No. 26-458

In the
Supreme Court of the United States

TAMAS HAMPEL,

Petitioner,

v.

VIRGIN ORBIT HOLDINGS, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE*
INSTITUTE FOR TRADE, STANDARDS AND SUSTAINABLE DEVELOPMENT, INC.
IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Institute for Trade, Standards and Sustainable Development ("ITSSD") is a nonprofit legal research and educational organization focusing on domestic, foreign and international laws, regulations, and industry standards ostensibly grounded in sustainable development concepts.[1]

Amicus' interest in this case stems from the significant transparency, accountability, and informational asymmetries that result when small publicly listed debtor "emerging growth companies" benefitting from relaxed public reporting and accounting obligations are enabled to use bankruptcy law cramdown provisions to hide asset value and ensure bankruptcy court reorganization/liquidation plan confirmations.

SUMMARY OF ARGUMENT

Bankruptcy courts act as courts of equity by assuming an active role when presiding over the reorganization plan confirmation process, where they have a duty to make an informed, independent judgment regarding each element of confirmation to ensure statutory and fairness requirements are satisfied. Bankruptcy courts premise their decision to leave debtors in possession upon the assurance the debtors' officers and employees can be depended on to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. *Amicus* notified party counsels of their intent to file on October 27, 2026.

fulfill the fiduciary responsibilities of a trustee. Nevertheless, the risk that assets may be concealed and/or substantially undervalued remains greater than when a trustee is appointed, especially under the expedited "cramdown" procedure.

The lower courts in the action at bar incorrectly applied the five-factor test used in *In re Melinta Therapeutics, Inc.*, 623 B.R. 257 (Bankr. D. Del. 2020), that the Third Circuit embraced from the Sixth Circuit decisions in *In re Tenn-Fla Partners*, 170 B.R. 946 (Bankr. W.D. Tenn. 1994). Said standard is used to ascertain whether a "fraud upon the court" has occurred justifying revocation of a confirmed reorganization plan order under 11 U.S.C. § 1144.

Caselaw holds that the correct legal standard is two-pronged: fraudulent intent is established by proof of intentional misrepresentation **or** intentional omission of material fact. It also shows that the correct legal burden of proof is preponderance of the evidence. Such legal standard and burden of proof acknowledge that direct evidence of fraudulent intent is often unobtainable, and it enables court reliance upon indirect evidence of fraudulent intent logically inferred from all the facts and circumstances. It includes information gleaned from the court record, official government documents, and/or other evidence presented by the § 1144 movant.

Petitioner identified the debtors' affirmative misrepresentations **and** omissions or concealments of material information concerning the commercial value of the key intellectual property ("IP") underlying the debtors' publicly touted "first-of-its-kind"

rocket launch and delivery system technology. However, the lower courts, focusing only on the first of these prongs, overlooked and even rejected, such circumstantial evidence. The lower courts also overlooked circumstantial evidence of extant "insider" debtor relationships that precedent required them to closely scrutinize where debtors-in-possession ("DIP")s are involved, to ensure that "insider" "affiliates," officers and/or DIP lenders do not unlawfully influence the bankruptcy disclosure and confirmation process.

The lower courts' error rendered them unable to see what was in plain sight before them and enabled the DIP lender and its key indirect owner, Sir Richard Branson, to breach their legal duty of full and honest disclosure and their fiduciary duty to the bankruptcy court and estate, and thereby, to unduly influence such bankruptcy process to gain an advantage. The "public wrong" known as "fraud upon the court" resulted, compromising the integrity and impairing the effective functioning of the federal bankruptcy system.

The granting of this petition provides this Court with the opportunity to finally clarify for the lower courts the correct legal standard and burden of proof that a § 1144 movant must satisfy to establish the debtor fraudulent intent necessary to revoke a confirmation plan order procured by fraud.

ARGUMENT

I. Bankruptcy Courts Sitting as Common Law Courts of Equity Must Construe Fraud to Include Omissions and Concealments Using Logical Inferences from the Facts and Circumstances

Courts of equity have long construed the term "fraud" to "properly include[…] all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence," justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." *Moore v. Crawford*, 130 U.S. 122, 128 (1889) (quoting 1 Story Eq. Jur. § 187). Accord *SEC v. Capital Gains Res. Bur., Inc.*, 375 U.S. 180, 194 & n.43 (1963) (quoting same). "Fraud has a broader meaning in equity [than at law] and **[specific] intention to defraud or to misrepresent is <u>not</u> a necessary element**." (emphasis added). *Id*. at 193.

Third Circuit federal courts have long sanctioned inferences of fraudulent intent from circumstantial evidence. *See*, *Fed. Deposit Ins. Corp. v. Alter*, 106 F. Supp. 316, 318 (W.D.Pa. 1952) (quoting *Moore*, 130 U.S. at 128); *La Porte v. United States Radium Corp.*, 13 F. Supp. 263, 273 (D.N.J. 1935) (quoting 1 Story Eq. Jur. § 187); *In re Monroe, Ctr. II Urban Renewal Co., LLC*, 2012 Bankr. LEXIS 3857 (Bankr. D.N.J 2012) at * 12; *Chorost v. Grand Rapids Fac. Show Rooms, Inc.*, 172 F.2d 327, 329 (3d Cir. 1949); *Guaranty Trust Co. v. Williamsport Wire Rope Co.*, 107 F. Supp. 759, 760 (M.D.Pa. 1952); *United States v. Tabor*, 803 F.2d 1288, 1305 (3rd Cir. 1986); *Tiab Commc'ns. Corp. v. Keymarket of NEPA, Inc.*, 263 F.

Supp.2d 925, 934 (M.D.Pa. 2003); *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 213-214 (3d Cir. 1990)).

Similarly, this Court has held that, when considering the facts and circumstances in assessing fraudulent intent "where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185 (1907). Lower federal courts also have recognized that fraud "is rarely susceptible of direct proof," and "must ordinarily be established by circumstantial evidences and legitimate inferences arising therefrom." *See Connolly v. Gishwiller*, 162 F.2d 428, 433 (7th Cir. 1947); *Matter of Braten Apparel Corp.*, 21 B.R. 239, 256 (Bankr. S.D.N.Y. 1982) (citing 37 Am. Jur. 2d, Fraud and Deceit § 4381 (1968)) and (citing *Connolly*, 162 F.2d at 433); *Matter of Braten Apparel Corp.*, 26 B.R. 1009, 1014 (S.D.N.Y. 1983); *In re Michelson*, 141 B.R. 715, 728-729 (E.D.Cal. 1992); *Hertzman v. Lynch*, 54 F.2 38 (1st Cir. 1931).

II. Courts Must Construe Fraudulent Intent in the Context of Disclosure and Confirmation Consistent with the Common Law to Ascertain Whether Fraud Upon the Court Has Occurred Under § 1144

A. The § 1144 'Procured-by-Fraud' Standard Requires Proof of Common Law Fraudulent Intent Inferred from the Facts and Circumstances, Including Omissions of Material Information

This Court has determined, that "there is no reason to doubt Congress's intent to adopt a common-law understanding of the terms it used." *Field v. Mans*, 516 U.S. 59, 67 (1995). It found, in construing "[t]he operative terms in § 523(a)(2)(A), [that…] 'false pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art. **They are common-law terms**, and […] **in the case of 'actual fraud,'** which concerns us here, **they imply elements that the common law has defined them to include**." (emphasis added). *Field*, 516 U.S. at 69.

As the *Field* Court explained, "[i]t is well established that 'where Congress uses terms that have accumulated settled meaning under…the common law, **a court must infer**, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" 516 U.S. at 69. "In this case, […] there is no reason to doubt Congress's intent to adopt a common-law understanding of the terms it used," and "[w]e construe the terms in 523(a)(2)(A) **to incorporate the general common law of torts**, the dominant consensus of common-law jurisdictions, **rather than the law of any particular State**." (emphasis added). 516 U.S. at 70,n.9. Accord *Husky Int'l Electr., Inc. v. Ritz*, 578 U.S. 355, 359 (2016) (quoting *Field*, 516 U.S. at 69 in the context of fraudulent conveyances); *Bartenwerfer v. Buckley*, 598 U.S. 69, 83 (2023) (Sotomayor, J. concur. op.) (citing *Husky Int'l Electr., Inc.*, 578 U.S. at 360).

B. Since § 1144 Fraud Upon the Court is a Species of Fraud with Public Policy Implications, Proof of Fraudulent Intent Must be Established by a Preponderance of Circumstantial Evidence

A bankruptcy court assumes an "active" role when presiding over a reorganization plan confirmation process. It "must [] approve the disclosure statement as containing adequate information, […and…] must [also] decide for itself whether the elements prescribed for confirmation have been satisfied." *In re Michelson*, 141 B.R. at 720 (citing §§ 1125, 1129). Since a bankruptcy court must "make an informed, independent judgment regarding each element of confirmation," it "**act[s] as a court of equity** and must assure itself that the plan is likely to succeed. […] It remains the law that 'every important determination by the court in […reorganization] proceedings calls for an informed independent judgment." (emphasis added). *Id* at 720 (citing §§ 1129(a)-(b)).

Section 1144 authorizes the Bankruptcy Court to revoke its prior order of confirmation of a Chapter 11 reorganization plan "only if such order was procured by fraud." Courts have understood that although a broad range of frauds may justify confirmation order revocation, **the specific fraud at issue in this context**, under both prior and current bankruptcy law, is "**fraudulent misrepresentation or misrepresentation by omission of material facts**." (emphasis added). *In re Michelson*, 141 B.R. at 725; Accord *In re Giguere*, 165 B.R.531, 534 (Bankr. D.RI. 1994); *In re Tenn-Fla Partners*, 170 B.R. 946, 967 (Bankr. W.D. Tenn. 1994).

"Under the Bankruptcy Code, as was settled under the Bankruptcy Act, fraudulent intent is required before revocation is warranted." *In re Michelson*, 141 B.R. at 725. "**Specific intent to defraud,**

however, is not needed. **Rather, the requisite intent, in the context of defective disclosure**, exists where there is **intentional omission of material fact**." (emphasis added). *Id.* This result obtains because "[f]raud has a broader meaning in equity [than at law] and [a specific] intention to defraud or to misspresent is not a necessary element." *Capital Gains Res. Bur., Inc.*, 375 U.S. at 193. "Thus, a person who (1) is obliged to disclose, (2) knows of the existence of material information, and (3) does not disclose it has fraudulent intent for purposes of revoking the order confirming a plan of reorganization." *In re Michelson*, 141 B.R. at 725. Accord *In re Ogden Modulars*, 180 B.R. 544, 547 (Bankr. E.D.Mo. 1995). "Bankruptcy courts have overwhelmingly held that **a debtor's silence regarding a material fact** can constitute a false representation." *In re Van Horne*, 823 F.2d 1285, 1288 (8th Cir. 1987) (emphasis added)).

Courts have since applied the following five-factor test to determine whether there is circumstantial evidence of fraudulent intent sufficient to establish a fraud upon the court for purposes of revoking a confirmation order. Thus, a § 1144 movant must establish:

> (1) that the debtor made a representation regarding compliance with Code § 1129 which was materially false; (2) that the representation was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth; (3) that the representation was made to induce the court to rely upon it; (4) [that] the court did rely upon it; and (5) that as a consequence

> of such reliance, the court entered the confirmation order.

In re Tenn-Fla Partners, 170 B.R. at 965, *aff'd Tenn-Fla Partners v. First Union Nat'l Bank of Fla.*, 229 B.R. 720, 730 (W.D.Tenn. 1999), *aff'd In re Tenn-Fla Partners*, 226 F.3d 746, 750 (6th Cir. 2000). Accord *In re Melinta Therapeutics, Inc.*, 623 B.R. 257, 263-264, n.27 (Bankr. D.Del. 2020). And "fraud under § 1144 must be established by **a preponderance of the evidence**." (emphasis added). *Tenn-Fla Partners*, 229 B.R. at 727-728. The *In Tenn-Fla Partners* district court "[found] that the use of the preponderance of the evidence standard will not offend the need for finality inherent in the Bankruptcy Code." *Id.* at 727.

Whether information is "material" "is measured by an objective standard drawn from the definition of 'adequate information' at section 1125(a) that asks what the 'hypothetical reasonable investor typical of holders of claims or interests of the relevant class' would want to know in order to make an informed judgment about the plan." *In re Michelson*, 141 B.R. at 725 (citing § 1125(a)[(1)]). At least one court has found that information about the value of a debtor's property is "material" to evaluating whether fraud upon the court has occurred. "**[M]isrepresentations made to a bankruptcy court concerning the value of property owned by the debtor is the type of 'fraud' contemplated by Congress in enacting section 1144**." (emphasis added). *United States v. Kostoglou*, 73 B.R. 596, 599 (Bankr. N.D. Ohio 1987).

Since "[t]he court's duty [is] to make an informed, independent judgment regarding confirmation issues," "it is apparent that pulling the wool over the eyes of the court impairs the judicial machinery in the performance of its duty." *In re Michelin*, 141 B.R. at 725. Thus, "[t]he important inquiry is whether the fraud harmed the integrity of the judicial process, not whether the fraud prejudiced a party or caused economic loss." *Id.* at 726. Accord *In re Intermagnetics America, Inc.*, 926 F.2d 912, 917 (9th Cir. 1989). For this reason, at least one court has held that "we do not think […] reliance by a creditor or other party" upon "misrepresentations made to the bankruptcy court," e.g., "concerning the value of property owned by a debtor," "is a necessary element" to prove fraud upon the court. *Kostoglou*, 73 B.R. at 599. Rather, "[w]e think it sufficient that a showing be made that the court relied thereon and that a creditor or other party was damaged thereby." *Id*. Accord *In re Tenn-Fla Partners)*, 170 B.R. at 967. Therefore, a debtor's "suppression of material facts that likely would have led to a different result unambiguously constitutes an impairment of the adjudicatory process." *In re Michelson*, 141 B.R. at 730.

III. DIPs Serving as 'Officers of the Court' and Fiduciaries Subject to an Affirmative Duty of Full and Honest Disclosure Remain Susceptible to Influence by 'Insiders'

A. Debtors-in-Possession Owe an Affirmative Duty of Full and Honest Disclosure to Ensure the Effective Functioning of the Bankruptcy System

The Bankruptcy Code "imposes on debtors an affirmative duty of full disclosure." 11 U.S.C. § 521 "requires the debtor to file with the court 'a **schedule of assets and liabilities**…and a statement of the debtor's financial affairs.' The schedule must disclose, *inter alia*, 'contingent and unliquidated claims of every nature' and provide an **estimated value** for each one. " (emphasis added). *Ryan Ops. G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (citing § 521(1)). Courts "typically look for disclosures related to a variety of topics. Such topics include, among others: […] '(9) **the accounting method utilized to produce financial information** and the name of the accountants responsible for such information.'" (emphasis added). *In re Hopeman Bros., Inc.*, 2025 Bankr. LEXIS 3324 (Bankr. E.D.Va. 2025) at *31.

"The purpose of the disclosure statement is not to assure acceptance or rejection of a plan, but to provide enough information to interested persons so they may make an informed choice between two alternatives." *In re United States Brass Corp.*, 194 B.R. 420, 423 (Bankr. E.D.Tx. (1996). "These disclosure requirements are crucial to the effective functioning of the federal bankruptcy system. Because creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed plan, **the importance of full and honest disclosure cannot be overstated.**" (emphasis added). *Ryan Ops. G.P.*, 81 F.3d at 362. Accord *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988); *Danise v. Saxon Mortg. Servs.*, 738 Fed. Appx. 47, 50 (3d Cir. 2018) (quoting same).

Because "[o]ne purpose of section 1144 is to guard against the danger that a plan of reorganization will be accepted and confirmed through fraudulent statements or omissions by the plan proponent," *In re Michelson*, 141 B.R. at 720, "[**t]he information must obviously be accurate to the best of the Plan [p]roponent's knowledge**." (emphasis added). *In re B&M Linen Corp.*, 2013 Bankr. LEXIS 2823 (Bankr. S.D.N.Y. 2013) at *21. "The accuracy of disclosure is an issue that must be addressed at the confirmation hearing where it must be demonstrated by a preponderance of the evidence that the 'proponent of the plan complied with the applicable provisions of [title 11]." *In re Michelson*, 141 B.R. at 719 (quoting § 1129(a)(2)).

B. DIP Fiduciaries Making Disclosures are Subject to Heightened Scrutiny

Section 1144 "fraud upon the court" is considered a species of fraud "which does or attempts to, defile the court itself, or [a]s "a fraud perpetrated by **officers of the court** so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." (emphasis added). *In re Michelson*, 141 B.R. at 725-726; *In re Intermagnetics America, Inc.*, 926 F.2d at 916 (quoting 7 J. Moore & J. Lucas, *Moore's Federal Practice* P 60.33 at 515 (2d ed. 1978)). Therefore, "[i]n the disclosure and confirmation process in reorganizations under chapter 11, the plan proponent [i.e., the Debtor or his agent] and the proponent's counsel **have a duty to make full, candid, and complete disclosure of material facts**. Failure to do so may lead [] to a conclusion that there has been a fraud on the court." (emphasis added). *In re Michelson*, 141 B.R. at 730.

Officers of the court include "[c]ounsel[s] practicing before the court," "the bankruptcy trustee," and the "debtor in possession." *Id.*, at 727. "The **debtor in possession also qualifies as an officer of the court** by virtue of performing the trustee's duties, which include **fiduciary obligations** while acting as representative of, and in the best interests of, the estate." (emphasis added). *Id.*; *In re Intermagnetics America, Inc.*, 926 F.2d at 917.

This Court has traditionally held that, because "the duties which the corporate Debtor in possession must perform during the proceeding are substantially those imposed upon the trustee," "[s]o long as the Debtor remains in possession, it is clear that the *corporation* bears essentially the same fiduciary obligation to the creditors as does the trustee for the Debtor out of possession." (italics in original). *Wolf v. Weinstein*, 372 U.S. 633, 649 (1963). This Court also has held that, "in practice these fiduciary responsibilities fall not upon the inanimate corporation, but upon the officers and managing employees who must conduct the Debtor's affairs under the surveillance of the court." *Wolf*, 372 U.S. at 649-650. Accord, *In re Tenn-Fla Partners*, 170 B.R. at 968; *Comm. Futures Trading Com. v. Weintraub*, 471 U.S. 343, 355 (1985). "Indeed, the willingness of courts to leave debtors in possession 'is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of trustee.'" *Weintraub*, 471 U.S. at 355 (quoting *Wolf*, 372 U.S. at 651). Nevertheless, the Ninth Circuit admonishes that "[t]he dangers resulting from the concealment of assets are greater when the debtor remains in posses-

sion than in cases in which a third party acts as trustee." *Stein v. United Artists Corp.*, 691 F.2d 885, 892 (9th Cir. 1982).

C. Courts Must Employ a Heightened Level of 'Close Scrutiny' to Determine Whether DIPs Have Made Disclosures Influenced by 'Insiders'

Courts must "carefully scrutinize" a DIP's relationship with potential "insiders," especially in a non-consensual cramdown case, where the disclosure and confirmation process can be used to perpetrate a fraud upon the court through omission of material facts to secure plan confirmation. *See In re Ogden Modulars*, 180 B.R. at 545, 547-548. Thus, courts have held that a person's "insider status" is among "the circumstances from which fraudulent intent may be inferred." *In re Animo Servs.*, 2026 Bankr. LEXIS 735 (Bankr. N.D.Tx. 2026) at *33; *In re DBSI, Inc.*, 445 B.R. 344, 348-349 (Bankr. D.Del. 2011). "'An insider is one who has a sufficiently close relationship with the debtor that his conduct is made **subject to closer scrutiny** than those dealing at arms length with the debtor.'" (emphasis added). *In re Tarricone, Inc.*, 286 B.R. 256, 262 (Bankr. S.D.N.Y. 2002) (quoting S. Rep. No. 95-989, 2d Sess. at 25 (1978)). "'Whether or not an individual or entity will qualify as an insider is a question of fact' that must be analyzed 'on a case-by-case basis.'" *In re SPAC Recovery Co.*, 676 B.R. 260, 272 (Bankr. S.D.N.Y. Jan. 2, 2026).

1. *Statutory Insider Status*

A person may be a "statutory insider" under § 101(31). Where the debtor is a corporation, § 101(31)(B)(i-iii) defines an "insider" as including its "director," "officer" or a "person in control." § 101(31)(E) defines an "insider" as its "affiliate," or "insider of an affiliate as if such affiliate were the debtor." And § 101(31)(F) defines an "insider" as its "managing agent."

"Lending institutions have been found to be [statutory] insiders [under § 101(31)(B)(iii)] when exerting 'dominion and control,' or, when they 'exercise sufficient authority over the corporate debtors so as to unquantifiably dictate corporate policy **and the disposition of assets**.'" *In re Exide Techs., Inc.*, 299 B.R. 732, 743 (Bankr. D. Del. 2003) (emphasis added). Yet, "[e]ven if [a] DIP Lender does not qualify as a 'statutory insider,' the record [may still] support[] a finding of 'non-statutory insider' status under *Tarricone*." *In re SPAC Recovery Co.*, 676 B.R. at 272-273.

Section 101(2)(A) defines "affiliate" as an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent of more of the outstanding voting securities of the debtor." Section 101(2)(B) defines "affiliate" as a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor."

Courts have held that § 101(2)(B) "describes an affiliate as having either a 'vertical relationship' or a 'horizontal relationship' with the debtor." *In re Opus*

East, LLC, 528 B.R. 30, 92 (Bankr. D.Del. 2015); *In re Reichmann Petrol. Corp.*, 364 B.R. 916 (Bankr. E.D.Tx. 2007). "Courts have found that a corporation is an affiliate of another corporation 'where one person controls both the debtor and another corporation.'" *In re 22 Acqn. Corp.*, 2004 U.S. Dist. LEXIS 6435 (E.D.Pa. 2004) at *20-21; *In re Holly Hill Med. Ctr., Inc.*, 53 B.R. 412 (Bankr. M.D.Fla. 1985). "Control 'can only be attained by way of equity ownership, either direct or indirect (i.e. tiered), and not by mere virtue of an official position.'" *In re 22 Acqn. Corp.*, at *21 (quoting *In re Elephant Bar Rest., Inc.*, 196 B.R. 747, 751 (W.D.Pa. 1996)). "Furthermore, 'in a case of multiple tiered ownership structure, more than 50 percent ownership must exist with respect to each tier of the structure in order to attribute equity ownership and control.'" *Id.* (quoting *Collier on Bankruptcy*, 15th Ed.); *In re Elephant Bar Rest., Inc.*, 196 at 749. Accord *In Reichmann Petrol. Corp.*, 364 B.R. at 920.

Only three federal courts have considered the facts and circumstances necessary to assess "managing agent" "insider" status under § 101(31)(F). The first court defined a "managing agent" as an "entit[y] that exert[s] or could exert operational control over a debtor, a division or unit of a debtor, or a significant portion of a debtor's property. Such operational control would ordinarily include the ability to make personnel decisions, the authority to incur or pay obligations and access to financial and other information essential to the operation of the debtor." *In re Standard Stores, Inc.*, 124 B.R. 318, 323 (Bankr. C.D.Cal. 1991). Yet, when such court applied this test, it did not find "insider" status. The second court applied this test and found that, a municipality was the 'managing agent' of the debtor special improvement districts, as

"the City had "authority to incur or pay obligations,' as well as 'access to financial and other information essential to the operation of the debtor," i.e., since two of the three factors had been met. *See In re City of Col. Falls, MT., Special Imp. Dist. No. 25*, 143 B.R. 750, 765-766 (Bankr. D.Mont. 1992)). And the third court which applied this test found that, the company formed to provide development management services to the affiliated group of debtors met all three factors, even though it "would still be subject to supervision and veto power by the officers and board of directors." *In re Palmdale Hills Prop.*, 2017 Bankr. LEXIS 3534 (Bankr. C.D.Cal.2017) at *3, 33.

2. *Non-Statutory Insider Status*

Alternatively, since "Congress[] use[d…] the term 'includes' in § 101(31), courts have identified a category of creditors, sometimes called 'non-statutory insiders," who fall within the definition, but outside of any of the enumerated categories." *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 395 (3d Cir. 2009). Unlike § 101(31) which requires "actual control (or its close equivalent)," "a finding of such control is not necessary for an entity to be a non-statutory insider." *Id* at 396. "'The 'control' to which [non-statutory insider] cases refer can only correctly be interpreted as something short of actual, legal control over the debtor's business because 'actual control' would subject the creditor to the statutory category of 'person in control of the debtor' under [§ 101(31)]. Any interpretation of 'control' within the non-statutory-insider context as anything like the ability to 'order, organize or direct' the debtor's operations is simply incorrect.'" *Id.*; *In re U.S. Med., Inc.*, 531 F.3d 1272, 1277,n.5 (10th Cir. 2008).

Instead, courts have determined that non-statutory insider requires "a close relationship with the debtor and some evidence, other than the relationship, that the transaction was not conducted at arm's length." *In re Opus East, LLC*, 528 B.R. at 93. Accord *In re SPAC Recovery Co.*, 676 B.R. at 273. Courts must thus consider the following three factors: "(1) the closeness of the relationship between the [debtor] transferor and transferee, (2) the degree of influence the transferee exerts over the transferor, and (3) whether the transactions were arms-length." *Id*. Accord *In re Oakwood Homes Corp.*, 340 B.R. 510, 523-524 (Bankr. D.Del. 2006)). "A transaction is at 'arm's length' when it is 'conducted as though the two parties were strangers.'" *In re SPAC Recovery Co.*, 676 B.R. at 272; *U.S. Bank Nat'l Assoc. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 397 (2018). Therefore, a third party's relationship with a debtor will be deemed close enough to impart non-statutory-insider status, "'where [it] compels the conclusion that the individual or entity has a relationship with the debtor, close enough to gain an advantage attributable simply to *affinity* rather than to the course of business dealings between the[m].'" (italics in original). *In re Palmdale Hills Prop.*, at *18; *In re Rexford Properties, LLC*, 557 B.R. 788, 797 (Bankr. C.D.Calif. 2016)).

IV. The Lower Courts' Failure to Apply the Correct Standard and Burden of Proof to the Facts Needed to Infer DIP Fraudulent Intent and 'Insider' Influence on the Disclosure and Confirmation Process Compromised Bankruptcy System Integrity

The lower courts, in this case, incorrectly applied the same five-factor test the Third Circuit *In re Melinta Therapeutics* court had embraced from the Sixth Circuit decisions in *In re Tenn-Fla Partners*, *supra* at Sec. II.B. Yet, because the lower courts incorrectly applied this test inconsistent with precedent, important facts evidencing debtor fraudulent intent discernible from the court record, official government documents and Petitioner's filings were overlooked or rejected.

Caselaw reveals the correct Section 1144 fraud-upon-the-court standard is two-pronged: fraudulent intent is established by proof of intentional misrepresentation **or** intentional omission of material fact. It also shows the correct burden of proof is **preponderance of the evidence**, *see In re Tenn-Fla Partners*, 229 B.R. at 727-728, and **not clear and convincing evidence** as the lower courts effectively applied on grounds of "finality:"[2] "'fraud is not to be inferred."[3] The correct legal standard and burden of proof, however, acknowledge that direct evidence of fraudulent intent is often unobtainable, and it enables court reliance upon indirect evidence of fraudulent intent logically inferred from all the facts and circumstances. *See* Secs. I.A, II.B, *supra*.

The lower courts, however, did not adhere to precedent, and focused only upon the test's first prong.

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[2] *See* Cert. Pet., App. D at 45a; App. C at 29a.

[3] *See* Cert. Pet., App. B at 9a, citing *In re Vandeweghe*, 49 F.2d 939, 940 (S.D.N.Y. 1931) (and cases cited below) no longer followed. *Cf. In re Celsius Network, LLC*, 2024 Bankr. LEXIS 1386 (Bankr. S.D.N.Y. 2024) at *12-13 (**requiring strong inferences of fraudulent intent from circumstantial evidence**).

They refused to infer from relevant circumstantial evidence of the debtors' fraudulent intent contained in the documents the debtors publicly filed with the Securities and Exchange Commission ("SEC") and in this adjudication, and rejected[4] the circumstantial evidence Petitioner had presented in his pleadings and at the revocation hearing.[5] Thus, the courts could not see what was in plain sight before them – evidence of **both** the debtors' affirmative misrepresentations **and** omissions of material information about the value and disposition of their proprietary intellectual property ("IP") assets.

The debtors' key IP assets consisted of trade secrets, trademarks and non-disclosure agreements protecting and maintaining proprietary IP rights, including methodologies, practices, tools, technologies, technical expertise, processes, and other unpatented research, development and engineering skills and proprietary know-how[6] "utilized in designing, developing,

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[4] *See* Cert. Pet., App. D at 45a-46a; App. C at 29a-32a; App. B at 7a-9a.

[5] *See* Cert Pet., App. F at 76a-77a; App. H at 110a-114a, 116a-117a.

[6] *See* United States Securities and Exchange Commission, *Prospectus Supplement No. 1, Form 10-K Annual Report Pursuant to Sec. 13 or 15(d) of the Securities Exchange Act of 1934, of Virgin Orbit Holdings, Inc. ("VO-SEC10-K")* (3/31/22), at 12, <https://www.sec.gov/Archives/edgar/data/1843388/000162828022007955/vorb-20211231x10k424b3.htm>; United States Securities and Exchange Commission, *Form S-1 Registration Statement Under Securities Act of 1933 of Virgin Orbit Holdings, Inc. ("VO-SEC-S-1-Regis.")* (Jan. 24, 2022), at 75, <https://www.sec.gov/Archives/edgar/data/1843388/000121390022003369/fs12022_virginorbit.htm>.

implementing, and maintaining applications and processes used in [their] launch systems and related technologies."[7] The debtors represented these IP assets to the public as underlying the "first ever" organically designed and developed small-satellite-focused rocket launch and delivery system technology.[8]

The lower courts also overlooked relevant circumstantial evidence about how the debtors inexplicably failed to have these key IP assets commercially or economically appraised,[9] despite the estimated "$280 million" of "contracted revenue" and $3.6 billion "pipeline,"[10] the debtors expected to derive from their use of such assets in an "established" "small satellites […] industry."[11] In addition, the lower courts overlooked relevant circumstantial evidence about the debtors' substantial undervaluation of these IP assets at a zero "0" $ "undetermined" book value in their court-filed Schedule of Assets and Liabilities,[12] which the debtors' court-filed Disclosure Statement revealed was unaudited and not prepared in accordance with

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[7] *See VO-SEC10-K* at 29.

[8] *See* John Fuller, Jeff Kwong, Collin Corey, Kirit Patel, Bret Perry, *LauncherOne Now in Orbit: Dedicated Air-Launch Brings Proven, Responsive Space Access with Historic NASA VCLS Demonstration Mission*, SSC21-V-IV-05, Presentation at 35th Annual AIAA/USU Conference on Small Satellites (Aug. 7-12, 2021), <https://digitalcommons.usu.edu/smallsat/2021/all2021/160/>.

[9] *See* Case No. 23-10405-KBO, Doc.120 at 4.

[10] *See VO-SEC-S-1-Regis.* at 9.

[11] *See* Tech Briefs, Propulsion, *Plane-Launched Rocket Opens Up Space for Small Satellites* (Jan. 1, 2020), <https://www.techbriefs.com/component/content/article/36556-plane-launched-rocket-opens-up-space-for-small-satellites>

[12] *See* Doc.120, *supra* at 5,15,29; Case No. 23-10405-KBO, Doc.121 (4/24/23) at 15.

GAAP.[13] This occurred because the debtors were an "emerging growth company" benefitting from relaxed SEC reporting and accounting requirements in a cramdown reorganization/liquidation.[14]

Furthermore, the lower courts overlooked debtor disclosures[15] and public awareness that: (1) as of 1/1/22, the debtors used these IP assets to "successfully launch[]19 satellites" into space;[16] (2) the debtors publicly reported $34 million in revenue for the third quarter ended 9/30/22[17]; and (3) as of 12/22, the debtors executed a satellite-launch service contract with a South Korean space industry investment group, and a satellite launch and range license with the UK government.[18] And the lower courts overlooked how the (confirmed) Fifth Amended Joint Chapter 11 Plan excluded these remaining IP assets from plan liquidation so they could be clawed back by the DIP lender[19]

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[13] *See* Doc.120, *supra* at 2-3; Case No. 23-10405-KBO, Doc.465 at 6, 68, 81-82.

[14] *See VO-SEC10-K*, *supra* at F-10; *VO-SEC-S-1-Regis.*, *supra* at 6; Doc.465, *supra* at 22.

[15] Doc. 465, *supra* at 27-29 (re **33 satellites delivered to orbit**).

[16] *See* About Virgin Orbit, *Virgin Orbit Goes Public*, Virgin Orbit Press Release (Jan. 7, 2022), <https://www.virgin.com/about-virgin/latest/virgin-orbit-goes-public>.

[17] *See* Sissy Cau, *Richard Branson's Struggling Virgin Orbit Gets Another Lifeline*, The Observer (Feb. 2, 2023), <https://observer.com/2023/02/richard-bransons-virgin-orbit-raise-funds-virgin-group/>.

[18] *See* SkyBrokers, General, *Supplier Virgin Orbit*, <https://sky-brokers.com/supplier/virgin-orbit/>.

[19] *See* Doc.465, *supra* at 4, 22, 105¶56, 110¶90, 114¶130, 174-174n.3; Case No. 23-10405-KBO, Doc.604-1 at 16¶89, 20¶129, 30¶c.

as its key indirect shareholder, Sir Richard Branson[20] likely directed.

Moreover, the lower courts overlooked relevant circumstantial evidence of how the debtors had managed to perpetrate such intentional misrepresentations and omissions of material fact in breach of their legal and fiduciary duties during the disclosure and confirmation process. By not adhering to precedent, these courts failed to carefully scrutinize important information the court-filed Hart declaration[21] and DIP Term Loan Credit Agreement,[22] and certain SEC filings, contained. Careful scrutiny was required because these documents contained key information about the debtors' and their affiliates' ownership and corporate structure[23] and the extant "insider" relationships between and within the debtors, the DIP lender and their indirect common majority owner.[24] The term loan credit agreement also revealed the DIP lender's "senior secured super-priority" creditor status, and its role as both "administrative agent" and "collateral agent" which ensured its effective control over the IP assets.[25] And these documents enabled

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[20] *See VO-SEC10-K*, *supra* at 70; *VO-SEC-S-1-Regis.*, *supra* at 98.
[21] *See* Cert. Pet., App. E.
[22] *See* Case No. 23-10405, Doc.17 at 115-228.
[23] *See* Cert. Pet., App. E at 74a (Ex.A Organization Chart); *VO-SEC10-K*, *supra* at 70; *VO-SEC-S-1-Regis.*, *supra* at 98, 101, 108-109; Doc.17, *supra* at 223-225; Doc. 465, *supra* at 27.
[24] *See* Cert. Pet. App. B at 4a (acknowledging "indirect parent" debtor-DIP relationship"); Doc.17, *supra* at 145 ("Subsidiary"), 223-225; Case No. 23-10405-KBO, Doc. 604-1 at 67; *VO-SEC10-K*, *supra* at 70; *VO-SEC-S-1-Regis.*, *supra* at 98, 101, 108-109.
[25] *See* Doc.17, *supra* at 115,123 ("Acceptable-Plan-of-Reorganization," "Acceptable-Sale-Transaction," "Administrative-Agent"),

the lower courts to infer that both the DIP lender's role under the loan credit agreement and its indirect supermajority ownership interest in the debtors effectively enabled it, and by extension, Richard Branson, to indirectly control the direction of the debtors' operations throughout the disclosure and confirmation process.[26]

Lastly, the lower courts overlooked relevant circumstantial evidence of debtor fraudulent intent that first came to light only after the plan confirmation effective date (8/2/23[27]). It shows that, approximately nine months thereafter, debtor "insiders" had already solicited and secured commercial nonexclusive licensing arrangements with third parties for the use of such IP asset-based technology for several million dollars per contract,[28] which transactions the debtor going concerns inexplicably did not pursue before plan confirmation (7/31/23).

Had the lower courts applied the correct legal standard and burden of proof, the creditors may likely have voted for reorganization rather than liquidation,

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128 ("Collateral-Agent"), 134 ("Guarantors"), 143 ("Related-Parties"), 145 ("Subsidiary"), 147 at Sec.1.03,165 at Sec.3.11,172-173 at Sec.6.01,180-181 at Sec.6.12, 196 at Sec.7.02, 205 at Sec.8.13.

[26] *See VO-SEC10-K* at 36 ("***VIL is able to control the direction of our business, and the concentrated ownership of our common stock will prevent you and other shareholders from influencing significant decisions.***") (emphasis in original); *Id*. at 70.

[27] *See* Kroll Case Info, *Virgin Orbit, LLC*, <https://cases.ra.kroll.com/virginorbit/>.

[28] *See* Linkedin, *Dan Hart's Post* (Apr. 9, 2024), <https://www.linkedin.com/posts/dan-hart-0809b420_announcing-the-virgin-orbit-ip-library-now-share-7183517599261995008-ehmx/>.

and the IP asset claw-back would not likely have occurred. More importantly, the DIP lender and its indirect owner would not likely have managed to game the disclosure and confirmation process, compromise bankruptcy system integrity, and prevent the administration of justice.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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