any order which impacts its RICO Lawsuit.[27] Voya's true argument,

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being entered upon, not the proceeding in which judgment is entered.

Id. 117:9–13.

[27] Permeating its written submission on remand and at argument is Voya's real position: even the district court cannot enter an order confirming a plan that contains third party releases. *See*, *e.g.*, Opt-Out Lenders' Opening Brief on Remand Issues at 31, May 19, 2017, D.I. 439 ("Article III, as consistently interpreted by the Supreme Court, grants a party the right to an adjudication on the merits by an Article III judge of claims within the core of Article III judicial power. It does not authorize either Article III or non-Article III tribunals to summarily extinguish a common law claim over the plaintiff's objection without any form of merits-based adjudication whatsoever,"); Opt-Out Lenders' Reply Brief on Remand Issues at 13, June 12, 2017, D.I. 444 ("Voya's consistent position from the beginning of plan confirmation

therefore, is not a *Stern* argument as *Stern* addresses which judge—an Article III judge or an Article I judge—must issue the confirmation order, not whether the order should issue at all.

The Debtors [28] respond to Voya's argument on Voya's terms, that is, they assume *Stern* is applicable. The Debtors contend *Stern* stands for the proposition that bankruptcy judges have constitutional authority to resolve matters that are " 'integral to the structuring of the debtor-creditor relationship.' "[29] The Debtors argue that it is the relationship of the claim to the bankruptcy process that is important, not the nature of the claim itself. The Debtors further posit that if it is necessary for the bankruptcy judge to rule on a matter in

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proceedings was that this Court lacks the power or authority to grant non-consensual releases of Voya's claims against other non-debtors through a final plan confirmation order, that the proper forum for adjudication of Voya's claims against the Non-Debtor Equity Holders was the District Court in which the Fraud Action was filed, and that the releases had to be stricken form the Plan in order to comply with Article III."); Oral Argument on Remand, Hr'g Tr. 128:23–129:3, (The Court: So notwithstanding *Continental* Judge Stark can't [enter a confirmation order with non-consensual releases] even though that's Third Circuit Law? Mr. Redburn: Correct, because the Article III and due process required adjudication of those claims on the merits.")

[28] The Debtors, TA Millennium, Inc. and James Slattery filed combined briefs on remand. When used in reference to positions on remand, the term "Debtors" will refer collectively to these parties.

[29] Supplemental Brief of the Debtors, TA Millennium, Inc., and James Slattery Regarding the Court's Adjudicatory Authority and Related Issues on Remand from the District Court 10–16, May 19, 2017, D.I. 437.

the context of plan confirmation, then the judge has the constitutional power to enter a final judgment on that core bankruptcy proceeding, even if it impacts state law claims. Here, they contend, it was necessary for me to approve the releases because both the feasibility and the implementation of the Plan required the contribution from the Non-Debtor Equity Holders. The Debtors conclude, therefore, that the *Stern* standard is met because my determination that the *Continental* hallmarks were satisfied means that the releases were integral to the debtor-creditor relationship and necessarily resolved as part of confirming the Plan.

DISCUSSION

I. Bankruptcy Jurisdiction

Bankruptcy jurisdiction is conferred in 28 U.S.C. § 1334, titled "Bankruptcy cases and proceedings." With exceptions not applicable here, district courts have original and exclusive jurisdiction in all bankruptcy cases, i.e., the main proceeding.[30] District courts also have original but not exclusive jurisdiction of all "civil proceedings arising under title 11, or arising in or related to cases under title 11."[31] Because this jurisdiction is granted to the district court, bankruptcy judges exercise bankruptcy jurisdiction only to the extent the district court refers the case or proceeding to the bankruptcy judge.[32] In the District of Delaware,

[30] 28 U.S.C. § 1334(a).

[31] 28 U.S.C. § 1334(b).

[32] 28 U.S.C. § 157(a)–(b).

there is a standing order referring all bankruptcy cases and their attendant civil proceedings to bankruptcy judges.[33]

Bankruptcy cases and civil proceedings arising in and arising under title 11 are "core" proceedings, while civil proceedings related to cases under title 11 are denominated "non-core." The distinction is significant because bankruptcy judges can both hear and determine core proceedings, meaning that bankruptcy judges can enter final orders in these proceedings subject to appeal to the district court. On the other hand, bankruptcy judges can only hear, but not determine, non-core proceedings, meaning that the bankruptcy judge must enter proposed findings of fact and conclusions of law for review by the district court under Federal Rule of Bankruptcy Procedure 9033.

If the proceeding before the court is neither core nor non-core, then it does not fall within the subject matter jurisdiction granted to district courts in § 1334 and neither the district court nor the bankruptcy judge may enter an order in the matter.

"Confirmations of plans" is one of sixteen core proceedings listed in § 157(b)(2).[34] The foremost treatise on bankruptcy places these sixteen enumerated core proceedings into five categories: (i) matters of administration; (ii) avoidance actions; (iii) property of the

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[33] United States District Court for the District of Delaware Amended Standing Order of Reference, In re Standing Order of Reference Re: Title 11, February 29, 2012.

[34] 28 U.S.C. § 157(b)(2)(L).

estate; (iv) omnibus categories; and (v) cases filed under chapter 15.[35] Confirmations of plans is in the first category together with matters concerning the administration of the estate, allowance and disallowance of claims against the estate and exemptions, estimations of claims for purposes of confirming a plan, orders with respect to obtaining financing, motions to terminate the automatic stay, dischargability determinations and objections to discharges.[36] As Collier states with respect to matters of administration, such as confirmations of plans:

> There has never been any doubt about the constitutional authority of a nontenured judge to enter final orders in such matters, which are unique to bankruptcy cases. This has been true since the regime of the Bankruptcy Act and remains true today, even under *Marathon, Granfinanciera, S.A. v. Norberg* and *Stern v. Marshall*. This category of core proceedings has produced almost no litigation regarding bankruptcy court authority.[37]

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[35] *See* 1 COLLIER ON BANKRUPTCY ¶ 3.02[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

[36] *See id* at ¶ 3.02[3][a].

[37] *Id.* (citations omitted).

II. A Bankruptcy Judge has Constitutional Adjudicatory Authority to Enter a Confirmation Order Containing Nonconsensual Third Party Releases

A Decisional law Applying *Marathon* and *Stern* Uniformly Hold that Bankruptcy Judges have such Authority

1. The *Marathon* Decision

Before *Stern*, there was *Marathon.*[38]

In *Marathon*, the Supreme Court of the United States concluded that Congress's broad grant of jurisdiction to bankruptcy judges in the Bankruptcy Act of 1978 ("Act") was unconstitutional. This ruling was made in the context of civil litigation asserting state law causes of action. In *Marathon*, the plaintiff/debtor Northern Pipeline sued defendant Marathon Pipe Line by filing a complaint in the bankruptcy court in which Northern Pipeline's bankruptcy case was pending. Northern Pipeline asserted state law claims sounding in breaches of contract and warranty, misrepresentation, coercion and duress. Marathon moved to dismiss the complaint asserting that the Act unconstitutionally conferred judicial powers on non-Article III judges. In a plurality opinion, the Supreme Court agreed with Marathon. Striking down the entire Act—as opposed to so much of the Act as permitted the bankruptcy judge to render judgment on the state law action—upended the bankruptcy community and created

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[38] *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion).

significant uncertainty regarding bankruptcy jurisdiction.[39] In the wake of congressional inaction after the *Marathon* decision, on December 3, 1982, the Judicial Conference of the United States proposed emergency model rules, which each judicial circuit approved for adoption by district courts as local rules.[40] Congress subsequently adopted the Emergency Rules as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the current statute conferring bankruptcy jurisdiction.[41]

In the heyday/melée of *Marathon*, the United States Court of Appeals had occasion to address whether bankruptcy judges have constitutional authority to enter final orders confirming plans of reorganization containing third party releases. In *In re AOV Industries, Inc.*,[42] a case having strong parallels to *Millennium*, the bankruptcy court approved such a plan over objection. AOV consisted of an integrated group of coal mining, processing, exporting and trading companies. Its exclusive European marketing agent, Steag Handel GmbH ("Steag"), was also a major creditor. Pre-bankruptcy, AOV needed working capital; it raised that cash by negotiating a stock purchase agreement through which Sleigh, Ltd. ("Sleigh") acquired a 50% interest in AOV. Once Sleigh took control of AOV,

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[39] *See generally* Benjamin Weintraub & Alan N. Resnick, *Bankruptcy Court Jurisdiction Under the Judicial Conference Emergency Rule*, 16 UCC L.J. 59 (1983).

[40] *See id.*

[41] Amendments since 1984 are not relevant to this analysis.

[42] 792 F.2d 1140 (D.C. Cir. 1986).

AOV filed its bankruptcy case. Two pieces of litigation figured prominently in *AOV Industries*: (i) a postpetition lawsuit by AOV against Sleigh surrounding the stock acquisition; and (ii) a prepetition lawsuit by Hawley Fuel Coalmart ("Hawley") against Steag asserting that Steag guaranteed AOV's indebtedness to Hawley.

After negotiations, AOV, Sleigh and Steag entered into a plan contribution agreement that formed the basis of AOV's plan of reorganization. Sleigh and Steag collectively agreed to forego over $51 million in claims against AOV for, respectively, 100% of the AOV stock and a $2.6 million security interest in AOV's assets. Further, as a "critical component" of the plan, Sleigh and Steag agreed to contribute $3 million of a $4.5 million fund for unsecured creditors. This fund, however, would not be available unless all but a few creditors gave Sleigh and Steag releases.[43] One of those required to give a release if he wanted a distribution was AOV's founder Hubert Bruce.

AOV's creditors voted overwhelmingly in favor of the plan. Bruce, however, challenged the bankruptcy court's jurisdiction to render a binding judgment on the plan based on the recent *Marathon* decision.

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[43] The $4.5 million fund was available to unsecured creditors "on the Consummation Date if releases are received from creditors except for Hawley Fuel Coal, Inc., Ambrose Branch Coal Co., their affiliates and any other creditor or creditors whose claims, when taken as a whole, do not exceed $300,000." *Id.* at 1143. In this respect, the releases appear to be consensual, if coerced. The opinion does not turn on the nature of the releases.

Mindful of this challenge, the bankruptcy judge certified the case to the district court pursuant to the bankruptcy Emergency Rules then in effect.[44] Brace and Hawley also took a direct appeal of the bankruptcy court's ruling to the district court. In the consolidated certification/appeal proceeding, the district court rejected the constitutional challenge and held that the bankruptcy court could enter a final order on confirmation consistent with *Marathon.*

On further appeal, the D.C. Circuit described Bruce's argument as follows: (i) the confirmation of the debtor's plan could only be approved by the district court because the confirmation hearing was "outside the core of normal bankruptcy proceedings" as the plan involved the release of "non-bankruptcy claims—those held by one creditor against another creditor"; (ii) Bruce had separate, outstanding claims against both Sleigh and Steag, which the plan significantly affected; therefore, (iii) such releases are prohibited because it permits an Article I court to influence cases that can only be resolved by an Article III court.[45]

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[44] Model Emergency Rule § (e)(2)(A)(ii) permitted the bankruptcy court to certify that "circumstances require that the order or judgment [entered by the bankruptcy judge] be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed." *See generally* Weintraub & Resnick, 16 UCC L.J. 59 (1983).

[45] The court does state that Bruce "never specifies, however, how his claims are affected." *AOV Indus.*, 792 F.2d at 1145.

Keenly aware of the recent jurisdictional upheaval, the D.C. Circuit began its ruling with an analysis of bankruptcy jurisdiction following *Marathon*. The court acknowledged the Supreme Court's holding that Congress had overstepped its bounds in the Bankruptcy Reform Action of 1978 by impermissibly—and unconstitutionally—granting Article I judges judicial power reserved for Article III courts. The court also recognized the Emergency Rules subsequently adopted by Congress in the Bankruptcy Amendments and Federal Judgeship Act of 1984, which distinguished between related and core proceedings. Acknowledging the state of play, the D.C. Circuit Court soundly rebuffed Bruce's expansive reading of *Marathon*:

> We reject Bruce's argument and his reading of *Marathon*. The approval of a disclosure statement and the confirmation of a reorganization plan are clearly proceedings at the core of bankruptcy law; appellant cities no authority for the notion the court's actions were "related" proceedings within the meaning of the Emergency Rule or the 1984 Bankruptcy Amendments. See 28 U.S.C. § 157(b)(2)(L) (core proceedings include "confirmations of plans"): Emergency Rule § (d)(3)(A) ("related proceedings do not include . . . matters concerning the administration of the estate . . . [or] proceedings in respect to the confirmation of plans"). **Although the bankruptcy's court's decision may have an impact on claims outside the scope of the immediate proceedings, we do not read Marathon and its progeny to prohibit all**

> **bankruptcy court decisions that may have tangential effects. The expansive reading of Marathon urged on us by Bruce would limit the power of these article I courts to a far greater degree than we believe Congress or the Supreme Court intended.**[46]

The only other circuit court that appears to have addressed the issue is the Seventh Circuit. In a single sentence, the Seventh Circuit adopted the *AOV Industries* position, stating: "As a preliminary matter, we note that a bankruptcy court does have the power to determine the legality of provisions, including releases, incorporated into a reorganization plan."[47]

2. The *Stern* Decision

Stern followed *Marathon* by twenty-nine years. It did not change much.

In *Stern*, Vickie Lynn Marshall filed a chapter 11 bankruptcy case in the Central District of California. Prior to filing her bankruptcy petition, Vickie,[48] who was the third wife of the elderly and very wealthy J. Howard Marshall, filed suit in Texas state probate court ("Texas Litigation") against Pierce Marshall, J.

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[46] *Id.* at 1145–46 (emphasis added).

[47] *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1045 (7th Cir. 1993) (citing *AOV Indus.*, 792 F.2d at 1145, and 28 U.S.C. § 157(b)(2)(L), and noting that the appellants were really questioning the legitimacy of the releases).

[48] I will continue the Supreme Court's practice of referring to the parties by their first names.

Howard's son, for tortious interference with an *inter vivos* gift. In the Texas Litigation, Vickie asserted that Pierce had fraudulently induced J. Howard to exclude Vickie from J. Howard's living trust (and, later, his will) even though, Vickie asserted, J. Howard meant to give her one-half of his estate.

Pierce initiated an adversary proceeding in Vickie's bankruptcy case seeking both damages for defamation and a declaration that the defamation claim was nondischargeable under 11 U.S.C. § 523(a). Pierce also filed a proof of claim for damages due to defamation. Vickie defended Pierce's defamation claim in the adversary proceeding and filed a counterclaim for tortious interference with the gift she believed J. Howard sought to give her. Vickie's counterclaim appeared to mirror, at least in part, the state law complaint she filed in the Texas Litigation.

The bankruptcy judge entered orders in the adversary proceeding all in Vickie's favor. As to Pierce's defamation claim, the judge granted summary judgment for Vickie, thus denying Pierce any recovery. After a bench trial on Vickie's counterclaim for tortious interference, the bankruptcy judge awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages. In the meantime, the judge in the Texas Litigation presided over a jury trial and entered judgment in favor of Pierce on his defamation claim.

In post-trial proceedings, Pierce re-asserted an argument that Vickie's counterclaim was not a core

proceeding and thus the bankruptcy judge was limited to submitting proposed findings of fact and conclusions of law to the district court for review *de novo* on that claim. The bankruptcy court rejected Pierce's argument finding that counterclaims are core based on § 157(b)(2)(C). On appeal the district court disagreed holding that while Vickie's counterclaim fell within the literal language of § 157(b)(2)(C), the Supreme Court's decision in *Marathon* precluded the court from holding that "any and all" counterclaims are core. Eventually, the Ninth Circuit agreed with the district court's legal conclusion, holding that "a counterclaim under § 157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the Code only if the counterclaim is so closely related to a [creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself."[49] The Supreme Court granted certiorari.

In its opinion, the Supreme Court first addressed the bankruptcy court's statutory authority to enter a final order on Vickie's counterclaim. The Court rejected Pierce's argument that Vickie's counterclaim was in a new category of proceedings—namely, core proceedings that do not arise in or arise under title 11. Instead, the Court recognized core proceedings are "at most, those that arise in title 11 cases or arise under title 11"[50] and that each of the sixteen types of proceedings enumerated in § 157 are core. Thus, the Court agreed

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[49] *In re Marshall*, 600 F.3d 1037, 1058 (9th Cir. 2010) (quotation omitted).

[50] *Stern*, 131 S. Ct. at 2605 (quotation omitted).

with Vickie that "§ 157(b)(2)(C) permits the bankruptcy court to enter a final judgment on her tortious interference claim."[51]

Notwithstanding the finding that as a statutory matter the bankruptcy judge could enter a final order on Vickie's counterclaim, the Court ruled that Article III of the Constitution precluded it. The Court held that Vickie's state law counterclaim was not a public right under any of its admittedly inconsistent and various formulations of that doctrine articulated to date.[52] Vickie's counterclaim was not related to federal governmental action;[53] it did not flow from a federal statutory scheme; [54] nor was it "completely dependent upon" adjudication of a claim created by federal law.[55] The Court also held that the bankruptcy court does not qualify as an authority (such as a federal agency) limited to a "particularized area of the law."[56]

The Supreme Court also conducted a lengthy examination of Vickie's counterclaim in light of the preference actions brought by the trustees in *Katchen* and *Langenkamp.* In each of those cases, a preference defendant filed a proof of claim against the estate. The Court held that the defendants were not entitled to an Article III adjudicator because the trustee's claims

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[51] *Id.*

[52] *See id.* at 2611.

[53] *See id.* at 2613.

[54] *See id.* at 2614.

[55] *See id.*

[56] *See id.* at 2615.

could be determined as part of the claims allowance and disallowance process.[57] The Supreme Court also noted that in both *Katchen* and *Langenkamp*, the trustee was asserting a right of recovery created by federal bankruptcy law. By contrast, Vickie's counterclaim, "is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding."[58] And, the Supreme Court noted the discussion in *Granfinanciera* distinguishing between suits to augment the estate (such as fraudulent conveyance claims and Vickie's counterclaim) and "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res."[59]

It was in the context of its discussion of *Katchen, Langenkamp* and *Granfinanciera* (all lawsuits brought by trustees seeking affirmative recoveries), that the *Stern* Court announced a disjunctive test (the "Disjunctive

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[57] *See Katchen v. Landy*, 382 U.S. 323 (1966) (holding that the plenary proceeding the creditor sought could be entertained in the bankruptcy court because the same issues arose as part of the claim allowance/disallowance process, and offering no opinion on whether the referee would have summary jurisdiction over a trustee's claim for affirmative relief that could not be disposed of in connection with ruling on objections to a proof of claim (cited in *Stern*, 131 S. Ct. at 2616)); *Langenkamp v. Culp*, 498 U.S. 42, (1990) (holding that when a creditor files a proof of claim, "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction.") (cited in *Stern*, 131 S. Ct. at 2617).

[58] *Stern*, 131 S. Ct. at 2618.

[59] *Id.* at 2614 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989)).

Test") for whether a bankruptcy judge can enter a final order on a trustee's counterclaim:

> Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself ***or*** would necessarily be resolved in the claims allowance process.[60]

Vickie's counterclaim failed the Disjunctive Test. Vickie's counterclaim did not "stem" from the bankruptcy itself as it did not derive from bankruptcy law and it existed without regard to the bankruptcy proceeding. And it was not necessarily resolved in the claims allowance process because there never existed a reason to believe that the process of ruling on Pierce's proof of claim would necessarily resolve Vickie's counterclaim. Thus, the Court ruled that the bankruptcy judge lacked the constitutional authority to "enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[61] In doing so, it emphasized its narrow ruling stating: "[w]e do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute."[62]

The actual outcome of *Stern*—that a bankruptcy judge cannot enter a final order on a trustee's state law

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[60] *Id.* at 2618 (emphasis added).

[61] *Id.* at 2620.

[62] *Id.*

counterclaim against a creditor that is not resolved in the process of ruling on the creditor's proof of claim—tread little new ground. As Chief Justice Roberts observed: if you substitute "tort" for "contract"—and, I would add, "counterclaim" for "claim"—you have *Marathon.*[63] What was novel about *Stern* is that Vickie's counterclaim falls into one of the enumerated categories of core proceedings in § 157(b)(2). For the first time, the Supreme Court held that notwithstanding the statutory designation of a proceeding as core, a bankruptcy judge could not enter a final judgment in that proceeding. Unlike *Marathon*, however, the Supreme Court did not find the entirety of Congress's referral of core proceedings to bankruptcy judges to be unconstitutional, mandating a congressional fix. Upon finding "one isolated" instance of constitutional infirmity, the *Stern* Court dealt with that instance; it did not expand its holding to the entirety of § 157(b)(2).

The parties directed me to only two post-*Stern* cases addressing the constitutionality of bankruptcy judges entering final orders confirming plans containing third party releases.[64] In the first case, *Charles*

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[63] *Id.* at 2615.

[64] As opposed to objecting to the merits of the releases themselves, which is a typical objection, an objection to the bankruptcy court's ability to enter a final order approving third party releases is rare. See *infra* Part I. Our independent research did not reveal reported cases post-*Stern* analyzing constitutional authority to enter final confirmation orders containing releases other than those cited by the parties.

Street African Methodist Episcopal Church of Boston,[65] the bankruptcy judge determined he had constitutional authority to enter a final confirmation order containing releases even though he considered the proposed third party release inappropriate on the facts before him and ultimately did not confirm the debtor's plan. In *Charles Street*, the debtor filed its bankruptcy petition because it was facing foreclosure by its largest creditor, OneUnited. OneUnited's loans were secured by the church property and one of the loans was the subject of a disputed guarantee from the First Episcopal District of the African Methodist Episcopal Church ("FEDAME"). A complex plan was proposed, which, as relevant here, contained a release of FEDAME's guaranty obligations. OneUnited objected to the plan on nineteen different grounds, including that the releases were an impermissible means of implementation. Specifically, OneUnited contended that: (i) the bankruptcy court lacked subject matter jurisdiction to approve a plan containing releases; (ii) the bankruptcy court lacked constitutional authority to adjudicate a plan containing third party releases; (iii) § 524(e) prohibits the grant of third party releases; (iv) third party releases cannot be approved over objection; (v) equity barred the release because FEDAME fraudulently induced OneUnited to rely on the guarantee and false financial statements; and (vi) the release did not meet the *Master Mortgage* standards.

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[65] *In re Charles St. Afr. Methodist Episcopal Church of Bos.*, 499 B.R. 66 (Bankr. D. Mass. 2013).

In analyzing OneUnited's objection, Judge Bailey first concluded that he had subject matter jurisdiction under § 1334(b) over confirmation of plans, which "is the matter before the Court" and is "the quintessential bankruptcy matter."[66] Next, he concluded that he had constitutional authority to enter a final order confirming a plan with releases. Judge Bailey determined the operative proceeding was the confirmation hearing, which stems from federal law. Indeed, he declared confirmation of a plan to be a public right. And he rejected the same argument now made by Voya on remand, concluding that approval of the release in the plan was not tantamount to adjudication of FEDAME's guaranty, and thus *Stern* did not preclude him from entering a final order confirming a plan containing third party releases. In ruling, Judge Bailey determined that confirmation of a plan is not an adjudication of all the disputes it may touch.

In the second case, *MPM Silicone*, Judge Drain came to the same conclusion. In a bench ruling confirming a plan of reorganization containing releases, Judge Drain stated: "I also should note, because this was raised in the objection, that I firmly believe that I have jurisdiction over [releases] for the reasons that I stated at the beginning of this ruling, and that I can issue a final order on it within the confines of *Stern v. Marshall*, given that this is in the context of the

[66] *Id.* at 99.

confirmation of the plan, and pertains ultimately to the debtors' rights under the Bankruptcy Code."[67]

B. Bankruptcy Judges have Constitutional Adjudicatory Authority to Enter Final Orders Confirming Plans Containing Nonconsensual Releases Under Any Interpretation of *Stern*

1. The Various Interpretations of *Stern*

In the immediate aftermath of *Stern*, courts and commentators debated its implications. Some supported a narrow interpretation of *Stern*: *Stern* stands for the sole proposition that a bankruptcy judge "lacked constitutional authority to enter a final judgment on a **state law counterclaim** that is not resolved in the process of ruling on a creditor's proof of claim" (the "Narrow Interpretation"). To support this view, courts and commentators point to Chief Justice Roberts' repeated and express statements that the practical consequences of the decision would not be significant, that the limitation imposed by *Stern* would not "meaningfully change[ ] the division of labor in the current statute" and that "the question presented [to

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[67] *MPM Silicones, LLC*, No. 14-22503-rdd, 2014 WL 4436335, at *34 (Bankr. S.D.N.Y. Sept. 9, 2014). Earlier, Judge Drain stated: "I clearly have jurisdiction with regard to [ ] issues, which arise under sections 510(a), 502(b)(2), 506(b), 1129(a) and (b) of the Bankruptcy Code, pursuant to 28 U.S.C. sections 157(a)–(b) and 1334(b), as these issues arise under the Bankruptcy Code and in the chapter 11 case, let alone that they're clearly related to the chapter 11 case." *Id.* at *1.

the Court] was a 'narrow' one." Others supported a broad interpretation of *Stern*, not limited to counterclaims: that a bankruptcy judge cannot enter a final judgment on **all state law claims, all common law causes of action or all causes of action under state law** (the "Broad Interpretation"). Support for the Broad Interpretation comes from the varying language used in *Stern*, which does not consistently limit the discussion to a "Vickie-type" counterclaim. Under both the Narrow Interpretation and the Broad Interpretation, *Stern* is limited to a state law claim or counterclaim brought by the debtor-in-possession or trustee. In other words, *Stern* is limited to claims based on state law that are commenced in the context of traditional civil litigation, or generically "Debtor/Trustee v. Defendant."[68]

After considering these opposing viewpoints, it appears that my colleagues on the Delaware bench who have specifically taken a position have consistently adopted the Narrow Interpretation. Our research of reported decisions reveals that in adopting the Narrow Interpretation, Judge Sontchi concluded that *Stern* was "not applicable" to a complaint asserting equitable subordination,[69] Judge Gross concluded that *Stern* did

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[68] For a fulsome and thoughtful discussion of the Narrow Interpretation and the Broad Interpretation, *see In re USDigital, Inc.*, 461 B.R. 276 (Bankr. D. Del. 2011).

[69] *USDigital*, 461 B.R. at 292 (Sontchi, J.) ("Count 15, which asserts a claim for equitable subordination, is a non-enumerated core proceeding under section 157(b)(2). Moreover, as it does not involve a state law counterclaim to a proof of claim filed by the trustee, the Supreme Court's holding in *Stern* is not applicable.

not preclude him from entering final orders on fraudulent conveyance and preference actions brought to augment the estate,[70] Judge Walsh concluded that he could enter final orders on the core preference, postpetition transfer, fraudulent transfer, and unjust enrichment claims before him,[71] and Judge Carey concluded that *Stern* was not a factor when ruling on a motion to enforce releases in a confirmation order.[72]

The inquiry in this case is limited to the statutory framework. Thus, Count 15 is a core proceeding under both the statute and the Constitution.") (citations omitted).

[70] *Burtch v. Seaport Capital, LLC (In re Direct Response Media, Inc.)*, 466 B.R. 626, 644 (Bankr. D. Del. 2012) (Gross, J.) ("The Supreme Court expressly took measures to limit the reach and breadth of its opinion and its interpretation by lower courts. The Court adopts the Narrow Interpretation and holds that *Stern* only removed a non-Article III court's authority to finally adjudicate one type of core matter, a debtor's state law counterclaim asserted under § 157(b)(2)(C). By extension, the Court concludes that *Stern* does not remove the bankruptcy courts' authority to enter final judgments on other core matters, including the authority to finally adjudicate preference and fraudulent conveyance actions like those at issue before this Court.").

[71] *Zazzali v. 1031 Exch. Grp. (In re DBSI)*, 467 B.R. 767, 772 (Bankr. D. Del. 2012) (Walsh, J.) ("I agree with my colleagues that *Stern's* holding should be read narrowly and thus restricted to the case of a "state-law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Stern*, 131 S. Ct. at 2620. I note also that numerous other recent decisions have agreed with the narrow interpretation. *See*, *e.g.*, *Kirschner v. Agoglia (In re Refco, Inc.)*, 461 B.R. 181 (Bankr. S.D.N.Y. 2011); *Fox v. Picard (In re Madoff)*, 848 F. Supp. 2d 469 (S.D.N.Y. 2012). Thus, I find that *Stern* is not applicable to this action, as it does not involve a state-law counterclaim by the estate.").

[72] *In re WCI Cmtys., Inc.*, No. 09-52250, 2012 WL 1981713 n.14 (Bankr. D. Del. June 1, 2012) (Carey, J.) ("The parties offered

Judge Walrath, in her opinion in *WaMu*,[73] did not specifically take a position on the Narrow Interpretation or the Broad Interpretation. Rather, the approach she took might be labeled the "most broad" interpretation, meaning that bankruptcy judges should examine their ability to enter final orders in **all enumerated or unenumerated core proceedings** ("Broadest Interpretation").[74] In *WaMu*, the plan of reorganization's central component was a global settlement of claims and counterclaims among the debtors, the creditors' committee and multiple major parties in the case. Certain major groups of creditors contended that although Judge Walrath could conduct the confirmation hearing she could only present proposed findings of fact and conclusions of law to the district court because the settlement of the estate's claims could only be determined by an Article III court.[75]

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supplemental submissions after the United States Supreme Court's decision in *Stern v. Marshall* 564 U.S. ___, 131 S.Ct. 2594 (2011). The Espinals argue that *Stern* requires that the "State Law" claims raised in the State Court Action be transferred to the Article III district court or to the State Court. The underlying merits of the claims made in the State Court Action are not before me; therefore, *Stern v. Marshall* does not pose a challenge to this Court's jurisdiction.").

[73] *In re Wash. Mut., Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011), *vacated in part*, No. 08-12229, 2012 WL 1563880 (Bankr. D. Del. Feb. 23, 2012).

[74] In *Charles Street*, Judge Bailey appears to have adopted the Broadest Interpretation by entertaining the possibility that the grant of authority in § 157(b)(2)(L)—confirmation of a plan—could be unconstitutional. 499 B.R. at 99–100.

[75] The objectors had argued in their written submissions that the court did not have authority to conduct the confirmation

Judge Walrath rejected the objectors' argument for three separate reasons. First, she recognized the historical practice of approval of settlements dating back to the Bankruptcy Act. She noted that compromises are integral to bankruptcy cases, that compromises are often included in plans of reorganization, and that confirmation of a plan is "within the bankruptcy court's core jurisdiction." [76] Second, Judge Walrath looked at the nature of settlement approval. She observed the "fundamental difference" between approving a settlement of a claim and adjudicating the merits of a claim. She ruled that a court does not need jurisdiction over the underlying claims in order to approve a compromise of them. She also examined the standard the court considers when approving a settlement and held that the standard, which is the "lowest point in the range of reasonableness" establishes that the court is not ruling on the merits of the claims being settled.[77] Finally, Judge Walrath found the approval of the global settlement "particularly within the core jurisdiction" of the bankruptcy court because it dealt

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hearing at all, but they modified their position at the commencement of the confirmation hearing. *See Wash. Mut.*, 461 B.R. at 213.

[76] *Id.* at 215 (quoting *AOV Indus.*, 792 F.2d at 1145–46 ("The approval of a disclosure statement and the confirmation of a reorganization plan are clearly proceedings at the core of bankruptcy law. . . . Accordingly, we find that the bankruptcy court had jurisdiction to approve [them].")).

[77] "The lowest point in the range of reasonableness is far from the standard required for an Article III court to enter a final determination on the merits of the claims." *Id.* at 216 (quotation omitted).

with a determination of whether property is property of the estate.

At bottom, Judge Walrath concluded she had jurisdiction to both hear and determine confirmation of the *WaMu* plan, which incorporated the global settlement. In her Broadest Interpretation of *Stern*, Judge Walrath did not try to squeeze the proverbial "square peg" of confirmation into the proverbial "round hole" of trustee claims and counterclaims. In other words, Judge Walrath did not import the Disjunctive Test into her analysis; she tailored her constitutional argument to the proceeding in front of her.

2. The Operative Proceeding is Confirmation of a Plan, Which is Governed by a Federal Standard

In this matter, the operative proceeding for purposes of a constitutional analysis is confirmation of a plan. Confirmation of a plan is not a "claim" or "counterclaim." It is not an "action" as the word is used in *Stern*.[78] The confirmation process is commenced by the filing of a disclosure statement, which, once approved,

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[78] In context, the word "action" in *Stern* means a complaint or counterclaim: "*Granfinanciera's* distinction between **actions** that seek to 'augment the bankruptcy estate' and those that seek 'a pro rata share of the bankruptcy *res*,' *ibid.*, reaffirms that Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case: the question is whether the **action** at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499 (emphasis added).

may be noticed out together with the plan and ballots soliciting acceptances and rejections.[79] In addition to classifying claims and specifying treatment for those claims, plans may seek approval of sales, assumption or rejection of contracts, substantive consolidation, equitable subordination and, as it did here, approval of settlements and releases. An objection transforms the confirmation hearing into a contested matter.[80]

"Confirmations of plans" is an enumerated core proceeding under 28 U.S.C. § 157(b).[81] As such, I have statutory authority to enter a final judgment on confirmation of a plan under *Stern*.[82] The question then becomes whether I have constitutional authority to do so. Adopting the Narrow Interpretation, *Stern* is inapplicable as confirmation of a plan is not "a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." Adopting the Broad Interpretation, the same is true: *Stern* is inapplicable as confirmation of a plan is not a state law claim of any type. Under both of these interpretations, then, my constitutional analysis stops. My inquiry is limited to the statutory framework, and I can enter a final order confirming Millennium's Plan as a constitutional matter.[83]

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[79] *See* FED. R. BANKR. P. 3017.

[80] *See* FED. R. BANKR. P. 3020(b)(1).

[81] 28 U.S.C. § 157(b)(2)(L).

[82] *See Stern*, 131 S. Ct. at 2605.

[83] *See USDigital*, 461 B.R. at 292.

The outcome is the same if I adopt the Broadest Interpretation. First, confirmation of a plan is a "proceeding[] at the core of bankruptcy law,"[84] or, in other words, a quintessential "core" proceeding.[85] Confirmation of a plan is the goal of chapter 11 cases, and is "historically a core competency of the bankruptcy court."[86] "Confirmations of plans," which are "matters of administration" are "unique to bankruptcy cases."[87]

Second, in confirming a plan, even one with releases, the judge is applying a federal standard. To confirm a plan, it must satisfy each subsection of § 1129(a) and (b), as applicable. To the extent a *Stern* analysis requires a specific look at releases (and it is not clear that it does), those releases must comply with applicable provisions of the Bankruptcy Code. Courts that permit releases in appropriate circumstances often look to

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[84] *AOV Indus.*, 792 F.2d at 1145.

[85] *Charles St.*, 499 B.R. at 99.

[86] *In re Manchester Oaks Homeowners Ass'n, Inc.*, No. 11–10179–BFK, 2014 WL 961167, at *7 (Bankr. E.D. Va. Mar. 12, 2014). *See also id.* at *8 ("This case does not involve the entry of a money judgment, and does not raise the kind of systemic concerns at issue in *Stern*.").

[87] *See* 1 COLLIER ON BANKRUPTCY ¶ 3.02[3][a].

§§ 1129(a)(1),[88] 1123(b)(6)[89] and 105.[90] Courts that do not permit releases often cite § 524(e).[91] Regardless, courts are interpreting federal law. As the Seventh Circuit held, whether these releases are legally permissible is a matter the bankruptcy court has the power to determine.[92]

In the Third Circuit, nonconsensual third party releases are permissible in plans of reorganization if they meet the *Continental* standard of fairness and necessity to the reorganization.[93] In my Bench Ruling, I held that the releases in the Millennium Plan met that standard after examining the *Continental* hallmarks and the *Master Mortgage* factors.[94] The *Master*

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[88] 11 U.S.C. § 1129(a)(1) (The court shall confirm a plan only if: "The plan complies with the applicable provisions of this title.").

[89] 11 U.S.C. § 1123(b)(6) (plans may "include any other appropriate provision not inconsistent with the applicable provisions of this title.").

[90] 11 U.S.C. § 105(a) ("The court may issue any order process, or judgment that is necessary to carry out the provisions of this title.").

[91] 11 U.S.C. § 524(e) ("Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.").

[92] *Specialty Equip.*, 3 F.3d at 1045. *See also* discussion *supra* concerning *AOV Indus., Charles St.*, and *MPM Silicones.*

[93] Bench Ruling Hr'g Tr. 24:19-22. *See also Continental*, 203 F.3d at 214 ("The hallmarks of permissible non-consensual releases—fairness, necessity to the reorganization, and specific factual findings to support these conclusions. . . .").

[94] Bench Ruling Hr'g Tr. 16:12–26:14.

Mortgage factors, like the *Dow* factors[95] (or any other standard in circuits that permit third party releases), are a federal, judicially-created yardstick against which a third party release is measured:

> The *Master Mortgage* Court cites five factors to consider in allowing a release of a third party as part of a plan of reorganization: (1) an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (2) substantial contribution by the non-debtor of assets to the reorganization; (3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success; (4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and (5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.[96]

The above five factors compel the bankruptcy judge to examine the terms of the plan of reorganization, the outcome of the solicitation of the plan and the necessity of the injunction to the success of the plan.

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[95] *See Class Five Nev. Claimants v. Dow Coming Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657–58 (6th Cir. 2002).

[96] *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortg. Inv. Fund*, 168 B.R. 930, 937 (Bankr. W.D. Mo.)).

These factors do not ask the bankruptcy judge to examine or make rulings with respect to the many claims that may be released by virtue of the third party releases.[97] An order confirming a plan with releases, therefore, does not rule on the merits of the state law claims being released.[98]

Further, there is no state law equivalent to confirmation of a plan. And, third party releases do not exist without regard to the bankruptcy proceeding.[99] Rather, a ruling approving third party releases is a

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[97] *Cf. AOV*, 792 F.2d at 1153 (in determining whether it could grant effective relief to objector Hawley on its objection that the plan discriminated among creditors, the D.C. Circuit stated: "The [favorable state court] holding for Steag does not affect the propriety of the Plan's treatment of appellant, any more than the verdict favorable to Hawley would have. *The current case is not concerned with the merits of the underlying claims; the focus is on whether the Plan as devised treats some creditors unfairly.*") (emphasis added); *In re WCI Communities, Inc.*, No. 09–52250 (KJC), 2012 WL 1981713 n. 14 (reorganized debtor filed an adversary proceeding against putative state court class action plaintiffs to enforce releases and injunction in confirmation order channeling certain claims to a trust. In finding jurisdiction, Judge Carey stated: "the underlying claims in the State Court Action are not before me; therefore *Stern v. Marshall* does not pose a challenge to this Court's jurisdiction.").

[98] *See*, *e.g.*, *Charles St.*, 499 B.R. at 99 ("Confirmation of a plan is not an adjudication of the various disputes it touches upon—the Guaranty being here but one of many; it is a total reorganization of the debtor's affairs in a manner available only in bankruptcy.").

[99] *Cf. Stern*, 131 S. Ct. at 2618 ("Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.").

determination that the plan at issue meets the federally created requisites for confirmation and third party releases.[100] Thus, looking to historical context, the nature of confirmation and the standard the judge applies to determine whether releases are appropriate, a bankruptcy judge has constitutional adjudicatory authority to enter a final confirmation order containing non-consensual third party releases.[101]

3. Voya's Interpretation Finds no Basis in *Stern*

Voya does not agree with the Narrow, Broad, or Broadest Interpretation of *Stern*. Voya rejects both the Narrow Interpretation and the Broad Interpretation as it applies *Stern* outside the context of traditional

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[100] *Cf. In re Okwonna-Felix*, No. 10–31663–H4–13, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011) ("In the dispute at bar, the Debtor is requesting this Court to approve a settlement under an express bankruptcy provision, i.e., Bankruptcy Rule 9019. This Rule gives bankruptcy courts discretion to approve a compromise. State law has no equivalent to Bankruptcy Rule 9019. Moreover, the factors which bankruptcy courts are required to review in making a determination of whether or not to approve a settlement have been developed entirely by the federal courts, including the Supreme Court of the United States. *See United States v. Key*, 397 U.S. 322 (1970); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Accordingly, because the resolution of the Motion is not based on state common law, but entirely on federal bankruptcy law (both the Rule and the case law instructing how to apply the Rule), the holding in *Stern* is inapplicable, and this Court has the constitutional authority to enter a final order in this contested matter pursuant to 28 U.S.C. §§ 157(a) and (b)(1).").

[101] *See Wash. Mut.*, 461 B.R. at 213–17.

civil litigation, i.e., § 157(b)(2)(C) (a counterclaim by a debtor à la Vickie's counterclaim), a complaint filed by the trustee to augment the estate (à la Northern Pipeline's breach of contract suit against Marathon) or an objection to a proof of claim (à la Pierce's proof of claim). Voya also rejects the Broadest Interpretation as it recognizes but ignores the context of the proceeding before the court (confirmation of a plan). Rather, Voya contends that because it filed the RICO Lawsuit, the *Stern* analysis I must do in the confirmation context focuses on that lawsuit. Voya inserts its claims in the RICO Lawsuit into the *Stern* Disjunctive Test and contends that they neither stem from the bankruptcy itself nor are resolvable in the claims allowance process (the "Voya Interpretation"). Voya, therefore, concludes that I cannot enter a final order confirming a plan that releases those claims.

Assuming that it is ever appropriate to import the Disjunctive Test into a context other than a state law cause of action filed by a trustee/debtor (i.e., complaint or counterclaim),[102] Voya does not point to anything in *Stern*, or in any case interpreting *Stern*, suggesting that the "action at issue" should be a proceeding other than the operative proceeding before the bankruptcy judge. The *Stern* Court looked at Vickie's counterclaim in the adversary proceeding before the bankruptcy court and in light of Pierce's proof of claim. It did not,

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[102] I would be remiss if I did not point out prior to the conclusion of my analysis that RICO claims, which are the predominant claims asserted in the RICO Lawsuit, are not claims based on state law.

for example, look at the Texas Litigation Vickie commenced prepetition. Nor did it rule on the basis that a court properly exercising bankruptcy jurisdiction could not affect the Texas Litigation. And, there was no other "action at issue" before the bankruptcy judge to look at; certainly confirmation of a plan was not before the bankruptcy judge. Focused as it was on an actual *claim*, albeit a counter*claim* in an adversary proceeding (and comparing Vickie's counterclaims to the claims asserted in *Katchen, Langenkamp, Granfinanciera* and *Marathon*), the *Stern* Court defined what was constitutional in that context—a counterclaim by the debtor/trustee against a third party.[103] The *Stern* Court examined Pierce's right to an Article III adjudication on Vickie's counterclaim and found that Vickie's claim "is in no way derived from or dependent upon bankruptcy law,"[104] neither was there "reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim."[105]

Voya's inverse reasoning finds no justification in *Stern*. *Stern* did not address, either expressly or by implication, any context other than counterclaims; the Supreme Court certainly did not announce a broad holding addressing every facet of the bankruptcy

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[103] *Cf. Cottonwood P'ship, L.L.P. v. Kivisto (In re SemCrude L.P.)*, No. 11-1174 (SLR), 2012 WL 5554819, at *3 (D. Del. Nov. 15, 2012) (affirming the bankruptcy court's decision to look at the motion before it—a motion to enjoin—and not the subject matter of the underlying litigation pending in a different court when conducting its jurisdictional analysis).

[104] *Stern*, 131 S. Ct. at 2618.

[105] *Stern*, 131 S. Ct. at 2617–18.

process. *Stern* did not hold, as Voya suggests, that regardless of which articulated (or unarticulated) core proceeding is before the court, the bankruptcy judge cannot, consistent with the Constitution, enter a final order in that core proceeding if that order affects a party's entitlement to have a debtor's or trustee's state law claim heard by an Article III court. All the more, *Stern* does not endorse the Voya Interpretation—that "[u]nder *Stern*, Article III prevents a bankruptcy court from entering final judgment disposing of a non-bankruptcy claim against a non-debtor that is not resolved as part of the claim resolution process, regardless of the proceeding (adversary proceeding, contested matter, plan confirmation, etc.)."[106]

But, if I were going to import the *Stern* Disjunctive Test into Millennium's plan confirmation proceeding, it would be closer to the Debtors' analysis.[107] First, however, I would conclude that confirmation of the Plan, as the operative proceeding, satisfies the first standard articulated in the Disjunctive Test. For all of the reasons set forth above, I would find that the Plan (and/or the releases) "stem(s) from the bankruptcy case" and thus I can, consistent with the Constitution, enter a

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[106] Opt-Out Lenders' Opening Brief on Remand Issues at 19.

[107] The Debtors' position is most akin to the Broadest Interpretation in that they extend the Disjunctive Test beyond § 157(b)(2)(C). But, the Debtors do not argue that the court should look at "whether the action at issue"—i.e., the confirmation proceedings (or the releases)—"stems from the bankruptcy itself." Rather, the Debtors import the Disjunctive Test and contend that the court must look at whether the releases "would necessarily be resolved in the confirmation process."

final order confirming Millennium's Plan. Second, I would also conclude that the confirmation of the Plan satisfies the second standard articulated in the Disjunctive Test. As I already found, the releases were integral to confirmation and thus integral to the restructuring of the debtor-creditor relationship. Thus, the releases would be "necessarily resolved in the confirmation process" or "necessarily resolved in the process of restructuring the debtor-creditor relationship."

Finally, even under the Voya Interpretation, on the facts of this case I would determine that the RICO Lawsuit was "necessarily [] resolved in the claims allowance process." As previously discussed, the Plan settlements were comprehensive in nature. The settlements provided for the contribution of $325 million in exchange for the releases by the Debtors and third parties (including Voya), the settlement with the USA Settling Parties, as well as the allowance and treatment of claims under the Existing Credit Agreement.[108] The settlement was global in nature: the claims under the Existing Credit Agreement were "Allowed," but only in the context of the Plan funded by the Non-Debtor Equity Holders, which required the third party releases. Voya held such a claim, and so its claim was "Allowed"

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[108] The Plan provided: "Class 2 consists of all Existing Credit Agreement Claims, The Existing Credit Agreement Claims are ***Allowed Claims*** in an aggregate outstanding principal amount of $1,752,812,500, plus any and all accrued interest, fees and other amounts due and payable under the Existing Loan Documents except Prior Agent Indemnity Claims." Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, LLC, et al. at 22, Nov. 10, 2015, D.I. 14.

by virtue of the Plan. As third party releases were essential to the allowance of those claims, the RICO Lawsuit was necessarily resolved in the claims allowance process.[109]

C. A Bankruptcy Judge's Final Order on a Core Issue That May Have a Preclusive Effect on a Third Party Lawsuit Does Not Violate *Stern*

Voya also contends that it is unconstitutional for a bankruptcy judge to enter a final order in any context if that final order might affect a lawsuit filed by a creditor against a third party. Voya is incorrect. While the Third Circuit has not directly ruled on the question before me on remand, it has ruled that *Stern* does not prevent a bankruptcy judge from entering final orders in statutorily core proceedings notwithstanding the orders' collateral impact on state law claims.

In *In re Lazy Days' RV Center Inc.*,[110] the bankruptcy court re-opened a confirmed bankruptcy case at the request of the reorganized debtor in order to rule on whether a purchase option in an assigned lease that was the subject of a prepetition settlement agreement incorporated into a plan of reorganization survived in light of § 365(f) of the Bankruptcy Code.

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[109] *See Fisher Island Invs., Inc. v. Solby+Westbrae Partners (In re Fisher Island)*, 778 F.3d 1172, 1192 n.13 (11th Cir. 2015) (noting that even if ownership of a debtor is not generally a core issue, the facts of the case made it core as the issue was the central one in the case).

[110] 724 F.3d 418 (3d Cir. 2013).

Post-confirmation, the reorganized debtor attempted to exercise the purchase option, but the landlord refused to honor it. The landlord and the reorganized debtors each filed separate lawsuits in Florida state court to determine their respective rights under the lease. The reorganized debtors also filed an emergency motion in the bankruptcy court seeking a ruling that the lease's anti-assignment clause was unenforceable. The bankruptcy judge ruled that the anti-assignment provision in the lease was unenforceable and that the landlord's refusal to honor the purchase option violated the settlement agreement. On appeal, the district court vacated the bankruptcy judge's order finding it to be an advisory opinion. On further appeal, the Third Circuit reversed the district court's ruling and remanded.

Among the issues on appeal, the Third Circuit addressed the landlord's argument that the bankruptcy judge unconstitutionally "asserted subject matter jurisdiction over a private rights dispute."[111] The court quickly dispatched this argument, ruling that unlike *Stern*, *Granfinanciera* and *Marathon*, which "dealt with the difficult question of when a bankruptcy court may constitutionally exercise jurisdiction over common law claims":

> By contrast, the Bankruptcy Court in this case did not decide a question of state common law, but rather determined whether, in light of 11 U.S.C. § 365(f)(3), an anti-assignment

[111] *Id.* at 423.

> clause survived the Settlement Agreement it had confirmed as part of a Chapter 11 bankruptcy. **Here, the Reorganized Debtors' claim for relief was based on a federal bankruptcy law provision with no common law analogue, so the *Stern* line of cases is plainly inapposite.**[112]

In analyzing the *Stern* argument, the court looked at the proceeding before it—the motion to reopen the bankruptcy case and the request for a declaration of rights under a section of the Bankruptcy Code. It did not look at the Florida state law claims. The Third Circuit was not oblivious to the state law litigation, however, as the landlord also argued that the mandatory abstention provision of 28 U.S.C. § 1334(c)(2) required the bankruptcy court to defer to pending state law litigation.[113] The Third Circuit quickly dispatched of this argument as well:

> As we noted already, **although this proceeding may have been provoked by**

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[112] *Id.* at 423 (citing *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009)) (emphasis added).

[113] § 1334(c)(2) provides:

> Upon timely motion of a party in a proceeding based upon a State Law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

> **state court actions and surely impacted them, the proceeding in the Bankruptcy Court was founded upon a quintessentially federal claim,** *viz.*, whether the anti-assignment clause was invalid under 11 U.S.C. § 365(f)(3). **Furthermore, this dispute "aris[es] in a case under the title 11"** as the Bankruptcy Court was asked to interpret and enforce a reorganization plan which was entered as part of Lazy Days's Chapter 11 bankruptcy.[114]

Applying *Lazy Days* here shows that the *Stern* line of cases is inapposite. The Third Circuit in *Lazy Days* focused on the operative proceeding in front of the bankruptcy judge, not the state law claims. Here, the operative proceeding is confirmation of a plan of reorganization under § 1129 of the Bankruptcy Code, a proceeding "based on a federal bankruptcy law provision with no common law analogue." And, even if the operative proceeding is more narrow—namely, Millennium's request for confirmation of a plan that includes third party releases—the *Stern* line of cases is still inapposite. There is no state law analogue; third party

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[114] *Lazy Days*, 724 F.3d at 424 (emphasis added). The Third Circuit reversal of the district court's opinion also demonstrates the Third Circuit was aware that the bankruptcy court's ruling would impact the pending state court litigation. In the district court opinion, the judge stated that: "it is crystal clear that the reorganized debtors went to the Bankruptcy Court to get an opinion that could be submitted to the Florida courts" and found, therefore, that the bankruptcy court had issued an advisory opinion on the survivability of the purchase option, which was the subject of the Florida litigation.

releases in chapter 11 plans are quintessentially federal in nature. Whether this requested relief is permissible or not is based entirely on federal bankruptcy law—the *Continental* hallmarks.

Even more recently (on March 20 of this year), the Third Circuit held in *Linear Electric Company, Inc.*[115] that *Stern* did not prevent a bankruptcy judge from entering a final order "discharging" construction liens filed by a non-debtor supplier against real property owned by a non-debtor. Pursuant to New Jersey state law, a supplier who sells materials on credit to a contractor who then incorporates those materials into property owned by a third party may file a lien against the third parties' real property if the supplier goes unpaid. Linear, the contractor/debtor, filed its chapter 11 petition at a time when two of its suppliers had not been paid in full. The suppliers thereafter filed construction liens on the real property into which Linear had incorporated their materials. Linear immediately filed a motion with the bankruptcy court to discharge the liens against the real property (owned by a non-debtor) as violating the automatic stay asserting that the liens were, in actuality, against the funds the non-debtor owed Linear (i.e., Linear's accounts receivable). The bankruptcy judge granted the motion and the non-debtor owner paid its outstanding account payable to Linear. The bankruptcy judge also held the suppliers'

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[115] *In re Linear Elec. Co., Inc.*, 852 F.3d 313 (3d Cir. 2017).

construction liens to be void *ab initio* for violation of the automatic stay.[116]

On appeal, the suppliers argued that the bankruptcy judge could not enter a final order invalidating their state law construction liens consistent with the constitutional proscriptions found in *Stern* because their filed state law liens against the non-debtor owner were private rights entrusted to Article III courts. The Third Circuit disagreed. While acknowledging that bankruptcy judges cannot enter final orders on certain state common law claims between private parties without their mutual assent, the Third Circuit found that Congress could assign cases involving "public rights" to non-Article III courts. The Third Circuit described public rights cases as those cases "in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority."[117] Looking at the operative proceeding—the motion alleging violation of the automatic stay—the court held:

> **Those claims arise under the federal bankruptcy laws. As such, any rights at issue are rights created by Congress, and such rights are public rights.** Article III

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[116] The bankruptcy judge did rule that the date of the filing of the liens could be treated as a notice under 11 U.S.C. § 546(b), which generally provides relation back lien protection against the debtor's interests. *See Linear*, 852 F.3d at 319.

[117] *Id.* at 320 & n.31 (quoting *Stern*, 131 S. Ct. at 2613).

> does not prevent a non-Article III court from resolving cases regarding public rights; thus the Bankruptcy Court could constitutionally determine whether the liens violated the automatic stay.[118]

Linear is significant for multiple reasons. Post-*Stern* and *Wellness Int'l Network, Ltd. v. Sharif*,[119] the Third Circuit has spoken more definitively than the Supreme Court on bankruptcy and public rights. The Third Circuit has now declared that claims arising under the federal bankruptcy laws are public rights.[120] In *Linear* the "claim arising under the federal bankruptcy laws" was the debtor's motion for violation of the automatic stay arising under section 362 of the Bankruptcy Code; here, it is the Debtors' request for confirmation of a plan arising under section 1129 of the Bankruptcy Code (or, more narrowly, the third party releases under the *Continental* hallmarks.) As such, the Third Circuit has effectively endorsed the view that confirmation of a plan is a public right.

Further, the posture of *Linear* and *Millennium* are similar, compelling similar results. Although not stated in *Linear*, it seems clear that the direct claim of the suppliers to a construction lien on the non-debtor owner's real property interests would be, at most, "related to" the bankruptcy case, while the motion for violation of the automatic stay is core. Notwithstanding

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[118] *Id.* at 320 (emphasis added).

[119] 135 S. Ct. 1932 (2015).

[120] *See Linear*, 852 F.3d at 319–20.

the decision on the merits, the Third Circuit recognized that the suppliers had two sources of recovery; they could have asserted liens against both the debtor's accounts receivable and the non-debtors' real property.[121] Thus, the bankruptcy court's ruling that the construction liens were void *ab initio* "surely impacted" any claims that the non-debtor suppliers had against the non-debtor's real property interests.[122] There is no question, then, that, if the proper standard is met, a bankruptcy judge may enter a final order in a core matter that impacts or even precludes a state law action between two non-debtors.[123]

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[121] *See id.* at 323 ("Hence the text of the Construction Lien Law provides no reason to believe that the liens are not *also* against Linear Electric's accounts receivable (*in addition to the development owners' real property interests.*") (second emphasis added).

[122] It might be argued that the automatic stay will lift once a discharge is granted or the case is dismissed so there is no harm to the supplier. But, because New Jersey lien law requires the supplier's lien to be lodged of record within, at most, 120 days following the date the material was supplied for which payment is claimed, N.J. STAT. ANN. § 2A:44A-6(a)(2), the Third Circuit's ruling left the suppliers without a remedy against the non-debtor owner. "For better or for worse, the automatic stay requires that [the suppliers] wait as Linear Electric's bankruptcy case proceeds and receive whatever they will receive under bankruptcy law *without resort to other mechanisms to claim greater payments.*" *Id.* (emphasis added).

[123] A Westlaw search revealed seven Third Circuit cases that cite *Stern*, The other five are:

(1) ***In re Prosser*, 574 F. App'x 82, 84 (3d Cir. 2014)** (holding in context of turnover action and without discussion, that *Stern* "does not alter this [subject matter jurisdiction] analysis, because this case does not involve a counterclaim, nor is it solely based on

state law."). This panel appears to adopt the Narrow Interpretation.

(2) ***Holber v. Suffolk Constr. Co. (In re Red Rock Servs., Co.)*, 642 F. App'x 110, 114–15 (3d Cir. 2016)** (non-debtor subcontractor filed proof of claim in contractor/debtor's bankruptcy case asserting damages for breach of contract; debtor filed adversary proceeding against subcontractor asserting same; Third Circuit held that the bankruptcy court had constitutional authority to enter a final order on all state law claims because they were "inextricably interlinked with the claims flowing from the adversary proceeding and, consequently, from the federal bankruptcy statutory regime." The state law claims had to be resolved to determine whether the debtor and the creditor had claims against each other.) This panel appears to adopt the Broad Interpretation of *Stern*, and suggests that the claims process is part of the federal bankruptcy statutory scheme.

(3) ***Carr v. New Century TRS Holdings, Inc. (In re New Century TRS Holdings, Inc.)*, 544 F. App'x 70, 73–74 (3d Cir. 2013)** (Creditor and debtor settled creditor's state law damages claim based on fraud and violation of the Truth-in-Lending Act. Creditor subsequently asserted that debtor had fraudulently induced her into settling claim and asserted that the bankruptcy court did not have authority to enter a final order on her claims. The Third Circuit distinguished Vickie's counterclaim and held that the creditor's fraudulent inducement was "irreversibly intertwined" with the previous settlement of the creditor's claims.). This panel appears to adopt the Broad Interpretation.

(4) ***One2One Commc'ns, LLC v. Quad/Graphics, Inc. (In re One2One Commc'ns, LLC)*, 805 F.3d 428, 433 (3d Cir. 2015)** (in the context of a concurring opinion discussing equitable mootness, Judge Krause states: "Thus, the Court in *Stern* made clear that non-Article III bankruptcy judges do not have the constitutional authority to adjudicate a claim that is exclusively based upon a legal right grounded in state law despite appellate review of the bankruptcy judge's decision by an Article III judge. However, Stern did not consider the authority of bankruptcy judges to make final determinations regarding other kinds of claims and counterclaims brought by debtors and creditors, nor did *Stern* consider whether Article III requires appellate review of a

The Third Circuit is not the only circuit drawing this conclusion. The Sixth Circuit in *In re Hart*[124] also ruled *Stern* did not preclude the entry of a final order by a bankruptcy judge even though that order would appear to indirectly preclude certain state law claims. In *Hart*, the bankruptcy judge entered a judgment finding a bank's loans to debtor Hart nondischarge able under § 523(a)(2)(B) of the Bankruptcy Code. At the bank's request and over Hart's *Stern* objection, the bankruptcy judge also entered judgment on the amount of each non-dischargeable loan. The Sixth Circuit distinguished *Stern* both factually and legally.

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bankruptcy judge's decisions by an Article III judge. Accordingly, we are obligated to apply this Court's equitable mootness doctrine notwithstanding *Stern*."). Judge Krause's discussion suggests the Broad Interpretation. She also suggests that a bankruptcy judge can enter a final order confirming a plan containing releases. *See id.* at 445 ("Although Article III judges decide whether an appeal is equitably moot, bankruptcy courts control nearly all of the variables in the equation, including whether a reorganization plan is initially approved, whether a stay of plan implementation is granted, whether settlements or releases crucial to a plan are approved and executed, whether property is transferred, whether new entities (in which third parties may invest) are formed, and whether distributions (including to third parties) under the plan begin—all before plan challengers reach an Article III court.").

(5) ***Tribune Media Co. v. Aurelius Capital Mgmt. (In re Tribune Media Co.)*, 799 F.3d 272 (3d Cir. 2015)** (mentioning *Stern* in concurring opinion responding to Judge Krause's concurrence in *One2One*; not relevant for current analysis).

In sum, the Third Circuit has either adopted the Narrow Interpretation (*Prosser*), the Broad Interpretation (*RedRock, New Century, One2One* (concurrence) or the Broadest Interpretation (*Lazy Days, Linear*) in each of its reported decisions.

[124] *Hart v. S. Heritage Bank (In re Hart)*, 564 F. App'x 773 (6th Cir. 2014).

Factually, unlike Vickie, Hart did not assert a counterclaim in the nondischargeability proceeding; only the bank's claim was before the bankruptcy court. Legally, unlike Vickie's counterclaim, the bank's claim against Hart arose in the bankruptcy case and was an enumerated core matter under § 157(b)(2)(I)–(J).[125] The court also concluded that the bankruptcy court could enter a final order on the amount of a claim in the dischargeability context under Sixth Circuit precedents.[126]

Hart rejected the debtor's argument that the bankruptcy judge lacked constitutional authority to enter a final judgment because of pending state court litigation even though it precluded Hart from filing and pursuing counterclaims in that litigation. As relevant here, the Sixth Circuit recognized the distinction between entering a judgment that directly extinguished counterclaims filed in state court (which *arguably* exceeded the bankruptcy court's constitutional authority) and entering a monetary judgment on dischargeability (a federal issue that indirectly precluded Hart from filing her counterclaim in state court). As the Sixth Circuit observed: "Hart should not be able to

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[125] Consisting of "determinations as to the dischargeability of particular debts," and "objections to discharges." *See* 28 U.S.C. § 157(b)(2)(I)–(J).

[126] The panel deciding *Hart* may have felt constrained by its previous rulings, as the *Hart* court recognized that "bankruptcy courts' well-settled statutory and constitutional authority to make dischargeability determinations is *distinct* from the question of whether the bankruptcy courts may enter a final monetary judgment after determining the amount of the discharge." *Hart*, 564 F. App'x at 776 n.1.

escape the collateral effects of the bankruptcy court's decision made under proper authority."[127]

In *In re Fisher Island Investments, Inc.*,[128] the Eleventh Circuit held that a bankruptcy judge had both statutory and constitutional authority to enter a final order determining which of two non-debtor entities owned three alleged debtors in the context of involuntary bankruptcy filings. The involuntary bankruptcy proceedings were "but a small part of global litigation" over the ownership and control of a wealthy businessman's assets, a dispute "spawn[ing] litigation in the Republic of Georgia, the United Kingdom, Liechtenstein, the British territory of Gibraltar, and both state and federal courts in the United States."[129]

Prepetition, two factions (the Redmond Group and the Zeltser Group) were litigating the ownership issues in New York and California. When the petitioning creditors filed the involuntary petitions, they also moved for joint administration of the cases and to appoint a trustee to take control of the alleged debtors' assets. The Zeltser Group answered the involuntary petition on behalf of the alleged debtors consenting to all the relief sought. The Redmond Group claimed it was the authorized representative of the alleged debtors, moved to strike the Zeltser Group's answer and alleged that the involuntary petitions were improperly filed to stay the state court ownership litigation.

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[127] *Id.* at 777.

[128] *Fisher Island*, 778 F.3d 1172.

[129] *Id.* at 1177.

Ultimately, the bankruptcy judge ruled in favor of the Redmond Group. Zeltser appealed.

At the circuit court level, the court ruled that the ownership dispute was "core" and that the bankruptcy judge had both statutory and constitutional authority to enter a final judgment. The court determined that resolution of the ownership issue was critical to the administration of the alleged debtors' estates and directly affected the debtor-creditor relationship thus falling within the catch-all enumerated core proceedings of §§ 157(b)(2)(A) and (O).[130] It further concluded that the bankruptcy judge necessarily had to determine who owned the alleged debtors in order to adjudicate the involuntary petitions and the $32 million in alleged debt because one faction admitted the debt and the other did not.[131] Alternatively, the Eleventh Circuit found that the Zeltzer Group consented to the bankruptcy court's final adjudication of the ownership issue by its actions and representations and even invoked the aid of the bankruptcy court on the issue.

As for *Stern*, the Eleventh Circuit determined that its "narrow holding" was "wholly inapplicable."[132] It

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[130] 28 U.S.C. § 157(b)(2)(A) (core proceedings include "matters concerning the administration of the estate"); § 157(b)(2)(O) (core proceedings include "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.").

[131] It is unclear from the opinion whether the Zeltzer Group actually contested the debt, contested the involuntary petition, or both.

[132] *Fisher Island*, 778 F.3d at 1192.

recognized that the ownership issue resembled Vickie's counterclaim as it was a state law claim that did not involve public rights, or stem from the federal regulatory scheme. Further, the ownership issue did not involve a particularized area of the law nor was it determined by bankruptcy law. And although the court concluded that the ownership issue was "necessarily resolved by the bankruptcy court through the process of adjudicating the creditors' claims," the claims process was not the proof of claim process referenced by the *Stern* court as the "relevant parties" did not file a proof of claim. Rather, the "claims process" appears to be the involuntary petition itself.[133] As the court repeatedly emphasized, determining the authorized representative of the debtor was a threshold issue in the case because it was necessary to determine whether the involuntary petition was contested or not.[134] Thus, the Eleventh Circuit ruled that the bankruptcy judge could enter a final order on the ownership issue, notwithstanding its substantial impact on the pending proceedings in other courts.[135]

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[133] There is no suggestion in the opinion that the three creditors who filed the involuntary petition were in any way involved in the ownership dispute.

[134] In an interesting footnote, the 11th Circuit stated that even if ownership of a debtor is not generally a core issue, the facts of the case made it core as the issue was the central one in the case. *See Fisher Island*, 778 F.3d at 1192 n.13.

[135] I recognize that in *Lazy Days, Hart* and *Fisher Island*, each objecting party received some sort of adjudication on at least a part of the actual merits of its claims whereas here there has been no hearing on the merits of the RICO Lawsuit. The hearings

Here, the entry of the order confirming Millennium's Plan did collaterally impact the RICO Lawsuit—I undoubtedly provided the Non-Debtor Equity Holders with a defense that they can use in any continuation of the RICO Lawsuit before Judge Sleet. Whether that defense is the affirmative defense of *res judicata* (as Voya contends), release,[136] a Rule 12(b)(1) mootness defense,[137] issue preclusion, or a defense that the claim should be barred by reason of § 1141 of the Bankruptcy Code,[138] the confirmation order has *surely impacted* the RICO Lawsuit. But, as can be seen from *AOV Industries, Specialty Equipment, Lazy Days, Linear, Hart, Fisher Island* and any number of other cases,

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the objectors received, however, were not the Article III adjudications they requested.

[136] FED. R. CIV. P. 8(C) lists release as an affirmative defense. ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . release. . . ."). Release is a concept distinct from *res judicata*, another enumerated affirmative defense.

[137] Voya's claims may have been made moot due to the impossibility of recovery. *See In re AE Liquidation, Inc.*, 435 B.R. 894, 903 (Bankr. D. Del. 2010) (rejecting a *res judicata* theory with respect to two counts in adversary proceeding seeking to prevent a sale of aircraft that would convey clear title to a buyer because they were not the same cause of action as a § 363 sale motion, but holding that those counts were made moot by the entry of the sale order transferring the aircraft free and clear of claims, and thus bankruptcy judge no longer had jurisdiction over those two counts of the complaint).

[138] *See e.g. CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 194 n.4 (3d Cir. 1999) (suggesting that issue preclusion or § 1141(a) may be the more appropriate defense, but analyzing claim preclusion/*res judicata* because the district court and the parties primarily treated the case as one of claim preclusion).

a bankruptcy court order that impacts a litigant's state law claims even when litigation is pending does not violate *Marathon* or *Stern.*[139] This conclusion holds true

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[139] Other reported decisions in which courts have held that a bankruptcy judge has constitutional adjudicatory authority post-*Stern* to issue an order in a core proceeding that impacts state law claims include: (i) *In re Safety Harbor Resort and Spa*, 456 B.R. 703 (Bankr. M.D. Fla. 2011) (finding that a bankruptcy judge has constitutional adjudicatory authority to impose creditor suggested "lock up" restrictions on the reorganized debtor's business operations and non-debtor guarantors' assets as condition to confirming plan containing third party releases; lock up restrictions were an integral part of the order confirming the plan and confirmation of a plan is core; also finding guarantor consent by virtue of controlling interest in debtor as proponent of the plan); (ii) *In re Catholic Bishop of N. Alaska*, 525 B.R. 723, 730 (D. Alaska 2015) (over *Stern* objection, holding that even if parties had not waived their right to challenge bankruptcy judge's constitutional adjudicatory authority by not raising it prior to appeal, bankruptcy judge had authority to determine state law adverse possession property rights in context of non-debtor/purchaser's motion to enforce § 363 sale order because it "was necessary for the proper administration of the bankruptcy estate"); *In re Owner Mgmt. Serv., LLC Trustee Corps.*, 530 B.R. 711 (Bankr. C.D. Cal 2015) (holding that post-*Stern*, bankruptcy judges can continue to enter final orders on substantive consolidation) (citing *In re LLS America*, 2011 WL 4005447 (Bankr. E.D. Wash. Sept. 8, 2011) *aff'd In re LLS Am., LLC*, 2012 WL 2042503 (9th Cir. BAP June 5, 2012) ("Substantive consolidation does not exist outside the context of a bankruptcy proceeding. It is only available in a bankruptcy proceeding commenced under the federal bankruptcy scheme. Although not expressly provided for in the Bankruptcy Code, it has been a tool utilized by bankruptcy courts since the Bankruptcy Act of 1898. Clearly, substantive consolidation is a core matter as it "arises under" Title 11 or "arises in" a case under Title 11. . . . The narrow holding of *Stern v. Marshall* does not apply to the Motion for Substantive Consolidation.")); *In re Land Resource, LLC*, 505 B.R. 571, 581–82 (M.D. Fla. 2014) (holding that the bankruptcy court had constitutional adjudicatory

even if that impact effectively precludes adjudication of the merits of a state law claim.

Voya argues, primarily based on *Digital Impact*[140] and *CoreStates* (or perhaps a combination of the two), that the entry of a confirmation order containing releases constitutes an "adjudication" of its RICO Lawsuit, which *Stern* prohibits. Voya's reliance on these cases is misplaced. Taking the position that third party releases in a plan are equivalent to an impermissible adjudication of the litigation being released is, at best, a substantive argument against third party releases, not an argument that confirmation orders containing releases must be entered by a district court. Indeed, neither of these cases examine a bankruptcy judge's constitutional power to enter an order.

Moreover, Voya's position rests on backwards reasoning—it examines the legal consequence of the confirmation order to find fault with the entry of the order, rather than examining the propriety of issuing the confirmation order in the first instance. Citing *Digital Impact* and *CoreStates*, Voya starts from a general premise that a confirmation order containing third party releases is *res judicata* with respect to the claims it releases. Because *res judicata* requires that the

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authority to enter order approving settlement that contained permanent injunction and bar order permanently enjoining non-debtors from pursuing claims against other non-debtors, and that *Stern* is inapposite and should not be extended beyond its narrow holding).

[140] *In re Dig. Impact, Inc.*, 223 B.R. 1 (Bankr. N.D. Okla. 1998).

impacted action (the RICO Lawsuit) be based on the same cause of action as the prior suit (the confirmation order),[141] Voya reasons that the confirmation order is an adjudication on the RICO Lawsuit. And, because the RICO Lawsuit is non-core, Voya concludes that I cannot enter the confirmation order approving third party releases because I could not enter a final order in the non-core RICO Lawsuit absent its consent, which it does not give.[142] This is not the law.

First, as admitted by Voya's counsel at argument, *Digital Impact* does not hold that confirmation of a plan of reorganization is an adjudication of the merits of the RICO Lawsuit.[143] Rather, *Digital Impact* states

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[141] "Claim preclusion requires: (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privities; and (3) a subsequent suit based on the same cause of action." *CoreStates*, 176 F.3d at 194.

[142] See Opt-Out Lenders' Opening Brief on Remand Issues 17–18.

[143] **The Court:** But isn't confirmation what was in front of me?

Mr. Redburn: Let me be clear about what I'm saying. Yes, confirmation is what was in front of you.

When you asked me what was in front of you I interpreted that as what was the claim as to which the Court entered judgment and there were two things; confirmation, but by through the release injunction and bar order that was contained in the confirmation plan that Your Honor confirmed—sorry, plan of reorganization that Your Honor confirmed that was a judgment that was entered on Voya's claim.

The Court: And who says that other than *Digital Impact?* What case says that other than *Digital Impact?*

that the release before it was "equivalent to issuing a final judgment" in favor of the released party.[144] Even so, it is no more "equivalent to a final judgment" than any other order issued by a bankruptcy judge that may be used in subsequent litigation to establish a defense, including the orders entered in *Lazy Days, Linear, Hart* or *Fisher Island.*[145]

Second, *Digital Impact is* a pure jurisdictional case. In *Digital Impact*, the bankruptcy judge held a confirmation hearing and *sua sponte* raised two issues: (i) whether the court could confirm a plan that did not pay priority administrative claimants in full; and (ii) whether the court had jurisdiction or power to enter an order releasing a third party (Dickerson) from claims

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> **Mr. Redburn:** That's an excellent question. *The way I would respond to it is I don't have a specific case that says that explicitly; however—*
>
> **The Court:** Because the case of *Digital Impact* doesn't say that either.
>
> **Mr. Redburn:** *I agree with that, however, it's a matter of simple logic.* What the effect of the release injunction and bar order is the exercise of judicial power to extinguish a claim as a matter of law. If that's not what a judgment is I don't know what is.

Oral Argument on Remand, July 27, 2017, Hr'g Tr. 80:21–81:19, D.I. 456 (emphasis added).

[144] *Dig. Impact*, 223 B.R. at 12.

[145] *See* n. 136, 137, 138 *supra.* Until a litigant attempts to use a bankruptcy order as a defense in subsequent litigation, and the presiding court performs its analysis, it is not certain which defensive theory, if any, might be the most appropriate. The Non-Debtor Equity Holders may also have the ability to bring a motion to enforce the confirmation order.

relating to his participation in the case. After post trial briefing and argument, the *Digital Impact* judge found that she did not have even "related to" jurisdiction over any potential/theoretical third party litigation against Dickerson because the outcome of that litigation would not have any effect on the administration of the estate.[146] The *Digital Impact* judge also questioned her jurisdiction under § 1334 to grant releases at all—not whether she or the district court must enter the final order granting the releases. It is in this context that *Digital Impact* cites *Western Real Estate Fund* (which holds that section 524(e) prohibits third party releases) for the proposition that a confirmation order containing releases is "equivalent" to a ruling on the merits of the litigation it touches.[147]

Third, an analysis of *CoreStates* does not assist Voya; rather, it is fatal to Voya's theory. *CoreStates* analyzed the claim preclusive effect of a specific confirmation order and held that where a subsequent claim arose from the same cause of action as a claim actually asserted in the bankruptcy case and resolved by the confirmation order, claim preclusion was applicable.[148]

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[146] The plan required simultaneous funding and distributions to creditors on the effective date. *Dig. Impact*, 223 B.R. at 12. Dickerson also waived any claims that he had against the estate. *Id.* at 5.

[147] *Id.* While the *Digital Impact* judge does not adopt the § 524(e) statutory argument against releases, she states that § 524(e) embodies an important policy. *See id.* at 10.

[148] *CoreStates*, 176 F.3d at 195–99. In its conclusion, the Third Circuit stresses that *CoreStates'* claims in subsequent

It did not, as Voya suggests, hold that every confirmation order is *res judicata* on every issue raised in a post-confirmation lawsuit.[149] More importantly, Voya ignores the first ruling of the *CoreStates* Court: that a confirmation order has claim preclusive effect on a "related to" proceeding if that proceeding otherwise meets the requisites for *res judicata.*

CoreStates involved an intercreditor dispute between two lenders (CoreStates and Huls) regarding which of them was entitled to funds from their mutual borrower/debtor United Chemical Technologies. Prepetition, CoreStates, Huls and United Chemical were parties to a subordination agreement under which Huls agreed to hold in trust for CoreStates any funds it might receive in a United Chemical bankruptcy, and to immediately deliver any such funds to CoreStates. When United Chemical subsequently filed its bankruptcy case, it sponsored a plan by which it proposed to pay CoreStates over time and permit CoreStates to retain certain liens. Huls was to receive $600,000 in cash on its claim. CoreStates objected to the plan on the basis that the payment to Huls unfairly discriminated between creditors, but CoreStates did not specifically base its objection on the subordination

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litigation are precluded "because of the coincidence of several unusual circumstances." *CoreStates*, 176 F.3d at 206.

[149] Indeed, the following year, the Third Circuit held that a confirmation order did not bar a subsequent lawsuit because the later claim did not arise from the same cause of action as a claim actually asserted in the earlier bankruptcy case. *E. Minerals & Chems. Co. v. Mahan*, 225 F.3d 330, 339 (3d Cir. 2000) (discussing *CoreStates*).

agreement. CoreStates' objection was overruled and the plan was confirmed, After multiple appeals and payment of the $600,000 to Huls, an amended plan was confirmed; the amended plan did not change Huls' plan treatment or purport to change CoreStates' rights vis-à-vis Huls. After confirmation, CoreStates sued Huls in the district court on the subordination agreement, and Huls raised a *res judicata* defense. Based on the specific facts and posture of the case, the district court granted Huls's motion to dismiss.

On appeal, CoreStates challenged not only the district court's specific application of the doctrine of *res judicata*, but whether the doctrine could be applied at all. CoreStates argued that the preclusive effect of bankruptcy court orders should be limited. Specifically, CoreStates argued that the claim preclusion doctrine should not "preclude claims that [fall] within the non-core 'related'—as opposed to the core—bankruptcy jurisdiction."[150] In a several page discussion, the Third Circuit recognized and discussed a split among the circuits with respect to the question of whether a bankruptcy judge—which can only hear, but not determine, a non-core matter (absent consent)—could enter a confirmation order that could bar the prosecution of that non-core matter. Siding with the majority of circuits, and examining the Restatement (Second) of Judgments, the Third Circuit concluded that it could.[151] The Third Circuit was persuaded that a limitation on the

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[150] *CoreStates*, 176 F.3d at 195.

[151] *Id.*

judicial power of a judge is not a limitation on jurisdiction, and thus not a limitation on the preclusive effect of the judge's order. The Third Circuit, thus, ruled that a confirmation order has preclusive effect with respect to a non-core, "related to" proceeding if the proceeding otherwise meets the requisites of the *res judicata* doctrine.[152]

CoreStates runs counter to Voya's argument. It comports with the conclusion reached from an analysis of the Third Circuit's decisions in *Lazy Days* and *Linear*, that an order entered by a bankruptcy judge may "surely impact" state law claims.

D. Adopting the Voya Interpretation Would Dramatically Change the Division of Labor Between the Bankruptcy and District Courts

Finally, I feel compelled to briefly address Voya's assertion on remand that under the Voya Interpretation "the vast majority of activities in which a bankruptcy court engages on a day-to-day basis, such as issuing DIP financing orders, approving asset sales, allowing or disallowing claims against a debtor's estate, are entirely unaffected by *Stern*."[153] Voya makes this proclamation in its opening brief on remand without any analysis. As acknowledged at argument, however,

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[152] Voya's *res judicata* argument is at odds with its position that the merits of the RICO Lawsuit were not in front of me at confirmation. *See* Part IV, *infra*.

[153] Opt-Out Lenders' Opening Brief on Remand Issues at 22.

Voya recognizes at least two times when district courts would be compelled to enter the final order approving a debtor's requested relief: (i) any § 363 sale of assets in which a purchaser seeks to be free of successor liability—which is every § 363 sale of assets; and (ii) requests to compel annual meetings of stockholders.[154] In addition to the contexts already examined in this Opinion,[155] I would add: (i) substantive consolidation of debtors, and/or debtors and non-debtors (in which the rights of creditors and non-creditors against non-debtor entities are rearranged); (ii) recharacterization and/or subordination (in which state law debts are transformed); (iii) requests to establish notice procedures to preserve a debtor's net operating losses by prohibiting trading in stock without certain advance notice (in which trades in derogation of those procedures are declared void *ab initio*); and (iv) a sale of property subject to a co-debtor stay (in which the court compels the sale of a non-debtors' interest in property).[156] Voya suggests that consent may permit the

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[154] Oral Argument on Remand, Hr'g Tr. at 119:16–122:20.

[155] Those contexts are: (i) stay violation motions (in which state law lien rights against third parties are adjudicated); (ii) involuntary proceedings (in which ownership issues between two non-debtors are adjudicated); (iii) interpretation of previous orders (in which state law contractual rights are adjudicated) and (iv) non-dischargeability litigation (in which judgment is entered on state law claims).

[156] These are not random thoughts. Since the Remand Decision, I have been asked to (i) approve a § 363 sale motion with successor liability provisions, (ii) establish procedures for preservation of net operating losses, (iii) approve a sale of co-debtor

bankruptcy court to enter a final order in these instances, but it seems at least arguable that consent would be withheld to leverage a party's position. As Judges Krause and Ambro noted in their respective discussions of equitable mootness in their separate concurring opinions in *One2One* and *Tribune*, there is ample room for gamesmanship by both debtors and creditors in the bankruptcy context.[157]

While recognizing that even a slight encroachment by Congress into the prerogative of the Judicial Branch cannot be tolerated, Chief Justice Roberts was convinced that his ruling in *Stern* did not "change all that much."[158] The main reason is that the bankruptcy system already contemplates that certain state law claims, such as Vickie-type counterclaims, are to be

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property, and (iv) interpret a previous order approving substantive consolidation.

[157] *See*, *eg., One2One*, 805 F.3d at 453 (Krause, J., concurring) ("we should be even less solicitous of parties who act opportunistically or advocate unlawful plan provisions during confirmation"); *Tribune*, 799 F.3d at 288–89 (Ambro, J., concurring) ("Without equitable mootness, any dissenting creditor with a plausible (or even not-so-plausible) sounding argument against plan confirmation could effectively hold up emergence from bankruptcy for years (or until such time as other constituents decide to pay the dissenter sufficient settlement consideration to drop the appeal), a most costly proposition.") Indeed, the O'Hagan article cited by Voya appears to fall into this category. The author describes his article as a look at "an underutilized—yet potent—procedural weapon." Eamonn O'Hagan, *On a "Related" Point: Rethinking Whether Bankruptcy Courts Can "Order" the Involuntary Release of Non-Debtor, Third-Party Claims*, 23 AM. BANKR. INST. L.R. 531, 531 (2015).

[158] *Stern*, 131 S. Ct. at 2620.

ultimately resolved by non-bankruptcy judges. As Chief Justice Roberts observed, district court judges review *de novo* and enter final orders in lawsuits that allege "related to" claims, and bankruptcy courts must or may abstain from ruling on state law disputes that can be timely adjudicated.[159] But, there is no established alternative framework for ruling on core proceedings interpreting federal law that touch upon state law rights.

For all of these reasons, I conclude that I had constitutional adjudicatory authority to enter a final order confirming Millennium's Plan.[160]

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[159] *See* 28 U.S.C. §§ 157(c), 1334 (c)(1)–(2).

[160] As many courts before me, I performed a "related to" analysis in the first instance because that is the argument that Voya made. Finding that I had at least "related to" jurisdiction, and with this being the only non-merits challenge, I determined I had subject matter jurisdiction and proceeded to analyze the merits of the requested relief.

Given the analysis I have just performed (and the significant time we have spent in chambers to be in a position to respond to the district court's question on remand[A]), I question whether this "related to" analysis is the proper analytical framework to begin with as it relates to confirmation of a plan containing releases.[B] Some courts do not perform such an analysis. The circuit courts deciding *AOV Industries* and *Specialty Equipment* held that the bankruptcy court can rule on the legality of release provisions in a plan consistent with the Constitution, and they ruled without performing a "related to" analysis. Further, courts do not conduct this analysis in other contexts in which third party litigation is impacted.

Our research did not reveal the genesis of this analytical framework, and an attempt to trace it back to its origins did not supply a satisfying result. But at least one commentator has

suggested it was improperly imported from decisions addressing the court's ability to issue injunctions temporarily staying third party litigation.[C] Having immersed ourselves in the *Stern* question presented by the Remand Decision, I believe that to the extent a "related to" analysis is relevant to third party releases in the confirmation context, it may act as a check on the outer boundaries of permissible releases, as a substantive matter.[D] In that regard, I agree with Judge Frank that perhaps many reported decisions conflate, as Voya did in many ways here, subject matter jurisdiction with the substantive merits.[E] Where I may part ways with Judge Frank, however, is his suggestion that this distinction may be wholly academic in most cases. If the "related to" analysis is appropriate in the confirmation context, there would appear to be no principled reason not to perform a "related to" analysis in the many other contexts in which bankruptcy judges rule on matters that may impact private rights between non-debtors.

[A] There is no denying the complexity of the cases interpreting the Supreme Court's holdings in the Article I/Article III arena. *Kirschner*, 461 B.R. at 191 (citing cases). And, although distinct from jurisdictional questions, a byproduct of answering the question on remand is the re-thinking of the entire framework of confirmation of plans containing releases.

[B] I am not the first to do so. *See In re Lower Bucks Hosp., 471 B.R. 419, 448 n.45 (Bankr. E.D. Pa. 2012), aff'd sub nom. Bank of N.Y. v. Becker (In re Lower Bucks Hosp.), 488 B.R. 303 (E.D. Pa. 2013), aff'd sub nom. In re Lower Bucks Hosp., 571 F. App'x 139 (3d Cir. 2014); Charles St.*, 499 B.R. at 99 ("It may or may not be appropriate for a court exercising bankruptcy jurisdiction to confirm a plan containing a third-party release—and, if it is appropriate, the manner and degree of relation of the released claim to the case are certainly factors in the analysis—but the court undoubtedly has jurisdiction to adjudicate the plan, even without recourse to its related-to jurisdiction,").

[C] These injunctions are unmoored to confirmation of plans. *See generally* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L.J. 1 (1988). While I do not necessarily agree with Professor Brubaker's conclusions, I

III. Voya Both Forfeited and Waived any Constitutional Adjudicatory Authority Objection to my Ability to Enter a Final Order Confirming the Plan

Even assuming that I did not have constitutional adjudicatory authority to enter a final order confirming Millennium's Plan, Voya forfeited the right to

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appreciate the thought put into analyzing the genesis of the framework.

[D] Judge Frank was not confronted with this direct question either, but he posited:

> Because there is no express provision of the Bankruptcy Code authorizing the confirmation of plans that include third party releases, the decisional law on the subject permitting confirmation of such plans appears to be a judicial gloss on the statute, albeit one grounded in 11 U.S.C. § 105. Viewed from that perspective, arguably, it may be more accurate to conceptualize a ruling, in a particular case, that the bankruptcy court lacks the authority to approve a particular third-party release or impose a particular injunction because the nexus between the released or enjoined matter and the bankruptcy case is too attenuated, as a decision of substantive bankruptcy law—i.e., establishing the boundary line of permissible plan provisions—rather than a decision based on *subject matter jurisdiction* under 28 U.S.C, § 1334(b). *But see Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004) (suggesting that the exercise of bankruptcy jurisdiction involves *in rem* proceedings "premised on the debtor and his estate").

Lower Bucks, 471 B.R. at 448 n.45.

[E] *Lower Bucks*, 471 B.R. at 448 n.45 ("There is a reasonable case to be made that [the objector] and perhaps the courts in some reported decisions, have conflated subject matter jurisdiction with the substantive merits.").

contest my authority by not raising the argument. Voya also implicitly consented [161] to my authority, thereby waiving the right to contest it.

Waiver and forfeiture are commonly confused terms. "Although jurists often use the words interchangeably," [162] waiver and forfeiture have different meanings. "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.' "[163]

In 2015, the Supreme Court ruled in *Wellness* that litigants may consent to a bankruptcy court's constitutional adjudicatory authority to enter final orders.[164] If litigants consent, any objection to a bankruptcy court's

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[161] As Mr. Weintraub pointed out at argument, the use of the word "consent" in the context of this case can be confusing as it is used in myriad contexts. *See* Oral Argument on Remand, Hr'g Tr. 146:6–148:5. I will use the word "consent" when referring to whether a party agrees that the bankruptcy court may enter a final order on a matter (or has impliedly consented, or waived/forfeited the argument). I will use the word "assent" when referring to whether a party has agreed to the grant of third party releases. Lest anyone is confused, I find that Voya did not assent to the granting of third party releases, but that it did consent (or waived/forfeited any objection) to the entry of a final order on confirmation.

[162] *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004). While I have attempted to adhere closely to these definitions in this Opinion, I believe certain intentional actions can constitute both a forfeiture and a waiver of a right.

[163] *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

[164] *Wellness*, 135 S. Ct. at 1948–49.

authority is waived.[165] Consent may be express or implied,[166] but in either event must be knowing and voluntary.[167] After the Supreme Court's decision in *Wellness* confirmed that litigants can consent to a bankruptcy judge's constitutional adjudicatory authority, many courts have found implied consent when a party appears before a bankruptcy judge without raising a constitutional objection.[168] While *Wellness*

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[165] *Id., see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) ("the entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to waiver.' ").

[166] *See*, *e.g.*, *Wellness*, 135 S. Ct. at 1948 ("[n]othing in the Constitution requires that consent to adjudication by a bankruptcy court be express."); *Roell v. Withrow*, 538 U.S. 580, 590 (2003) ("the Article III right is substantially honored" by permitting waiver based on "actions rather than words.").

[167] *See Wellness*, 135 S. Ct. at 1948 (citing *Roell*, 538 U.S. at 588 n.5).

[168] *See Mandel v. Jones*, No. 4:12-cv-87, 2016 WL 4943366, at *5 (E.D. Tex. Sept. 16, 2016) (holding that parties may impliedly consent when a bankruptcy judge hears evidence and testimony without objection by the parties) (citing *In re McCollom Interests, LLC*, 551 B.R. 292, 300 (Bankr. S.D. Tex. 2016) ("[T]his Court held two hearings during which two of the Firm's attorneys appeared and gave testimony; and the Firm never objected to this Court's constitutional authority to enter a final order. . . . If these circumstances do not constitute implied consent, nothing does.")); *Campbell v. Carruthers (In re Campbell)*, 553 B.R. 448, 452 (Bankr. M.D. Ala. 2016) (misprint in published decision, but available in Westlaw version) (concluding that a defendant's failure to appear and defend against claims in an adversary proceeding, despite service of the summons, constituted knowing and voluntary consent to a non-Article III adjudicator within the meaning of *Wellness*) (and cases cited therein); *In Matter of Smiley*, 559 B.R. 215, 217 (Bankr. N.D. Ind. 2016) (finding implied

primarily focused on consent, the Supreme Court also recognized that a party can forfeit a constitutional right.[169] Both the concept of implied consent and forfeiture increase judicial efficiency and check gamesmanship.

On remand, I asked the parties to brief the issue of whether Voya had waived any argument that I lacked constitutional adjudicatory authority to enter a final order confirming Millennium's Plan. I did so for a simple reason—I believed I had ruled on all objections fairly raised at the confirmation hearing. I did not remember the words "constitutional adjudicatory authority," "proposed findings of fact and conclusions of law," "report and recommendation," or the like in any of Voya's confirmation submissions or in Voya's argument at confirmation. But, recognizing that I could be incorrect, I asked the parties to identify the portions of the record in which Voya made its *Stern* argument.[170]

In its submissions on remand, Voya identified the following portions of the record: (i) its "Local Rule 9013-1(h) reservation of rights;" and (ii) Paragraph 24

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consent when litigants "actively participate in the proceeding, knowing their rights, but choose not to assert them").

[169] *Wellness*, 135 S. Ct. at 1949 (The Supreme Court left it to the Seventh Circuit on remand to decide "whether Sharif's actions evinced the requisite knowing and voluntary consent," if so, consent waives the right to an Article III judge, "and also whether, as Wellness contends, Sharif forfeited his *Stern* argument below.").

[170] In requesting this briefing, I trust I have not erred or hopelessly ventured beyond the scope of the questions presented to me by the Remand Decision.

of Voya's Initial Confirmation Objection.[171] Voya also pointed to the Debtors' statements and written submissions regarding *Stern* as well as its own lack of assent to the releases. I will address each of these items in order.

Delaware Local Bankruptcy Rule 9013-1(h) (the "Local Rule") provides:

> All objections or other responses to a motion filed pursuant to this Rule [which pertains to any motion or application filed in a main bankruptcy case, *see* L.R. 9013-1(a)] shall contain a statement that the filing party does or does not consent to the entry of final orders or judgments by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution. If no such statement is included, the filing party shall have waived the right to contest the authority of the Court to enter final orders or judgments.[172]

The Local Rule appears to serve two purposes. It draws one bright line for waiver determinations: if a party does not include the proposed statement in its filing

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[171] Opt-Out Lenders' Reply Brief on Remand Issues at 11, June 12, 2017, D.I. 444.

[172] Del. Bankr. L.R. 90134(h), http://www. deb.uscourts.gov/court-info/local-rules-and-orders/local-rules?items_per_page=All (emphasis added). The current version of Local Rule 9013-1(h) was added to Delaware Local Bankruptcy Rules in 2013. *Compare* L.R. 90134(h) (2012) *with* L.R. 9013-1(h) (2013), http://www.deb.uscourts.gov/local-rules-and-orders.

(and has not actually made a constitutional argument), the party has waived its right to contest the bankruptcy judge's entry of a final order on the proceeding before the court.[173] Conversely, if a party includes the proposed statement in its filing, the Local Rule appears to provide a "safe harbor" and the constitutional adjudicatory authority issue is not waived by way of that initial filing.[174]

By pointing to the Local Rule, Voya equates not waiving the right with actually making the argument. But, they are not the same, and the rule does not suggest as much. Reciting the statement in the Local Rule is no substitute for timely making the argument clearly and unequivocally in a subsequent filing.[175]

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[173] Additionally, the Local Rule provides parties and counsel with notice of the need to object to entry of final orders by a bankruptcy judge. *Cf. In re Campbell*, 553 B.R. at 452 (implied consent exists when defendant ignores summons containing language stating that a failure to respond to the summons will be deemed consent to entry of a judgment by the bankruptcy court) (misprint in published decision, but available in Westlaw version). Voya does not argue that it was not aware of the ability or need to challenge my constitutional authority to enter a final order.

[174] Indeed, it is not uncommon for a party to put such a statement in its Notice of Appearance.

[175] Of course, placing the statement in a submission in which a constitutional adjudicatory authority argument is actually made is entirely unnecessary as the argument has not been waived. Conversely, placing the statement in a submission ought to mean that the constitutional argument was not made in it.

Failure to make the argument negates any previous "reservation" of the right to do so.[176]

In any event, Voya did not insert the Local Rule verbatim into its submission. Instead, Voya changed the language of the Local Rule in its filing to state:

> By submitting this Memorandum of Law, the Opt-Out Lenders do not consent to the entry of a final judgment or order on any issue, including but not limited to confirming the Plan, if it is determined that this Court, absent the consent of the parties, lacks jurisdiction to enter a final order or judgment consistent with Article III of the United States Constitution.[177]

The next sentence stated:

> **FOR THE AVOIDANCE OF DOUBT, THE OPT-OUT LENDERS DO NOT CONSENT, AND HEREBY OBJECT, TO THE THIRD-PARTY RELEASE, BAR ORDER, AND PLAN INJUNCTION (TO THE EXTENT THE BAR ORDER AND/OR PLAN INJUNCTION WOULD IMPAIR THE OPT-OUT LENDERS' DIRECT CLAIMS AGAINST NON-DEBTOR ENTITIES).**[178]

Although Voya's editing of the Local Rule only changed a few words—from "if it is determined that the Court,

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[176] Voya places its modified Local Rule statement in a "reservation of rights" section, which is a common misnomer.

[177] *See* Initial Confirmation Objection ¶ 75 (emphasis added).

[178] *Id.*

absent consent of the parties, *cannot enter* final orders or judgments" to "if it is determined that this Court, absent the consent of the parties, *lacks jurisdiction to enter* a final order or judgment"—the changes are significant. Voya changed the words to reflect a jurisdictional argument (the subject matter jurisdiction argument it raised) rather than a constitutional argument. Ultimately, however, Voya's true focus was the next sentence, which signaled in all caps and bolded text, that Voya did not assent to the third party releases.

The Local Rule is not a trump card for parties to hide behind, allowing them to wait and see how the judge rules before crying "*Stern*." If a party has a constitutional objection to the bankruptcy judge's adjudicatory authority to enter final orders, it is incumbent upon the party to place that objection squarely before the judge. In expedited proceedings, such as Millennium's confirmation hearing, it is all the more critical that the specific argument be brought to the judge's attention at the hearing as well. The insertion in a party's submission of the statement in the Local Rule (modified or not)—with nothing more—is not sufficient to make a constitutional objection.[179]

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[179] *See*, *e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 262 (3d Cir. 2009) ("[T]he crucial question regarding waiver is whether defendants presented the argument with sufficient specificity to alert the district court." (internal quotation and citation omitted)); *Shell Petroleum, Inc. v. U.S.*, 182 F.3d 212, 218 (3d Cir. 1999) ("a party still must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits." (citation omitted)); *Keenan v. City of*

Voya suggests that Paragraph 24 of its Initial Confirmation Objection provides the "something more." Paragraph 24 is the first of four paragraphs under the substantive heading "The Court Does Not Have Jurisdiction To Approve The Third-Party Release Or Related Provisions Of The Plan." It reads, in full:

> The jurisdiction of the Bankruptcy Courts is statutorily defined, and is confined to the boundaries of that statutory definition. *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 2603 (2011) (noting that Bankruptcy Courts may only "hear and enter final judgments in all core proceedings arising under title 11, or arising in a case under title 11"); see also *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 (2015) (observing that "bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts"); 28 U.S.C. § 157(a). Rather, Bankruptcy Courts may only enter final judgments on non-core matters with the consent of the affected parties. *Wellness*, 135 S. Ct. at 1949. Because the Third-Party Release would impact direct, non-bankruptcy claims held by non-Debtors against other non-Debtors and which would not trigger the Court's jurisdiction, the Court does not have jurisdiction to approve the Third-Party Release without the consent of the Third Party Releasing Parties.

Phila., 983 F.2d 459, 471 (3d Cir. 1992) ("[T]he crucial question regarding waiver is whether defendants presented the argument with sufficient specificity to alert the [trial] court.").

> The Opt-Out Lenders have not given such consent.[180]

Nowhere in this paragraph does Voya challenge my constitutional authority to enter a final order confirming Millennium's Plan. Read in context, this paragraph appears to be the first paragraph of an introductory jurisdictional section, citing *Stern* and *Wellness* for general jurisdictional principles.[181] And, it is yet another

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[180] Initial Confirmation Objection ¶ 24.

[181] The entirety of the section reads as follows:

> 25. Bankruptcy Courts have core jurisdiction over four specific types of matters: "(1) cases under [the Bankruptcy Code], (2) proceeding[s] arising under [the Bankruptcy Code], (3) proceedings arising in a case under [the Bankruptcy Code], and (4) proceedings related to a case under [the Bankruptcy Code]." Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.), 372 F.3d 154, 162 (3d Cir. 2004) (citation and internal quotation marks omitted); see also 28 U.S.C. § 1334(a)—(b).
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> 26. A proceeding solely between non-debtor parties based on non-bankruptcy law can never fall within a Bankruptcy Court's "arising under" jurisdiction. Rather, such proceedings can *only* lie within a Bankruptcy Court's "related to" jurisdiction, and then only "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate [.]" *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (citations omitted); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 226 (3d Cir. 2004). The Third Circuit has reaffirmed the *Pacor* test, subject to the limitations discussed below. *See*, *e.g.*, *id.; In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002).

statement that Voya does not assent to third party releases. In any event, the argument that Voya now makes is not contained in Paragraph 24.

At oral argument, Voya admitted that its position on remand is novel and that nobody has "really articulated this issue in the way it's being articulated to this Court before."[182] On that basis, it is all the more important that Voya articulate its position fully and with specificity, in both its written submissions and at oral argument. Any general discussion of or general reference to *Stern* did not make a constitutional adjudicatory authority argument.[183]

> 27. The Court "cannot simply presume it has jurisdiction in a bankruptcy case to permanently enjoin third-party . . . actions against non-debtors." *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214, n.12 (3d Cir. 2000). Thus, as a threshold issue to confirmation of the Plan, the Court must evaluate whether it has jurisdiction to release and enjoin claims of non-consenting non-Debtors against other non-Debtors. The Opt-Out Lenders respectfully submit that the Court does not have such jurisdiction and thus should not confirm the Plan as proposed.

Id. at ¶ 25–27.

[182] Oral Argument on Remand, Hr'g Tr. 100:21–102:1.

[183] *See*, *e.g.*, *United States v. Perminter*, No. 10-204, 2012 WL 642530 (W.D. Pa. 2012) ("While the Government did cite to *Samson* in its opposing brief, 'simply citing a case in the District Court is not sufficient to raise all arguments that might flow from it.' " (citations omitted)); *In re Inv. Sales Diversified, Inc.*, 49 B.R. 837 (Bankr. D. Minn. 1985) (while both parties cited to and argued for and against the application of a previous decision, defendants did not plead or effectively raise collateral estoppel and so that defense was waived); *Walsh v. Mellas*, 837 F.2d 789, 799–800 (7th

Moreover, the Debtors' references to *Stern* in their written submission or in argument do not assist Voya here. It [sic] its confirmation submission, the Debtors apparently treated the above paragraph 24 (with its citation to *Stern*) as a possible constitutional argument and responded to it accordingly.[184] Voya filed its Supplemental Confirmation Objection in response. [185] Although Voya's Supplemental Confirmation Objection

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Cir. 1988) ("In *Walsh I*, the defendants 'raised' the defense in their answer to plaintiff's complaint, but failed to bring the argument to the court's attention, despite their having had numerous opportunities to do so. The cases holding that an omission of this character constitutes a waiver of the right to present that issue on appeal are legion. The mere fact that an obscure reference to defendants' 'good faith' is contained in one of the defendants' pleadings does not suffice to preserve that issue for appeal. [A] trial judge may properly depend upon counsel to apprise him of the issues for decision. He is not obligated to conduct a search for issues which may lurk in the pleadings." (citations and footnotes omitted)).

[184] *See* Debtors' Response to Voya's Objection to Confirmation of Proposed Chapter 11 Plan at 17–19, Dec. 7, 2015, D.I. 131; Oral Argument at Dec. 10 Hearing, Hr'g Tr. 33:2–34:2.

[185] The introductory paragraph to Voya's submission reads: "The Opt-Out Lenders, as defined in the *Memorandum of Law of the Opt-Out Lenders in Opposition to (I) Approval of the Disclosure Statement, (II) Approval of the Class 2 Ballot, and (III) Confirmation of the Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, et al.*, by and through their undersigned counsel, hereby submit this supplemental memorandum of law in response to the briefs submitted by TA (the 'TA Br.'), D.I. 124, the Debtors (the 'Debtors' Br.'), D.I. 131, and James Slattery (the 'Slattery Br.' and collectively with the TA Br. and the Debtors' Br., the 'Confirmation Briefs'), D.I. 136. In response to the arguments set forth in the Confirmation Briefs, the Opt-Out Lenders respectfully state as follows . . . " Supplemental Confirmation Objection 1.

replies to the Debtors' "arising in" and "related to" jurisdictional arguments, it does not reply at all to the Debtors' constitutional argument. The words "*Stern*" or "constitution" do not appear in the Supplemental Confirmation Objection, nor does Voya object to the entry of a final order in connection with confirmation or request that proposed findings of fact and conclusions of law be submitted to the district court.[186] Failure to respond to an argument simply cannot be construed as making an argument.[187]

Similarly, Voya failed to respond to the Debtors' preemptive *Stern* comments made at argument. At no time during the confirmation hearing did Voya utter the word *Stern*, make any constitutional adjudicatory authority argument, or contend that I was limited to submitting proposed findings of fact and conclusions of law to the district court. Nor did Voya speak up once I concluded my Bench Ruling or even after I asked whether any party had a question or clarification it needed to make on the record. While the United States Trustee offered comments on the proposed form of order immediately after my Bench Ruling and

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[186] Voya does, again, "reserve" whatever rights it previously "reserved" in paragraph 75 of its Initial Confirmation Objection. Supplemental Confirmation Objection ¶ 39.

[187] *See Diaz v. Bullock*, No. 13–5192 (JLL), 2014 WL 5100560, at *3 (D.N.J. Oct. 10, 2014) ("Plaintiff did not respond to Defendants' jurisdictional arguments at all, which constitutes a waiver of this issue."); *Walker v. E.I. du Pont de Nemours and Co.*, 199 F. Supp. 3d 883, 896 (D. Del. 2016) (plaintiff abandons claim stated in complaint where he fails to mention it in his opposition to a motion for summary judgment).

subsequently as reflected in the Debtors' December 14, 2015 letter, Voya stood silent.[188]

Voya's actions after the confirmation order was entered provide further evidence that Voya did not raise a *Stern* objection to my entry of the confirmation order. Voya immediately appealed the confirmation order, and as reflected in Voya's Statement of the Issues on Appeal, Voya did not identify my entry of a final order as an issue on appeal. Rather, consistent with its theory of the case, Voya appealed my decision that the RICO Lawsuit was "related to" the bankruptcy case (Issue 1), the substantive issue of whether nonconsensual releases are ever permissible (Issue 2), the standard for assessing third party releases if they are permissible (Issue 3), issues surrounding the appropriate financial contribution to support a release; (Issues 4 and 5) and whether I properly applied the correct legal standard to the facts of the case, assuming both subject matter jurisdiction and that releases are permissible (Issue 6). Because Voya appealed every ruling I made, had Voya raised the *Stern* issue prior to the entry of the confirmation order, no doubt its Statement

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[188] Typically, I would be skeptical of the Debtors' argument that Voya consented to the entry of a final order when it failed to specifically object to such in the context of the settlement of the order. The settlement of an order is not the time to re-hash objections. Standing alone, I would reject this argument. But, in context, I find it another indication that Voya waived and/or forfeited any *Stern* argument. Further, I reject Voya's argument that it believed I had ruled on the constitutional issue and, if not, that there was no "meeting of the minds." *See*, *e.g.*, Oral Argument on Remand, Hr'g Tr. 213:12–213:20. Voya's contractual standard is not relevant.

of Issues on Appeal would have included a question of whether I erred in entering a final order confirming the Plan.

Finally, Voya points to its statements, both verbally and in writing, that it "does not consent" to the third party releases as an indication that it was objecting to the entry of a final order on a constitutional basis. It is undisputed that Voya did not assent to the grant of third party releases. That was the crux of Voya's objection, the very issue at the heart of the confirmation hearing, and the reason for evaluating the *Continental* hallmarks and the *Master Mortgage* factors. The question is not whether Voya assented to the third party releases or whether the releases were permissible (a question addressed by any number of reported decisions), but whether Voya objected to the entry by a bankruptcy judge of a final confirmation order approving those releases (an argument rarely made).

As is plain, I believe that Voya simply did not make the argument, which constitutes a forfeiture. The Debtors contend that Voya made a strategic decision to hold the argument in reserve in order to both obtain the consideration under the Plan and to have the ability to ask for a direct certification to the Third Circuit on whether nonconsensual third party releases are ever permissible. In other words, the Debtors contend that Voya's litigation strategy was to get to the Third Circuit as soon as possible. To support their conclusion, the Debtors point to the following: (i) Voya's true argument was that no judge—neither a bankruptcy judge

nor a district judge—could impose a release on Voya without its assent because of a lack of subject matter jurisdiction; (ii) Voya never asked in court that I issue proposed findings of fact and conclusions of law; (iii) Voya did not ask the Debtors' counsel to include in his December 14, 2015, letter a request that I issue proposed findings of fact and conclusions of law; and (ix) Voya needed a final order as a predicate for seeking a direct appeal to the Third Circuit.[189]

To the extent that Voya intended to keep its constitutional objection in its back pocket to be used on appeal if it was not successful before me, such gamesmanship is prohibited, establishes intent and implied consent and therefore constitutes waiver.[190] On the other hand, if Voya simply wanted a final order entered to be in a position to file the Certification Motion (without giving thought one way or the other to *Stern's* constitutional proscriptions), this was also an intentional

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[189] Oral Argument on Remand, Hr'g Tr. at 140-157. I note that the Certification Motion was filed on the same day that the confirmation order was entered on the docket.

[190] *See*, *e.g.*, *Wellness*, 135 S. Ct. at 1948 (implied consent increases judicial efficiency and checks gamesmanship); *see also Roell*, 538 U.S. at 590 ("Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority."); *Stern*, 131 S. Ct. at 2608 (the consequences of "a litigant . . . 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor—can be particularly severe. If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly." (citations omitted)).

act resulting in implied consent to my constitutional adjudicatory authority, and therefore constitutes waiver.

But even if I credit Voya's contention that it either preserved its constitutional adjudicatory argument through its modified Local Rule language or made such an argument in its written submission, Voya fares no better. It is beyond dispute that Voya did not make a constitutional adjudicatory authority argument or request that I enter proposed findings of fact and conclusions of law at the confirmation hearing. Voya had plenty of opportunity to do so.[191] To the extent, therefore, that Voya's written submission could ever be considered to evidence an intent not to consent to final orders, its failure to raise the Stern issue at argument constitutes a waiver or abandonment of that right.[192]

To summarize:

- Voya did not include in its Initial Confirmation Objection the statement found in Local Rule 9013-1(h) and so, per the Local Rule, Voya waived the right to contest my authority to enter a final order confirming the Plan;
- Voya did not actually make a constitutional adjudicatory authority argument in either its Initial Confirmation Objection or its Supplemental Confirmation Objection and so Voya forfeited its right to contest my authority to

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[191] Voya's entire oral argument on its confirmation objection was twenty minutes of a five-hour hearing.

[192] *See* n.187, *supra.*

enter a final order confirming the Plan as it did not timely assert that right;

- To the extent Voya made a strategic decision to hold its constitutional authority argument in reserve for appeal in order to receive its Plan consideration and to seek direct certification to the Third Circuit, Voya waived any constitutional right to contest my authority to enter a final order confirming the Plan;
- To the extent that Voya was not acting strategically with respect to a *Stern* argument, but simply wanted a final order so that it could seek direct certification to the Third Circuit, Voya waived any constitutional right to contest my authority to enter a final order confirming the Plan; and
- To the extent that Voya believed it made a constitutional adjudicatory authority argument in its Initial Confirmation Objection, its failure to respond to the Debtors' constitutional argument both in its Supplemental Confirmation Objection and during oral argument at the confirmation hearing constituted a waiver and an abandonment of the right to contest my authority to enter a final order confirming the Plan.

For the above reasons, I conclude that Voya waived or forfeited any argument that it was entitled to have an Article III court enter a final order confirming Millennium's Plan.

IV. Even if Voya was Entitled to a Hearing on the Merits of the RICO Lawsuit in the Context of Confirmation, Voya Waived that Right

In its Remand Decision, the District Court provided two options in the event that I concluded I did not have constitutional adjudicatory authority to enter the order confirming Millennium's Plan: strike the third party release relative to Voya's claims in the RICO Lawsuit, or submit proposed findings of fact and conclusions of law on them. Because I conclude that I did have such authority, I need not do either.

But, even if I found to the contrary, I would not take either path here. If I am wrong, and I did not have constitutional adjudicatory authority to enter a final order, the district court may treat the confirmation order as proposed findings of fact and conclusions of law.[193] While the district court would have to enter the final order confirming the Plan, the standard for third party releases is still the same. Third party releases may be granted in the context of confirmation if the plan proponent can prove that it meets the *Continental* hallmarks of fairness and necessity to the reorganization. *Stern* does nothing to change that standard; *Stern* speaks only to which judge must enter the final order.

Voya consistently and repeatedly took the position—at the confirmation hearing and on remand—

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[193] United States District Court for the District of Delaware Amended Standing Order of Reference, In re Standing Order of Reference Re: Title 11, February 29, 2012.

that the merits of the claims in its RICO Lawsuit were not before me. Voya's argument at confirmation was that I did not have subject matter jurisdiction over the RICO Lawsuit and therefore could not grant the releases, and in any event, the releases were not warranted under the *Continental* hallmarks and/or the *Master Mortgage* five factor test. As set out in Part II, that standard considers the terms of the plan, the outcome of the solicitation and the necessity of the injunction to the success of the plan; the standard does not look at the merits of the claims being released nor did Voya argue that it does. Thus, the gravamen of Voya's objection did not put the merits of its claims against the Non-Debtor Equity Holders at issue.

In fact, Voya took the exact opposite view. Voya was clear that it was not putting the merits of the RICO Lawsuit at issue in the confirmation hearing, and balked at the Debtors' suggestion that it had to. Voya succinctly summed up its position in its Supplemental Confirmation Objection made the day prior to the confirmation hearing:

> The Plan Proponents' suggestion that [Voya is] somehow required to prove the merits of their claims in the Plan confirmation process in order to avoid having a release imposed against their will is utterly without merit. It is for the District Court to adjudicate the merits of [Voya's] claims. Consistent with fundamental principles of bankruptcy jurisdiction and substantive bankruptcy law, this Court cannot lawfully compel the release of those

> claims, ***regardless of its view as to their likelihood of success***.[194]

The very idea that the merits were before me ran directly counter to the main thrust of Voya's argument that no court (not the bankruptcy court nor the district court) could enter an order approving third party releases because Voya was entitled to a hearing on the merits of its RICO Lawsuit by Judge Sleet in the context of that lawsuit.[195]

On remand, Voya made the same argument—that the merits of its RICO Lawsuit were not in front of me—and therefore Voya should not, and could not, put on evidence regarding its claims against the Non-Debtor Equity Holders. In its recently submitted proposed findings of fact and conclusions of law,[196] Voya asks me to make the following finding:

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[194] Supplemental Confirmation Objection ¶ 38 n.15 (emphasis added).

[195] While perhaps Voya could have asserted an alternate position, it did not do so.

[196] The parties were invited to submit proposed findings of fact and conclusions of law in support of their submissions on remand and both parties did. D.I. 438, 463. Not surprisingly, the submissions are widely divergent, not only as to the findings and conclusions themselves, but with respect to the topics they cover. The Debtors' submission included findings and conclusions with respect to the claims asserted in the RICO Lawsuit based on general evidence submitted at confirmation and the proposition that I could judge the claims based on the survey standard used in the settlement context. Of course, the Debtors' proposed findings and conclusions found Voya's claims had no merit. Voya's proposed findings and conclusions did not go to the merits of its claims against the Non-Debtor Equity Holders. Rather, Voya's findings

> 48. As the District Court observed, this Court "did not conduct any proceedings on the merits of the [RICO Lawsuit], and [the District] Court is not in any position at this point to adjudicate those claims (on which, among other things, no discovery has been taken)." Opinion at 27. The [RICO Lawsuit] was not filed in this Court, was not referred to this Court by the District Court, and was not (nor could it have been, as no Debtor was a party) removed to this Court for adjudication. Simply put, the merits of the [claims asserted in the RICO Lawsuit] ***have never been presented to*** or considered by this Court. Accordingly, this Court is not in a position to conduct any proceedings on the merits of the [RICO Lawsuit] or to submit to the District Court any findings of fact or conclusions of law on the merits, *or* ***any other final disposition***, of the [the claims asserted in the RICO Lawsuit].[197]

At no time, therefore, did Voya put on, or intend to put on, any evidence with respect to its claims against the Non-Debtor Equity Holders. Instead, Voya asserted that the merits of its claims were not relevant to the confirmation hearing.

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stated, among other things, that I could not reach the merits of the claims as they were not before me.

[197] Voya's Proposed Findings of Fact and Conclusions of Law at 26, Aug. 16, 2017, D.I. 463 (footnote omitted) (emphasis added). Consistent with its true position, Voya never asked for discovery nor did it ask that the confirmation hearing be delayed because it needed discovery.

As previously discussed, on remand, Voya now maintains that the grant of releases in the confirmation order was an actual adjudication of its claims in the RICO Lawsuit. Voya cannot have it both ways. If the entry of the confirmation order was an actual adjudication of Voya's claims, then it was incumbent on Voya to submit evidence on the merits of its claims at the confirmation hearing.[198] It did not do so.[199]

Based on the foregoing, even if I had concluded that I did not have the constitutional adjudicatory authority to enter a final order confirming the Plan, I would not now submit proposed findings of fact and

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[198] Debtors cite several cases for the proposition that a party objecting to plan confirmation must provide evidence in support of its objection. *See* [Proposed] Findings of Fact and Conclusions of Law, and Order Granting Third Party Releases and Related Relief Provided in Debtors' Confirmed Chapter 11 Plan and the Confirmation Order ¶ 124, May 19, 2017, D.I. 438 (citing *In re Hercules Offshore, Inc.*, 565 B.R. 732, 766 (Bankr. D. Del. 2016)); *In re All Land Invs., LLC*, 468 B.R. 676, 688 (Bankr. D. Del. 2012); *In re Tribune Co.*, 464 B.R. 126, 151 (Bankr. D. Del. 2011). While I do not know that I agree with this conclusion in every context, I do here. In this case, it is an appropriate conclusion to reach in the face of an argument that the entry of the confirmation order was an adjudication of the merits of Voya's claims. Accordingly, I find that on the facts and arguments made in this case, Voya did not meet its burden of proof to present evidence on the merits of its claims in the RICO Lawsuit.

[199] Voya is also arguing on remand that its asserted right to a jury trial in the RICO Lawsuit supports the position that I could not enter a final order confirming Millennium's Plan. This appears to be yet another after-the-fact argument as Voya did not raise its right to a jury trial during the confirmation hearing or in proceedings before the district court on appeal. *See* Oral Argument on Remand, Hr'g Tr. 76:9–12, 77:13–78:17.

conclusions of law to the district court on the merits of Voya's RICO Lawsuit. To the extent that Voya was entitled to any hearing on the merits of its claims in connection with the confirmation hearing, it consciously chose not to avail itself of that opportunity. And, it continues to make that choice. To the extent Voya had a right to a hearing on the merits of its RICO Lawsuit in connection with plan confirmation, Voya intentionally relinquished that right. It has, therefore, been waived.

CONCLUSION

The district court remanded this case to me so that I could rule on my constitutional adjudicatory authority to issue Millennium's confirmation order. In doing so, the district court recognized that remanding this case to me "was far from ideal at this stage of the Chapter 11 proceedings," but believed that "given [my] experience and expertise, [I] should rule on this issue first." I trust this Opinion will aid the district court on appeal.

Dated: October 3, 2017

/s/ Laurie Selber Silverstein
LAURIE SELBER SILVERSTEIN
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: MILLENNIUM LAB HOLDINGS II, LLC, *et al*., Debtors.	:	Chapter 11 Bankr. Case No. 15-12284-LSS (Jointly Administered)
OPT-OUT LENDERS,[1] Appellants, v. MILLENNIUM LAB HOLDINGS II, LLC, *et al*., TA MILLENIUM, INC., and JAMES SLATTERY, Appellees.	:	Civ. No. 16-110-LPS. **CORRECTED OPINION, ADDING FOOTNOTE 4, ISSUED ON MARCH 20, 2017**

MEMORANDUM OPINION

(Filed Mar. 20, 2017)

Millennium Lab Holdings II, LLC, and its affiliated reorganized debtors (collectively, the "Debtors"), move this Court (D.I. 6) (the "Motion to Dismiss")[2] to dismiss the appeal filed by ISL Loan Trust and certain affiliated funds (collectively, "Appellants") from an

[1] Appellants are identified in Appellants' Brief in Support of Appeal from Bankruptcy Court Order Confirming Debtors' Plan of Reorganization. (D.I. 13 at 1)

[2] The Motion to Dismiss (D.I. 6) is joined by James Slattery (D.I. 10) as well as TA Millennium, Inc. and TA Associates Management L.P. (D.I. 11).

order (B.D.I. 195)[3] ("Confirmation Order") entered by the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court") confirming the Debtors' Amended Prepackaged Joint Chapter 11 Plan of Reorganization (B.D.I. 182) (as amended, the "Plan"), on the basis that the appeal is equitably moot. For the reasons stated below, the Court will deny the Motion to Dismiss without prejudice and remand to the Bankruptcy Court for further proceedings.

I. INTRODUCTION[4]

The appeal of the Confirmation Order concerns a matter of some controversy: the approval of nonconsensual third-party releases (*i.e.*, the involuntary extinguishment of a non-debtor, third-party's claim against another non-debtor, third party) as part of a chapter 11 plan of reorganization. Here, the Plan released a non-debtor, third-party's direct, non-bankruptcy, common law fraud and RICO claims against non-debtor equity holders. The issues on appeal include, *inter alia*,

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[3] The docket of the Chapter 11 cases, *In re Millennium Lab Holdings II, LLC, et al.*, Case No. 15-12284-LSS (Bankr. D. Del.), is referred to herein as "B.D.I. ___."

[4] In the original version of this Opinion (issued on March 17, 2017), the Court inadvertently failed to include a citation to an insightful article that was of substantial assistance to the Court as it evaluated the issues addressed here. The article is entitled *On a "Related" Point: Rethinking Whether Bankruptcy Courts Can "Order" the Involuntary Release of Non-Debtor Third-Party Claims*, 23 Am. Bankr. Inst. L. Rev. 531 (2015), and was written by Eamonn O'Hagan. The Court apologizes to Mr. O'Hagan for its oversight.

(1) whether the Bankruptcy Court had subject matter jurisdiction to approve the nonconsensual third-party releases, and (2) whether the Bankruptcy Court had constitutional authority to permanently release the claims post-*Stern*.[5]

A. Adjudicatory Authority and Subject Matter Jurisdiction

Article III imposes a structural limitation on the power of an Article I court to enter final orders or judgments on state law claims without the parties' consent. As the Supreme Court explained in *Wellness Int'l Network, Ltd. v. Sharif.*

> Article III, § 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress has in turn established 94 District Courts and 13 Courts of Appeals, composed of judges who enjoy the protections of Article III: life tenure and pay that cannot be diminished. Because these protections help to ensure the integrity and independence of the Judiciary, "we have long recognized that, in general, Congress may not withdraw from" the Article III courts "any matter which, from its nature, is the subject of a suit at the common law. . . ."
>
> Congress has also authorized the appointment of bankruptcy and magistrate judges,

[5] *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

> who do not enjoy the protections of Article III, to assist Article III courts in their work. . . . Congress' efforts to align the responsibilities of non-Article III judges with the boundaries set by the Constitution have not always been successful. . . . [R]ecently in *Stern*, this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication.

135 S. Ct. 1932, 1938-39 (2015) (internal citations omitted). It is clear from these recent Supreme Court cases that parties have a constitutional right to have their common law claims adjudicated by an Article III court, and that right cannot be abridged by Congressional action.

Federal bankruptcy jurisdiction is a Congressional creation under 28 U.S.C. § 1334(b), which provides that "district courts shall have original and exclusive jurisdiction of all cases under title 11," and original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." The authority of Bankruptcy Courts to oversee bankruptcy matters derives from 28 U.S.C. § 157(a), which sets out that "[e]ach district court may provide for any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

Despite the District Court's general referral of bankruptcy matters to the Bankruptcy Court, the

extent of the Bankruptcy Court's adjudicatory authority depends on the type of proceeding before it and is subject to the bounds of the constitutional limitations described above. Thus, Bankruptcy Courts may "enter appropriate orders and judgments" ***only*** in "cases under title 11" and "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). When a matter is not a "core" proceeding but rather is "related to" a bankruptcy case, Bankruptcy Courts have authority only to "hear" the matter and submit proposed findings of fact and conclusions of law to the Article III District Court. 28 U.S.C. § 157(c)(1).[6] This limitation on the power of Article I judges to enter final orders in non-core proceedings protects a party's constitutional right to have its common law claims adjudicated by an Article III court. An exception to this limitation applies where all of the parties to the proceeding consent to the Bankruptcy Court's entry of final orders. *See* 28 U.S.C. § 157(c)(2); *Wellness*, 135 S. Ct. at 1942 (holding that Article III permits consent-based adjudication by Bankruptcy Court).

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[6] The District Court may then "accept, reject or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions." Fed. R. Bankr. P. 9033(d). Any final order of judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected. *See* 28 U.S.C. § 157(c)(1).

B. Subject Matter Jurisdiction Over Non-consensual Third-Party Releases

The permanent release of a non-debtor, third-party's claim against another non-debtor, third party – whether through a chapter 11 plan or otherwise – is an exercise of the Bankruptcy Court's "related to" jurisdiction. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 224, 233 (3d Cir. 2005) (holding that chapter 11 plan could not permanently enjoin third-party claims because "related to" jurisdiction did not exist over such claims); *In re Congoleum Corp.*, 362, B.R. 167, 190-91 (Bankr. D.N.J. 2007) (stating that "first hurdle" to approval of release is establishing that court had related to jurisdiction). This is because a non-debtor's pre-bankruptcy claim against another non-debtor does not "aris[e] under title 11" and does not "aris[e] in a case under title 11." 28 U.S.C. § 157(b)(1); *see also In re Digital Impact, Inc.*, 223 B.R. 1, 11 (Bankr. N.D. Okla. 1998) (holding that controversies are not "cases under" title 11 where parties thereto are not debtors in bankruptcy, and that controversies did not "arise under" Code, because "controversies contemplated [between the parties] are not limited to causes of action under the Bankruptcy Code, such as avoidance actions"). Thus, a proceeding solely between non-debtor parties based on non-bankruptcy law can only be heard by Bankruptcy Courts under "related to" jurisdiction, and then only "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt

estate." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) ("Proceedings 'related to' the bankruptcy include . . . suits between third parties which have an effect on the bankruptcy estate."). As such, whether a Bankruptcy Court has "related to" subject matter jurisdiction over the nonconsensual release of third-party claims is frequently litigated. Once established, a common plan objection is based on the statutory edict that a Bankruptcy Court exercising "related to" jurisdiction over non-core proceedings cannot issue final orders or judgments but is instead limited to issuing proposed findings of fact and conclusions of law. *See* 28 U.S.C. § 157(c)(1).

Conversely, plan proponents frequently argue that because Congress included "confirmations of plans" in its list of "core proceedings" under the statute, the nonconsensual release of third-party claims is an exercise of the Bankruptcy Court's "arising in" or "arising under" jurisdiction when accomplished in the context of the plan, and therefore the Bankruptcy Court has authority to enter a final order releasing those claims. *See* 28 U.S.C. § 157(b)(2). The weakness of this argument is its treatment of a chapter 11 plan as a jurisdictional and adjudicatory "blank check." Indeed, courts have repeatedly rejected this type of jurisdictional and adjudicatory bootstrapping.[7]

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[7] *See*, *e.g.*, *Combustion Eng'g*, 391 F.3d at 224-25 (explaining that even if Bankruptcy Code § 105(a) provides statutory authority for Bankruptcy Court to approve third-party release, "[section] 105 does not provide an independent source of federal subject

C. Adjudicatory Authority Post-*Stern*

In *Stern*, the Supreme Court held it unconstitutional for Congress to give Bankruptcy Courts – which are not established under Article III of the Constitution – final adjudicatory authority over a bankruptcy estate's defamation counterclaim against an estate creditor, notwithstanding that such counterclaims are among the proceedings that Congress has listed as "core." *See* 131 U.S. at 2600-01 (concluding that although Bankruptcy Court had statutory authority to enter final judgment on certain counterclaims pursuant to 28 U.S.C. § 157(b)(2)(C), it lacked constitutional authority to render final judgment). According to the Supreme Court, the counterclaim at issue did not fall within the narrow "public rights" exception to Article III requirements;[8] rather, the claim arose under state

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matter jurisdiction. . . . 'Related to' jurisdiction must therefore exist independently of any plan provision purporting to involve or enjoin claims against non-debtors."); *Digital Impact*, 223 B.R. at 11 ("If proceedings over which the Court has no independent jurisdiction could be metamorphisized into proceedings within the Court's jurisdiction by simply including their release in the proposed plan, this court could acquire infinite jurisdiction").

[8] As explained by the Supreme Court, the "public rights" exception is limited "to cases in which the claim at issue derives from a federal regulatory scheme, or in which the resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Stern*, 131 S. Ct. at 2613. Applied to bankruptcy, the Supreme Court held that the "public rights" exception extended no farther than to claims that "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* at 2618. By contrast, claims

law between private parties and was, therefore, a matter of "private right, that is, of the liability of one individual to another." *Id.* at 2611-12, 2614 (internal quotations omitted). That the defendant filed a proof of claim in the bankruptcy case did not alter this conclusion because: (i) the counterclaim did not arise from the bankruptcy itself; and (ii) it was not necessary to resolve the counterclaim as part of the process of allowing or disallowing the creditor's proof of claim. *See id.* at 2611. *Stern* made clear the limitation on a Bankruptcy Court's authority to enter a final order on a non-core claim for which the claimant has a constitutional right to adjudication by an Article III court. The Supreme Court later clarified that parties could consent to final adjudication by a non-Article III court. *See Wellness*, 135 S. Ct. at 1944-45.

Following *Stern*, it is clear that regardless of whether the Bankruptcy Court has subject matter jurisdiction over proceedings – both core and non-core – it cannot enter a final order releasing third-party claims unless it has constitutional authority to do so as well.

"between two private parties" based on state common law or statutes that are not closely intertwined with a federal regulatory program are "private" rights that must be adjudicated by an Article III Court. *See id.* at 2614.

II. BACKGROUND

A. Events Leading to Chapter 11 Filing

Appellants[9] were lenders of approximately $106.3 million of aggregate principal amount of senior secured debt issued in April 2014 pursuant to a $1.825 billion senior secured credit facility (the "Credit Facility") which was governed by a credit agreement dated April 16, 2014 (the "Credit Agreement") among, *inter alia*, Debtors Millennium Lab Holdings II, LLC ("Holdings") and Millennium Health, LLC, f/k/a Millennium Laboratories, LLC ("Millennium"), and several other lenders (the "Lenders"). (*See* D.I. 14 at A108, A1128) The Credit Facility was issued as part of a "dividend recapitalization" transaction for the benefit of what would then be the non-debtor stockholders of Millennium's parent company, Holdings. (D.I. 14 at A108) The stock of Holdings was owned approximately 55% by non-debtor Millennium Lab Holdings, Inc. ("MLH"),[10] and approximately 45% by non-debtor TA Millennium, Inc. ("TA")[11] (MLH and TA, collectively, the "Non-Debtor

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[9] Appellants are investment funds and accounts managed by Voya Investment Management Co. LLC and Voya Alternative Asset Management LLC.

[10] The stock of non-debtor MLH was owned in "various amounts" by 14 different trusts. (*See* B.D.I. 181, Ex. B (Guarantee Agreement)) Seven of the 14 trusts were established by Millennium founder, Chairman and former-CEO James Slattery ("Slattery") for the benefit of himself and/or various members of his family; these seven trusts collectively owned approximately 79.896% of the stock of non-debtor MLH. (*Id.*)

[11] TA is an affiliate of private equity firm TA Associates Management, L.P.

Equity Holders"). (*Id.*) Of the $1.775 billion of term loan proceeds under the Credit Facility, nearly $1.3 billion was paid out as a special dividend to the Non-Debtor Equity Holders. (B.D.I. 206, 12/11/15 Hr'g. Tr. at 8:9-8:13; D.I. 14 at A2386)

The Debtors are providers of laboratory-based diagnostic testing services that derive significant revenue from Medicare and Medicaid reimbursements. (D.I. 9 at M7) As such, they are subject to substantial regulation and oversight, including by federal and state agencies. (D.I. 14 at A107) As of early 2012, the United States Department of Justice (the "DOJ") was conducting joint criminal and civil investigations into Millennium (the "DOJ Investigation"). (*Id.* at A109) In the course of the DOJ Investigation (and prior to the issuance of the Credit Agreement), Millennium met with the DOJ "on numerous occasions" to discuss the allegations under investigation and produced to the DOJ approximately 11 million pages of documents. (*Id.*) In December 2014, the DOJ confirmed to Millennium that the DOJ would pursue claims against Millennium. (*Id.*) By February 2015, the Centers for Medicare & Medicaid Services ("CMS") notified Millennium that it was revoking Millennium's Medicare billing privileges based on billings submitted for 59 deceased patients. (*Id.*) On May 4, 2015, Millennium received a notification that its Medicare billing privileges would be revoked also on account of its alleged submission of fraudulent claims for services without valid physician orders. (*Id.*)

On May 21, 2015, Millennium disclosed to its Lenders that it had entered into an agreement in principle with the DOJ, CMS, and various other government entities, to settle *inter alia* claims under the False Claims Act for Medicare fraud for a settlement payment of approximately $250 million. (*See* D.I. 14 at A867) On October 29, 2015, Millennium sought approval from its Lenders to restructure its debt obligations through either an out-of-court transaction or a prepackaged plan of reorganization. (*Id.* at A80) Consummation of an out-of-court transaction was not achieved. On November 10, 2015, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Contemporaneously therewith, the Debtors filed their Plan (B.D.I. 14) and accompanying Disclosure Statement (B.D.I. 15).

B. The Proposed Nonconsensual Third-Party Release and Related Provisions

The Plan provided a basis for the continuation of the Debtors' business. Relevant to this appeal, the Plan also provided for a $325 million contribution by the Non-Debtor Equity Holders, specifically $178.75 million from MLH and $146.25 million from TA. Of the Non-Debtor Equity Holders' $325 million contribution, $256 million would fund Millennium's settlement of the DOJ's claims, $50 million would be paid to certain Lenders in exchange for their early commitment to support Millennium's restructuring, and the remaining $19 million could be used as Millennium operating capital. (D.I. 14 at A92, A94, A169-A170) In exchange

for the $325 million contribution, the proposed Plan provided the Non-Debtor Equity Holders with full releases and discharges of any and all claims against them and related parties – including any claims brought directly by non-Debtor lenders such as Appellants – and including claims relating to the $1.3 billion special dividend that had been paid to the Non-Debtor Equity Holders while the Debtors were in the midst of the DOJ Investigation. (*See* B.D.I. 195-1, Plan at Art. X at H-K; D.I. 14 at A2208) The proposed Plan provided no ability for parties to "opt-out" of the third-party releases, meaning the releases would be granted upon confirmation of the Plan regardless of whether a creditor consented. (*See* Plan, Art. X at H-K) The proposed Plan also permanently enjoined Appellants from commencing or prosecuting claims released pursuant to the Plan against MLH, TA, or their Related Parties (as defined in the Plan). (*See id.*)

C. The Fraud Action

On December 9, 2015, prior to the plan confirmation hearing, Appellants filed a complaint in this Court (the "Fraud Action") against MLH, TA, TA Associates Management, L.P., and two corporate executives who are beneficiaries of the Plan's third-party releases, James Slattery and Howard Appel ("Defendants"). (*See ISL Loan Trust v. TA Associates Management, L.P., et al.*, Civ. No. 15-1138 (GMS) (D. Del.)) The complaint demands a jury trial and asserts the following causes of action: (i) violation of RICO and conspiracy to violate RICO (18 U.S.C. §§ 1962(c) & (d)), based on allegations

that Defendants engaged in fraudulent billing practices, including sending illegal reimbursement requests to Medicare and state Medicaid agencies; (ii) fraud and deceit based on intentional misrepresentation, aiding and abetting fraud, and conspiracy to commit fraud, based on allegations that Defendants made false and misleading representations, for the purpose of inducing Appellants to enter into the Credit Agreement, regarding the accuracy of Debtors' financial records, Debtors' compliance with applicable laws, and the existence of pending investigations and litigation against the Debtors; and (iii) restitution, based on allegations that, as a result of the fraudulent inducement, Defendants received a benefit of more than $100 million of loans issued under the Credit Agreement, which benefits Defendants have retained at Appellants' expense. (*See* Civ. No. 15-1138 (GMS), D.I. 7 (redacted complaint)) The Fraud Action is currently stayed pending the outcome of this appeal. (*See id.*, D.I. 11)

D. Appellants' Objections to Plan Confirmation

Appellants raised a litany of objections to confirmation of the Plan. In addition to various objections regarding the content and adequacy of the Disclosure Statement, Appellants argued that the Bankruptcy Court lacked either "arising in" or "related to" subject matter jurisdiction to approve the nonconsensual third-party release contained in the Plan. (*See* B.D.I. 122 at 17-25; B.D.I. 174 at 4-9) Appellants further

asserted that, even if the Bankruptcy Court had subject matter jurisdiction, the proposed approval of the releases under section 105(a)[12] of the Bankruptcy Code would contravene other sections of the Bankruptcy Code, including section 524(e), and hence the Bankruptcy Court lacked statutory authority to approve the release provisions.[13] (*See* B.D.I. 122 at 26-28) Appellants further argued that the Plan could not be confirmed unless it permitted creditors to opt out of the third-party release (*see id.* at 29-31), and even if the Plan were so amended, exceptional circumstances did not exist to justify limiting the liability of a non-debtor to another non-debtor under Third Circuit law. (*See id.* at 31-32 (citing *In re Continental Airlines*, 203 F.3d 203, 213, n. 9 (3d Cir. 2000) ("*Continental II*"))

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[12] Section 105(a) permits Bankruptcy Courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code.]" 11 U.S.C. § 105(a). However, section 105(a) cannot be used to craft new remedies that contravene existing statutory provisions, *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014), or create substantive rights that are otherwise unavailable under applicable law, *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003).

[13] The Bankruptcy Code provides that the discharge of a debtor's indebtedness "does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Notwithstanding section 524(e), the Bankruptcy Code grants Bankruptcy Courts the ability to enjoin non-debtors' claims against other non-debtors with respect to asbestos-related liability. *See* 11 U.S.C. § 524(g) (authorizing non-debtor releases in asbestos liability cases when specified conditions are satisfied, including creation of trust to satisfy future claims); *Combustion Eng'g*, 391 F.3d at 236 n.48 (discussing same).

In pre-confirmation briefing, Appellants' Plan objection did no more than touch upon the Bankruptcy Court's lack of adjudicatory authority, in a section addressing its lack of subject matter jurisdiction (and seemingly conflating those concepts):

> The jurisdiction of the Bankruptcy Courts is statutorily defined, and is confined to the boundaries of that statutory definition. *Stern v. Marshall*, 131 S. Ct. 2594, 2603 (2011) (noting that Bankruptcy Courts may only "hear and enter final judgments in all core proceedings arising under title 11, or arising in a case under title 11"); *see also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 (2015) (observing that "bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts"); 28 U.S.C. § 157(a). Rather, Bankruptcy Courts may only enter final judgments on non-core matters with the consent of the affected parties. *Wellness*, 135 S .Ct. at 1949. Because the Third-Party Release would impact direct, non-bankruptcy claims held by non-Debtors against other non-Debtors and which would not trigger the Court's jurisdiction, the Court does not have ***jurisdiction*** to approve the Third-Party Release without the consent of the Third Party Releasing Parties. [Appellants] have not given such consent.

(B.D.I. 122 at 17) (emphasis added)

In response, Debtors accused Appellants of reading *Stern* too broadly, asserting instead that *Stern* had

left intact the Bankruptcy Court's constitutional authority to approve the third-party releases. (*See* B.D.I. 131 at 17) Debtors argued that courts in this jurisdiction and others have rejected *Stern* challenges regarding the Bankruptcy Courts' constitutional authority, including in connection with the consideration and approval of nonconsensual third-party releases in a plan. (*See id.* at 17-18) Debtors argued that adjudication of the Plan is "a unitary omnibus civil proceeding for the reorganization of all obligations of the debtor and disposition of all its assets" unique to bankruptcy and "not an adjudication of the various disputes it touches upon." (*See* B.D.I. 131 (quoting *In re Charles Street African Methodist Episcopal Church of Boston*, 499 B.R. 66, 99 (Bankr. D. Mass. 2013))

The foregoing is the extent of the pre-confirmation briefing on the Bankruptcy Court's adjudicatory authority. (*See* D.I. 174 (Appellants' supplemental plan objection, focusing on subject matter jurisdiction and not mentioning lack of adjudicatory authority under *Stern*))

E. The Confirmation Ruling

On December 10, 2015, the Bankruptcy Court held a contested hearing to consider the adequacy of the Disclosure Statement and confirmation of the Plan; at the hearing the Bankruptcy Court's lack of adjudicatory authority was only briefly addressed. (*See* B.D.I. 190 at 33-34) The Debtors referred to the *Stern* argument as a "total red herring." (*Id.* at 33) Because *Stern*

addressed a Bankruptcy Court's constitutional authority to adjudicate state law claims, and because and the Plan did not adjudicate any claims, the Debtors argued *Stern's* holding was inapplicable. (*See id.* at 33-34) Debtors cited two cases from outside of this circuit, *In re MPM Silicones LLC*, 2014 WL 4436335, at *2 (Bankr. S.D.N.Y. Sept. 9, 2014), which overruled a *Stern* challenge to a plan's nonconsensual third-party releases, and the *Charles Street* case, which held that plan confirmation, including any third-party releases contained in the plan, were matters coming within the "public rights" exception, such that Congress may constitutionally assign them to a non-Article III adjudicator. (*See id.* at 33-34 (citing *Charles Street*, 499 B.R. at 99)) No further mention of the issue of the Bankruptcy Court's adjudicatory authority was made at the confirmation hearing.[14]

In a bench ruling on December 11, 2015, the Bankruptcy Court overruled Appellants' objection to the nonconsensual third-party releases and confirmed the Plan. (*See* B.D.I. 206, 12/11/15 Hr'g. Tr.) Addressing Appellants' subject matter jurisdiction arguments, the Bankruptcy Court held that it had, at the very least, "related to" subject matter jurisdiction over the claims based on contractual indemnification and fee

[14] The remaining arguments presented by the Debtors, Appellants, and the Office of the United States Trustee focused on whether the Bankruptcy Court had subject matter jurisdiction to approve the nonconsensual third-party releases; if so, whether the Third Circuit permitted nonconsensual third-party releases; if so, what standard applied; and whether the Plan releases met that standard. (*See* B.D.I 190)

advancement obligations that satisfied the *Pacor*[15] test under Third Circuit law. (*See id.* at 13:1-15:22) The Bankruptcy Court further noted that "*Stern v. Marshall* does not change the conclusion that this Bankruptcy Court has ***jurisdiction***":

> The holding in *Stern* was meant to be a narrow one; one that does not, quote, "meaningfully change the division of labor between the Bankruptcy Court and the District Court." To this end, debtors cite cases rejecting a *Stern* challenge, regarding the Bankruptcy Court's constitutional authority to consider approval of third-party releases in a plan, including Judge Drain's decision in *MPM Silicones*, but not any decisions in this district. These Courts may be correct. But because of the necessities of this case, I have not had time to address that argument. ***But I need not do so, given my finding that I have related-to jurisdiction.*** Having decided I have jurisdiction, I now turn to whether third-party releases are appropriate in this case . . .

(*See* id. at 15:23-16:11 (emphasis added))[16] Thus while the Bankruptcy Court's confirmation ruling included a finding that it had "related to" subject matter jurisdiction over the claims, its ruling did not address whether

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[15] *Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984).

[16] The Plan Confirmation Order simply stated that the Bankruptcy Court had jurisdiction under 28 U.S.C. § 1334(a) to approve the injunction, bar order, exculpation, and releases set forth in Article X of the Plan. (*See* D.I. 14, Plan Confirmation Order at A2094)

the Bankruptcy Court lacked adjudicatory authority to enter a final order releasing those claims.

The Bankruptcy Court then turned to whether the third-party release was fair and necessary to the reorganization, applying five factors articulated in *Master Mortgage*[17] and ultimately returning to the *Continental II* hallmarks. (*See id.* at 17:9-26:14) Having found the releases were fair and necessary to the reorganization, the Bankruptcy Court entered the Confirmation Order. (B.D.I. 195)

On the same day, Appellants filed this appeal along with a motion to stay the Confirmation Order (B.D.I. 204) ("Stay Motion").[18] The Stay Motion was subsequently denied by the Bankruptcy Court. (B.D.I. 227) Appellants did not seek a stay in this Court or the Third Circuit, and the Debtors filed a notice of the occurrence of the Plan's effective date on December 18, 2015 (the "Effective Date"). (B.D.I. 229)

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[17] *See* B.D.I. 206, 12/11/15 Hr'g. Tr. at 17:9-24:18 (referring to *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)).

[18] In the bench ruling, the Bankruptcy Court stated: "[T]his is a package deal. The releases were necessary to induce the equity holders to make their three-hundred-and-twenty-five-million-dollar payment to the debtors, and to induce the ad hoc [lender] group's support of the [RSA] and the plan. Without the releases, there will be no cash contribution to pay the government settlements, and the lenders, including [Appellants], would not receive the equity of the company, valued at in excess of $900 million." (*See* B.D.I. 232, 12/18/15 Hr'g. Tr. at 14:20-15:3)

F. Certification of Direct Appeal

Contemporaneously with their appeal, Appellants also filed a motion pursuant to 28 U.S.C. § 158(d)(2)(A) for certification of a direct appeal to the Third Circuit (B.D.I. 203) ("Certification Motion") with respect to several issues, including Issue 2: whether Bankruptcy Courts "have the authority to release a non-debtor's direct, fraud-based claims for willful misconduct against other non-debtors without the consent of the releasing non-debtor?" (B.D.I. 203 at 5) Although this issue speaks of "authority" to release claims – presumably referring to adjudicatory authority under *Stern* – the arguments raised in support of certification centered on permissibility of non-consensual third-party releases under Third Circuit precedent.

Appellants argued that in *Continental II*, the Third Circuit merely recognized that some courts look to whether a non-consensual third-party release is fair and necessary to the reorganization, and that those courts have recognized certain "hallmarks of permissible non-consensual releases." (*See id.* at 7 (citing *Continental II*, 203 F.3d at 214)) According to Appellants, however, the Third Circuit expressly declined to adopt that or any other standard for approving nonconsensual third-party releases, observing in a later opinion that *Continental II* merely "left open the possibility that some small subset of non-consensual third-party releases might be confirmable where the release is 'both necessary [to the plan of reorganization] and given in exchange for fair consideration.'" *In re Lower Bucks Hospital*, 571 App'x 139, 144 (3d Cir. 2014)

(quoting *Continental II*, 203 F.3d at 214, n.11). Because "the Third Circuit has never ruled that releases of non-debtors' claims against other non-debtors are permissible ***at all*** outside the context of asbestos related mass tort liability, and thus never pronounced a binding legal standard for assessing whether such releases are permissible," Appellants argued that direct appeal of this issue would "enable the Third Circuit to clarify two crucial legal issues that remain undetermined in this Circuit: whether non-consensual releases of non-debtors' direct claims against other non-debtors are permissible and if so, under what circumstances." (B.D.I. 203 at 3-4)

Arguing against certification of this issue, Debtors responded that post-*Stern*, Bankruptcy Courts in this and other circuits have rejected arguments that they lack subject matter jurisdiction and authority to approve third-party releases in core proceedings such as plan confirmation. (*See* B.D.I. 234 at 9) Appellants countered that the release at issue "is the most expansive non-debtor release ever approved in this District" (*see* B.D.I. 203 at 3) and that a Plan provision "that releases and enjoins a vast universe of direct claims against numerous non-Debtors represents an incredibly expansive view of the Bankruptcy Court's powers, barring [Appellants'] direct claims (pending in an Article III court) against non-Debtors without their consent" (B.D.I. 203 at 8). In reply, Appellants further argued that the Debtors and other parties had, throughout the bankruptcy proceedings, repeatedly mischaracterized their reliance on *Stern*:

> The only propositions for which [Appellants] have cited *Stern* are that (a) absent the consent of all affected parties, the [Bankruptcy] Court's subject matter jurisdiction is subject to strict statutory boundaries and (b) as an Article I court, the [Bankruptcy] Court lacks the power to restrict a future Article III court's ability to award damages to [Appellants] on account of their claims against [Non-Debtor Equity Holders].

(*See* B.D.I. 243 at 7) This comprises the extent of briefing on the Bankruptcy Court's lack of authority in connection with the Certification Motion.

At a hearing on the Certification Motion on December 30, 2015, Appellants argued that the issue should be certified for direct appeal in order to resolve conflicting decisions within the Third Circuit. Appellants argued that the Confirmation Order conflicted with decisions within this District that did not permit nonconsensual third-party releases. (*See* B.D.I. 253, 12/30/15 Hr'g. Tr.) Conversely, Debtors argued that the different outcomes in cases addressing third-party releases within the Third Circuit are driven by the unique facts of each case and, thus, were not conflicting decisions. Lack of adjudicatory authority was not the focus of these proceedings.

On January 12, 2016, the Bankruptcy Court certified for direct appeal to the Third Circuit, as a question of law requiring the resolution of conflicting decisions pursuant to 158(d)(2)(A)(ii), the issue of "whether a bankruptcy court has the authority to

grant nonconsensual third party releases over objection." *In re Millennium Lab Holdings*, 543 B.R. 703 (Bankr. D. Del. 2016). In a thorough memorandum opinion, the Bankruptcy Court first concluded that there is controlling precedent in the Third Circuit regarding the efficacy of nonconsensual third party releases, citing "[t]he hallmarks of permissible nonconsensual releases – fairness, necessity to the reorganization, and specific factual findings to support these conclusions . . . " – which the Third Circuit set forth in *Continental II* and referred to again in *Global Industrial.*[19] *See id.* at 713. The Bankruptcy Court further concluded that the Confirmation Order, which approved the third-party releases without Appellants' consent, conflicted with the Bankruptcy Court's prior holding in the *Washington Mutual* case,[20] which held

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[19] *Continental II* identified the hallmarks of permissible nonconsensual releases – fairness, necessity to the reorganization, and specific factual findings to support those conclusions – but in the absence of those factors, declined to "speculate upon whether there are circumstances under which we might validate a nonconsensual release that is both necessary and given in exchange for fair consideration." *Continental II*, 203 F.3d at 214. In *Global Industrial*, the Third Circuit specifically relied in the *Continental II* hallmarks in remanding to the Bankruptcy Court to make sufficient findings so that, if there was a subsequent appeal, "a determination can be made on whether there is a legitimate basis for concluding that [the injunction is] necessary to the reorganization and fair." *See In re Global Industrial*, 645 F.3d 201, 215 (3d Cir. 2011).

[20] *In re Washington Mutual*, 442 B.R. 314, 352 (Bankr. D. Del. 2011) ("This Court has previously held that it does not have the power to grant a third party release of a non-debtor. . . . Rather, any such release must be based on consent of the releasing party (by contract or the mechanism of voting in favor of the plan).

that any third-party release of a non-debtor must be based on the consent of the releasing party (by contract or the mechanism of voting in favor of the plan). (*See id.* at 715) Because a resolution of these conflicting decisions under Third Circuit law was required, the Bankruptcy Court granted certification on this particular issue. (*See id.* at 717).[21] Relevant to this appeal, the *Washington Mutual* decision, issued in January 2011, pre-dates the Supreme Court's decisions in *Stern* (June 2011) and *Wellness* (May 2015), and the memorandum opinion granting certification does not include any discussion of *Stern* or its progeny. Rather, the memorandum opinion addresses the issue on whether a third-party release of a non-debtor must be based on the consent of the releasing party, regardless of the type of claim at issue. On February 22, 2016, the Third Circuit denied Appellants' petition for permission to

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Therefore, the original language in the Plan that would mandate third party releases even in the place of an indication on the ballot that the party did not wish to grant the release would not pass muster.") (internal citations omitted). Ultimately, over objection, the *Washington Mutual* Court found that a "release for distribution" provision did not violate the best interest of creditor test and was purely voluntary. *See In re Washington Mutual*, 461 B.R. 200 (Bankr. D. Del. 2011).

[21] The Bankruptcy Court held: "Here, all of the cases within the Third Circuit cited by the parties recognize *Continental*, even *Washington Mutual*. But, my interpretation [of] what is meant by *Continental*'s hallmarks – fairness and necessity to the reorganization – differs from that of the *Washington Mutual* court. Accordingly, I find that Issue 2 meets the criteria of section 158(d)(2)(A)(ii)." *Millennium*, 543 B.R. at 715.

appeal pursuant to 28 U.S.C. § 158(d)(2), and the appeal was docketed in this Court on February 26, 2016.

The Debtors' Motion to Dismiss the Appeal on the basis of equitable mootness has been fully briefed. (D.I. 6, 7, 8, 9, 10, 11, 28, 33, 34, 35) Merits briefing is also complete. (D.I. 12, 13, 14, 24, 25, 26, 27, 31, 32) On October 7, 2016, the Court heard oral argument on the Motion to Dismiss and the merits of the appeal. (D.I. 44)

III. PARTIES' CONTENTIONS

Appellants raise several issues on appeal, but their principal challenge centers on the Bankruptcy Court's lack of adjudicatory authority: "The key question presented by this appeal is whether non-debtor Appellants' direct, state law and federal RICO claims against certain non-debtors, with respect to which Appellants have a constitutional right to adjudication by an Article III Court, can be released and permanently enjoined by an Article I Bankruptcy Court without Appellants' consent." (*See* D.I. 13 at 2) Appellants argue that regardless of whether *Continental II* intended to approve nonconsensual third-party releases in any context, that decision predated *Stern*, and *Continental II* is inconsistent with *Stern*. The impact of *Stern* is that a finding of "related to" subject matter jurisdiction under the statute does not end the inquiry. The Bankruptcy Court must have constitutional adjudicatory authority as well. Appellants argue that the release and permanent injunction of their direct, non-bankruptcy

claims against other non-debtors is a final order, which the Supreme Court's decisions in *Stern* and *Wellness* forbid.[22] (*Id.*)

Conversely, Debtors argue that *Stern* left intact the Bankruptcy Court's constitutional authority to approve a plan of reorganization including third-party releases and that courts in this District have rejected *Stern* challenges regarding a Bankruptcy Court's authority to do so. (*See* D.I. 21 at 31-34) Debtors further argue that even if the Bankruptcy Court lacked the necessary constitutional authority to enter a final order approving the nonconsensual releases of Appellants' claims, review and approval of the Confirmation Order by this Court moots Appellants' constitutional authority argument. (*See id.* at 35)

By the Motion to Dismiss, Debtors contend that, notwithstanding any merits of the appeal, it must be dismissed as equitably moot, as the Plan has been substantially consummated since the Effective Date. (*See* D.I 7 at 14 (arguing that complete change of ownership and control of successor Reorganized Debtors has been effected; substantially all transfers of property contemplated by Plan have been completed; and other

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[22] Appellants further argue that the Bankruptcy Court lacked statutory authority to enter the Confirmation Order approving non-consensual third-party releases over Appellants' objection; the Bankruptcy Court lacked subject matter jurisdiction to approve the releases; and even if the Bankruptcy Court had authority and jurisdiction to approve the releases, the Bankruptcy Court erred in holding that the facts of this case warranted that extraordinary relief. (*See* D.I. 13 at 2-3)

substantial distributions under Plan have been made and are continuing)) In support of dismissal, Debtors argue that Appellants failed to exhaust their opportunities to seek a stay of the Confirmation Order, and cannot now ask the Court to unwind the global settlement and releases that serve as the foundation of the Plan, while retaining the full benefit of the $325 million settlement contribution. (*Id.* at 2) Debtors argue that the relief sought in the appeal threatens both to fatally scramble the Plan and significantly harm third parties who justifiably have relied on the Plan Confirmation Order. (*Id.*)

IV. JURISDICTION AND STANDARDS OF REVIEW

A. Appeal of the Confirmation Order

This Court has jurisdiction over all final judgments, orders, and decrees of the Bankruptcy Court pursuant to 28 U.S.C. § 158(a)(1). An order confirming a plan of reorganization is a final order. When reviewing a case on appeal, the Court reviews the Bankruptcy Court's legal determinations *de novo*, its factual findings for clear error, and its exercise of discretion for abuse thereof. *See In re United Healthcare Systems, Inc.*, 396 F.3d 247, 249 (3d Cir. 2005).

B. Motion to Dismiss Appeal as Equitably Moot

Equitable mootness is a judge-made abstention doctrine which finds applicability in the limited context

of bankruptcy, usually in an appeal following the confirmation of a plan of reorganization. *See In re SemCrude*, 728 F.3d 314, 317 (3d Cir. 2013). "Once effective, reorganizations typically implement complex transactions requiring significant financial investment." *Id.* Notwithstanding an aggrieved party's statutory right to appeal, and a federal court's "virtually unflagging obligation" to exercise the jurisdiction conferred on them, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), in some circumstances granting the relief requested in the appeal "would disrupt the effected plan or harm third parties." *SemCrude*, 728 F.3d at 317. Parties seeking to dismiss an appeal as equitably moot contend that "even if the implemented plan is imperfect, granting the relief requested [in the appeal] would cause more harm than good." *Id.* In light of the responsibility of federal courts to exercise their jurisdictional mandate, the Third Circuit has cautioned that an appellate court must "proceed most carefully before dismissing an appeal as equitably moot." *Id.* at 318. "Before there is a basis to forgo jurisdiction, granting relief on appeal must be almost certain to produce a perverse outcome – chaos in the bankruptcy court from a plan in tatters and/or significant injury to third parties. Only then is equitable mootness a valid consideration." *Id.* at 320 (citing *In re Phila. Newspapers LLC*, 690 F.3d 161, 168 (3d Cir. 2012) (internal citations and quotations omitted)).

In *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) (*en banc)* ("*Continental I*"), the Third Circuit

established five prudential factors to be considered in determining whether to dismiss an appeal of a bankruptcy order as equitably moot.[23] More recently, to reduce uncertainty in applying *Continental I*'s "interconnected and overlapping" factors, *Phila. Newspapers*, 690 F.3d at 168, the Third Circuit collapsed these five factors into a two-step inquiry. *See In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015). The Court's considerations should be as follows: "(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *Id.* at 278 (citing *SemCrude*, 728 F.3d at 321).

V. DISCUSSION

A. Equitable Mootness

Debtors' arguments in favor of dismissal on equitable mootness grounds are persuasive. Appellants, however, argue that equitable mootness cannot prevent this Court's review of the *Stern* issue. Appellants argue that the appeal implicates the Bankruptcy Court's constitutional power to act, and under well-established Supreme Court precedent this Court is

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[23] *See Continental I*, 91 F.3d at 560 ("(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.")

obligated to decide whether the Bankruptcy Court had such power before considering whether the appeal should be dismissed under the judge-made equitable mootness doctrine. (*See* D.I. 28 at 16-19) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-104 (1998); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-42 (1986)) Conversely, Debtors argue that in the *One2One*[24] and *Tribune*,[25] the Third Circuit has made clear that "*Stern* does not in any way impact dismissals for equitable mootness." (*See* D.I. 33 at 9-10) However, neither of those cases involved a claim that the Bankruptcy Court had acted in violation of Article III or *Stern*. Thus, the Court agrees with Appellants that it cannot consider the Debtors' motion to dismiss the appeal on equitable mootness grounds without first determining whether a constitutional defect in the Bankruptcy Court's decision deprived that court of the power to issue that decision.[26]

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[24] *In re One2One Commc'ns, LLC*, 805 F.3d 428 (3d Cir. 2015).

[25] *Tribune*, 799 F.3d at 286.

[26] Debtors noted at oral argument that they had "no objection to Your Honor dismissing this case as equitably moot except for dealing with the so-called *Stern v. Marshall* issue . . . " (D.I. 44, 10/7/16 Hr'g. Tr. at 46) "Your Honor can decide, and we cited many cases that have decided, that say that Bankruptcy Court subject matter jurisdiction to confirm plans, the central role that bankruptcy courts play under the Bankruptcy Code is completely unaffected by *Stern v. Marshall*. There is Third Circuit authority to that effect and there are many other cases. So we have no problem with Your Honor deciding that limited issue, if you feel a need to, but [the Debtors] don't think you need to." (*Id.* at 46-47)

The Court turns to Appellants' *Stern* argument.

B. Lack of Adjudicatory Authority

The Bankruptcy Court held that it had, at a minimum, "related to" subject matter jurisdiction under *Pacor*, based on its holding that certain "indemnification rights and the advancement rights . . . provide a sufficient nexus, such that I have jurisdiction." (B.D.I. 206, 12/11/15 Hr'g. Tr. at 13:1-14:2) The Bankruptcy Court further held that "*Stern v. Marshall* does not change the conclusion that this Bankruptcy Court has ***jurisdiction***." (*Id.* at 15:23-15:24 (emphasis added)

This Court agrees. However, as discussed above, subject matter jurisdiction is not the end of the inquiry, as the Bankruptcy Court must have constitutional authority as well. It is unclear to what extent the Bankruptcy Court had the opportunity to consider what is now the main issue on appeal – the Bankruptcy Court's authority post-*Stern* to enter a final order discharging Appellants' non-bankruptcy state law claims against non-debtors without Appellants' consent – given the lack of time and attention the parties ascribed to this issue in their briefing and arguments below. What is clear is that the Bankruptcy Court had no occasion to explain its reasoning on this issue. As the Bankruptcy Court explained: "because of the necessities of this case, I have not had time to address that argument. ***But I need not do so, given my finding that I have related-to jurisdiction.***" (*Id.* at 16:4-16:11 (emphasis added))

Appellants argue that by holding that statutory "related to" jurisdiction is the same as constitutional adjudicatory authority to release and permanently enjoin non-debtor Appellants' non-bankruptcy state law claims against non-debtors without Appellants' consent – or that "related to" jurisdiction confers such constitutional adjudicatory authority on the Bankruptcy Court – the Bankruptcy Court's analysis was incorrect. That Appellants' constitutional authority objection was not addressed in the confirmation ruling is hardly surprising, given that the argument was set forth less than clearly in the papers and at oral argument. As summarized at length above, this objection was barely mentioned in pre-confirmation briefing, subsumed as it was in Appellants' subject matter jurisdiction arguments, and was not meaningfully addressed at oral argument on Plan confirmation or the Certification Motion. Adjudicatory authority was not central to the Bankruptcy Court's certification opinion either.

Based on the foregoing lack of clarity in the parties' papers, coupled with the exigencies of these chapter 11 cases – including the short timeframe within which the Bankruptcy Court had to address Plan objections and rule on Plan confirmation, in order to avoid government-ordered shutdown of the Debtors' business – the Court is not convinced that the Bankruptcy Court ever had the opportunity to hear and rule on the adjudicatory authority issue.[27]

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[27] *See* B.D.I. 206, 12/11/16 Hr'g. Tr. at 4 ("I'm ruling from the bench because a prompt ruling is needed in this case, given the

C. Merits of Appellants' Arguments

There appears to be no dispute between the parties that Appellants' state common law fraud and RICO claims are non-bankruptcy claims between non-debtors which do not "stem[] from the bankruptcy itself" and would not "necessarily be resolved in the claims allowance process." *See Stern*, 131 S. Ct. at 2618. Despite Debtors' reliance on *Charles Street*, the Court is not persuaded that these claims involve matters of "public rights" which could be assigned to a non-Article III court. Rather these are claims "between two private parties" based on state common law or statutes that are not closely intertwined with a federal regulatory program. *See Stern*, 131 S.Ct. at 2614. As such, Appellants appear to be entitled to Article III adjudication of these claims, and *Stern* dictates that no final order could be entered on such claims by an Article I court, barring consent of the parties (which has not been provided here). The Court is further persuaded by Appellants' argument that the Plan's release, which permanently extinguished Appellants' claims, is tantamount to resolution of those claims on the merits against Appellants. *See*, *e.g.*, *Digital Impact*, 223 B.R. at 13 n.6 ("A release, or permanent injunction, contained in a confirmed plan . . . has the effect of a judgment – a judgment against the claimant and in favor

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looming December 30 deadline under the settlement agreement with the United – the U.S. settling parties; such that, a written decision is not possible. Because of this, my ruling is not as concise as it would be, and it's not as precise as it would be, or probably as well said as it would be if I had the time to draft an opinion.").

of the non-debtor, accomplished without due process. Neither the non-debtor, nor the claimant, have an opportunity to present their claims or defenses to the court for determination. . . ."); *see also CoreStates Bank N.A. v. Huls America, Inc.*, 176 F.3d 187, 194 (3d Cir. 1999) ("The principle of claim preclusion applies to final orders overruling objections to a reorganization plan in bankruptcy proceedings just as it does to any other final judgment on a claim.") The Court does not agree with Debtors that the Plan release did not run afoul of *Stern* because it was not a final adjudication of the claims. If Article III prevents the Bankruptcy Court from entering a final order disposing of a non-bankruptcy claim against a nondebtor outside of the proof of claim process, it follows that this prohibition should be applied regardless of the proceeding (*i.e.*, adversary proceeding, contested matter, plan confirmation).

Debtors contend that any concerns that an Article III court must consider the third party releases on a final basis may be cured and mooted by this Court's *de novo* review, relying on the Supreme Court's decision in *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014).[28] But this Court's review of the Plan

[28] In *Executive Benefits*, the Bankruptcy Court conducted summary judgment proceedings on the merits of the trustee's fraudulent conveyance claims and entered judgment in the trustee's favor. *Id.* at 2169. The District Court conducted *de novo* review and affirmed. *See id.* at 2174. Because the District Court would have done the same thing had the Bankruptcy Court issued proposed findings of facts and conclusions of law, the Supreme Court concluded that the District Court had in

confirmation order does not satisfy constitutional concerns set forth in *Stern* and its progeny because there has been no adjudication on the merits of the actions released by the Plan: Appellants' Fraud Action. The Bankruptcy Court did not conduct any proceedings on the merits of the Fraud Action, and this Court is not in any position at this point to adjudicate those claims (on which, among other things, no discovery has been taken).[29] Debtors' argument that this Court's *de novo* review of the confirmation order can cure *Stern* concerns – as "the factual record is uncontroverted and satisfies the controlling standard for approval of nonconsensual third party releases" – misses the point. As Appellants argue, affirming the Bankruptcy Court's approval of the release would do nothing more than ratify the entry of a judgment extinguishing

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fact adjudicated the fraudulent conveyance claims and entered a valid final judgment in compliance with Article III. *See id.* at 2175.

[29] Debtors assert that Appellants had the opportunity in the Bankruptcy Court to present whatever evidence they wished at the Plan confirmation hearing, suggesting that Appellants have already been offered the trial to which Appellants claim they have been unconstitutionally deprived. (*See* D.I. 44, 10/7/16 Hr'g. Tr. at 14-15; 69-70) The Court understands Debtors' argument essentially to be that even if Appellants are correct that they had a right to a trial on their fraud and RICO claims, Appellants waived that right. This issue has not been presented yet to the Bankruptcy Court. As part of the proceedings on remand, the Bankruptcy Court is free to consider whether, even if Appellants had a right to a trial that was impermissibly eliminated by the third-party nonconsensual releases that, in any event, Appellants independently waived their right to such a trial. The Court does not mean to suggest it has already determined the correct answer to this question.

Appellants' claims without an actual adjudication of them on the merits by an Article III judge. Thus, this Court's review of the Plan Confirmation Order cannot resolve the constitutional concerns set forth in *Stern*.

D. Remand for Further Proceedings

Notwithstanding the seeming merits of Appellants' arguments, the Court will not rule on an issue that the Bankruptcy Court itself may not have ruled upon, especially in light of the fact that this issue has now become Appellants' primary argument on appeal. Further proceedings are necessary. The Court will therefore remand this case to the Bankruptcy Court to consider whether, or clarify its ruling that, the Bankruptcy Court had constitutional adjudicatory authority to approve the nonconsensual release of Appellants' direct non-bankruptcy common law fraud and RICO claims against the Non-Debtor Equity Holders; and, if it does not have such authority, to submit proposed findings of fact and conclusions of law regarding the final disposition of these claims through the Confirmation Order, or, alternatively, to strike the nonconsensual release of Appellants' claims from the Confirmation Order.

The Court recognizes such a remand is far from ideal at this stage of the Chapter 11 proceedings. Still, given its experience and expertise, the Bankruptcy Court should rule on this issue first.

VI. CONCLUSION

For the reasons explained above, the Court will deny without prejudice the Motion to Dismiss the Appeal as equitably moot and remand to the Bankruptcy Court for further proceedings. A separate Order will be entered.

March 20, 2017
Wilmington, Delaware
[CORRECTED VERSION]

/s/ Leonard P. Stark
HON. LEONARD P. STARK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: MILLENNIUM LAB HOLDINGS II, LLC, *et al.*, Debtors.	:	Chapter 11 Bankr. Case No. 15-12284-LSS (Jointly Administered)
OPT-OUT LENDERS, Appellants, v. MILLENNIUM LAB HOLDINGS II, LLC, *et al.*, TA MILLENIUM, INC., and JAMES SLATTERY, Appellees.	:	Civ. No. 16-110-LPS.

ORDER

(Filed Mar. 17, 2017)

At Wilmington, this 17th day of March, 2017, for the reasons set forth in the accompanying Memorandum issued this date, IT IS HEREBY ORDERED that:

1. The Motion to Dismiss (D.I. 6) is DENIED WITHOUT PREJUDICE.

2. The Confirmation Order is remanded for further proceedings: (i) the Bankruptcy Court shall consider whether, or clarify its ruling that, it had constitutional adjudicatory authority to approve the non-consensual release of Appellants' direct non-bankruptcy common

law fraud and RICO claims against the Non-Debtor Equity Holders; (ii) if not, to issue proposed findings of fact and conclusions of law regarding final disposition of these claims through the Confirmation Order, or alternatively, to strike the nonconsensual release of Appellants' claims from the Confirmation Order; and (iii) in connection with the foregoing, to conduct any further proceedings the Bankruptcy Court deems just and necessary.

/s/ Leonard P. Stark
HON. LEONARD P. STARK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MILLENNIUM LAB HOLDINGS II, LLC, et al.[1]	Case No. 15-12284 (LSS)
	(Jointly Administered)
Debtors.	**Re: Docket Nos. 202, 203, 205, 234, 243**

ORDER PURSUANT TO 28 U.S.C. § 158(D)(2) CERTIFYING DIRECT APPEAL

(Filed Jan. 12, 2016)

AND NOW, this 12th day of January, 2016, for the reasons set forth in the Memorandum Opinion of even date,

IT IS HEREBY ORDERED that:

The Opt-Out Lenders' Emergency Motion for Certification of Direct Appeal to the United States Court of Appeals for the Third Circuit Pursuant to 28 U.S.C. § 158(D)(2) [D.I. 203] from this Court's Findings of Fact, Conclusions of Law and Order (I) Approving the (A) Prepetition Solicitation Procedures, (B) Forms of Ballots, (C) Adequacy of Disclosure Statement Pursuant to Sections 1125 and 1126(c) of the Bankruptcy Code, and (D) Form and Manner of Notice of Combined Hearing and Commencement of Chapter 11 Cases, and (II) Confirming the Prepackaged Joint Chapter 11

[1] The Debtors are as follows: Millennium Lab Holdings II, LLC; Millennium Health, LLC; and RxAnte, LLC.

Plan of Reorganization of Millennium Lab Holdings II, LLC, et al. [D.I. 195] is **GRANTED**.

BY THE COURT:

/s/ Laurie Selber Silverstein
LAURIE SELBER SILVERSTEIN
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MILLENNIUM LAB HOLDINGS II, LLC, et al.,	Case No. 15-12284 (LSS) Jointly Administered
Debtors.[1]	**Related D.I. 195, 203, 204, 209, 213, 220**

ORDER DENYING MOTION OF THE OPT-OUT LENDERS FOR STAY PENDING APPEAL OF ORDER CONFIRMING AMENDED PREPACKAGED JOINT PLAN OF REORGANIZATION OF MILLENNIUM LAB HOLDINGS II LLC, *ET AL.*

(Filed Dec. 18, 2015)

Upon the Court's consideration of the Motion of the Opt-Out Lenders For Stay Pending Appeal of Order Confirming Amended Prepackaged Joint Plan Of Reorganization Of Millennium Lab Holdings II, LLC, et al. [D.I. 204] (the "Stay Motion"); and upon consideration of the Debtor's and the Ad Hoc Consortium's objections to the Stay Motion [D.I. 212 and 213]; and upon consideration of the Opt-Out Lenders' reply in support of the Stay Motion [DI 220]; and upon the

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Millennium Lab Holdings II, LLC (5299); Millennium Health, LLC (5558); and RxAnte, LLC (0219). The Debtors' address is 16981 Via Tazon, San Diego, California, 92127.

record of the confirmation hearing proceedings [D.1. 190; transcript]; and for the reasons set forth by the Court on the record at the hearing held on December 11, 2015 [DI 206; transcript]; and upon consideration of the arguments of counsel at the hearing held on December 17, 2015 to consider the Stay Motion; and for the reasons set forth by the Court on the record at the hearing held on December 18, 2015; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Stay Motion is DENIED.

2. This Court's Order Temporarily Staying Confirmation Order [DI 209] is vacated in its entirety, and the temporary stay imposed by that order is no longer in effect.

3. This Court shall retain jurisdiction to hear and resolve any disputes arising from or related to the interpretation and/or implementation of this Order.

Dated: Wilmington, Delaware
December 18, 2015

/s/ Laurie Selber Silverstein
The Honorable Laurie Selber Silverstein
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
MILLENNIUM LAB HOLDINGS II, LLC, et al.,	:	Case No. 1512284 (LSS)
	:	Jointly Administered
Debtors.[1]	:	**Related Docket No. 14, 15, 182**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (I) APPROVING THE (A) PREPETITION SOLICITATION PROCEDURES, (B) FORMS OF BALLOTS, (C) ADEQUACY OF DISCLOSURE STATEMENT PURSUANT TO SECTIONS 1125 AND 1126(c) OF THE BANKRUPTCY CODE, AND (D) FORM AND MANNER OF NOTICE OF COMBINED HEARING AND COMMENCEMENT OF CHAPTER 11 CASES, AND (II) CONFIRMING THE PREPACKAGED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF MILLENNIUM LAB HOLDINGS II, LLC, ET AL.

(Filed Dec. 14, 2015)

Upon the motion (the "Motion") of the Debtors (i) for entry of an order (a) approving the Debtors' prepetition

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Millennium Lab Holdings II, LLC (5299); Millennium Health, LLC (5558); and RxAnte, LLC (0219). The Debtors' address is 16981 Via Tazon, San Diego, California, 92127.

solicitation procedures (the "Solicitation Procedures"), (b) scheduling a combined hearing on (x) the adequacy of the Debtors' *Offering Memorandum and Solicitation for Out-of-Court Transaction and Disclosure Statement for Prepackaged Plan of Reorganization*, dated October 29, 2015 [Docket No. 151 (the "Disclosure Statement"), with respect to the *Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, LLC et al.*, dated October 29, 2015 [Docket No. 14] (as amended in the form attached to this Order, the "Plan"),[2] and (y) confirmation of the Plan; (c) approving the procedures for objecting to the adequacy of the Disclosure Statement and confirmation of the Plan, and (d) approving the form and manner of notice of the combined hearing and commencement of these chapter 11 cases; (ii) for entry of an order (a) approving the adequacy of the Disclosure Statement and (b) confirming the Plan; and (iii) for entry of an order authorizing the Debtors to assume the USA Settlement Agreements and the RSA; and upon the order dated November 12, 2015, granting, in part, the Motion (the "Scheduling Order") [Docket No. 60]; and the Court having considered the *Debtors' Memorandum of Law in Support of Entry of an Order Confirming the Joint Prepackaged Chapter 11 Plan of Reorganization of Millennium Lab Holdings II, LLC et al.* (the "Confirmation Brief"), the *Declaration of William Brock Hardaway in Support of (I) Confirmation of the Debtors' Plan and (II) Debtors' Response to Voya Objection to Confirmation of Debtors' Chapter 11 Plan*

[2] Capitalized terms used but not defined herein have the meaning set forth in the Plan.

(the "Hardaway Declaration") [Docket No. 133], the *Declaration of David S. Kurtz in Support of (I) Confirmation of the Debtors' Plan and (II) Debtors' Response to Voya Objection to Confirmation of Debtors' Chapter 11 Plan* (the "Kurtz Declaration") [Docket No. 134], the *Declaration of George D. Pillari in Support of (I) Confirmation of the Debtors' Plan and (II) Debtors' Response to Voya Objection to Confirmation of Debtors' Chapter 11 Plan* (the "Pillari Declaration"), the *Debtors' Response to Voya Objection to Confirmation of Proposed Chapter 11 Plan* [Docket No. 131), the *Declaration of David A. Aloise in Support of Confirmation of Debtors' Chapter 11 Plan* (the "Aloise Declaration" and, together with the Pillari Declaration, the Hardaway Declaration and the Kurtz Declaration, the "Declarations") [Docket No. 135], the *TA Millennium, Inc. Joinder and Brief in Support of Plan Confirmation and in Opposition to Voya's Plan Objection* [Docket No. 124], and the *Joinder of James Slattery in Support of Confirmation of the Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, LLC, et al* [Docket No. 136]; and the Court having considered the two objections filed, one of which was limited to raising objections to the third-party releases, bar order and injunction provisions of the Plan and one of which objected to the Plan on grounds that (i) the Plan actually impairs the "unimpaired" classes; (ii) the Plan's nonconsensual third-party releases are not permissible; and (iii) the Debtors have not established that the appropriateness of the Debtor releases; and the Court having held a hearing on December 10, 2015 pursuant to sections 1128 and 1129 of the Bankruptcy Code to

consider confirmation of the Plan (the "Confirmation Hearing"); and the Court having admitted into the record and considered evidence at the Confirmation Hearing; and after due deliberation thereon and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

A. Jurisdiction; Venue; Core Proceeding (28 U.S.C. §§ 157(b)(2) and 1334(a)). This Court has jurisdiction over the above-captioned jointly administered Chapter 11 Cases pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L), and this Court has jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed.

B. Filing of Plan. On November 10, 2015, the Debtors filed the Plan and the Disclosure Statement.

C. Plan Supplements. On November 25, 2015 the Debtors filed a supplement (the "First Plan Supplement") to the Plan [Docket No. 114]. The First Plan

[3] Each finding of fact set forth or incorporated herein, to the extent it is or may be deemed a conclusion of law, shall also constitute a conclusion of law. Each conclusion of law set forth or incorporated herein, to the extent it is or may be deemed a finding of fact, shall also constitute a finding of fact

Supplement contained the following documents: (i) the New Term Loan Agreement, (ii) the New Holdco Charter, (iii) the New Holdco Bylaws, (iv) the Millennium Corporate Claim Trust Agreement, and (v) the Millennium Lender Claim Trust Agreement. On December 1, 2015 the Debtors filed a second supplement (the "Second Plan Supplement") to the Plan [Docket No. 115]. The Second Plan Supplement contained the Form of Guarantee and Collateral Agreement for the New Term Loan Facility, New Holdco's Registration Rights Agreement and the Amended and Restated Operating Agreement of New Holdco. In addition, on December 9, 2015 the Debtors filed a third supplement (the "Third Plan Supplement" and, together with the First Plan Supplement and the Second Plan Supplement, the "Plan Supplements") to the Plan [Docket No. 179]. The Third Plan Supplement contained (i) blackline documents reflecting changes to certain of the documents previously filed with the First Plan Supplement and the Second Plan Supplement, (ii) a list of the members selected by the Ad Hoc Group Majority to the New Board and the officers of the Reorganized Debtors, as applicable, as well as information relating to the compensation of the directors and officers of New Holdco and the Reorganized Debtors, as applicable, (iii) a Loan Agreement between the Millennium Corporate Claim Trust and Millennium and (iv) a Loan Agreement between the Millennium Lender Claim Trust and Millennium. The Third Plan Supplement also disclosed the identity and compensation of the persons who have been designated to serve as the Trustee and Trust

Advisory Board of each of such Trusts and the terms of their compensation.

D. Transmittal of Solicitation Package. As set forth in the *Declaration of James Daloia of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Prepackaged Joint Plan of Reorganization of Millennium Lab Holdings II, LLC.* dated November 9, 2015 [Docket No. 17] (the "Tabulation Declaration"), prior to the Petition Date, the Debtors caused, among other documents identified in the Tabulation Declaration, the ballot, in the form attached to the Motion as Exhibit A (the "Ballots"), and copies of the Disclosure Statement and Plan (the "Solicitation Packages") to be distributed as required by sections 1125 and 1126 of Title 11 of the United States Code (the 'Bankruptcy Code"), Rules 3017 and 3018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), all other applicable provisions of the Bankruptcy Code, the Scheduling Order, and all other applicable rules, laws, and regulations applicable to such solicitation, including section 4(a)(2) of the Securities Act of 1933 (as amended, and including the rules and regulations promulgated thereunder, the "Securities Act"). The Plan and the Disclosure Statement were transmitted to all creditors entitled to vote on the Plan and sufficient time was prescribed for creditors to accept or reject the Plan. Such transmittal and service

was adequate and sufficient under the circumstances and no other or further notice is or shall be required.

E. Mailing and Publication of Combined Notice. On November 12, 2015, the Debtors caused (i) the Notice of Non-Voting Status in substantially the form attached to the Scheduling Order as Exhibit B to be mailed to all of the Debtors' known creditors and interests holders not entitled to vote on the Plan and (ii) the Confirmation Hearing Notice in substantially the form attached to the Scheduling Order as Exhibit C (the "Combined Notice") to be mailed to all of the Debtors' known creditors and interest holders of record, and all other parties required to be served under the Scheduling Order. See Affidavit of Service of Steven Gordon re: Notice of Commencement of Chapter 11 Cases, Imposition of Automatic Stay and Combined Hearing [Docket No. 101]. Additionally, the Debtors published notices (the "Publication Notice") substantially similar to the Combined Hearing Notice in the New York Times on November 23, 2015 and in the San Diego Union Tribune on November 24, 2015. See Affidavit of Service of David M. Smith re: Publication Notice [Docket No. 141]. Publication of the Publication Notice was in substantial compliance with the Scheduling Order and Bankruptcy Rule 2002(l). The Debtors have given proper, adequate and sufficient notice of the hearing to approve the Disclosure Statement as required by Bankruptcy Rule 3017(a). The Debtors have given proper, adequate and sufficient notice of the Confirmation Hearing as required by Bankruptcy Rule 3017(d). Due, adequate, and sufficient notice of the Disclosure

Statement, the Plan, along with deadlines for filing objections to the Plan and the Disclosure Statement, has been given to all known holders of Claims and Equity Interests substantially in accordance with the procedures set forth in the Scheduling Order. No other or further notice is or shall be required.

F. Objections. All objections and all reservations of rights that have not been withdrawn, waived or settled, pertaining to confirmation of the Plan are overruled on the merits.

G. Adequacy of Disclosure Statement. Because the Plan was solicited prior to the Petition Date, the adequacy of the Disclosure Statement is governed by Bankruptcy Code sections 1125(b) and (g). The information contained in the Disclosure Statement contained adequate material information regarding the Debtors for parties entitled to vote on the Plan to make informed decisions regarding the Plan. Additionally, the Disclosure Statement contains adequate information as that term is defined in Bankruptcy Code section 1125(a) and complies with any additional requirements of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules, as well as with applicable non-bankruptcy law. The Disclosure Statement complies with the requirements of Bankruptcy Rule 3016(c) by sufficiently describing in specific and conspicuous language the provisions of the Plan that provide for releases and injunctions against conduct not otherwise enjoined under the Bankruptcy Code and sufficiently identifies the persons and entities that are subject to the releases and injunctions. The only objections to the

adequacy of the Disclosure Statement timely made were submitted by Voya and the United States Trustee, those objections are hereby overruled, and the voting on the Plan was overwhelmingly in support.

H. Solicitation. Sections 1125(g) and 1126(b) of the Bankruptcy Code apply to the solicitation of acceptances and rejections of the Plan prior to the commencement of these Chapter 11 Cases. Votes for acceptance or rejection of the Plan were solicited in good faith and in compliance with sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, and all other applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and all other rules, laws, and regulations. In particular, the solicitation of the Plan commenced on October 29, 2015, in accordance with applicable non-bankruptcy law, and remained open until November 8, 2015 (the "Voting Deadline"). The establishment of the Voting Deadline as November 8, 2015 was reasonable under Bankruptcy Rule 3018(b) and did not prescribe an unreasonably short time for creditors to accept or reject the Plan. The form of the Ballot was adequate and appropriate and complied with Bankruptcy Rule 3018(c). The form of the Ballot was sufficiently consistent with Official Form No. 14 and adequately addressed the particular needs of these Chapter 11 Cases and were appropriate for the Class entitled to vote to accept or reject the Plan. Substantially all of the Holders of Existing Credit Agreement Claims, the only Holders of Claims entitled to vote under the Plan, cast a ballot. The only objections to the adequacy of the solicitation

which were timely made were submitted by Voya and the U.S. Trustee, those objections are hereby overruled, and the voting on the Plan was overwhelmingly in support. Accordingly, the solicitation of the Plan, including the Solicitation Procedures and the Solicitation Packages, complied with the provisions of Bankruptcy Code section 1125(g).

I. Good Faith Solicitation (11 U.S.C. § 1125(e)). All persons who solicited votes on the Plan, including any such persons released or exculpated pursuant to Article X of the Plan, solicited such votes in good faith and in compliance with the applicable provisions of the Bankruptcy Code and are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code, and, with respect to the Exculpated Parties and the USA Settlement Parties, to the exculpation and limitation of liability provisions set forth in Article X.D of the Plan. No objection to the good faith of the Debtors was timely made, and the voting on the Plan was overwhelmingly in support.

J. Tabulation Results. On November 10, 2015, the Debtors filed the Tabulation Declaration, certifying the method and results of the ballot tabulation for the Class entitled to vote under the Plan (the "Voting Class"). As evidenced by the Tabulation Declaration, the Voting Class has accepted the Plan with respect to each of the Debtors in accordance with section 1126 of the Bankruptcy Code. Specifically, 93.02% of the Holders of all Class 2 Existing Credit Agreement Claims, representing 93.74% of the aggregate principal amount of all Existing Credit Agreement Claims, voted to

accept the Plan. All procedures used to tabulate the Ballots were fair and reasonable and conducted in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and all other applicable rules, laws, and regulations. As set forth in the *Declaration of Ray Garson in Support of Confirmation of Debtors' Chapter 11 Plan* [Docket No. 169], following the tabulation of the Ballots, a member of the Ad Hoc Group advised the Debtors that it had purchased $1,460,838.88 of Class 2 Existing Credit Agreement Claims formerly held by JPMorgan Chase Bank, N.A. (the, "Post-Tabulation JP Morgan Assigned Claims"), which had voted to reject the Plan, and that pursuant to its obligations under the RSA it wished to change the vote cast in respect to such Post-Tabulation JP Morgan Assigned Claims to a vote in favor of the Plan. Pursuant to Bankruptcy Rule 3018(a), good and sufficient cause exists to allow the assignee of the Post-Tabulation JP Morgan Assigned Claims to change the votes submitted in respect to such claims to votes in favor of the Plan.

K. As set forth in the *Declaration of Thomas Ewald in Support of Confirmation of Debtors' Chapter 11 Plan* [Docket No 170], following the tabulation of the Ballots, a second member of the Ad Hoc Group further informed the Debtors that it had a pending purchase of other Class 2 Existing Credit Agreement Claims in the amount of $5,984,848.48 formerly held by an entity that had not cast a ballot in respect of such Claims (the "Post-Tabulation Pending Claims Purchase", the Claims which are the subject of such

purchase, the "Post-Tabulation Pending Purchased Claims" and, together with the Post Tabulation JP Morgan Claims, the "Post-Tabulation Claims").

L. As members of the Ad Hoc Group which signed the RSA, the Persons who purchased or have a binding legal obligation to acquire the Post-Tabulation Claims are obligated to make such claims subject to the RSA when they acquire such Post-Tabulation Claims. The holders of the Post-Tabulation Claims have represented to the Court that such Persons desire to include the Post-Tabulation Claims in the amount they hold as Consenting Lenders for purposes of the RSA and the amount used for purposes of calculating (1) the respective percentage beneficial interests in the Millennium Corporate Claim Trust held by all Holders of Existing Credit Agreement Claims, (ii) in the Millennium Lender Claim Trust held by all Consenting Lenders, and (iii) the amount of the Retained Lender Causes of Action which have been assigned to each such Trust. The Court determines that allowing the Post-Tabulation Claims to be considered as having accepted the Plan and allowing the Post-Tabulation Claims to be included in the amounts used for calculating the beneficial interests in the Millennium Lender Claims Trust and the amount of the Retained Lender Causes of Action which have been assigned to such Trust is consistent with the RSA, fair and reasonable to Consenting Lenders and in the best interests of the Estates.

M. Bankruptcy Rule 3016. The Plan is dated and identifies the entities submitting it, thereby satisfying

Bankruptcy Rule 3016(a). The filing of the Disclosure Statement with the clerk of the Court simultaneously with the Plan satisfied Bankruptcy Rule 3016(b).

N. Burden of Proof. As more fully set forth herein, the Debtors, as proponents of the Plan, have met their burden of proving each of the elements of sections 1129(a) and 1129(b) of the Bankruptcy Code by a preponderance of the evidence, which is the applicable evidentiary standard for confirmation of the Plan.

O. Plan Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1)). The Plan satisfies section 1129(a)(1) of the Bankruptcy Code because it complies with the applicable provisions of the Bankruptcy Code, including, but not limited to: (a) the proper classification of Claims and Equity Interests (11 U.S.C. §§ 1122, 1123(a)(1)); (b) the specification of Unimpaired Classes (11 U.S.C. § 1123(a)(2)); (c) the specification of treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)); (d) provision for the same treatment of each Claim or Equity Interest within a Class (11 U.S.C. § 1123(a)(4)); (e) provision for adequate and proper means for implementation (11 U.S.C. § 1123(a)(5)); (f) the prohibition against the issuance of non-voting equity securities (11 U.S.C. § 1123(a)(6)); (g) adequate disclosure of the procedures for determining the identities and affiliations of the directors, members and officers with respect to the Reorganized Debtors (11 U.S.C. § 1123(a)(7)); and (h) the inclusion of additional plan provisions permitted to effectuate the restructuring of the Debtors (11 U.S.C. § 1123(b)).

(a) Proper Classification (11 U.S.C. §§ 1122 and 1123(a)(1)). In particular, Article III of the Plan adequately and properly identifies and classifies all Claims and Equity Interests. The Plan designates eight (8) Classes of Claims and three (3) Classes of Equity Interests. The Claims or Equity Interests placed in each Class are substantially similar to other Claims or Equity Interests, as the case may be, in each such Class, and such classification therefore satisfies section 1122 of the Bankruptcy Code. Valid business and legal reasons exist for the various Classes of Claims and Equity Interests created under the Plan, and such Classes do not unfairly discriminate between holders of Claims or Equity Interests. Thus, the Plan satisfies section 1123(a)(1) of the Bankruptcy Code.

(b) Specified Treatment of Unimpaired Classes (11 U.S.C. 1123(a)(2)). The Plan specifies in Article III that Classes 1, 3, 4, 5, 6, 8, 9 and 11 are Unimpaired under the Plan, thereby satisfying section 1123(a)(2) of the Bankruptcy Code.

(c) Specified Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)). The Plan specifies in Article III that Classes 2, 7 and 10 are Impaired under the Plan and sets forth the treatment of the Impaired Classes in Article III of the Plan, thereby satisfying section 1123(a)(3) of the Bankruptcy Code.

(d) No Discrimination (11 U.S.C. § 1123(a)(4)). Article III of the Plan provides for the same treatment for each Claim or Equity Interest in each respective Class unless the holder of a particular Claim or Equity

Interest has agreed to a less favorable treatment of such Claim or Equity Interest. Accordingly, the Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

(e) Implementation of the Plan (11 U.S.C. § 1123(a)(5)). Article V of the Plan provides adequate and proper means for implementation of the Plan, thereby satisfying section 1123(a)(5) of the Bankruptcy Code.

(f) Nonvoting Equity Securities (11 U.S.C. § 1123(a)(6)). Article V.K of the Plan provides that the New Holdco Organizational Documents and Reorganized Debtors Organizational Documents shall be amended and restated as necessary to satisfy the provisions of the Plan and the Bankruptcy Code, including section 1123(a)(6). Accordingly, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

(g) Selection of Officers and Directors (11 U.S.C. § 1123(a)(7)). The Debtors have identified proposed directors and officers of the Reorganized Debtors (or have provided for the selection thereof), as applicable. Officers of Millennium and RxAnte LLC immediately prior to the Effective Date will remain officers of each of Reorganized Millennium and Reorganized RxAnte LLC on the Effective Date. The Third Plan Supplement discloses the identity of the members of the New Board as designated by the Ad Hoc Group Majority. As the Ad Hoc Group Majority will own all of the equity in New Holdco upon the consummation of the Plan, New Holdco will own all of the equity in Reorganized Millennium and Reorganized Millennium will

own all of the equity in RxAnte LLC, the Ad Hoc Group Majority's selection of the officers and members of the new boards of such Reorganized Debtors and New Holdco, as applicable, is consistent with the interests of holders of Claims and Equity Interests and with public policy. The manner of selection and appointment of directors of each of the Reorganized Debtors and New Holdco under the Plan is consistent with the interests of holders of Claims and Equity Interests and with public policy and, thus, satisfies section 1123(a)(7) of the Bankruptcy Code.

(h) Additional Plan Provisions (11 U.S.C. § 1123(b)(6)). The Plan's additional provisions are appropriate and not inconsistent with the applicable provisions of the Bankruptcy Code.

P. Debtors' Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2)). The Debtors have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Scheduling Order, and other orders of this Court, thereby satisfying section 1129(a)(2) of the Bankruptcy Code. In particular, the Debtors are proper debtors under section 109 of the Bankruptcy Code. The Debtors are proper proponents of the Plan pursuant to section 1121(a) of the Bankruptcy Code. The Debtors, as proponents of the Plan, complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and the Scheduling Order in transmitting the Plan, the Disclosure Statement, the Ballots and notices and in soliciting and tabulating votes on the Plan.

Q. Plan Proposed in Good Faith (11 U.S.C. § 1129(4)(3)). The Debtors have proposed the Plan in good faith, for proper purposes and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, the Court has examined the totality of the circumstances surrounding the filing of the Chapter 11 Cases, the formulation of the Plan and all modifications thereto. The Chapter 11 Cases were filed, and the Plan and all modifications thereto were proposed, with the legitimate and honest purpose of reorganizing and maximizing the value of the Debtors and the recovery to stakeholders. No objection to the good faith of the Debtors was timely made, and the voting on the Plan was overwhelmingly in support.

R. Payments for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)). Pursuant to Article II.A(i) of the Plan, professionals holding Professional Fee Claims are required to file their final fee applications with the Court no later than forty five (45) days after the Effective Date. These applications remain subject to Court approval under the standards established by the Bankruptcy Code, including the requirements of sections 327, 328, 330, 331, 503(b) and 1103 of the Bankruptcy Code, as applicable. In addition, on or as soon as reasonably practicable after the Equity Transfer Date, the Administrative Agent shall receive payment in full in Cash of the Administrative Agent Fees, and Brown Rudnick, LLP, FTI, and Delaware Counsel to the Ad Hoc Group shall receive payment in full of

any fees and expenses owed to them under the RSA as advisors to the Ad Hoc Group. The payment of such fees shall be subject to paragraph 14(d) of the Interim Cash Collateral Order. Finally, Article IX of the Plan provides that the Court will retain jurisdiction after the Effective Date to hear and determine all applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or the Plan, including requests by Professionals. Accordingly, the Plan fully complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

S. Board of Directors and Officers (11 U.S.C. § 1129(a)(5)). The Debtors have sufficiently disclosed the initial officers and members of the new boards of each of New Holdco and the Reorganized Debtors, as applicable, including the identity of any insider that will be employed or retained by the Reorganized Debtors. The Third Plan Supplement discloses the identity of the officers and members of the new boards (or have provided for the selection thereof) of each of New Holdco and the Reorganized Debtors, as applicable, as well as the nature of the compensation that will be received by any insider of the Debtors. The appointment to, or continuance in, such office of each individual, and the methods established therefore, are consistent with the interests of holders of Claims and Equity Interests, and with public policy. Therefore, section 1129(a)(5) of the Bankruptcy Code is satisfied with respect to the Plan.

T. No Rate Changes (11 U.S.C. § 1129(a)(6)). Section 1129(a)(6) of the Bankruptcy Code is satisfied

because the Plan does not provide for any change in rates over which a governmental regulatory commission has jurisdiction.

U. Best Interests Test (11 U.S.C. § 1129(a)(7)). The liquidation analysis attached as Exhibit I to the Disclosure Statement, the Pillari Declaration, and other evidence proffered or adduced at the Confirmation Hearing (1) are persuasive and credible, (2) are based upon reasonable and sound assumptions, (3) provide a reasonable estimate of the liquidation values of the Debtors in the event the Debtors were liquidated under Chapter 7 of the Bankruptcy Code, (4) have not been controverted by other credible evidence or sufficiently challenged in any objection to the Plan, and (5) establish that each holder of a Claim or Equity Interest in an Impaired Class that has not accepted the Plan will receive or retain under the Plan, on account of such Claim or Equity Interest, property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under Chapter 7 of the Bankruptcy Code on such date. Therefore, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code.

V. Acceptance By Certain Classes (11 U.S.C. § 1129(a)(8)). Classes 1, 3, 4, 5, 6, 8, 9 and 11 are Unimpaired by the Plan and, therefore, under section 1126(f) of the Bankruptcy Code, such Classes are conclusively presumed to have accepted the Plan. Class 2 was entitled to vote on the Plan and such Class has voted to accept the Plan. Accordingly, Bankruptcy Code section 1129(a)(8) has been satisfied with respect to

Classes 1 through 6, 8, 9 and 11. Classes 7 and 10 are deemed to reject the Plan pursuant to Bankruptcy Code section 1126(g), but, as found below, the Plan is confirmable under Bankruptcy Code section 1129(b) notwithstanding the rejections by such Classes. Therefore, section 1129(a)(8) of the Bankruptcy Code has not been satisfied with respect to these Classes.

W. Treatment of Administrative and Priority Tax Claims and Priority Non-Tax Claims (11 U.S.C. § 1129(a)(9)). The treatment of Administrative Claims and Other Priority Claims under the Plan satisfies the requirements of section 1129(a)(9)(A) and (B) of the Bankruptcy Code, and the treatment of Priority Tax Claims under the Plan satisfies the requirements of section 1129(a)(9)(C) of the Bankruptcy Code.

X. Acceptance By Impaired Class (11 U.S.C. § 1129(a)(10)). At least one Impaired Class of Claims voted to accept the Plan determined without including any acceptance of the Plan by any "insiders." Therefore, section 1129(a)(10) of the Bankruptcy Code is satisfied with respect to the Plan.

Y. Feasibility (11 U.S.C. § 1129(a)(11)). The Plan does not provide for the liquidation of all or substantially all of the property of the Debtors. The financial projections in Exhibit H to the Disclosure Statement, the Hardaway Declaration, and the evidence proffered or adduced at the Confirmation Hearing (i) are persuasive and credible, (ii) have not been controverted by other credible evidence or sufficiently challenged in any of the objections to the Plan, and (iii) establish that

the Plan is feasible and that confirmation of the Plan is not likely to be followed by the liquidation of the Reorganized Debtors or the need for further financial reorganization of the Reorganized Debtors. Therefore, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

Z. Payment of Fees (11 U.S.C. § 1129(a)(12)). The Debtors have paid or, pursuant to the Plan, will pay by the Effective Date, fees payable under 28 U.S.C. § 1930, thereby satisfying section 1129(a)(12) of the Bankruptcy Code.

AA. Retiree Benefits (11 U.S.C. 1129(a)(13)). Article VI.G of the Plan provides that employment and severance policies, and all compensation and benefit plans, policies, and programs of the Debtors generally applicable to their employees, retirees, and the employees and retirees of their subsidiaries, including, without limitation, all savings plans, retirement plans, healthcare plans, disability plans, severance benefit plans, incentive plans, life, and accidental death and dismemberment insurance plans, are treated as Executory Contracts under the Plan and on the Effective Date will be assumed. To the extent that such plans or agreements providing for bonuses or severance to insiders may fall within Article VI.G of the Plan, such plans and agreements will not be assumed; provided, however, that such insiders may assert any claims arising under such plans or agreements against the applicable Debtors as Class 6 Claims. Therefore the payment of all retiree benefits (as defined in section 1114 of the Bankruptcy Code) shall continue at the

previously established levels, thereby satisfying section 1129(a)(13) of the Bankruptcy Code.

BB. Miscellaneous Provisions (11 U.S.C. §§ 1129(a)(14)-(16)). Sections 1129(a)(14)-(16) are inapplicable as the Debtors (i) have no domestic support obligations (1129(a)(14)), (ii) are not individuals (1129(a)(15)), and (iii) are for-profit businesses (1129(a)(16)).

CC. Section 1129(b); Confirmation of Plan Over Nonacceptance of Impaired Classes. Holders of Claims and Existing Equity Interests in Classes 7 and 10 are deemed to have rejected the Plan (the "Deemed Rejecting Classes"). All of the requirements of section 1129(a) of the Bankruptcy Code, other than section 1129(a)(8) with respect to such Classes, have been met. Notwithstanding the fact that the Deemed Rejecting Classes are deemed to reject the Plan and thus do not satisfy section 1129(a)(8), the Plan may be confirmed pursuant to section 1129(b)(1) of the Bankruptcy Code because the Plan does not discriminate unfairly and is fair and equitable with respect to the Deemed Rejecting Classes. After entry of this Confirmation Order and upon consummation of the Plan, the Plan shall be binding upon the members of the Deemed Rejecting Classes.

DD. The Plan does not unfairly discriminate because members within each Class are treated similarly. In particular, all Holders of Class 7 MLH Tax Note Claims and Class 10 Existing Equity Interests in Millennium are placed into their individual classes

and given the same respective treatment. Accordingly, the Plan does not discriminate unfairly in respect to the Deemed Rejecting Classes or any other Class of Claims or Equity Interests.

EE. The Plan is fair and equitable with respect to the Deemed Rejecting Classes. Specifically, Class 7 is composed of certain insiders that agreed pursuant to the RSA to allow their MLH Tax Note Claims to be cancelled. Similarly, holders of equity interests in Class 10 agreed pursuant to the RSA to allow their Existing Equity Interests in Millennium to be cancelled. Additionally, the reinstatement of Class 9 Existing Equity Interests in Holdings and Class 11 Existing Equity Interests in RxAnte, LLC does not violate Bankruptcy Code sections 1129(b)(2)(B) and (C). The senior creditors, who are entitled to all value under the Plan, have consented to these Classes, both of whom have lower priority, being reinstated. Holdings will retain no assets. The preservation of Existing Equity Interests in Holdings and RxAnte does not enable any claimholder or interest holder junior to the Deemed Rejecting Classes to retain or recover any value under the Plan. Accordingly, the Plan is fair and equitable and does not discriminate unfairly, as required by section 1129(b) of the Bankruptcy Code, and may be confirmed under Bankruptcy Code section 1129(b) notwithstanding the Deemed Rejecting Classes' deemed rejection of the Plan.

FF. Only One Plan (11 U.S.C. § 1129(e)). Only one Plan is being sought to be confirmed in the Chapter

11 Cases. Accordingly, the requirements of section 1129(c) of the Bankruptcy Code have been satisfied.

GG. Principal Purpose of Plan (11 U.S.C. § 1129(d)). The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 (15 U.S.C. § 77e). Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

HH. Small Business Case (11 U.S.C. § 1129(e)). Section 1129(e) is inapplicable because these Chapter 11 Cases do not qualify as small business cases thereunder.

II. Satisfaction of Confirmation Requirements. Based upon the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

JJ. Executory Contracts. The Debtors have exercised reasonable business judgment in determining whether to assume or reject their executory contracts and unexpired leases pursuant to Article VI of the Plan. Each assumption of an executory contract or unexpired lease pursuant to Article VI of the Plan shall be legal, valid and binding upon the applicable Debtor or Reorganized Debtor and their assignees or successors and all non-Debtor parties (and their assignees or successors) to such executory contract or unexpired lease, all to the same extent as if such assumption had been effectuated pursuant to an order of the Court entered before the date of the entry of this Confirmation Order (the "Confirmation Date") under section 365 of

the Bankruptcy Code. The Debtors are not assigning any Executory Contracts or Unexpired Leases pursuant to Article VI.B of the Plan, and therefore the provisions of the Plan addressing assignment of Executory Contracts or Unexpired Leases shall have no force or effect. The Debtors are not rejecting any Executory Contracts or Unexpired Leases.

KK. Adequate Assurance. The Debtors have cured, or the Reorganized Debtors shall promptly cure, defaults (if any) under or relating to each of the executory contracts and unexpired leases that are being assumed by the Debtors pursuant to the Plan, including, without limitation, the performance of the Debtors and Reorganized Debtors of each one's obligations under the USA Settlement Agreements, and the Debtors' and Reorganized Debtors' continued participation in the Medicare and Medicaid programs in the ordinary course of business to be governed by and subject to, the terms and conditions of the Medicare and Medicaid Agreements and the Medicare statutes, regulations, policies and procedures, including the recovery of overpayments in the ordinary course of business.

LL. Injunctions and Releases. This Court has jurisdiction under sections 1334(a) and (b) of title 28 of the United States Code to approve the injunction, bar order, exculpation and releases set forth in Article X of the Plan. Each of the injunctions and releases set forth in Article X of the Plan are fair and necessary to the Plan, thereby satisfying the requirements of *In re Continental Airlines, Inc.*, 203 F.3d 203, 214 (3d Cir. 2000), and other applicable case law. Such releases and

injunctions are given in exchange for and are supported by fair, sufficient, and adequate consideration provided by each and all of the parties providing such releases. Pursuant to section 1123(b) of the Bankruptcy Code and Bankruptcy Rule 9019(a), the releases and injunctions set forth in the Plan and implemented by this Order are fair, equitable, reasonable, and in the best interests of the Debtors, the Debtors and their Estates, and the holders of claims and equity interests. This Court's findings of fact to support the approval of the Plan's injunctions and releases provisions, based on the record established at the Confirmation Hearing, including the Declarations, are set forth below.

(a) Compromise and Settlement. The Plan memorializes the significant compromises and agreements by and among the Released Parties that were agreed upon in the RSA and as reflected in the USA Settlement Agreements and the Plan. The Released Parties' commitments under the USA Settlement Agreements and the Plan are contingent upon the corresponding commitments by the other Released Parties and the Releasing Parties. In consideration for the classification, distributions, and other benefits provided under the Plan (including the releases, injunctions and bar order), the provisions of the Plan constitute a good faith compromise and settlement of all Causes of Action and controversies among the Released Parties to the extent and subject to the terms set forth in the Plan, whether known or unknown, contingent or non-contingent, matured or unmatured, suspected or unsuspected, foreseen or unforeseen, liquidated or

unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, whether arising before, on, or after the Petition Date, in contract or in tort, in law or in equity, or pursuant to any other theory of law, relating to or in connection with the business or affairs of or transactions with the Debtors or as otherwise set forth in the Plan. These compromises and settlements are (i) in the best interests of the Debtors, their Estates and creditors, and other parties in interest; (ii) fair, equitable, proposed in good faith and reasonable; and (iii) an essential element of the resolution of these Chapter 11 Cases in accordance with the Plan. Each of the release, bar order, and indemnification provisions set forth in the Plan: (i) is within the jurisdiction of the Court under 28 U.S.C. §§ 157(a), 157(b)(2), and 1334(a); (ii) is an essential means of implementing the Plan pursuant to section 1123(a)(5) of the Bankruptcy Code; (iii) is an integral element of the compromises and settlements identified in the Plan; (iv) confers material benefit on, and is in the best interest of the Debtors, their Estates and their creditors; (v) is important to the overall objectives of the Plan to finally resolve all Causes of Action among or against the Released Parties; and (vi) is consistent with sections 105, 1123, 1129 and other applicable provisions of the Bankruptcy Code.

(b) Fairness.

(i) The Released Parties have provided, or have agreed to provide, a substantial contribution that was essential to make the

Plan feasible and to provide a fair result and fair consideration for affected creditors.

(ii) MLH is contributing $178.75 million in connection with the Plan and TA is contributing $146.25 million, which together with other contributions and benefits form the combined Settlement Contribution of $325 million in cash, to be paid to, or for the benefit of, Millennium pursuant to the terms of the USA Settlement Agreements, the RSA, and the Plan as the sole means of satisfaction of the terms of the USA Settlement Agreement. MLH and TA are also contributing the guaranty of the Initial USA Settlement Deposit. In addition, MLH and TA have agreed to transfer ownership of the equity interests in the Debtors to the Prepetition Lenders as set forth in the Plan. These contributions are reasonable, particularly in light of the complexity, difficulty, and time that would be required to litigate the disputes being settled.

(iii) Each of the non-Debtor Released Parties will waive their Claims and any distributions, other than those distributions provided for in the Plan, to which each would be entitled on account of such Claims against the Debtors and the other Released Parties or have otherwise provided substantial contributions to the Plan. These compromises together with the Settlement Contribution provide a substantial contribution and are critical to the Plan.

(iv) A majority of the Prepetition Lenders and their Related Parties extensively negotiated and assisted in formulating the Plan, entered into the RSA, and under the Plan have agreed to convert their Existing Credit Agreement Claims into Pro Rata shares of the New Term Loan and equity in Reorganized Millennium, each of which provides substantial benefits to the Debtors' estates, the Prepetition Lenders and the Debtors' other constituencies as a result of MLH's and TA's contributions under the Plan and the RSA and the USA Settlement Agreements.

(v) The contributions provided in exchange for the releases and injunctions represent an exchange of fair consideration. The sole voting class, containing the Prepetition Lenders, overwhelmingly voted to accept the Plan and the Prepetition Lenders are receiving their pro rata share of 100% of the equity in Reorganized Millennium (subject to traditional dilution), the $600 million New Term Loan, the beneficial interests in the Millennium Corporate Claim Trust, and as applicable, the Millennium Lender Claim Trust. The Settlement Contribution provided by MLH and TA, and the other consideration provided by all of the non-debtor Released Parties and their Related Parties provides the Prepetition Lenders with a substantial recovery and allows all other holders of Claims to remain unimpaired. Moreover, Reorganized Millennium will have a substantially deleveraged balance sheet and is projected to generate positive EBITDA and excess cash flow. The

uncontroverted evidence presented at the Confirmation Hearing also demonstrates that the equity in Reorganized Millennium has substantial value. The value of the consideration provided to creditors under the Plan, made possible by, and relative to, the Settlement Contribution, attests to the fairness of the Plan settlements and compromises.

(vi) As reflected in the Tabulation Declaration, Holders of 93.02% of all Existing Credit Agreement Claims voted in support of the Plan, thus confirming the reasonableness of the settlements. Accordingly, the Plan has been overwhelmingly accepted by the Class of creditors primarily affected by the releases.

(vii) Each Non-Consenting Lender will receive more value under the Plan than they would in liquidation and, accordingly, receive fair and reasonable consideration in exchange for the releases and injunctions under the Plan.

(c) Necessity to the Reorganization. The injunctions and releases provisions are critical to the success of the Plan. Without the releases, and the enforcement of such releases through the Plan's injunction provisions, the Released Parties are not willing to make their contributions under the Plan. Absent those contributions, the Debtors will be unable to satisfy their obligations under the USA Settlement Agreements and no chapter 11 plan will be feasible and the Debtors would likely shut down upon the revocation of their Medicare enrollment and billing privileges.

(d) Record Supports Specific Findings. The record of the Confirmation Hearing and the Chapter 11 Cases is sufficient to support the injunctions and releases provisions contained in the Plan.

(e) Extraordinary Circumstances. The filing of the Chapter 11 Cases was the consensual culmination of months of negotiations among the Debtors, the USA Settlement Parties, the Prepetition Lenders, MLH and TA and provides a global resolution through the settlements embodied in the RSA and the USA Settlement Agreements, subject to approval and implementation through the Plan. The Plan avoids the need for contentious and value-destroying litigation and preserves the Debtors business as a going concern and maximizes the value of the Estates. The extensive efforts and substantial contributions by each of the Released Parties, along with the magnitude of the recoveries provided under the Plan to Holders of Allowed Claims constitute extraordinary circumstances warranting the injunctions and releases provisions set forth in the Plan.

(f) Identity of Interest. For the reasons listed below, there is a substantial identity of interest between the Debtors and the Released Parties and their respective Related Parties, such that a Cause of Action asserted against a Released Party or its Related Parties is essentially a Claim against the Debtors to the extent the Released Party or Related Party (as applicable) has indemnification rights against the Debtors.

(i) Each of the Released Parties share a common goal of resolving their competing and interrelated claims and achieving fair and equitable distributions through the Plan. Absent the involvement of the Released Parties, none of the settlements required for, or entered into in connection with, the confirmation of the Plan would be possible, and few business assets would be available for distribution to creditors if the Debtors' Medicare enrollment and billing privileges were revoked and the Debtors were forced to cease operations.

(ii) Many of the Debtors' Related Parties allege that they may have direct or indirect indemnification rights against the Debtors arising out of one or more of the following: (i) specific board actions or resolutions; (ii) certificates of formation of the Debtors; (iii) bylaws and operating agreements of the Debtors; (iv) employment agreements; or (v) statutory or common law. Claims successfully asserted by any of the Debtors' Related Parties under any of the foregoing bases would deplete the assets of the Debtors' Estates.

(iii) Many of the Debtors' Related Parties share insurance policies with the Debtors. As a result claims asserted against the Debtors' Related Parties would deplete the assets of the Debtors' Estates to the extent such claims were covered under the shared insurance policies.

MM. Bar Order and Injunction. The bar order and injunction provisions set forth in Sections X.J and X.K of the Plan are essential to the Plan, and are necessary to implement the Plan and to preserve and enforce the releases and the exculpation. The bar order and injunction provisions are appropriately tailored to achieve the foregoing purposes.

NN. Retained Claims and Other Matters. The provisions set forth in Sections X.L an [sic] X.M of the Plan are specifically negotiated and tailored provisions to provide various protections to MLH and TA in respect of certain specified matters relating to Preserved Estate Claims and Preserved Lender Claims. These bargained for protections are an essential part of the compromise that allowed for the continuation of the Preserved Estate Claims and the Preserved Lender Claims notwithstanding the funding of the Settlement Contribution. These provisions strike a fair and appropriate balance between allowing for the preserved claims and providing protection to MLH and TA from litigation that is not being settled under the Plan. These provisions are an inextricable part of the Plan transactions and are necessary to implement the Plan and preserve the benefit of the contemplated releases.

OO. Issuance of New Common Stock. The issuance of the New Holdco Common Stock is an essential element of the Plan and is in the best interests of the Debtors, their Estates, and their creditors. New Holdco is authorized, without further approval of this Court or any other party, to issue the New Holdco Common Stock in accordance with the Plan and to execute and

deliver all agreements, documents, instruments, and certificates relating thereto.

PP. New Term Loan Agreement. The credit facility contemplated by the New Term Loan Agreement (the "New Term Loan Facility") is an essential element of the Plan and is in the best interests of the Debtors, their Estates, and their creditors. Pursuant to this Order and the Plan, without any requirement of further action by security holders, directors, members or managers of the Debtors or execution of the New Term Loan Agreement by any of the Prepetition Lenders, the New Term Loan Agreement and the other New Term Loan Documents will constitute legal, valid, enforceable and binding agreements of the parties thereto and the Lenders referred to therein in accordance with paragraph 18 of this Confirmation Order.

QQ. Appointment of Certain Persons Under the Plan. The appointment of (i) Marc Kirshner to serve as the Trustee of the Millennium Lender Claim Trust, (ii) Gene Davis, Alan Halperin and Matt Cantor to serve as the three-member Millennium Lender Claim Trust Advisory Board, (iii) Marc Kirshner to serve as the trustee of the Millennium Corporate Claim Trust and (iv) Gene Davis, Alan Halperin and Matt Cantor to serve as the three-member Millennium Corporate Claim Trust Advisory Board respectively, is hereby approved in all respects.

RR. Millennium Corporate Claim Trust Agreement. The Millennium Corporate Claim Trust Agreement is an essential element of the Plan and is in the

best interests of the Debtors, their Estates, and their creditors. The Debtors are authorized, without further approval of this Court or any other party, to enter into and to perform their respective obligations under the Millennium Corporate Claim Trust Agreement in accordance with the Plan. Upon its execution pursuant to this Order and the Plan, the Millennium Corporate Claim Trust Agreement will constitute a legal, valid, enforceable and binding agreement of the parties thereto.

SS. Millennium Lender Claim Trust Agreement. The Millennium Lender Claim Trust Agreement is an essential element of the Plan and is in the best interests of the Debtors, their Estates, and their creditors. The Debtors are authorized, without further approval of this Court or any other party, to enter into and to perform their respective obligations under the Millennium Lender Claim Trust Agreement in accordance with the Plan. Upon its execution pursuant to this Order and the Plan, the Millennium Lender Claim Trust Agreement will constitute a legal, valid, enforceable and binding agreement of the parties thereto.

TT. Exemption from Securities Laws (11 U.S.C. § 1145). Pursuant to the Plan, any securities issued and any subsequent sales, resales, transfers, or other distributions of any such securities shall be exempt from any federal or state securities laws registration requirements, including section 5 of the Securities Act, to the fullest extent permitted by section 1145 of the Bankruptcy Code. The issuance and distribution of the New Holdco Common Stock and the Equity Interests

in Millennium and any interest in either the Millennium Corporate Claim Trust or the Millennium Lender Claim Trust, to the extent any such interest may be considered a security, will be made in reliance on the exemption from registration provided by section 1145(a) of the Bankruptcy Code, or section 4(a)(2) of the Securities Act or Regulation D promulgated thereunder, and will be exempt from registration under applicable securities laws.

UU. Restructuring Transactions. The Reorganized Debtors' entry into and assumption of all obligations under and in respect of the transactions contemplated by Article V of the Plan and the other transactions contemplated by the Plan, including without limitation the Restructuring Transactions, is an exercise of reasonable business judgment, proposed in good faith, critical to the success and feasibility of the Plan and in the best interests of the Debtors, the Reorganized Debtors, the Estates and creditors. The Restructuring Transactions were negotiated, proposed, and entered into or will be entered into, as the case may be, by the Debtors, the Reorganized Debtors, and the counterparties thereto without collusion, in good faith, and from arm's-length bargaining positions. All documents heretofore executed in connection with the Restructuring Transactions are valid, binding and enforceable agreements and are not in conflict with any applicable federal or state law, and all documents to be executed following entry of this Confirmation Order in connection with the Restructuring Transactions, upon their execution, will be valid, binding and enforceable

agreements and will not be in conflict with any applicable federal or state law.

VV. Plan Conditions to Confirmation. The conditions to confirmation set forth in Article VIII.A of the Plan have been satisfied or waived in accordance with the terms of the Plan.

WW. Plan Conditions to Consummation. Each of the conditions to the Effective Date, as set forth in Article VIII.B of the Plan, is reasonably likely to be satisfied or waived in accordance with the terms of the Plan.

XX. Plan Conditions to the Equity Transfer Date. Each of the conditions to the Equity Transfer Date, as set forth in Article VIII.C of the Plan, is reasonably likely to be satisfied or waived in accordance with the terms of the Plan.

YY. Retention of Jurisdiction. The Court properly may retain jurisdiction over the matters set forth in Article IX.A of the Plan.

DECREES

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

Confirmation of Plan and Related Matters

1. Approval Of Disclosure Statement. Pursuant to Bankruptcy Rule 3017(b), the Disclosure Statement is approved under Bankruptcy Code sections 1125(a) and 1125(g).

2. Solicitation. The Solicitation Procedures including the procedures for transmittal of Solicitation Packages (as defined in the Motion), the form of Ballots, and the Voting Deadline, are approved under sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, the Local Rules, all other applicable provisions of the Bankruptcy Code, and all other rules, laws, and regulations applicable to such solicitation. The solicitation materials are approved under sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, the Local Rules, all other applicable provisions of the Bankruptcy Code, and all other applicable rules, laws, and regulations.

3. Confirmation. The Plan, including all provisions thereof (whether or not specifically approved herein), all Plan Supplements and all Exhibits attached thereto, is approved and confirmed under section 1129 of the Bankruptcy Code. All acceptances and rejections previously cast for or against the Plan are hereby deemed to constitute acceptances or rejections of the Plan.

4. Confirmation Order Binding on All Parties. Subject to the provisions of the Plan and Bankruptcy Rule 3020(e), in accordance with section 1141(a) of the Bankruptcy Code and notwithstanding any otherwise applicable law, upon the occurrence of the Effective Date, the terms of the Plan and this Confirmation Order shall be binding upon, and inure to the benefit of: (a) the Debtors; (b) the Reorganized Debtors; (c) any and all holders of Claims or Equity Interests (irrespective of whether such Claims or Equity Interests are

Impaired under the Plan or whether the holders of such Claims or Equity Interests accepted, rejected or are deemed to have accepted or rejected the Plan); (d) any other person giving, acquiring or receiving property under the Plan; (e) any and all non-Debtor parties to executory contracts or unexpired leases with any of the Debtors; and (f) the respective heirs, executors, administrators, trustees, affiliates, officers, directors, agents, representatives, attorneys, beneficiaries, guardians, successors or assigns, if any, of any of the foregoing. On the Effective Date, except as otherwise set forth in the Plan or paragraph 5 of this Confirmation Order, all settlements, compromises, releases, waivers, discharges, exculpations and injunctions set forth in the Plan shall be effective and binding on all Persons who may have had standing to assert any settled, compromised, released, waived, discharged, exculpated or enjoined causes of action, and no other Person or entity shall possess such standing to assert such causes of action after the Effective Date.

5. Unimpaired Claims. Notwithstanding the effectiveness and application of the provisions of Articles III.E.(i), III.E.(iii), III.E.(iv), V.I and X.C, X.H, X.I, X.J and X.K of the Plan as of the Effective Date, or any other provision of the Plan, the Disclosure Statement, the Plan Supplements, the RSA, any other document related to the Plan, or this Confirmation Order, that provides that a Claim is settled, satisfied, resolved, released, discharged, barred or enjoined, until a Claim that is against any of Holdings, Millennium or RxAnte, LLC, and which arises prior to the Effective Date of the

Plan and falls under Class 4 or 6 (including Claims arising from the rejection of Executory Contracts or Unexpired Leases and Claims arising under section 502(h) of the Bankruptcy Code) of the Plan or is a Cure Claim, has been (x) paid in full by Millennium or RxAnte, LLC, or Reorganized Millennium or Reorganized RxAnte, LLC, as applicable, in accordance with applicable law, or on such terms as may otherwise be agreed to between the Holder of such Claim and Millennium or RxAnte, LLC, or Reorganized Millennium or Reorganized RxAnte, LLC, as applicable, or in accordance with the terms and conditions of the particular transaction giving rise to such Claim as modified herein as to Holdings or (y) otherwise satisfied or disposed of as determined by a court of competent jurisdiction: (a) Holders of such Claims against Holdings, Millennium or RxAnte, LLC or Reorganized Millennium or Reorganized RxAnte, LLC, may pursue or enforce solely such Claims against Reorganized Millennium or Reorganized RxAnte, LLC, and (b) the property of each of Millennium's or RxAnte, LLC's Estates that vests in the applicable Reorganized Debtor pursuant to section V.C of the Plan shall not be free and clear of such Claims; provided, that for the avoidance of doubt, the foregoing shall not apply to paragraphs 30, 31, 32, 34, 41 and 47 of this Confirmation Order, and for the avoidance of doubt, nothing herein shall apply, or have any force and effect, with respect to any Claims against any Released Party or any of their Related Parties (other than Millennium or RxAnte, LLC, or Reorganized Millennium or Reorganized RxAnte, LLC) and, as such, the provisions of Articles IIIE.(i), III.E.(iii), III.E.(iv),

V.I and X.C, X.H, X.I, X.J and X.K of the Plan shall apply, without limitation, in all respects from and after the Effective Date in favor of all Released Parties and their Related Parties (other than Millennium or RxAnte, LLC, or Reorganized Millennium or Reorganized RxAnte, LLC) as against all Holders of Claims falling under Classes 4 or 6 and Cure Claims. Holders of Claims falling under Classes 4 or 6 of the Plan and Cure Claims shall not be required to file a Proof of Claim with the Bankruptcy Court. Holders of Claims falling under Classes 4 or 6 and Cure Claims shall not be subject to any claims resolution process in Bankruptcy Court in connection with their Claims, and shall retain all their rights under applicable non-bankruptcy law to pursue their Class 4 or 6 Claims, and Cure Claims, against Millennium or RxAnte, LLC or Reorganized Millennium or Reorganized RxAnte, LLC or other Entity in any forum with jurisdiction over the parties. Millennium, RxAnte, LLC, Reorganized Millennium, and Reorganized RxAnte, LLC shall retain all defenses, counterclaims, rights to setoff, and rights to recoupment as to Claims falling under Classes 4 or 6 of the Plan and as to Cure Claims. Notwithstanding the foregoing, nothing herein limits the retained jurisdiction of the Bankruptcy Court under Article IX of the Plan. Any Holders of Claims in Classes 4 and 6 that hold Claims against Holdings shall be deemed to hold such Claims solely against Reorganized Millennium and Reorganized RxAnte, LLC and the provisions of this paragraph shall apply to such Claims as against Reorganized Millennium and Reorganized RxAnte, LLC.

6. Notice. Notice of the Plan, the exhibits thereto (and all amendments and modifications thereto), the Disclosure Statement, the Solicitation Packages and the Confirmation Hearing was proper and adequate.

7. Objections. All objections and all reservations of rights that have not been withdrawn, waived or settled, pertaining to the confirmation of the Plan are overruled on the merits.

8. Authorization and Effectiveness of All Actions. All actions contemplated by the Plan are hereby authorized and approved in all respects (subject to the provisions of the Plan). The approvals and authorizations specifically set forth in this Confirmation Order are nonexclusive and are not intended to limit the authority of any Debtor or Reorganized Debtor or any officer or director thereof to take any and all actions necessary or appropriate to implement, effectuate and consummate any and all documents or transactions contemplated by the Plan or this Confirmation Order. Pursuant to this Order, Delaware General Corporate Law section 303, and other applicable law, the Debtors, the Reorganized Debtors and New Holdco are authorized and empowered, without action of their respective stockholders or members or boards of directors or managers (but subject to consent rights, if any, set forth in the Plan, and in the case of Holdings, also subject to the agreements governing the respective rights of the members of Holdings) to take any and all such actions as any of their executive officers may determine are necessary or appropriate to implement, effectuate and consummate and perform any and all documents

(including, without limitation, the New Term Loan Agreement and any and all documents relating thereto, including, without limitation, all security agreements, all related or ancillary documents and agreements, any mortgages contemplated thereby and the fee letter with the Administrative Agent for the New Term Loan (collectively, the "New Term Loan Documents"), the Millennium Lender Claim Trust Agreement and the Millennium Corporate Claim Trust Agreement) or transactions contemplated by the Plan or this Confirmation Order.

9. Vesting of Assets in the Reorganized Debtors. Except as provided in the Plan, including Article V.J of the Plan with respect to the property and assets not vesting free and clear of any Claims reserved for Governmental Units, Article V.F of the Plan with respect to the property and assets to be transferred to the Millennium Corporate Claim Trust, in the USA Settlement Agreements, or in this Confirmation Order, on or after the Equity Transfer Date, all property and assets of the Estates (including, without limitation, Causes of Action and Avoidance Actions, but only to the extent such Causes of Action and Avoidance Actions have not been waived or released pursuant to the terms of the Plan, pursuant to an order of the Bankruptcy Court, or otherwise) and any property and assets acquired by the Debtors pursuant to the Plan, will vest in the Reorganized Debtors, free and clear of all Liens or Claims. Except as may be otherwise provided in the Plan, on and after the Effective Date, the Reorganized Debtors may operate their businesses and may use,

acquire or dispose of property and compromise or settle any Claims without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules, other than those restrictions expressly imposed by the Plan and this Confirmation Order. Without limiting the foregoing, the Reorganized Debtors will pay the charges that they incur after the Effective Date for Professionals' fees, disbursements, expenses or related support services (including reasonable fees relating to the preparation of Professional fee applications) in the ordinary course of business and without application or notice to, or order of, the Bankruptcy Court.

10. Release of Liens, Claims and Equity Interests. Except as otherwise provided in paragraph 5 of this Confirmation Order, the Plan or in any contract, instrument, release or other agreement or document entered into or delivered in connection with the Plan, on the Equity Transfer Date and concurrently with the applicable distributions made pursuant to the Plan, all Liens, Claims, or Equity Interests in or against the property of the Estates will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or the vote, consent, authorization or approval of any Entity. Any Entity holding such Liens, Claims, or Equity Interests will, pursuant to section 1142 of the Bankruptcy Code, promptly execute and deliver to the Reorganized Debtors such instruments of termination, release, satisfaction and/or assignment (in recordable form) as may be reasonably requested by the

Reorganized Debtors and shall incur no liability to any Entity in connection with its execution and delivery of any such instruments. Without limitation of the generality of the foregoing, all mortgages, deeds of trust, security interests and other liens granted as security for the Existing Credit Agreement (including, but not limited to, the deeds of trust granted by the Debtors in respect to their interest as lessee under the JS Real Estate Leases and recorded in the jurisdictions where such properties are located) (the "Existing Leasehold Mortgages") shall be released, terminated, extinguished and discharged as provided above and the Debtors and the other parties to such Existing Leasehold Mortgages are hereby authorized and directed to execute and deliver any appropriate instruments or documents which may be reasonably requested by the Ad Hoc Group or the Prior Administrative Agent to evidence such releases of record at the applicable filing offices (including, but not limited, discharges of the Existing Leasehold Mortgages).

11. Corporate Structure. On or prior to the Equity Transfer Date, the Debtors or Reorganized Debtors are authorized to reorganize their corporate structure as contemplated by Article V.B of the Plan, including by completing the transactions under the Plan that would result in (i) New Holdco being formed and becoming the parent entity of Reorganized Millennium and, (ii) to the extent deemed necessary or desirable by the Debtors or Reorganized Debtors and an Ad Hoc Group Majority, the conversion of Millennium Health, LLC from a California limited liability company into a Delaware limited liability company. Furthermore, on or

prior to the Equity Transfer Date, New Holdco is authorized to enter into or otherwise adopt the New Holdco Organizational Documents.

12. Restructuring Transactions. The Restructuring Transactions are approved, and the Debtors and Reorganized Debtors and their officers, managers and directors are authorized, subject to the consent rights contained in the Plan, to execute, adopt and/or amend such documents (including, without limitation, the New Term Loan Agreement and the other New Term Loan Documents, the Millennium Lender Claim Trust Agreement and the Millennium Corporate Claim Trust Agreement, the New Holdco Organizational Documents and, if deemed necessary or desirable by the Debtors or the Reorganized Debtors and an Ad Hoc Group Majority, all documents relating to the conversion of Millennium Health, LLC from a California limited liability company into a Delaware limited liability company, including without limitation the Plan of Entity Conversion and Amended and Restated Operating Agreement) and take such actions as may be reasonably required to implement the Restructuring Transactions in a manner Consistent With The Restructuring Term Sheet, as defined in the Plan, and the tax provisions discussed therein.

13. Cancellation of Notes, Certificates and Instruments. On the Equity Transfer Date, and provided that the New Securities and Debt Documents have been executed by New Holdco and the Reorganized Debtors, as applicable and delivered to the party or parties entitled thereto and all amounts outstanding

under the Early Commitment Facility have been paid, except as otherwise provided in the Plan or this Confirmation Order, all notes, stock, instruments, certificates, agreements and other documents evidencing the Early Commitment Facility, the Existing Credit Agreement Claims and the Existing Equity Interests in Millennium will be canceled, and the obligations of the Debtors thereunder or in any way related thereto will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person. On the day following the date that the final distribution is made by Administrative Agent, the Administrative Agent will be released and discharged from any further responsibility under the Existing Loan Documents; provided, however, that any and all rights of indemnification applicable to the Administrative Agent (including, without limitation, any rights related to reimbursement of Administrative Agent Fees) or the Prior Administrative Agent, respectively, under the Existing Loan Documents and related documents shall survive and remain in full force and effect; provided further, however, until the Administrative Agent Fees have been paid in full, the Administrative Agent will retain its charging liens under the Existing Loan Documents with respect to any cash distributions to be made under the Plan by the Administrative Agent.

14. Preservation and Maintenance of Debtor Causes of Action. Except as otherwise provided in the

Plan or this Confirmation Order, or in any contract, instrument, release, or other agreement entered into in connection with the Plan as provided for in the Plan, after the Equity Transfer Date, Reorganized Millennium shall be automatically deemed to have transferred the Retained Corporate Causes of Action and the other Trust Assets (as defined below) to the Millennium Corporate Claims Trust free and clear of all liens, encumbrances, claims or interests as provided in Paragraph 25 hereof and the Reorganized Debtors or the Millennium Corporate Claim Trust (in accordance with Article V.F of this Plan), as applicable pursuant to the Plan, shall retain any and all rights to commence, pursue, litigate or settle, as appropriate, any and all Causes of Action that are not Released Claims, whether existing as of the Petition Date or thereafter arising, in any court or other tribunal including, without limitation, in an adversary proceeding filed in the Chapter 11 Cases. The Reorganized Debtors, as the successors in interest to the Debtors and the Estates, or the Millennium Corporate Claim Trust (in accordance with Article V.F of the Plan) as the transferee of the Retained Millennium Corporate Claims, as applicable, may, in their sole and absolute discretion, and will have the exclusive right to, enforce, sue on, settle, compromise, transfer or assign (or decline to do any of the foregoing) any claims or Causes of Action that are not Released Claims without notice to or approval from the Bankruptcy Court. The Reorganized Debtors or the Millennium Corporate Claim Trust, as applicable, or their successor(s) may pursue such retained claims, rights or Causes of Action, suits, or proceedings as

appropriate, but for the avoidance of doubt, not any Released Claims, in accordance with the best interests of the Reorganized Debtors or the Millennium Corporate Claim Trust, as applicable, or their successor(s) who hold such rights as determined by the Reorganized Debtors or the Millennium Corporate Trust, in their discretion.

15. Unless a Cause of Action against a Holder of a Claim or an Equity Interest or other Entity is (A) expressly waived, relinquished, released, compromised or settled in the Plan or any Final Order (including, without limitation, Released Claims released pursuant to this Confirmation Order), or (B) subject to the bar order and injunction provisions in Article X.J of the Plan, Article X.K of the Plan, and this Confirmation Order, such Cause of Action (including, without limitation, other than with respect to Released Claims, Causes of Action not specifically identified or of which the Debtors may presently be unaware or which may arise or exist by reason of additional facts or circumstances unknown to the Debtors at this time or facts or circumstances that may change or be different from those the Debtors now believe to exist and all Retained Corporate Causes of Action) is expressly reserved for later adjudication by the Debtors and, therefore, no preclusion doctrine, including, without limitation, the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable or otherwise) or laches will apply to such Causes of Action upon or after the Confirmation of the Plan or the Effective Date of the Plan based on the

Plan or the Confirmation Order, except where such Causes of Action have been expressly released in the Plan (including, without limitation, and for the avoidance of doubt, the releases contained in Article X of the Plan) or any other Final Order (including, without limitation, the Confirmation Order). Any Retained Corporate Causes of Action shall be transferred to the Millennium Corporate Claim Trust in accordance with Article V.F of the Plan and Paragraph 25 hereof and the terms of such Trust for later adjudication by the Millennium Corporate Claim Trust. In addition, except in respect to the Retained Corporate Causes of Action, the right to pursue or adopt any claims alleged in any lawsuit in which any Debtor is a plaintiff; defendant or an interested party, against any Entity, including, without limitation, the plaintiffs or co-defendants in such lawsuits is expressly reserved for the Debtors and the Reorganized Debtors.

16. Distribution Agent. Except as provided in the Plan, all distributions under the Plan shall be made by the Reorganized Debtors, New Holdco, or the Administrative Agent, respectively, as Distribution Agent, or by such other Entity designated by the Reorganized Debtors or New Holdco as a Distribution Agent on the Effective Date. The Distribution Agent shall not be required to give any bond or surety or other security for the performance of the Reorganized Debtors' duties as Distribution Agent unless otherwise ordered by this Court. For purposes of distributions under the Plan to the Holders of Existing Credit Agreement Claims, the Administrative Agent will be and shall act as the

Distribution Agent and in acting in such capacity shall be entitled to all of the rights, protections, and indemnities afforded to the Administrative Agent under the Existing Credit Agreement.

17. The Distribution Agent shall be empowered to (a) effect all actions and execute all agreements, instruments, and other documents necessary to perform its duties under the Plan; (b) make all distributions contemplated hereby; (c) employ professionals to represent it with respect to its responsibilities; and (d) exercise such other powers as may be vested in the Distribution Agent by order of the Bankruptcy Court, pursuant to the Plan, or as deemed by the Distribution Agent to be necessary and proper to implement the provisions hereof. If the Distribution Agent is an entity other than a Reorganized Debtor or New Holdco, such entity shall be paid its reasonable fees and expenses, including the reasonable fees and expenses of its attorneys or other professionals.

18. New Term Loan Facility. The terms of the New Term Loan Facility are hereby approved and the Debtors (other than Holdings) are authorized, without further approval of this Court or any other party, to (1) enter into, execute, deliver and perform all obligations under the New Term Loan Agreement and the New Term Loan Documents in accordance with the Plan, (2) grant such liens and security interests as necessary to provide security for the New Term Loan Facility in accordance with the New Term Loan Documents, (3) perform all of their obligations under the New Term Loan Agreement and the other New Term

Loan Documents, and (4) take all such other actions as the Debtors may determine are necessary, appropriate or desirable in connection with the consummation of the transactions contemplated by the New Term Loan Facility. Each Prepetition Lender, upon the effectiveness of the New Term Loan Agreement, is deemed to have consented and agreed to, and will be bound by the terms of the New Term Loan Agreement, including, without limitation, all obligations of the Lenders thereunder, notwithstanding the failure of any such Prepetition Lender to execute a signature page to the New Term Loan Agreement. The collateral agent for the New Term Loan Facility shall be granted Liens on the collateral, including all of the Debtors' interests in the JS Real Estate Leases, which Liens shall be deemed perfected and effective as of the Effective Date.

19. Millennium Corporate Claim Trust. On the Equity Transfer Date, but after the transactions described in clauses (i) and (ii) of the definition of Equity Transfer Date as set forth in the Plan, the Millennium Corporate Claim Trust shall be created by Millennium and shall be funded by Reorganized Millennium in the amount of $1,000,000 in Cash on the terms set forth in the Plan. Substantially simultaneously with the formation of the Millennium Corporate Claim Trust, the Retained Corporate Causes of Action are authorized to be and shall be automatically deemed to have been contributed to the Millennium Corporate Claim Trust free and clear of any liens, encumbrances, claims or interests pursuant to Paragraph 25 hereof.

20. The beneficiaries of the Millennium Corporate Claim Trust are the Holders of Existing Credit Agreement Claims. For purposes of allocating and distributing beneficial interests in the Millennium Corporate Claims Trust, the Post-Tabulation Claims Purchases shall be given effect. Solely to the extent of any net proceeds recovered from any Non-Contributing MLH Shareholder Claims, the Backstop MLH Shareholders shall be entitled to the reimbursement rights as follows: with respect to any net proceeds recovered by the Millennium Corporate Claim Trust from any Non-Contributing MLH Shareholder Claims, such net proceeds shall be reimbursed first to the Backstop MLH Shareholders, in the aggregate with any net proceeds received from the Millennium Lender Claim Trust up to the amount of the Non-Contributing MLH Shareholders' Pro Rata share of MLH Contribution. Subject to the reimbursement rights of the Backstop MLH Shareholders in accordance with Article V.F(iii) of the Plan, the Holders of Existing Credit Agreement Claims shall receive their Pro Rata share of beneficial interests in the Millennium Corporate Claim Trust, as provided in Article III.C(ii)(2) of the Plan.

21. The Millennium Corporate Claim Trust is hereby authorized, subject to the teens of the Millennium Corporate Claim Trust Agreement and the Plan, to appoint Marc Kirschner as the initial trustee of the Millennium Corporate Claim Trust and Gene Davis, Alan Halperin and Matt Cantor as the members of the Trust Advisory Board of such Trust, in each case on the terms set forth in the Plan and the Millennium

Corporate Claim Trust Agreement as filed with the Third Plan Supplement. All such persons are authorized to serve in their respective capacities as provided under the Plan, the Millennium Corporate Claim Trust Agreement and any related documents approved by this Court and, in connection therewith, are authorized to take any and all actions necessary in furtherance of the discharge of such persons' obligations under the Plan and any related documents approved by the Court. To the extent necessary, the appointment of such persons in their respective capacities under the Plan is approved pursuant to section 1123(b)(3)(B) of the Bankruptcy Code. The compensation of any such persons as set forth in the Millennium Corporate Claim Trust Agreement is hereby deemed reasonable and approved.

22. Millennium Lender Claim Trust. On the Equity Transfer Date, but after the transactions described in clauses (i) and (ii) of the definition of Equity Transfer Date as set forth in the Plan, the Millennium Lender Claim Trust shall be created and shall be funded by Reorganized Millennium in the amount of $2,000,000 Cash on the terms set forth in the Plan. Substantially simultaneously with the formation of the Millennium Lender Claim Trust, the Consenting Lenders are authorized to be and shall each be automatically deemed to have been [sic] contributed the Retained Lender Causes of Action to the Millennium Lender Claim Trust.

23. The beneficiaries of the Millennium Lender Claim Trust are the Consenting Lenders (which term

shall include the Post-Tabulation Claims). Solely to the extent of any net proceeds recovered from any Non-Contributing MLH Shareholder Claims, the Backstop MLH Shareholders shall be entitled to the reimbursement rights as follows: with respect to any net proceeds recovered by the Millennium Lender Claim Trust from any Non-Contributing MLH Shareholder Claims, such net proceeds shall be reimbursed first to the Backstop MLH Shareholders, in the aggregate with any net proceeds received from the Millennium Corporate Claim Trust up to the amount of the Non-Contributing MLH Shareholders' Pro Rata share of MLH Contribution. Subject to the reimbursement rights of the Backstop MLH Shareholders in accordance with this Article V.G(iii), the Consenting Lenders shall receive their Pro Rata share, based on the aggregate principal amount of only those Existing Credit Agreement Claims held by all Consenting Lenders, of beneficial interests in the Millennium Lender Claim Trust, as provided in Article III.C(ii)(2) of the Plan.

24. The Millennium Lender Claim Trust is hereby authorized, subject to the terms of the Millennium Lender Claim Trust Agreement and the Plan, to appoint Marc Kirschner as the initial trustee of the Millennium Lender Claim Trust and Gene Davis, Alan Halperin and Matt Cantor as the Members of the Trust Advisory Board of such Trust on the terms set forth in the Plan and the Millennium Lender Claim Trust Agreement as filed with the Third Plan Supplement. All such persons are authorized to serve in their respective capacities as provided under the Plan, the

Millennium Lender Claim Trust Agreement and any related documents approved by this Court and, in connection therewith, are authorized to take any and all actions necessary in furtherance of the discharge of such persons' obligations under the Plan and any related documents approved by the Court. To the extent necessary, the appointment of such persons in their respective capacities under the Plan is approved pursuant to section 1123(b)(3)(B) of the Bankruptcy Code. The compensation of any such persons as set forth in the Millennium Lender Claim Trust Agreement is hereby deemed reasonable and approved.

25. Additional Trust Matters.

(a) On the Equity Transfer Date, the Retained Corporate Causes of Action and all of the other Trust Assets (as such term is used in the Millennium Corporate Claim Trust Agreement) shall be automatically deemed transferred to the Millennium Corporate Claims Trust and the Consenting Lenders shall each be automatically deemed to have contributed the Retained Lender Causes of Action to the Millennium Lender Claim Trust and the Retained Corporate Causes of Action and the other Trust Assets (as used in the Millennium Lender Claim Trust Agreement) will be automatically be deemed to have been transferred to and vested in the Millennium Lender Claim Trust, in each case pursuant to the Plan and the terms of the applicable trust agreement and free and clear of any and all liens, claims, encumbrances, or interests of any kind in such property except as expressly provided in Section X.L of the Plan. Upon the transfer of the

Retained Corporate Causes of Action to the Millennium Corporate Claims Trust, the Millennium Corporate Claims Trust shall succeed to all of Reorganized Millennium's and its Estates' right, title and interest in all of the Retained Corporate Causes of Action and other Trust Assets of such Trust and neither Reorganized Millennium nor its Estate shall have any interest in or with respect to such Retained Corporate Causes of Action except as provided in the Millennium Corporate Claims Trust Agreement. Upon the transfer of the Retained Lender Causes of Action to the Millennium Lender Claims Trust, the Millennium Lender Claims Trust shall succeed to all right, title and interest of each of the Consenting Lenders in the Retained Lender Causes of Action and all right, title or interest of the Consenting Lenders or the Reorganized Debtors and their Estates in and to the other Trust Assets (as defined in the Millennium Lender Claims Trust Agreement) and none of the Consenting Lenders nor the Reorganized Debtors or their Estates shall have any interest in or with respect to such Retained Lender Causes of Action or such other Trust Assets, except for their respective beneficial interests in the Millennium Lender Claim Trust Agreement.

(b) On the Equity Transfer Date, Reorganized Millennium is authorized and directed to fund the Millennium Corporate Claim Trust with the initial contribution of $1,000,000 and the Millennium Lender Claim Trust with the initial contribution of $2,000,000 required under Sections V(F) and (G) of the Plan and the terms of the applicable trust agreement and

Reorganized Millennium is further authorized and directed to thereafter continue to fund the reasonable fees and expenses of each of such Trusts up to an aggregate of $10,000,000 as provided under such Sections of the Plan and the terms of the respective trust agreements.

(c) The Trust Delayed Draw Facility is an essential element of the Plan and is in the best interests of the Debtors, their Estates and their creditors. Reorganized Millennium is hereby authorized, without further approval of the Court or any other party, to enter into the Trust Delayed Draw Facility in accordance with the Plan. Upon its execution, pursuant to this Order and the Plan, the Trust Delayed Draw Facility will constitute a legal, valid, enforceable and binding agreement.

(d) On the Equity Transfer Date, pursuant to the terms of the Millennium Corporate Claims Trust and the Millennium Lender Claim Trust, any Privileges (as defined in the Millennium Corporate Claims Trust Agreement) associated with any of the Retained Corporate Causes of Action held by Reorganized Millennium or its Estate, and the right to assert and waive such privileges, shall be deemed to have been automatically, without further order of the Court or any other party, vested in the Trustee of the Millennium Corporate Claims Trust pursuant to the terms of the applicable trust agreement. The transfer and assignment of such privileges is an essential element of the Plan and is in the best interests of the Debtors, their Estates and their creditors. The Court further finds that each of the

Millennium Corporate Claims Trust and the Millennium Lender Claims Trust have a joint or common interest in respect of the Retained Corporate Causes of Action and the Retained Lender Causes of Action against the Excluded Parties and authorizes the Trustee of the Millennium Corporate Claims Trust in his discretion, to provide privileged documents and communications to the Millennium Lender Claims Trust as provided in the Millennium Lender Claims Trust Agreement. Reorganized Millennium is further authorized and directed to cooperate with the Millennium Corporate Claims Trust and the Millennium Lenders Claim Trust as required pursuant to the terms of the applicable trust agreement.

26. Issuance of New Securities and Debt Documents. On the Equity Transfer Date, but after the transactions described in clause (i) of the definition of Equity Transfer Date, as defined in the Plan, the transfer to New Holdco described in clause (ii) of the definition of Equity Transfer Date, as defined in the Plan, is authorized and shall be effected, and the Reorganized Debtors and New Holdco are authorized to, and will, issue and execute, as applicable, the New Securities and Debt Documents and any related documents, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or the vote, consent, authorization or approval of any Entity. The issuance and distribution of the New Holdco Common Stock will be made in reliance on the exemption from registration provided by section 1145(a) of the Bankruptcy Code, or

section 4(a)(2) of the Securities Act or Regulation D promulgated thereunder, and will be exempt from registration under applicable securities laws. Without limiting the effect of section 1145 of the Bankruptcy Code, or section 4(a)(2) of the Securities Act or Regulation D promulgated thereunder, all financing documents, agreements, and instruments entered into and delivered on or as of the Equity Transfer Date contemplated by or in furtherance of the Plan, including, without limitation, the New Term Loan Agreement and the other New Term Loan Documents, the New Holdco Common Stock, the New Holdco Registration Rights Agreement and any other agreement or document related to or entered into in connection with any of the foregoing, will become effective and binding in accordance with their respective terms and conditions upon the parties thereto, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or the vote, consent, authorization or approval of any Entity (other than as expressly required by such applicable agreement). The New Holdco Common Stock, when issued, will be duly and validly issued, fully paid and nonassessable.

27. Upon the Equity Transfer Date, after giving effect to the transactions contemplated hereby, the authorized capital stock or other equity securities of New Holdco will be that number of shares of New Holdco Common Stock as may be designated in the New Holdco Organizational Documents.

28. Executory Contracts and Unexpired Leases. Except as otherwise provided in the Plan, or in any contract, instrument, release, or other agreement or document entered into in connection with the Plan, as of the Effective Date, the Debtors shall be deemed to have assumed each Executory Contract and Unexpired Lease to which it is a party in accordance with, and subject to, the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code, unless such Executory Contract or Unexpired Lease expired or terminated pursuant to its own terms before the Effective Date.

29. All Executory Contracts or Unexpired Leases assumed by the Debtors pursuant to the foregoing (the "Assumed Agreements") shall remain in full force and effect for the benefit of the Reorganized Debtors, as applicable, and be enforceable by the Reorganized Debtors, as applicable, in accordance with their terms notwithstanding any provision in such Assumed Agreements that purports to prohibit, restrict or condition such assumption. Any provision in the Assumed Agreements that purports to declare a breach or default based in whole or in part on the above-captioned cases is hereby deemed unenforceable, and the Assumed Agreements shall remain in full force and effect.

30. Without limitation, the following executory contracts shall be assumed by the Debtors under 11 U.S.C. § 365 and Article VI of the Plan: (1) Facility Participation Agreement dated February 1, 2011 and amended on June 1, 2014 (the "FPA"), between UnitedHealthcare

Insurance Company and its affiliates (collectively referred to herein as "United"), and Millennium Health, LLC f/k/a Millennium Laboratories, Inc.; (ii) Master Services Agreement between United and RxAnte, LLC dated May 1, 2015, as well as the underlying Statement of Work No. 1 (Analytics, Decision Support & Provider Engagement); and (iii) Settlement and Release Agreement dated as of November 9, 2015 (the "Settlement"), between United and Millennium Health, LLC and its affiliates.

31. Notwithstanding anything to the contrary herein or in the Plan, defaults under the FPA shall be cured in accordance with 11 U.S.C. § 365(b) as follows: (a) other than as specified in subsection (c) below, United's claims for overpayments under the FPA for services rendered by the Debtors on or before November 9, 2015, shall be cured by the Debtors' performance under the Settlement; (b) United's rights to deny, in whole or in part, and seek recovery for overpayment of claims submitted by the Debtors bearing dates of service between November 10, 2015 and the Effective Date shall be expressly preserved, and such claims and/or overpayments will be paid or set-off in accordance with the terms of the FPA; and (c) United's rights to deny, in whole or in part, and seek recovery for overpayment of, claims submitted by the Debtors bearing dates of service within 12 months prior to November 9, 2015, for reasons arising in the ordinary course of business, which reasons are unrelated to United's allegations in the ARBITRATION (as defined in the Settlement) (the "Ordinary Course Reasons"), shall be

expressly preserved, and such claims and/or overpayments will be paid or set-off in accordance with the terms of the FPA; provided, however, that the Debtors reserve all of their rights under the FPA with regard to United's determination of the claims and overpayments as described in subsections (b) and (c) above. Examples of Ordinary Course Reasons include, but are not limited to, the following: services were rendered before or after member had coverage under applicable benefit plan; coordination of benefits; untimely submission of claim; incorrect contract rate applied; subrogation; claim paid at incorrect benefit level; and duplicate claim submissions.

32. For the avoidance of doubt, that certain Agreement, dated October 26, 2015, by and among Millennium Health LLC and certain of its affiliates on the one hand and Aetna, Inc., Aetna Health Management, LLC, and Coventry Health Care, Inc. on the other hand, shall be treated as an Executory Contract under Plan and on the Effective Date will be assumed pursuant to sections 365 and 1123 of the Bankruptcy Code and thereafter deemed an Assumed Agreement.

33. USA Settlement. Pursuant to Article III.C(v)(2) of the Plan, on or as soon as reasonably practicable after the Effective Date, but in any event, at least one (1) Business Day prior to the Equity Transfer Date, and in no event later than December 30, 2015, the Debtors shall pay (or cause to be paid) the Government Claims in full from the proceeds of the USA Settlement Funding Contribution plus Cash from Millennium in an amount equal to all costs and fees to the extent

required by the USA Settlement Agreements. The USA Settlement Funding Contribution shall be paid to the USA. If the USA Settlement Funding Contribution is not paid to the USA, then the USA shall receive Cash in the amount of $206 million, plus all interest, costs, and fees as required by the USA Settlement Agreements no later than December 31, 2015. The Cash payment of the Initial USA Settlement Deposit shall be final and irrevocable and shall not be subject to any Avoidance Action or any other avoidance or recovery on any basis in law or equity. Any and all claims against the USA Settlement Parties on account of payment of the Initial USA Settlement Deposit shall be waived by the Debtors and their Estates and no Entity shall bring any claim against the USA Settlement Parties on account of payment of the Initial USA Settlement Deposit, and all such claims by any Entity are permanently and indefinitely prohibited, barred, and enjoined.

34. Reorganized Millennium shall abide by the requirements and obligations set out in that certain Corporate Integrity Agreement executed by and between the Office of Inspector General of the Department of Health and Human Services and Millennium Health, LLC on or about October 16, 2015 with respect to all insurance claims for payment submitted to any of Allstate Insurance Company, Allstate Indemnity Company, Allstate Property and Casualty Insurance Company, Allstate New Jersey Insurance Company, Allstate New Jersey Property and Casualty Insurance Company, Allstate Fire and Casualty Insurance Company

f/k/a Forestview Mortgage Insurance Company, Encompass Indemnity Company, Encompass Insurance Company of America, Encompass Insurance Company of New Jersey and Encompass Property and Casualty Insurance Company of New Jersey and each of their respective Related Parties (collectively, the "Allstate Entities") as if said insurance claims for payment had been submitted to Medicare. The Allstate Entities shall adjust insurance claims submitted by Reorganized Millennium in the ordinary course of business as it adjusts claims submitted by other providers.

35. Boards of Directors. Immediately upon the occurrence of the Effective Date, (i) the authority, power and incumbency of the individuals then serving as directors of the Debtors shall be terminated and such individuals shall be deemed to have resigned and (ii) the members of the New Board and each of the boards of the Reorganized Debtors, as applicable, as designated under Article VI of the Plan will be appointed and commence serving in such capacity without further order of the Bankruptcy Court or any action by the boards of directors or shareholders of New Holdco, the Debtors or Reorganized Debtors.

36. Exemption from Certain Transfer Taxes. The issuance, transfer or exchange of debt and equity under the Plan, the creation of any mortgage, deed of trust, or other security interest, the making or assignment of any contract, lease or sublease, or the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with the Plan shall be exempt from all taxes (including, without

limitation, stamp tax or similar taxes) to the fullest extent permitted by section 1146 of the Bankruptcy Code, and the appropriate state or local governmental officials or agents shall not collect any such tax or governmental assessment and shall accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax or governmental assessment.

37. Payment of Fees. All fees due and payable pursuant to section 1930 of Title 28 of the U.S. Code prior to the Effective Date shall be paid by the Debtors on or prior to the Effective Date. After the Effective Date, the Reorganized Debtors shall pay any and all such fees when due and payable, and shall file with the Bankruptcy Court quarterly reports in a form reasonably acceptable to the U.S. Trustee. Each and every one of the Debtors shall remain obligated to pay quarterly fees to the Office of the U.S. Trustee until the earliest of that particular Debtor's case being closed, dismissed or converted to a case under Chapter 7 of the Bankruptcy Code.

Discharge of Debtors, Releases and Injunctions, Retained Claims

38. Discharge of Debtors. To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by the Plan or this Confirmation Order, all consideration distributed under the Plan will be in exchange for, and in complete

satisfaction, settlement, discharge, and release of, all Claims and Causes of Action, whether known or unknown, including any interest accrued on such Claims from and after the Petition Date, against, liabilities of, Liens on, obligations of, rights against, and Equity Interests in the Debtors or any of their assets or properties, and regardless of whether any property will have been distributed or retained pursuant to the Plan on account of such Claims or Equity Interests. Except as otherwise expressly provided by the Plan or the Confirmation Order, upon the Effective Date, the Debtors and their Estates will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever, including, but not limited to, demands and liabilities that arose before the Confirmation Date, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code. This Confirmation Order shall be a judicial determination of the discharge of all Claims against and Equity Interests in the Debtors, subject to the occurrence of the Effective Date. However, the foregoing provisions will have no effect on the Debtors' liabilities as reserved by the USA Settlement Agreements and as provided for in Article V.J of the Plan, whether such liabilities arose prior to or after the Confirmation Date.

39. Propriety of Releases, Injunction, and Limitation of Liability Provisions. Based on the findings of fact set forth in this Confirmation Order, including

paragraphs LL and MM, and the record established at the Confirmation Hearing, the releases, injunctions, bar order and limitation of liability provisions of the Plan are appropriate under applicable law:

(a) Substantial contributions by or on behalf of the Released Parties are being made to fund the distributions provided under the Plan.

(b) The Plan has been overwhelmingly accepted by the sole voting Class of creditors, which Class is affected by the injunctions, bar order, releases, and limitation of liability provisions of the Plan.

(c) The Third Party Releasing Parties are receiving fair consideration in exchange for the injunctions, bar order, releases, and limitation of liability provisions of the Plan.

(d) The injunctions, bar order, releases, and limitation of liability provisions are necessary and critical provisions of the Plan, without which the Plan would not be feasible,

(e) The record of the Confirmation Hearing and the Chapter 11 Cases is sufficient to support the injunctions, bar order, releases, and limitation of liability provisions of the Plan.

(f) The Plan is the product of a global settlement that was reached due to the extraordinary circumstances of these Chapter 11 Cases. These extraordinary circumstances (which include the imminent revocation of the Debtors' Medicare enrollment and billing privileges) support the approval of the injunctions, bar

order, releases, and limitation of liability provisions of the Plan.

(g) There is a substantial identity of interest between the Debtors and TA, MLH and other Released Parties, such that a Cause of Action asserted against any of them is essentially a Cause of Action against the Debtors and thus any Cause of Action asserted against any of them has a direct impact on the Debtors', their assets, and their reorganization.

(h) This Court has subject matter jurisdiction over the third party claims against the Released Parties because of the unity of interest between the Released Parties and the Debtors and the proper application of Bankruptcy Code 105 to this Court's confirmation of the Plan.

40. Releases; Limitation of Liability; Indemnification. The releases set forth in Article X.E, F, G and H of the Plan, the limitation of liability provisions set forth in Article X.D of the Plan, and the indemnification obligations set forth in Article VI.F and X.M of the Plan are incorporated in this Confirmation Order as if set forth in full herein and are hereby approved and authorized in their entirety and, except as otherwise set forth in paragraph 5 of this Confirmation Order, shall be, and hereby are, effective and binding, subject to the respective terms thereof, on all persons and entities who may have had standing to assert released Claims or Causes of Action, and no person or entity shall possess such standing to assert such Claims or Causes of Action after the Effective Date.

41. In addition to the foregoing, for the avoidance of doubt, the Debtors and each of their Related Parties (collectively, the "Millennium Entities") waive any and all payment or claim for payment on unpaid claims and previously-denied claims submitted to any of the Allstate Entities and/or for which any of the Allstate Entities are the responsible payor in all States within the United States of America for all dates of services through the Effective Date (the "Waived Claims"). The Millennium Parties shall not balance bill or otherwise seek payment from any person insured under a policy issued by any of the Allstate Entities and/or for whom any of the Allstate Entities are the responsible payor with respect to the Waived Claims. Further, for the avoidance of doubt, the Allstate Entities waive any and all claims against the Debtors related to the Allstate Litigation (as defined below) subject to the Allstate Entities' rights and obligations under this Order and the Plan.

42. Bar Order. Except as otherwise set forth in paragraph 5 of this Confirmation Order, the commencement or prosecution by any Entity, including, without limitation all Third Party Releasing Parties, any Non-Consenting Lenders, each Excluded Party, and, for the avoidance of doubt, any Consenting Lender, whether directly, derivatively or otherwise, of any claims or Causes of Action released pursuant to this Plan, including but not limited to the claims and Causes of Action released in Articles X.E, F, G, and H are hereby permanently enjoined. For the avoidance of doubt, this injunction shall permanently bar, enjoin,

and restrain (i) all persons and entities (including, without limitation, each Non-Consenting Lender, each Third Party Releasing Party, and each Excluded Party) from commencing or prosecuting any litigation or asserting any claims against Holdings, TA, MLH, and/or their respective Related Parties based on any Released Claims; and (ii) to the maximum extent possible under applicable law, each Excluded Party and each Third Party Releasing Party from commencing, prosecuting, or asserting against any of the Released Parties any Claims, actions or proceedings for contribution or indemnity, or otherwise, including any Claims, actions or proceedings for contribution or indemnity or otherwise with respect to any liability or obligation of any Excluded Party to Millennium or the Lenders arising out of or in connection with any Retained Claims. The foregoing provision shall not operate to enjoin the commencement or prosecution by the USA Settlement Parties of any action or proceeding to enforce the Guarantee Agreement, an exhibit to the USA Settlement Agreements.

43. The Released Parties and their Related Parties shall have no liability to any Excluded Party, Millennium or the Lenders with respect to any Retained Claims that are, immediately prior to the Effective Date, subject to contractual or other indemnity by Millennium in favor of the Excluded Parties, and all such claims shall be barred, enjoined and released.

44. Injunctions. Except as otherwise provided in the Plan or this Order, from and after the Effective Date, all Entities are permanently enjoined from

commencing or continuing in any manner, any suit, action or other proceeding, or creating, perfecting or enforcing any Lien of any kind, on account of or respecting any Claim, demand, liability, obligation, debt, right, Cause of Action, Equity Interest, or remedy released or to be released, exculpated or to be exculpated, or discharged or to be discharged pursuant to the Plan or this Confirmation Order. From and after the Effective Date, all Entities are permanently enjoined from commencing or continuing in any manner any Avoidance Action or any other action to avoid or recover the Initial USA Settlement Deposit. Except as otherwise set forth in paragraph 5 of this Confirmation Order, by accepting distributions pursuant to the Plan, each Holder of an Allowed Claim or Equity Interest will be deemed to have specifically consented to this injunction.

45. Continued Effect of Stay and Injunctions. All injunctions or stays in effect in the Chapter 11 Cases under sections 105 or 362 of the Bankruptcy Code or any order of the Bankruptcy Court, and extant on the Confirmation Date (excluding any injunctions or stays contained in the Plan or the Confirmation Order), shall remain in full force and effect until the Effective Date. As of the Effective Date, all injunctions, stays or exculpation provisions contained in the Plan or the Confirmation Order shall remain in full force and effect in accordance with their terms.

46. Retained Claims. The Retained Claims are preserved for prosecution by the Retained Claim Plaintiffs against the Excluded Parties pursuant to Article

X.L of the Plan. The terms of Article X.L of the Plan (including, without limitation, the terms relating to a Retained Claim Judgment with respect to an Excluded Party) are incorporated in this Confirmation Order as if set forth in full herein and are hereby approved and authorized in their entirety, including, but not limited to, with respect to contribution claims and Non-Contribution Actions.

47. In full and final satisfaction of the claims asserted by the Allstate Entities against the [sic] Millennium in that certain action captioned *Allstate Insurance Company, et al. v. Millennium Health, LLC f/k/a Millennium Laboratories, Inc., et al.*, Case No. 2:15-cv-06391 (E.D.N.Y.) (the "Allstate Litigation"), Allstate Insurance Company shall receive an Allowed Class 6 General Unsecured Claim against Millennium in the amount of $475,000 (the "Allstate Allowed Claim"). The Allstate Allowed Claim shall be paid in full, in cash, as soon as practicable in January 2016. The Allstate Entities shall file a stipulation of dismissal with prejudice as to their causes of action against Millennium, James Slattery, Howard Appel, and William B. Hardaway set out in the Allstate Litigation within five (5) business days of receipt of the Allstate Allowed Claim payment amount.

48. Government Claims and Actions. Notwithstanding anything to the contrary in the Plan, the Plan documents, or elsewhere in this Confirmation Order, nothing shall preclude, bar, or enjoin the United States of America, or its agencies, from taking any and all actions to enforce its police or regulatory powers, to

regulate and administer its federal programs, to bring any claim, action, proceeding, defense, or cause of action, or to assert setoff or recoupment rights (which are expressly preserved) except to the extent barred by the USA Settlement Agreements. Notwithstanding anything to the contrary in the Plan, the Plan documents, or elsewhere in this Confirmation Order, nothing shall release, discharge, or immunize the Debtors, Reorganized Debtors, or any third party or nondebtor entity from any debt, obligation, liability, claim, action, proceeding, defense, or cause of action in connection with any claim, action, proceeding, defense, or cause of action brought by the United States of America or its agencies, except as provided in the USA Settlement Agreements.

49. IRS Matters. Notwithstanding anything to the contrary in the Plan, the Plan documents, or elsewhere in this Confirmation Order: (a) the IRS will not be bound by any designation, allocation or other characterization, for tax purposes, of any proposed tax benefit or any transaction as set forth in these documents; (b) the IRS shall not be bound by any characterizations, for tax purposes of any valuation of any property as set forth in these documents; and (c) the Debtors and the Reorganized Debtors shall comply with the provisions of the Internal Revenue Code.

Notice and Other Provisions

50. Notice of Confirmation Order. On or before the fifth (5th) business day following the occurrence of

the Effective Date, the Debtors shall serve notice of entry of this Confirmation Order pursuant to Bankruptcy Rules 2002(f)(7), 2002(k), and 3020(c), on (i) the U.S. Trustee; (ii) counsel to the Ad Hoc Group of Prepetition Lenders; (iii) counsel to Millennium Lab Holdings, Inc.; (iv) counsel to TA Millennium, Inc.; (v) the United States Department of Justice; (vi) the parties included on the Debtors' consolidated list of twenty (20) largest unsecured creditors; (vii) all holders of Claims and Equity Interests, and (viii) all parties who have filed requests for notice in these cases under Bankruptcy Rule 2002, by causing a notice of this Confirmation Order in substantially the form of the notice annexed hereto as Exhibit A (the "Notice of Confirmation"), which form is hereby approved, to be delivered to such parties by first class mail, postage prepaid.

51. Notice need not be given or served under the Bankruptcy Code, the Bankruptcy Rules, or this Confirmation Order to any Person to whom the Debtors mailed a Combined Notice, but received such notice returned marked "undeliverable as addressed," "moved – left no forwarding address," "forwarding order expired," or similar reason, and as to which no new address was indicated, unless the Debtors have been informed in writing by such Person of that Person's new address.

~~52. Reversal/Stay/Modification/Vacatur of Confirmation Order. Except as otherwise provided in the Confirmation Order, if any or all of the provisions of the Confirmation Order are hereafter reversed, modified, vacated or stayed by subsequent order of the Court, or any other court, such reversal, stay,~~

~~modification or vacatur shall not affect the validity or enforceability of any act, obligation, indebtedness, liability, priority or lien incurred or undertaken by the Debtors or the Reorganized Debtors, prior to the effective date of any such reversal, stay, modification or vacatur, including, without limitation the validity of any obligation, indebtedness or liability incurred by the Reorganized Debtors. Notwithstanding any such reversal, stay, modification or vacatur of the Confirmation Order, any such act or obligation incurred or undertaken pursuant to, or in reliance on, the Confirmation Order prior to the effective date of such reversal, stay, modification or vacatur shall be governed in all respects by the provisions of the Confirmation Order and the Plan or any amendments of modifications thereto. Specifically, notwithstanding any such reversal, stay, modification or vacatur of the Confirmation Order, any obligation, indebtedness or liability incurred by the Debtors or the Reorganized Debtors shall be governed in all respects by the provisions of the Confirmation Order and the Plan or any amendments or modifications thereto.~~

53. Mailing of the Notice of Confirmation in the time and manner set forth in the preceding paragraphs shall be good and sufficient notice under the particular circumstances and in accordance with the requirements of Bankruptcy Rules 2002 and 3020(c), and no other or further notice is necessary. The Notice of Confirmation shall constitute sufficient notice of the entry of the Confirmation Order to any filing and recording officers, and shall be a recordable instrument

notwithstanding any contrary provision of applicable non-bankruptcy law.

54. Failure to Consummate Plan and Substantial Consummation. If the Effective Date does not occur as of December 30, 2015, then the Plan, any settlement or compromise embodied in the Plan (including the fixing or limiting to an amount certain any Claim or Class of Claims), the assumption or rejection of executory contracts or unexpired leases effected by the Plan, and any document or agreement executed pursuant to the Plan, shall be null and void. In such event, nothing contained in the Plan or this Confirmation Order, and no acts taken in preparation for consummation of the Plan, shall, or shall be deemed to, (a) constitute a waiver or release of any Claims by or against or Equity Interests in the Debtors or any other Entity, (b) prejudice in any manner the rights of the Debtors or any Entity in any further proceedings involving the Debtors, (c) constitute an admission of any sort by the Debtors or any other Entity, or (d) be construed as a finding of fact or conclusion of law with respect thereto.

55. References to Plan Provisions. The failure to include or specifically reference any particular provision of the Plan in this Confirmation Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Plan be confirmed in its entirety.

56. Exhibits. Each reference to a document, agreement or summary description that is in the form

attached as an exhibit to the Plan in this Confirmation Order, or in the Plan shall be deemed to be a reference to such document, agreement or summary description in substantially the form of the latest version of such document, agreement or summary description filed with the Court (whether filed as an attachment to the Plan or filed separately).

57. Plan Provisions Mutually Dependent. The provisions of the Plan are hereby deemed nonseverable and mutually dependent.

58. Confirmation Order Provisions Mutually Dependent. The provisions of this Confirmation Order are hereby deemed nonseverable and mutually dependent.

59. Confirmation Order Supersedes. It is hereby ordered that this Confirmation Order shall supersede any orders of this Court issued prior to the Confirmation Date that may be inconsistent with this Confirmation Order.

60. Conflicts Between Confirmation Order and Plan. The provisions of the Plan and of this Confirmation Order shall be construed in a manner consistent with each other so as to effect the purposes of each; provided, however, that (other than typographical errors or manifestly clear errors or oversights that can be corrected) if there is determined to be any inconsistency between any provision of the Plan, or any Plan Supplement, or any Exhibit to the same, and any provision of this Confirmation Order that cannot be so reconciled, then, solely to the extent of such inconsistency, the provisions of this Confirmation Order shall govern

and any such provision of this Confirmation Order shall be deemed a modification of the Plan and shall control and take precedence.

61. Separate Confirmation Orders. This Confirmation Order shall be deemed to be a separate confirmation order with respect to each Debtor and it shall be sufficient for the purposes thereof that the Clerk of this Court enters this Confirmation Order in the docket of the jointly administered case.

62. Retention of Jurisdiction. Pursuant to sections 105(a) and 1142 of the Bankruptcy Code, and notwithstanding the entry of this Confirmation Order or the occurrence of the Effective Date, this Court, except as otherwise provided in the Plan or herein, including, without limitation, the matters set forth in Article IX.B, shall retain exclusive jurisdiction over all matters arising out of, and related to, the Chapter 11 Cases and the Plan to the fullest extent permitted by law, including, but not limited to, the matters set forth in Article IX.A of the Plan.

63. Immediate Effectiveness. Notwithstanding Bankruptcy Rules 3020(e), 6004(h), 7062, 8001, 8002 or otherwise, immediately upon the entry of this Confirmation Order, the terms of the Plan, the Plan Supplements, and this Confirmation Order shall be, and hereby are, immediately effective and enforceable and deemed binding upon the Debtors, the Reorganized Debtors, any and all holders of Claims or Equity Interests (irrespective of whether such Claims or Equity Interests are Impaired under the Plan or whether the holders of such Claims or Equity Interests accepted,

were deemed to have accepted, rejected or were deemed to have rejected the Plan), any trustees or examiners appointed in the Chapter 11 Cases, all persons and entities that are party to or subject to the settlements, compromises, releases, discharges, injunctions, stays and exculpation described in the Plan or herein, each person or entity acquiring property under the Plan, and any and all non-Debtor parties to executory contracts and unexpired leases with the Debtors and the respective heirs, executors, administrators, successors or assigns, affiliates, officers, directors, agents, representatives, attorneys, beneficiaries, or guardians, if any, of any of the foregoing. The Debtors are authorized to consummate the Plan at any time after the entry of the Confirmation Order subject to satisfaction or waiver of the conditions precedent to the Effective Date and the Equity Transfer Date as set forth in Article VIII of the Plan.

64. Final Order. The Confirmation Order is a final order and the period in which an appeal must be filed shall commence upon the entry hereof.

Dated: Wilmington Delaware
December 14, 2015

/s/ Laurie Selber Silverstein
Honorable
Laurie Selber Silverstein
UNITED STATES
BANKRUPTCY JUDGE

[Attachments omitted]