No. _____

In The
Supreme Court of the United States

NATIONAL HERITAGE FOUNDATION, INC.,

Petitioner,

v.

THE HIGHBOURNE FOUNDATION, JOHN R. BEHRMANN, AND NANCY BEHRMANN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than 28 years, the Circuit Courts of Appeals have wrestled with the question of whether a bankruptcy court may approve a plan of reorganization ("Plan") in a bankruptcy under Chapter 11 ("Chapter 11") of the United States Bankruptcy Code ("Bankruptcy Code") that contains releases and injunctions in favor of nondebtors ("Nondebtor Releases"). There has long been a conflict among the Circuits on this issue. Moreover, even Circuits that permit Nondebtor Releases diverge on which standard to use.

Two Circuits – the Ninth and Tenth Circuits – reject Nondebtor Releases as prohibited by 11 U.S.C. §524(e). By contrast, at least five Circuits – including the Second, Third, Fourth, Sixth and Seventh – hold that a bankruptcy court may have authority to approve Nondebtor Releases in appropriate circumstances pursuant to either 11 U.S.C. §§1123(b)(6) or 105(a). They have recognized that Nondebtor Releases may be essential to whether a Plan is feasible, as required under 11 U.S.C. §1129(a)(11), and whether a debtor can remain a going concern after it exits bankruptcy, a primary goal of a reorganization, as this Court recognized in *Bank of America National Trust & Savings Association v. 203 N. LaSalle Street Partnership*, 526 U.S. 434 (1999) ("*Bank of America*").

The decision by the Fourth Circuit in this case ("Decision") makes it an outlier even among those

QUESTION PRESENTED – Continued

Circuits that permit Nondebtor Releases. It purports to apply factors for evaluating Nondebtor Releases that the Sixth Circuit first articulated in *Class Five Nevada Claimants v. Dow Corning Corp*., 280 F.3d 648 (6th Cir. 2002) ("*Dow Corning*") and that many lower courts have since relied upon, including whether the "impacted class" of creditors had an opportunity to vote on a Plan or to recover in full under a Plan. But the Fourth Circuit became the first court to define the "impacted class" as consisting of those donors whom the law says are not and cannot be creditors, and who otherwise still had a full opportunity to be paid in full under the Plan if they could prove creditor status based upon a claim for something other than making a tax-deductible donation to the Debtor.

Petitioner National Heritage Foundation, Incorporated ("NHF") is a nonprofit corporation, organized for charitable purposes, that sponsored donor advised funds (each a "DAF"), which are merely internal divisions of NHF. Under the Internal Revenue Code, NHF owns and controls its DAFs and donors to NHF for one or more DAFs sponsored by NHF relinquish all right, title and interest in and to donated assets. 26 U.S.C. §§170, 4966(d)(2). Donors, therefore, cannot be "creditors" or "claimants" under the Bankruptcy Code. Yet the Fourth Circuit found that NHF's Releases failed the *Dow Corning* test based on its

QUESTION PRESENTED – Continued

conclusion that donors, as an "impacted class," were not adequately protected in NHF's Plan.

Therefore, the question presented is:

> Where a Chapter 11 debtor's plan of reorganization hinges on the ability to enforce releases and injunctions in favor of non-debtors, may a court reject such releases and injunctions based on its concern over whether the plan makes distributions to non-creditors, here donors to charitable Donor Advised Funds.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption contains the names of all the parties.

Petitioner NHF is a Georgia nonprofit corporation and, as such, has no stock and no shareholders. Accordingly, no publicly-held company owns 10% or more of stock in NHF.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner respectfully petitions for a writ of *certiorari* to review the Fourth Circuit's Decision. The Decision makes serious errors of law on an issue of great public importance – the standard by which to judge the validity of releases and injunctions in favor of nondebtors in Chapter 11 bankruptcies. The Circuit Courts have been in conflict as to whether such Nondebtor Releases are permitted by the Bankruptcy Code. Moreover, even those Circuits that permit Nondebtor Releases have, in the words of one Circuit, "splintered on the governing standard."[1]

The Decision compounds such "splinter[ing]" by rejecting Nondebtor Releases when other courts that permit such Releases would not have. The Decision purports to apply the seven-factor test for evaluating Nondebtor Releases set forth by the Sixth Circuit in *Dow Corning*. But the Sixth Circuit in *Dow Corning* and all prior courts that have evaluated Releases have looked to their impact on classes of *creditors*. The Fourth Circuit, by contrast, rejected the Releases in NHF's Plan based on its conclusion as to how a "class" of non-creditors was "impacted" – the class of donors who donated to DAFs sponsored and maintained by NHF. Yet, the Internal Revenue Code directs that NHF is the sole owner of these donations, whether in cash or in property. Accordingly, donors

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[1] *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 656 (7th Cir. 2008) ("*Airadigm*").

have relinquished all right, title and interest in such donations. The Decision makes the Fourth Circuit the only court to hold that a class composed of those who may not be claimants or creditors under the Bankruptcy Code must have an opportunity to cast a ballot for and recover under a Plan for Nondebtor Releases to be valid.

The Decision is irreconcilable with the Internal Revenue Code because it recognizes rights and interests in parties whom the Internal Revenue Code mandates have no legal rights or interests. It introduces uncertainty for not only the more than 1,000 organizations in the United States that manage more than $45 billion of DAFs,[2] but also for any entity which accepts charitable contributions and seeks bankruptcy protection. Donors to all forms of charities may use that Decision to assert standing to challenge how a charity uses donated assets.

The Decision is independently irreconcilable with the Bankruptcy Code because it requires that non-creditors and non-claimants have rights that the Bankruptcy Code accords solely to those with enforceable "claims" and "interests," including the right to share in Plan distributions. 11 U.S.C. §1123(a)(4). It treats donors as having the equivalent of allowed claims, even those who filed no claim or late claims and even those whose claims were disallowed or

[2] NATIONAL PHILANTHROPIC TRUST, 2013 DONOR-ADVISED FUND REPORT, *available at* http://www.nptrust.org/daf-report/index.html.

settled. It holds that those who were "conclusively presumed" by the Bankruptcy Code to have accepted a Plan under Section[3] 1126(f) must, nonetheless, be able to cast a ballot to accept or reject that Plan. It creates insuperable, practical problems for Plan proponents and for courts and other litigants.

Finally, the Decision loses sight of what this Court in *Bank of America* held is the primary goal of a Chapter 11 reorganization – preserving the reorganized debtor as a going concern. Especially where creditors will be paid in full, a Court should not reject Releases that are essential for a debtor to stay in business because of conclusions about those with no legal rights in the bankruptcy.

The Decision highlights the need for this Court to articulate clear guidelines to advise bankruptcy courts what standards apply and how those should be weighed in determining whether Nondebtor Releases in a Plan are valid. This Court should, therefore, grant *certiorari* to resolve the Question Presented.

OPINIONS BELOW

The United States Bankruptcy Court for the Eastern District of Virginia ("Bankruptcy Court") issued its Findings of Fact, Conclusions of Law and

[3] The word "Section" or "§" refers to the Bankruptcy Code unless otherwise indicated.

Order under 11 U.S.C. §1129(a) and Fed. R. Bankr. P. 3020 Confirming the Fourth Amended and Restated Plan of Reorganization of the Debtor on October 16, 2009 ("Confirmation Order"). The Confirmation Order is unreported. (Appendix ("App.") 130-68) The Confirmation Order was originally affirmed by Order of the United States District Court for the Eastern District of Virginia ("District Court") dated August 17, 2010, which also is unreported. (App.128-29)

In 2011, the Fourth Circuit rejected attacks on NHF's Plan in general, but vacated that portion of the Confirmation Order that upheld the Nondebtor Releases because it found the Bankruptcy Court had not made sufficient findings of fact to support their validity. The Fourth Circuit then remanded the case to the Bankruptcy Court "to allow the bankruptcy court – if the record permits it – to set forth specific factual findings supporting its conclusions." That decision is reported at 663 F.3d 704 (4th Cir. 2011) (App.108-27) ("*NHF I*").

The Bankruptcy Court's order on remand rejecting the Nondebtor Releases ("Remand Order" or "RO") is reported at 2012 U.S. Bankr. LEXIS 3926 (Bankr. E.D. Va. Aug. 27, 2012). The District Court's decision affirming the Remand Order is reported at 2013 U.S. Dist. LEXIS 49081 (E.D. Va. Apr. 3, 2013). (App.38-67)

The Fourth Circuit granted panel rehearing for the limited purpose of deleting certain statements from its original opinion. Its Decision on rehearing

that is the subject of this Petition is reported at 760 F.3d 344 (4th Cir. 2014) (App.1-17) Its opinion prior to rehearing is reported at 2014 U.S. App. LEXIS 12144. (4th Cir. June 27, 2014). (App.19-36)

JURISDICTION

The Fourth Circuit entered its Decision on rehearing on July 25, 2014. (App.37) That date it denied Petitioner's request for rehearing *en banc*. (App.171) This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are included in the Appendix:

(1) 11 U.S.C. §101(5) (App.172);

(2) 11 U.S.C. §101(10) (App.172);

(3) 11 U.S.C. §105 (App.173);

(4) 11 U.S.C. §524(e) (App.173);

(5) 11 U.S.C. §1126(f) (App.173); and

(6) 26 U.S.C. §4966(d) (App.174).

STATEMENT OF THE CASE

I. Facts Material To The Question Presented.

A. NHF Must Advance Defense Costs And Indemnify Officers And Directors If Donors Sue.

NHF is a Georgia non-profit corporation organized for charitable purposes. (App.3)[4] NHF sponsors and maintains DAFs. (App.3) Under 26 U.S.C. §4966(d)(2)(A)(ii), NHF is the rightful owner of these DAFs. (App.3) Under the Internal Revenue Code, donors to a DAF relinquish all right, title and interest in the assets they donate in exchange for a dollar-for-dollar tax deduction. (App.3; *NHF I*, App.110n.1); 26 U.S.C. §170. At the time of its Chapter 11 bankruptcy, NHF sponsored 6,014 DAFs for approximately 9,000 donors who resided across the country. (RO¶9, App.70; *NHF I*, App.110)

NHF acts through its directors and officers. Under its bylaws, NHF is obligated to advance defense costs to these directors and officers and indemnify them for liability to the fullest extent of the

[4] The Fourth Circuit erroneously found that the IRS "revoked" NHF's status as a 501(c) public charity. (App.3 n.1) Rather, NHF made a voluntary agreement with the IRS, consistent with its conversion to a Type 1 supporting organization. NHF continues to pursue IRS recognition of tax-exempt status as a Type 1 supporting organization. The supporting organization is a public charity, described in 26 U.S.C. §§501(c)(3) and 509(a)(3), to which contributions are tax-deductible as charitable contributions, within the meaning of 26 U.S.C. §170.

Georgia Non-Profit Corporation Code. NHF must advance fees and costs without receipt of security or assurance of repayment. These indemnity obligations were assumed in the Plan. (RO¶48 & p. 16, App.78, 90-93)

On January 24, 2009, NHF filed a voluntary petition for bankruptcy under Chapter 11 after being unable to obtain an appeal bond regarding a $6 million verdict entered against it in a lawsuit brought by a donor in Texas state court. (App.3; RO¶¶14-15, App.71) (The verdict later was found to have been tainted by criminal bribery of the judge and guardian *ad litem*.)

B. The Record Shows That Absent The Releases, NHF Faces Significant Exposure From Potentially Thousands Of Donor Suits.

The Honorable Stephen S. Mitchell presided over NHF's bankruptcy through the time of Plan confirmation. The Bankruptcy Court established a bar date for filing proofs of claims. (RO¶16, App.71) NHF provided notice of this bar date to donors and other parties-in-interest. *NHF I* (App.10). Consistent with its duty under 11 U.S.C. §704(a)(5), NHF advised donors it believed they had no valid claim, because they had no interest in the DAFs. 343 parties – including approximately 200 donors – filed timely claims totaling $51 million. (RO¶17, App.71) NHF objected to donors' claims because donors had no legal title to donated

funds and, therefore, were not NHF's creditors. (RO¶21, App.72)

The Bankruptcy Court sustained NHF's objections to those donor claims that were based on the use of donated funds. (RO¶22, App.73) The Fourth Circuit refers to these as "donor claims" in its Decision. (App.10, 12-17) There were roughly a dozen donors who raised claims for rescission, alleging that they were fraudulently induced into donating, including Respondents. The courts below referred to these as "Pending Donor Claims." (RO¶24, App.73) The Bankruptcy Court scheduled the Pending Donor Claims and allowed these donors to litigate whether they had a right to recover from NHF based on their theories of rescission and fraud. If successful, the "Pending Donor Claims" would be paid in full. (RO¶¶22-24, App.73) On June 29, 2010, the Behrmanns settled and voluntarily withdrew their claim and NHF made a significant payment ($590,000 on a $626,000 claim) to their designated charity. (RO¶¶25-29, App.74; *NHF I*, App.111)

In NHF's Plan, Pending Donor Claims were classified among general unsecured claims in Class III(C). They were unimpaired because the Plan provided that, if ultimately allowed, they would be paid in full plus 4% interest. (RO¶42, App.76-77)

C. NHF's Creditors Overwhelmingly Approved Its Plan, Which Provides For Full Payment Of Allowed Claims.

The Plan contains releases and injunctions that precluded claims that arose prior to the Plan confirmation date against NHF's directors and officers and others "in connection with, relating to, or arising out of the operation of the Debtor's business, except to the extent relating to the Debtor's failure to comply with its obligations under the Plan." (RO¶43, App.77) The Plan also contained an Exculpation Provision requiring the Bankruptcy Court's approval before bringing suits against directors and officers based on post-petition conduct. (RO¶44, App.71)

The Plan provided that NHF's directors and officers would serve after confirmation. The Plan named these officers and set forth the modest salary each would receive for this post-confirmation service. (Plan §7.6, App.178-79)

Not surprisingly, because the Plan provided for full payment of all allowed claims, the Plan was overwhelmingly approved by all classes of creditors. The only impaired class of claimants – Class III(B) – voted to accept the Plan by 97.5%. (RO¶¶39, 40, App.76) Class III(C) was deemed to have accepted the Plan by operation of law because those claims, if allowed, were to be paid in full. 11 U.S.C. §1126(f). (*See also* RO¶42 & n.4, App.76-77)

Judge Mitchell conducted a two-day confirmation hearing. Janet Ridgely, NHF's Vice-President, testified

she believed the Releases were "essential to the success of the reorganized debtor" because she was concerned that without the Releases, donors would sue the directors and officers, triggering indemnification obligations. (RO¶¶46-47, App.77-78) She testified that directors and officers "absolutely" would not serve absent the Releases, although no other director or officer had specifically told her they would not serve absent the Releases. (RO¶47, App.78)

D. In Confirming NHF's Plan, The Original Bankruptcy Court Finds That Nondebtor Releases Are Essential To Its Reorganization.

After the Confirmation Hearing, the Bankruptcy Court concluded that the Releases were "essential" to the Plan. As the Fourth Circuit summarized in *NHF I*, the Bankruptcy Court's findings included that:

> (1) NHF's bankruptcy was "quite a unique case";
>
> (2) there were "legitimate interests" for approving the Release Provisions in the reorganization plan;
>
> (3) the "potential for mischief: was "very, very high" for a dissatisfied party whose claim was disallowed in the bankruptcy proceeding to sue NHF's officers and directors "seriatim";
>
> (4) NHF's obligations to indemnify its officers and directors could cause it to incur

> substantial legal costs in defending such claims; and
>
> (5) the Release Provisions served the purpose of "preventing an end-run around the plan" by not allowing dissatisfied claimants to attempt "second and third bites at the apple in another forum."

NHF I (App.113) (citations omitted).

The Behrmanns appealed the Confirmation Order, claiming it did not satisfy the Bankruptcy Code's requirements. The District Court, per Hon. Claude Hilton, affirmed the Confirmation Order. (App.128-29)

E. The Fourth Circuit Remands For More Specific Factual Findings.

On December 9, 2011, the Fourth Circuit decided *NHF I*. It rejected Respondents' "broadside contention" that the Plan was contrary to the Bankruptcy Code and remanded solely on the challenges to the Releases and Exculpation Provision. *NHF I* (App.115). It reaffirmed its earlier holdings that pursuant to §105, a Bankruptcy Court could release liabilities of a nondebtor under the terms of a Chapter 11 Plan, a finding it first made in *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989) ("*A.H. Robins*"), *NHF I* (App.117). However, it found that the Bankruptcy Court's legal conclusions were "meaningless in the absence of specific factual findings explaining why this is so." *Id.* (App.124). It

therefore vacated the Confirmation Order insofar as it approved the Nondebtor Releases and remanded "to allow the Bankruptcy Court – if the record permits it – to set forth specific factual findings supporting its conclusions." (App.124)

The Fourth Circuit acknowledged that the Bankruptcy Court on remand could determine what factors were most relevant to the issue of the Releases, but "commended" it to consider the factors for evaluating Nondebtor Releases set forth by the Sixth Circuit in *Dow Corning*, 280 F.3d 648, as well as the similar factors found in the District of Maryland's decision upholding releases in *In re Railworks Corp.*, 345 B.R. 529 (Bankr. D. Md. 2006). (App.123)

F. In A Related Appeal, The Fourth Circuit Holds That Donors Who Filed Tardy Claims Have No Rights As To NHF.

In another 2011 decision in a separate appeal arising from the NHF bankruptcy – *Anderson v. NHF*, 439 Fed. Appx. 238 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 850 (2011)[5] – the Fourth Circuit affirmed the Bankruptcy Court's denial of a donor's claim as being untimely despite the argument that tardiness was excusable because of NHF's representation to donors that it did not believe they had a valid claim in light of the Internal Revenue Code.

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[5] The case is discussed in *NHF I* (App.111 n.2).

G. A New Judge On Remand Now Rejects The Releases The Bankruptcy Court Originally Approved.

At the time of remand in 2012, Judge Mitchell had retired and the case was reassigned to Hon. Brian F. Kenney. As the issue of enforceability was based on the facts as known at the time of confirmation in 2009, the parties stipulated beforehand to stand on the existing record. (RO¶57, App.84) The Behrmanns promised the Bankruptcy Court that they would not bring claims against the directors and officers before it ruled on remand.[6]

On remand, the Bankruptcy Court reached the opposite result of Judge Mitchell's original ruling, finding the Releases invalid. It did, however, agree that the exculpation provision in the Plan was necessary and valid. In reaching its conclusion on the Releases, it determined that "there is a very real possibility that the officers and directors will be sued by the Donors, whose numbers run into the thousands." (RO, App.92) It concluded that in any lawsuit donors would bring, NHF would have to advance costs of defense irrespective of the merits of the claim and without any promise of repayment or security. (RO, App.90-93) It found that this created an identity of interests between NHF and its directors and officers. (*Id*.)

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[6] *See Behrmann v. NHF (In re NHF)*, 510 B.R. 526, 533-34 (E.D. Va. 2014).

Most relevant here, it found that "[t]he real possibility – indeed, the near certainty of multiple Donor lawsuits, coupled with NHF's indemnity obligation could have a materially negative impact on the Debtor's ability to successfully complete its reorganization." (RO, App.93)

Nonetheless, the Bankruptcy Court rejected the Releases, finding that donors whose claims had been disallowed prior to confirmation "were not allowed to vote under the Plan." (RO¶41, App.76). It acknowledged that, under §1123(a), donors were not legally entitled to vote because they had no "claim," but concluded they were "impacted" anyway, stating:

> The Debtor might contend that disallowed claimants are, as a matter of law, not entitled to vote, and therefore, the Donors could not possibly have accepted the Plan as a class. 11 U.S.C. §1126(a) ("The holder of a claim or interest allowed under Section 502 of this title may accept or reject a plan"). The issue, however, is not whether the Donor claims were entitled to vote; in fact, they were not. If one factor to be considered here was whether the impacted class accepted the Plan and voted in favor of the Release Provisions, the plain answer would be no.

(RO, n.10, App.99) In addition, it found that the Pending Donor Claims, by being part of an unimpaired class also, "were not entitled to vote," because §1126(f) "conclusively deemed [them] to have accepted the Plan." (RO¶42 n.4, App.76-77) It interpreted

§1126(f)'s "conclusive[ ] presum[ption]" to mean that those subject to Class III(C) also "are not entitled to vote." (*Id*.) It additionally concluded that donors did not have the opportunity to recover in full under the Plan because "the Donor Claims have not been 'channeled' anywhere; they simply have been disallowed." (RO, App.100) Finally, it found that the pledge of continued service by NHF's directors and officers was not a contribution of "substantial assets," because officers and directors had not made a financial contribution to the Plan. (RO, App.93-94)

The District Court affirmed, although it newly found that there was no identity of interests to support the Releases. (App.38-67) Thus, the District Court, too, on remand reached the opposite conclusion from its original conclusion.

H. Donors Sue NHF's Directors And Officers.

At the time they ruled on remand, the Bankruptcy Court and District Court were unaware that the Behrmanns, while promising not to sue while remand was pending, in fact, filed suit in the United States District Court for the Central District of California against NHF's directors and officers and others as a class action seeking treble damages under RICO, among other claims ("California Action"). The Bankruptcy Court and District Court have now found that the Behrmanns and their counsel acted in civil contempt by filing this Action and ordered them to pay a

portion of NHF's attorney's fees incurred as a result, which now total more than $1,000,000 (the "Contempt Proceeding").[7]

I. The Fourth Circuit Rejects The Releases Because Of How They Impact Donors.

The Fourth Circuit accepted the Bankruptcy Court's fact-finding and affirmed the lower courts. It purported to consider the *Dow Corning* factors. (App.7) In doing so, it agreed with the Bankruptcy Court that NHF had demonstrated an identity of interest with the released parties. (App.7-8) However, it found NHF failed to satisfy the other substantive *Dow Corning* factors. It agreed that donors were a "class" who were "impacted" by the Release but concluded they did not have an opportunity to vote on the Plan or to settle or otherwise recover in full under the Plan. (App.12-16) It also found that NHF had not shown that donor suits would materialize or that their cost would threaten NHF's reorganization. Finally, it found that NHF's directors' and officers' pledge of continued service was not a "substantial contribution." (App.8-11)

It originally ruled that if damages from donor suits "do materialize," NHF "is not without options"

[7] The Behrmanns and their counsel have appealed that determination, which is pending before the Fourth Circuit in a separate appeal. *Miller v. NHF*, Nos. 14-1451, 14-1453, 14-1576 (Cons.) (4th Cir.). As a result, NHF has still not received even a penny of the sanctions the Behrmanns and their counsel were ordered to pay.

and could petition the Bankruptcy Court to reopen the case. It also noted NHF could refile for bankruptcy. (App.35) NHF petitioned for rehearing and rehearing *en banc*. Among the other arguments, NHF noted that because the Plan was substantially consummated and more than 180 days had passed, it could not reopen the case under §§1127 and 1144. The Court granted panel rehearing, but its only change was to eliminate in the Decision the suggestion that NHF has options if it faces onerous donor suits. (App.169)

II. The Lower Courts Had Proper Federal Jurisdiction.

While this Petition is based on the Fourth Circuit's Decision after remand, the basis for Bankruptcy Court and District Court jurisdiction were the same both prior to and after remand. The Bankruptcy Court had jurisdiction under 28 U.S.C. §§1331 and 1334. The District Court had jurisdiction over the appeals of both the Confirmation Order and Remand Order under 28 U.S.C. §158.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because The Circuit Courts Are In Conflict On The Nationally Important Issue Of Whether Nondebtor Releases Are Enforceable And The Fourth Circuit – One That Will Enforce Nondebtor Releases – Is In Conflict With All Other Circuits That Do So.

In certain bankruptcies, the ability to enforce a non-consensual, Nondebtor Release may be the difference between the success or failure of a Chapter 11 debtor's reorganization. For more than 28 years, the Circuit Courts have wrestled with this important issue, but have reached conflicting results. Some read §524(e) to bar such Releases outright. Others conclude that §§1123(b)(6) and 105(a) permit Releases in appropriate circumstances. But even those Circuits that permit such Releases disagree on the governing standard. This confusion has long persisted and this Court has yet to address this issue. This case highlights why it is especially important for this Court to grant review and resolve the current conflict and articulate clear and uniform standards to guide future courts as to what standards apply, including how these factors should be weighed.

In its Decision, the Fourth Circuit rejected Nondebtor Releases because of how they impact a "class" of donors, parties who, as a matter of law, are not creditors of NHF and have no claim against it simply by virtue of making a donation to the Debtor. Yet, all prior Circuits that have upheld Nondebtor

Releases have judged such provisions by how they impact creditors or claimants, including the Sixth Circuit's *Dow Corning* decision, the standard the Fourth Circuit purported to apply.

If left to stand, the Decision would pose impracticable problems for Chapter 11 debtors trying to craft Plans and for courts and litigants, both inside and outside of bankruptcy. The Decision will be relied upon to suggest donors to charities have rights when the Internal Revenue Code mandates otherwise, and to suggest that non-creditors should have rights in bankruptcies that the Bankruptcy Code provides only to creditors.

A. The Circuits Are In Conflict As To Whether Nondebtor Releases Are Permissible.

1. Two Circuits Reject All Nondebtor Releases.

Despite the recognition by a number of Circuits that a Nondebtor Release may play a critical role in a debtor's reorganization, the Circuits are divided about whether such Releases are ever permissible.

Two Circuits – the Ninth and Tenth – read §524(e) to prohibit Nondebtor Releases. In *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995), the Ninth Circuit held "that §524(e) precludes bankruptcy courts from discharging the liabilities of nondebtors." *Id.* at 1402. It found that the grant by Congress of a narrow right to approve injunctions against nondebtor claims in certain

asbestos-related bankruptcies, §524(g)(2)(B), "reinforces the conclusion that §524(e) denies such authority in other, non-asbestos cases." *Id*.

The Tenth Circuit in *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990), also concluded that §524(e) prohibits the entry of a permanent injunction precluding suits against third parties. That Court was particularly focused on the circumstance where a debtor and third parties are each obligated for a debt that has not been fully repaid, concluding that even where a debtor is discharged in bankruptcy, "the debt still exists . . . and can be collected from any other entity that may be liable." *Id*. at 600 (citation omitted).

These decisions mean that if a debtor is before a Bankruptcy Court of the Ninth or Tenth Circuits, it cannot include a Nondebtor Release in its Plan, even if its reorganization would fail absent the Nondebtor Release.

2. Numerous Other Circuits Will Uphold Nondebtor Releases But Differ On Standards.

At least five other Circuits – the Second, Third, Fourth, Sixth and Seventh – acknowledge that Nondebtor Releases may be valid in appropriate circumstances. In *Dow Corning*, the Sixth Circuit rejected that §524(e) bars these, noting that §524(e) "explains the effect of a debtor's discharge. It does not prohibit the release of a nondebtor." *Dow Corning*, 280 F.3d at

657. The Seventh Circuit, too, has concluded that "§524(e) does not purport to limit the bankruptcy court's power to release a non-debtor from a creditor's claims." *Airadigm*, 519 F.3d at 656.

Courts that permit Nondebtor Releases have relied on §1123(b)(6) or §105(a) as authority. Section 1123(b)(6) permits a reorganization plan to "include any . . . appropriate provision not inconsistent with the applicable provisions of this title." (App.173) In *Dow Corning*, the Sixth Circuit relied on §1123(b)(6). *Dow Corning*, 280 F.3d at 565-57.

Section 105(a) provides that "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provision of this title." (App.172-73) In *NHF I*, the Fourth Circuit held that §105(a) gives a bankruptcy court authority to enforce Nondebtor Releases, concluding that §524(e) "does not deny the bankruptcy court the power to release liabilities of a nondebtor under the terms of a chapter 11 plan when the creditors of the nondebtor approved of and accepted the terms of the plan." *NHF I* (quoting *Stuart, LLC v. First Mount Vernon Indus. Loan Ass'n*, 3 Fed. Appx. 38 (4th Cir. 2001)).

B. While Other Circuits Judge Nondebtor Releases By Their Fairness To Creditors, The Fourth Circuit Rejected Releases Because Of Perceived Unfairness To Non-Creditors.

Even those Circuits that permit Nondebtor Releases apply a "variety of approaches." *Airadigm*, 519 F.3d at 656. However, the Decision, while purporting to apply the factors the Sixth Circuit articulated in *Dow Corning*, instead, decided the issue directly at odds with this Court and all prior courts that will enforce Nondebtor Releases.

1. The Circuits That Permit Nondebtor Releases Apply Varying Standards.

Most Circuits that permit Nondebtor Releases agree that such Releases can apply to pre-petition conduct. *See*, *e.g.*, *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 288-93 (2d Cir. 1992); *Dow Corning*, 280 F.3d at 658; *A.H. Robins*, 880 F.2d at 702; *In re Continental Airlines, Inc*., 203 F.3d 203, 214 (3d Cir. 2000).[8] However, courts that permit Nondebtor Releases of pre-petition conduct apply different tests to assess their enforceability.

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[8] The Seventh Circuit in *Airadigm*, however, suggested it would be concerned if a release extended to post-petition conduct, emphasizing that "[t]his is not 'blanket immunity' for all time, all transgressions and all circumstances." *Airadigm*, 519 F.3d at 657.

The Second Circuit has asked whether the Release terms are "important" to the success of the Plan, noting that courts have looked at four possible considerations:

> Courts have approved non-debtor releases when: the estate received substantial consideration; the enjoined claims were "channeled" to a settlement fund rather than extinguished; the enjoined claims would indirectly impact the debtor's reorganization "by way of indemnity or contribution"; and the plan otherwise provided for the full payment of the enjoined claims.

In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005) (citations omitted).

The Third Circuit in *Continental Airlines* identified six potential factors:

> Although some courts may consider identity of interest when deciding whether to grant a permanent injunction, that factor is not considered in a vacuum; rather, it must be supported by actual record facts in evidence, and accompanied by other key considerations, *e.g.*, whether the non-debtors made substantial contributions to the reorganization, whether the injunction is essential to reorganization, whether affected parties overwhelmingly have agreed to accept the proposed treatment, and whether the plan pays all or substantially all of the affected parties' claims.

203 F.3d at 217.

The Sixth Circuit in *Dow Corning* then adopted a seven-factor test:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

203 F.3d at 658.

In *NHF I*, the Fourth Circuit "commend[ed]" the *Dow Corning* factors (and the more abridged restatement of relevant factors in *Railworks*),[9] but stated

[9] These are: (1) overwhelming approval for the plan; (2) a close connection between the causes of action against the third party and the causes of action against the debtors; (3) that the injunction is essential to the reorganization; and (4) that the plan

(Continued on following page)

that it was "satisfied to leave to a bankruptcy court the determination of what factors may be relevant in a specific case." *NHF I* (App.122-34).

It is important for this Court to accept review to clarify which factors should apply, how and whether to weigh those factors, and whether such Nondebtor Releases (if granted) should apply to all creditors or a subset of creditors.[10]

2. The Decision Is Contrary To Section 1123(a)(4)'s Requirement That One Have A "Right" Or "Interest" To Receive A Plan Distribution.

Before the Decision, *all* prior courts which permit Nondebtor Releases that have analyzed whether a Nondebtor Release is enforceable have judged them by their fairness to *claimants* or "creditors." *See Dow Corning*, 280 F.2d at 658-79 (referring to the opportunity of "claimants"); *Metromedia*, 416 F.3d at 141

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or reorganization provides for payment of substantially all of the claims affected by the injunction. *Railworks*, 345 B.R. at 536.

[10] For instance, in *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233 (Bankr. S.D.N.Y. 2014), one bankruptcy court recently "blue-pencilled" Nondebtor Releases that had been presented to the Court and approved these insofar as they comported with Second Circuit precedent. It approved such releases as to parties that consented to the Releases or did not opt out of such Releases through the balloting for the plan; "for those claims that would trigger indemnification or contribution claims against the Debtors and thus impact the Debtors' reorganization," and for parties who provided substantial consideration to the reorganization.

(discussing when a court "may enjoin a *creditor* from suing a third party"); *Continental Airlines*, 203 F.3d 203 at 213 (discussing compensation "to *claimants*" in exchange for a release); (RO, App.97) (discussing cases addressing "adversely affected classes" of *creditors*).

In its Decision, the Fourth Circuit found that "the Release Provisions most directly impacted the class of individuals who made donations to NHF's Donor Advised Funds," which it termed "the donor class." (App.12) It relied on the purported "donor claims" of these donors to find NHF's Plan failed three of the six *Dow Corning* substantive tests. It acknowledged that DAFs "are funds in which donors relinquish all right and interest in the assets they donate" and recognized NHF solely owns these funds (App.3), a finding it also made in *NHF I*. (*See* App.111n.1) Nonetheless, the Fourth Circuit concluded that donors had not had an opportunity to vote on the Plan and, from that, concluded that "the equities weigh against NHF, as the class most affected by the Release Provision was not given the opportunity to accept or reject the plan." (App.15) The Court additionally found that the Plan did not provide "a mechanism to consider and pay all or substantially all of the class or classes affected by the nondebtor release," because "[a]ny *donor claims* not filed or allowed during the bankruptcy proceedings have simply been extinguished." (App.15) (emphasis added) The Fourth Circuit recognized that NHF provided "notice of an opportunity for donors to file claims against it during the bankruptcy proceedings," but – ignoring that donors have no ongoing interest in donated funds –

held that "NHF has provided no evidence . . . that this process adequately protected the *donors' interests*." (App.15) It specifically took issue with NHF's (accurate) representation in its Plan disclosure statement that it did not believe that donors had valid claims, stating that "[t]his hardly strikes us as a bona fide effort to ensure the consideration of nearly all of the donor class's claims." (App.15) It found that the Plan provided no opportunity for donors who chose not to settle to recover in full, stating that "we reiterate the import of NHF's failure to provide any mechanism to *pay donor claims* outside of the bankruptcy proceeding." (App.16) (emphasis added) In its conclusion, the Decision noted "given the extraordinary breadth of this particular release,[11] we are also troubled by NHF's failure to provide a mechanism outside of the bankruptcy process to satisfy *donor claims*." (App.17) (emphasis added) Again, however, the Fourth Circuit's conclusions based on "donor claims" ignore that by operation of the Internal Revenue Code, donors simply cannot have claims. They cannot be NHF's creditors solely by virtue of making a donation for which they received a dollar-for-dollar tax deduction.[12]

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[11] The Releases were not, in fact, "broad," but were limited to pre-petition conduct taken by parties "in connection with, relating to or arising out of the Debtor's business" (App.179-80) – in other words, in circumstances where claims were the same as against NHF itself.

[12] Indeed, the District Court in the Contempt Proceeding specifically found that a donor to the DAF could have no "claim" under the Bankruptcy Code. *Behrmann*, 510 B.R. at 540-41.

This erroneous finding, in particular, makes this case an especially important one for this Court to review. First, the Fourth Circuit creates an unnecessary conflict between the Bankruptcy Code and the Internal Revenue Code. The Internal Revenue Code provides that donors to a DAF relinquish all right, title and interest in and to the donated assets which belong exclusively to the charity which "sponsors" the DAFs. 26 U.S.C. §§170, 4966(d)(2). That would mean that a donor equally relinquishes any right against NHF's directors and officers just as he or she does as to NHF. The Internal Revenue Code also specifies that NHF is the rightful owner of the funds. Yet, the Decision has the perverse effect of allowing a non-owner of charitable assets to sue those who are legally authorized to act for the charitable organization about how they manage the charity's own assets. If left to stand, the result would mean that donors would have their cake (by enjoying their tax deduction upon donation) and eat it too (by having ongoing claims against what NHF, the rightful owner, does with the funds they donate). This creates an awkward precedent that donors to the more than 1,000 charities that sponsor DAFs might try to exploit in other contexts, both inside and outside of bankruptcy. Additionally, donors outside the DAF context are also likely to rely on the Decision as giving them standing in multiple legal contexts to challenge how a charity uses donated funds.

While the Fourth Circuit's conflation of donors with creditors represents its starkest departure from

prior law, it is not the only troubling one in the Decision. The Decision disregards §1123(a)(1)'s requirement that one must have a valid claim or interest in order to share in distributions under a debtor's Plan. Here, the donors have no claim or interest. Yet, the Decision allows donors to potentially burden NHF indirectly by suing its directors and officers, even when such donors: (a) filed no claim; (b) filed a late claim; (c) filed a claim that was disallowed; or (d) settled, withdrew or otherwise resolved their claim.[13]

The vast majority of NHF's donors filed no claim, and therefore forfeited any claim they otherwise might have had. Thus, even though thousands of donors filed nothing, the Fourth Circuit suggests that it is inequitable to bar them from asserting claims indirectly against NHF by suing its directors and officers.[14]

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[13] The Fourth Circuit noted that in *A.H. Robins*, a Plan allowed those with late claims to pursue recovery against a settlement fund, although it agreed this is not required. (App.14) The key difference is that those claiming personal injury from use of the Dalkon Shield in *A.H. Robins*, had they timely filed, would have been "claimants" under §101(5).

[14] In *Anderson*, the Fourth Circuit held that those who filed claims late were simply not NHF's claimants. This suggests even the Fourth Circuit's recognition that those who filed nothing or who filed late lost any possible right. The Decision makes *Anderson* a nullity because any claims the Fourth Circuit there held could not be brought against NHF directly may now potentially be reasserted against NHF indirectly in suits against officers and directors.

Approximately 200 donors filed claims. These were disallowed by the Bankruptcy Court on the basis of the Internal Revenue Code. (RO¶21, App.72) No donor appealed this order or further pursued any claim. Yet, the Fourth Circuit holds that those whose claims were disallowed against NHF itself should be permitted to revive their rejected assertions against NHF indirectly by suing its directors and officers.

Those, like the Respondents, who were "Pending Donor Claims," either settled or withdrew their claims. They therefore have no further claim against NHF. Thus, the Decision means that those who already received consideration on their claim from NHF directly may now potentially recover from NHF a second time indirectly by suing its directors and officers.

The Fourth Circuit's recognition of "rights," "claims," and "merits" in donors offends both the Internal Revenue Code and the Bankruptcy Code and, standing alone, shows how important it is for this Court to grant review.

3. The Decision Cannot Be Reconciled With Section 1126(f)'s Conclusive Presumption That Unimpaired Classes Accepted A Plan.

The Decision also departs from controlling law as to how voting should proceed under a Plan. Section 1126(f) provides that:

> [A] class that is not impaired under a plan and each holder of a claim or interest in such a class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such claims from the holders of claims or interest of such claims is not required.

Id. (App.173) This "conclusive[ ] presum[ption]" leaves a court no authority to count unimpaired class members' votes as anything but an acceptance. But the Fourth Circuit determined that the Bankruptcy Court was "entitled" to presume the donor class's support because their claims were unimpaired." (App.13) But, it was more than "entitled" to so presume; it was obligated to do so. The Fourth Circuit concluded that despite §1126(f)'s clear language, because "the power to authorize non-debtor releases [under §105] is rooted in a bankruptcy court's equitable authority," the donor class should have been "given the opportunity to accept or reject the plan." (App.13) This Court recently, in *Law v. Siegel*, 134 S. Ct. 1188 (2014), held that a court could not rely on §105 to authorize something that is contrary to a specific Bankruptcy Code provision. Yet, the Fourth Circuit faults NHF for not doing in its Plan what §1126(f) forbids.

4. The Decision Mistakenly Rejects Continued Service As A "Substantial Contribution."

The Decision's application of *Dow Corning*'s "substantial contribution" factor also is erroneous and requires clarification.[15] This is especially true in light of the indemnity obligation here, as NHF indisputably bears the real economic impact each time its officers and directors are sued, as it must both advance costs of defense and pay any potential liability. Thus, where, as here, a Plan pays allowed claims in full, it serves only to prejudice a debtor by dooming Releases the debtor might otherwise require to continue operations.

The Sixth Circuit and many other courts that consider this factor have commonly done so where Plans, unlike here, do not promise full payment to creditors. Where creditors would otherwise not be fully paid, it makes sense for a court to suggest that third parties provide further funds for creditors in exchange for a Release. The concern that creditors might not be fully paid if a nondebtor is released is also why the Tenth Circuit held in *Western Real Estate* that Nondebtor Releases are contrary to §524(e). This concern does not exist here, because NHF's Plan fully pays all allowed claims. There is no financial contribution that the directors and officers could have made.

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[15] This factor is not a part of the *Railworks* test.

Lower courts that have considered the "substantial contribution" in the context of where a Plan fully pays allowed claims have held that officers' and directors' continued service is a "substantial contribution" that may support a Release. *See In re Mercedes Homes, Inc*., 431 B.R. 869, 881 (Bankr. S.D. Fla. 2009).

To hold that such "sweat equity" is insufficient, the Fourth Circuit relied on this Court's decision in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988). Yet, *Ahlers* is not a case where creditors were paid in full. It concerns an instance, unlike here, where a Plan made an exception to the absolute priority rule and where the debtor retained an equity interest in property while creditors *were not* fully paid. *Id*. at 203.

5. The Decision Creates Insuperable Problems For The Future Drafting Of Plans And For Courts And Litigants Generally.

Finally, the Decision creates insuperable practical problems for Plan proponents and for courts and other litigants in future bankruptcies.

Even before the Decision, Plan proponents faced uncertainty because of the varying tests employed by the Circuits. The Decision compounds that uncertainty by opening up challenges to Plans by non-creditors. The Decision does not suggest how a Plan proponent decides which non-creditors it must protect or what

"rights" or "interests" they must be given in a Plan. If one treats non-creditors as creditors, that will itself create problems under §1123. For example, to give those with no allowed claim the same rights as those who have an allowed claim violates §1123(a), which requires that classes in a Plan be treated similarly. It also is contrary to §1123(a)(4), which requires that one must have a claim or interest to receive a distribution. Therefore, those with rightful claims or interests may challenge the Plan as being unfair and in violation of the Bankruptcy Code.

Similarly, if non-creditors are allowed to vote on a Plan, their inclusion may cause the rejection of a Plan that a debtor's actual creditors support. The Fourth Circuit did not address how a "claim" of a donor who has no legal right or interest is to be estimated or counted for voting purposes.

The conundrum the Decision creates as to voting is particularly difficult if, as here, actual allowed claims are to be paid in full. If §1126(f) says such a class is "conclusively presumed" to vote for a Plan, but, relying on the Decision, a future court lets class members cast actual ballots to reject the Plan, which vote should the Bankruptcy Court accept?

Moreover, to allow those who filed no claims or waived their claims to potentially share in distributions is unfair to those who followed the rules. It is particularly unjust to give those with disallowed claims "a second and third bite" at the apple, as Judge Mitchell feared. Also, if a debtor must set aside

funds to provide distributions for non-claimants, this likely will dilute distributions available to pay true creditors and will make Plans harder to fund.

II. The Fourth Circuit Gave Short Shrift To The Importance Of Maintaining A Reorganized Debtor As A Going Concern, Despite This Court's Mandate In *Bank of America* And The Bankruptcy Code's Requirements.

Both Congress and this Court have recognized that preserving going concerns, such as NHF, is a primary policy underlying Chapter 11 of the Bankruptcy Code. In *Bank of America*, this Court held that a goal in Chapter 11 bankruptcies is "preserving going concerns." 526 U.S. 434, 453. Moreover, under §1129(a)(11), a plan must be feasible in order to be confirmed. "Feasibility" means that "confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan." *Id*. Courts have recognized that Nondebtor Releases should be enforceable when necessary to achieve this goal. As the Sixth Circuit stated in *Dow Corning*, "when a plan provides for the full payment of all claims, enjoining claims against a nondebtor so as not to defeat reorganization is consistent with the bankruptcy court's primary function." *Dow Corning*, 280 F.2d at 656. Yet, here, the Decision rejects a Release that is both essential to the reorganization because of an indemnity relationship and is fair to creditors.

This Court should grant review to make clear that Releases should be upheld in such circumstances. This case gives this Court the opportunity to clarify that Nondebtor Releases are permissible, thus overruling the present bar to such provisions in the Ninth and Tenth Circuits.

Courts in a number of Circuits have upheld Nondebtor Releases because without them, a Plan could not be confirmed and the debtor would fail after it reorganized. For example, in *Airadigm*, the Seventh Circuit upheld a non-consensual, Nondebtor Release of a third party's liability arising out of a debtor's reorganization because that third party was providing financing that the debtor otherwise could not obtain and, therefore, "absent [the released party's] involvement, the reorganization simply would not have occurred." *Id*. at 657. *See also Drexel Burnham Lambert Group*, 960 F.2d at 288-93 (released nondebtor contributed $1.3 billion to settlement fund to which securities claims were channeled); *A.H. Robins*, 880 F.2d at 702 (released nondebtors contributed substantial funding to settlement fund for mass tort claimants).

However, courts have recognized that Nondebtor Releases also may be vital for reasons other than being essential to funding. Numerous courts have enforced Nondebtor Releases where a debtor's indemnity obligation to a third party essentially made the debtor the "real party defendant" if the third party were sued. The Fourth Circuit explained why

Nondebtor Releases were appropriate in such circumstances in *A.H. Robins v. Piccinin*, 788 F.2d 994 (4th Cir. 1986):

> This "unusual situation" [justifying Nondebtor Releases] it would seem, arises where there is such identity between the debtor and a third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third party who is entitled to absolute indemnity by the debtor on account of any judgment that might result in the case. To refuse application of a statutory stay in that case would defeat the very purpose and intent of the statute.

Id. at 999; *see also Dow Corning*, 280 F.3d at 658 (holding that an indemnity obligation impacts both whether there is an identity of interests between the debtor and the released party and whether the Nondebtor Release is "essential" to the debtor's reorganization). Lower courts, too, have upheld Nondebtors Releases for claims that would trigger indemnification claims against the debtor "and thus impact the Debtors' reorganization." *Genco*, 513 B.R. at 271. As the Bankruptcy Court recently explained in *Genco*:

> To the extent that the third party releases are congruent with the indemnification obligations, and the Debtors would be liable for

> any liability imposed on such persons, third party releases are acceptable.

Id. (quoting *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2007)).

The Fourth Circuit agreed that NHF's "expansive indemnity obligation" established an identity of interests with its directors and officers, acknowledging that:

> A non-debtor release may be appropriate in such circumstances because a suit against the non-debtor may "in essence, [be] a suit against the debtor" that risks "deplet[ing] the assets of the estate." *NHF I*, 663 F.3d at 711 (quoting *In re Dow Corning*, 280 F.3d at 658).

(App.7) Each time NHF's officers and directors are sued, NHF is the real party defendant.

Where there is an indemnity arrangement, the *Dow Corning* test makes it a key question whether "the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor." *Dow Corning*, 280 F.3d at 658. Many of the other *Dow Corning* factors go to protecting a companion interest in the Chapter 11 case – the rights of creditors. In NHF's bankruptcy, there is no doubt that creditor's rights were adequately protected – as those with allowed claims stand to recover full payment of what they were owed, along with 4% interest. The common theme in decisions of all Circuits that allow

Nondebtor Releases is that a Nondebtor Release should be enforced when it is essential to the debtor's reorganization – such as where there is an indemnity relationship – yet fair to creditors' rights.

The only question then is whether the record permitted the original Bankruptcy Court's conclusion that the success of NHF's reorganization "hinge[d] upon it being free from indirect liability through suits against its officers and directors." The Fourth Circuit answered this in the negative, claiming the record failed to contain proof that donors would bring suits or what the costs of such suits would be. (App.9-12) But this is incorrect.

In its Decision, the Fourth Circuit affirmed the Bankruptcy Court's findings of fact on remand. These show definitively that onerous suits will be brought and will imperil NHF's ability to continue operations. These findings include that:

- NHF failed because of a single donor suit (RO¶¶14-15, App.71);
- Thousands of donors might sue if given the chance and there is a "near certainty" that "multiple donor lawsuits" would be filed absent the Releases (App.92-93);
- Each time a donor sues, NHF would have to advance defense costs (App.93).

The Bankruptcy Court on remand recognized that donor suits could "negatively impact" NHF's reorganization, finding specifically:

> Should the Release Provisions be excised from the Plan, there is a very real possibility that the officers and directors will be sued by the Donors, whose numbers run into the thousands. The officers and directors would then look to the Debtor for indemnification, which would include, among other things, an advancement of legal fees to pay their expenses in defending the Donor claims. . . . The real possibility – indeed, the near certainty – of multiple Donor lawsuits, coupled with the officers' and directors' right to indemnification and the advancement of legal expenses, could have a materially negative impact on the Debtor's ability to successfully complete its reorganization.

(RO, App.92-93)

Indeed, donors have already brought onerous suits. Respondents' California Action demonstrates the risk NHF faces. When the Bankruptcy Court ruled, it – unlike the Fourth Circuit – did not know of this Action, which seeks treble damages for RICO, among other theories. The Fourth Circuit erroneously concluded that the Bankruptcy Court, in sanctioning Respondents, had ordered the California Action dismissed. (App.10) Rather, it continues as to the directors and officers. Even in its preliminary stages, this Action has caused NHF to incur more than $1,000,000 of fees. The Fourth Circuit also minimized that this was a suit by "a single donor," forgetting that the suit was brought as a class action and continues on behalf of multiple donors. (App.10) Indeed,

both lower courts entered stays pending appeal because they concluded that the California Action posed irreparable harm to NHF. As the District Court explained:

> The California litigation also raises in more concrete form the prospect of additional consequence to NHF caused by claims being asserted against its officers and directors, which may not be reversible or adequately compensated in damages.

NHF v. Behrmann, No. 1:12-CV-1329 (E.D. Va.), Dkt. No. 47 at 48.

The Fourth Circuit also found that the Plan's Severability Clause meant that the Releases could not be essential (App.11-12), but this misunderstands the nature and legal effect of a severability clause. Numerous courts have held that the inclusion in a document of a severability clause does not mean that particular terms of a document are not essential. As the Tenth Circuit explained in *Eckles v. Sharman*, 548 F.2d 905 (10th Cir. 1977), "[t]he crucial question is whether the clauses to be severed are essential to the contract." *Id*. at 909.

When it initially ruled, the Fourth Circuit stated that it believed NHF had two "options" if onerous donor suits materialized – to reopen the Plan or to refile for bankruptcy. (App.35) Yet, §§1127 and 1144 forbid the reopening of the Plan. Therefore, on rehearing, the Fourth Circuit removed references to that option. Now the only "option" NHF is left with if

donor suits proceed would be to file for bankruptcy a second time. This is exactly what this Court said in *Bank of America* should not happen. 526 U.S. at 453.

This Court should accept review to make clear that a Nondebtor Release that is fair to creditors and essential to a debtor's reorganization is legally enforceable, and to provide clear guidelines for courts to make these determinations.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

October 23, 2014

Respectfully submitted,

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ON REHEARING

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1608

NATIONAL HERITAGE FOUNDATION, INCORPORATED,

Plaintiff-Appellant,

v.

HIGHBOURNE FOUNDATION; JOHN R. BEHRMANN; NANCY BEHRMANN,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:12-cv-01329-AJT-JFA; 09-10525-BFK; 09-01342-SSM)

Argued: May 14, 2014 Decided: July 25, 2014

Before WILKINSON, AGEE, and DIAZ, Circuit Judges.

Affirmed by published opinion. Judge Diaz wrote the opinion, in which Judge Wilkinson and Judge Agee joined.

ARGUED: David B. Goroff, FOLEY & LARDNER LLP, Chicago, Illinois, for Appellant. Glenn W. Merrick, G.W. MERRICK & ASSOCIATES, LLC, Centennial, Colorado, for Appellees. **ON BRIEF**: Erika L. Morabito, Rory E. Adams, FOLEY & LARDNER LLP, Washington, D.C., for Appellant. Daniel J. Schendzielos, COLORADO TRIAL LAWYERS & LEGAL SERVICES, LLC, Greenwood Village, Colorado, for Appellees.

DIAZ, Circuit Judge:

On remand following an earlier appeal in this case, a bankruptcy court ruled that the non-debtor release provision in National Heritage Foundation's Chapter 11 reorganization plan was unenforceable. The district court affirmed. On appeal to this court, NHF argues that the courts below erred, claiming that the facts and circumstances surrounding its bankruptcy are sufficiently unique to justify the release. Finding insufficient evidence to support NHF's contentions, we affirm.

I.

A detailed recitation of the facts underlying this case is contained in our previous opinion, *Behrmann v. National Heritage Foundation, Inc.*, 663 F.3d 704 (4th Cir. 2011) (*NHF I*). We recite only those facts relevant to this appeal.

NHF is a non-profit public charity[1] that administers and maintains Donor-Advised Funds. These are funds in which donors relinquish all right and interest in the assets they donate. The sponsoring charitable organization – in this case, NHF – owns and controls all of the donated assets, although donors retain the right to make non-binding recommendations regarding the use of the assets.

In 2009, NHF filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code after a state court entered a multimillion dollar judgment against it. After multiple revisions, the bankruptcy court approved NHF's Fourth Amended and Restated Plan of Reorganization (the "Plan"). The Plan contained a Non-Debtor Release Provision covering NHF; the Official Committee of Unsecured Creditors (the "Committee") and its members; any designated representatives of the Committee; and any officers, directors, or employees of NHF, the Committee, or their successors and assigns (collectively, the "Released Parties"). The Release Provision provided that the Released Parties

> shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to any party in interest who has filed a claim or who was given notice of the Debtor's Bankruptcy Case (the "Releasing Parties") for any act or omission

[1] In November 2011, the IRS revoked NHF's status as a section 501(c) public charity.

> before or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the operation of the Debtor's business, except to the extent relating to the Debtor's failure to comply with its obligations under the Plan.

J.A. 1059.[2]

Certain NHF donors – the appellees in this case – challenged the Plan's confirmation on the ground that the Release Provision was invalid. The district court affirmed the bankruptcy court's confirmation of the Plan.

On the first appeal, we vacated that portion of the district court's judgment affirming the Release Provision, holding that the bankruptcy court failed to make sufficient factual findings to support its conclusion that the Release Provision was essential. *See NHF I,* 663 F.3d at 712-13. Although we reiterated this circuit's longstanding rule that non-debtor releases may be enforced in appropriate circumstances,

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[2] The Plan also contained an Exculpation Provision, barring suits against the Released Parties for any acts or omissions in connection with the bankruptcy, and an Injunction Provision, enjoining suits in violation of either the Release or Exculpation Provision. The bankruptcy court upheld the Exculpation Provision, *see In re Nat'l Heritage Found., Inc.,* 478 B.R. 216, 234 (Bankr. E.D. Va. 2012), a decision that neither party challenged. It also approved the Injunction Provision, but only to the extent that it enforced the Exculpation Provision and not the Release Provision. *See id.* Based on our holding that the Release Provision is unenforceable, we find no error in that judgment.

we cautioned that they should only be approved "cautiously and infrequently." *Id.* at 712. To determine whether such circumstances exist, we directed the bankruptcy court to consider the six substantive factors enumerated in *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.),* 280 F.3d 648 (6th Cir. 2002). These include whether:

> (1) There is an identity of interests between the debtor and the third party . . . ; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization . . . ; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; [and] (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full.

Id. at 658. On remand, we instructed the bankruptcy court – "if the record permits it – to set forth specific factual findings supporting its conclusions" that the Release Provision in NHF's Plan was valid. *NHF I,* 663 F.3d at 713.

A different bankruptcy court judge considered the case on remand. That court gave the parties the option of reopening the record to present more evidence, but they declined to do so. Reviewing the then-existing record, the bankruptcy court made factual findings with respect to each of the *Dow Corning* factors. It concluded that only one factor – an identity

of interests between NHF and the Released Parties – clearly weighed in favor of NHF, and it declared the Release Provision unenforceable. *See In re Nat'l Heritage Found., Inc.,* 478 B.R. 216, 232 (Bankr. E.D. Va. 2012). The district court affirmed the bankruptcy court's ruling. *See Nat'l Heritage Found., Inc. v. Behrmann,* No. 1:12-cv-1329, 2013 WL 1390822, at *9 (E.D. Va. Apr. 3, 2013). NHF timely appealed.

II.

We review the legal conclusions of the bankruptcy court and district court de novo. *Gold v. First Tenn. Bank Nat'l Ass'n (In re Taneja),* 743 F.3d 423, 429 (4th Cir. 2014). Like the district court below, we review the bankruptcy court's factual findings for clear error. *Id.*[3]

[3] Relying on *Henry A. Knott, Co. v. Chesapeake & Potomac Telephone Co. of West Virginia,* 772 F.2d 78 (4th Cir. 1985), NHF argues that the district court should have reviewed the bankruptcy court's factual findings on remand de novo. In *Henry A. Knott,* we held that a de novo hearing may be required before a successor judge "if the case requires the trier of fact to make credibility determinations concerning the testimony of witnesses." *Id.* at 85. Here, however, there was only one witness, Janet Ridgely, and her credibility was not in dispute. Rather, both courts simply found her testimony insufficient to support the Release Provision even if fully credited. Given this, we see no reason why the district court was required to depart from the general rule that the bankruptcy court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." Fed. R. Bankr. P. 8013.

A.

Based on the record before us, we conclude that NHF has failed to carry its burden of proving that the facts and circumstances of this case justify the Release Provision. Like the courts below, we consider the evidence with respect to each *Dow Corning* factor in turn.

1.

Under the first *Dow Corning* factor, a court must consider whether there is an identity of interests – usually an indemnity obligation – between the debtor and the released parties. A non-debtor release may be appropriate in such circumstances because a suit against the non-debtor may, "in essence, [be] a suit against the debtor" that risks "deplet[ing] the assets of the estate." *NHF I,* 663 F.3d at 711 (quoting *In re Dow Corning,* 280 F.3d at 658).

We conclude that NHF has demonstrated an identity of interests between itself and the Released Parties. Under the terms of its bylaws, NHF must advance legal expenses and indemnify its officers and directors for "any action . . . in which such person may be involved by reason of his being or having been a director or officer of" NHF. J.A. 868. No security is required to ensure the covered parties repay NHF for any advanced expenses. *See also In re Nat'l Heritage Found.,* 478 B.R. at 227-28 (describing the scope of NHF's indemnification provisions). Such an

expansive indemnity obligation is sufficient to satisfy the first *Dow Corning* factor.

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The second *Dow Corning* factor required NHF to demonstrate that the Released Parties made a substantial contribution of assets to its reorganization. *NHF I,* 663 F.3d at 711. In effect, this factor ensures that in order for a Released Party to achieve that status, it must have provided a cognizable and valid contribution to the debtor as part of the debtor's reorganization.

None of the Released Parties in this case made any financial contribution to the reorganization. NHF nonetheless argues that its officers and directors satisfied this requirement by promising to continue serving NHF.

As an initial matter, there is no evidence in the record to support NHF's assertion that its officers and directors actually promised to continue serving NHF.[4] Even if such a promise had been made, we find no error in the district court's conclusion that it would not constitute a substantial contribution of assets in this case. As the bankruptcy court found, NHF's "officers and directors, all of whom are insiders, performed their duties either because they were paid

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to do so (in the case of the officers), or because they had a fiduciary obligation to do so (in the case of the directors)." *In re Nat'l Heritage Found.,* 478 B.R. at 229. Under these circumstances, the Released Parties did not provide meaningful consideration for their release from liability. *Cf. In re SL Liquidating, Inc.,* 428 B.R. 799, 804 (Bankr. S.D. Ohio 2010) (concluding that directors and officers did not make a substantial contribution when their "described efforts . . . [were] consistent with their preexisting fiduciary duties and job responsibilities"). The absence of such consideration weighs against NHF's Release Provision.

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The third *Dow Corning* factor also counsels against the Release Provision. To satisfy this factor, a debtor must demonstrate that the non-debtor release is "essential" to its reorganization, such that "the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor." *NHF I,* 663 F.3d at 711-12 (quoting *In re Dow Corning,* 280 F.3d at 658).

NHF primarily contends that the risk of litigation from its donors, whose numbers run in the thousands, renders the Release Provision essential, as NHF would likely have to indemnify its officers and directors for their legal expenses should such suits arise.

Although we are sympathetic to NHF's concern about the possibility of donor suits, the evidence does not suggest that its reorganization is doomed without the Release Provision. NHF has provided little to no evidence regarding the number of likely donor claims, the nature of such claims, or their potential merit. NHF's vice president, Janet Ridgely, stated that NHF insiders are concerned about donors bringing suit, but that is simply too vague to substantiate the risk of litigation. *Cf. In re Dow Corning Corp.,* 287 B.R. 396, 411 (E.D. Mich. 2002) (finding a release provision essential when more than 14,000 lawsuits had already been filed against a non-debtor).[5]

Nor does the fact that a prior judgment against NHF was, by itself, sufficient to trigger bankruptcy establish that donor litigation, should it materialize, would imperil NHF's reorganization. Based on the dearth of evidence in the record, we can only speculate as to the potential impact of any donor suits on NHF's financial bottom line.

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[5] We recognize that the Behrmanns, the appellees in this case, filed a fraud action against NHF and its officers and directors, notwithstanding a stay leaving the Release Provision in effect. But the mere fact that a single donor suit has been filed does not establish that NHF will face a flood of litigation without the Release Provision. We also note that the district court ordered the dismissal of the Behrmanns' action and required them to pay attorney's fees to NHF. *See In re Nat'l Heritage Found., Inc.,* ___ B.R. ___, 2014 WL 1783943, at *9-*10, *18-*19 (E.D. Va. May 5, 2014).

NHF also argues that the Release Provision is essential because its current officers and directors may refuse to serve without such a release. In support, it points to Ridgely's testimony that the continued service of NHF's officers and directors is critical to the reorganization, and that a fear of third-party suits "might render [them] unwilling to serve." J.A. 949.

We find no error in the bankruptcy court's finding that the risk of officer-and-director flight in this case is minimal. Although not irrelevant, Ridgely's statement is hardly conclusive evidence that NHF's officers and directors would leave without the Release Provision. And as the bankruptcy court noted, the risk of NHF's insiders "abandon[ing] ship" is particularly low, given that most of them are members of a single family. *In re Nat'l Heritage Found.*, 478 B.R. at 229.

The bankruptcy court also correctly found that the Release Provision itself provides little inducement for these individuals to stay. NHF's insiders have already been exposed to whatever liability they may have for their pre-petition conduct, and the release does not shield them from liability going forward. And even if NHF's officers and directors do leave, NHF has not suggested that it would face difficulty recruiting new personnel. *See id.* at 230-31.

If this failure of proof were not enough, the severability clause contained in NHF's Reorganization Plan cements our view that the Release Provision is

not essential. That clause provides that the Plan would remain in effect "[s]hould *any* provision in this Plan be determined to be unenforceable." J.A. 643 (emphasis added). As we have already concluded, such language "suggests that the plan would remain viable absent the Release Provision[ ]." *NHF I,* 663 F.3d at 714.

Under these circumstances, we do not believe NHF has carried its burden of demonstrating that the Release Provision is essential to its reorganization. This failure weighs strongly against the validity of the Release Provision.

4.

To satisfy the fourth *Dow Corning* factor, NHF was required to prove that the class or classes affected by the Release Provision overwhelmingly voted in favor of the Plan.[6] *Id.* at 712.

In this case, the Release Provision most directly impacted the class of individuals who made donations to NHF's Donor-Advised Funds (the "donor class"). Under applicable bankruptcy rules, the donor class's support for the Plan was presumed without a formal vote because, under its terms, donor claims were eligible for full payment with interest. NHF maintains

[6] Appellees argue that NHF has waived argument with respect to the last three *Dow Corning* factors because it did not address them below. As NHF would not prevail on the merits anyway, we need not resolve this question.

that the donor class's presumed support for the plan weighs in favor of the Release Provision, and that, regardless, the class's support for the Plan is irrelevant because its donors are not actually creditors.

We recognize that there is some uncertainty regarding whether an unimpaired class's presumed support for a reorganization plan is sufficient to satisfy this *Dow Corning* factor. As a legal matter, the bankruptcy court was entitled to presume the donor class's support because their claims were unimpaired. *See* 11 U.S.C. § 1126(f) ("[A] class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class . . . is not required."). But the power to authorize non-debtor releases is rooted in a bankruptcy court's equitable authority. *See Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 701 (4th Cir. 1989). Here, the equities weigh against NHF, as the class most affected by the Release Provision was not given the opportunity to accept or reject the plan. *Cf. In re Specialty Equip. Cos.,* 3 F.3d 1043, 1047 (7th Cir. 1993) (finding releases consensual and valid when "each creditor could choose to grant, or not to grant, the release irrespective of the vote of the class of creditors or interest holders of which he or she is a member," meaning that "a creditor who . . . abstains from voting may still pursue any claims against third-party nondebtors").

In any event, we need not resolve this question today. Even if NHF is correct, this factor only marginally weighs in its favor, and it would not alter our ultimate conclusion that NHF has failed to demonstrate that the circumstances warrant the Release Provision. Creditor support does not make up for the fact that most of the other *Dow Corning* factors weigh against enforcing the Release Provision.

5.

Under the fifth *Dow Corning* factor, we consider whether the debtor's reorganization plan provides a mechanism to consider and pay all or substantially all of the class or classes affected by the non-debtor release. *See NHF I,* 663 F.3d at 712. As the district court noted, "[t]his consideration has typically been used to justify release provisions where the reorganization plan includes a mechanism such as a dedicated settlement fund to pay the claims . . . of those affected by an injunction." *Behrmann,* 2013 WL 1390822, at *8; *see also In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 142 (2d Cir. 2005) ("Courts have approved nondebtor releases when . . . the enjoined claims were 'channeled' to a settlement fund rather than extinguished. . . .").

For example, we have upheld a release provision in a reorganization plan when the debtor created a separate fund to settle, among other things, untimely claims or those that otherwise failed to comply with applicable procedures. *See A.H. Robins Co.,* 880 F.2d

at 700-02. Although there is no per se requirement that a debtor "channel" claims, the absence of such a mechanism can weigh against the validity of a non-debtor release, especially when the result is that the impacted class's claims are extinguished entirely.

The absence of such a mechanism here weighs against the Release Provision. Any donor claims not filed or allowed during the bankruptcy proceedings have simply been extinguished. Thus, NHF's plan lacks an important element of the plan endorsed in *A.H. Robins* – "a second chance for even late claimants to recover." *Id.* at 702.

To be sure, NHF provided notice and opportunity for donors to file claims against it during the bankruptcy proceedings. But NHF has provided no evidence – in the form of expert testimony or otherwise – that this process adequately protected the donors' interests. NHF certainly did not encourage donors to participate in the bankruptcy process. *See, e.g.,* J.A. 503 (informing donors in the disclosure statement that NHF would object to any donor-filed claims and that "Donors are not creditors of the Debtor and will have no rights to vote or reject the Debtor's Plan or receive Distributions under the Plan"). This hardly strikes us as a bona fide effort to ensure the consideration of nearly all of the donor class's claims, and we agree with the district court's conclusion that this factor weighs against the Release Provision.

6.

The final substantive *Dow Corning* factor is whether the plan provides an opportunity for those who chose not to settle to recover in full. *NHF I,* 663 F.3d at 712.

Our analysis of this factor largely overlaps with the preceding factor. To that effect, we reiterate the import of NHF's failure to provide any mechanism to pay donor claims outside of the bankruptcy proceedings. As the bankruptcy court found, "the very purpose of the Release Provision[ ] is to . . . preclud[e] any recovery from third party sources outside of the Plan." *In re Nat'l Heritage Found.,* 478 B.R. at 232.

B.

Our review of the record shows that one factor – the possibility that NHF will have to indemnify its officers and directors for litigation expenses – weighs clearly in favor of the Release Provision. But NHF has failed to provide sufficient evidence that it faces a strong possibility of suits that would trigger its indemnity obligation, much less that such suits would threaten its reorganization. And an indemnity obligation is not, by itself, sufficient to justify a non-debtor release. If it were, "third party releases would be the norm, not the exception, in Chapter 11 cases." *Id.* at 232. Given the extraordinary breadth of this particular release, we are also troubled by NHF's failure to provide a mechanism outside of the bankruptcy process to satisfy donor claims.

In sum, we agree with the district court that NHF has failed to demonstrate that it faces exceptional circumstances justifying the enforcement of the Release Provision in its Reorganization Plan.

We emphasize that our decision is ultimately rooted in NHF's failure of proof rather than circumstance alone. A debtor need not demonstrate that every *Dow Corning* factor weighs in its favor to obtain approval of a non-debtor release. But, as we noted in *NHF I,* a debtor must provide adequate factual support to show that the circumstances warrant such exceptional relief, and NHF has failed to do so here.

III.

For these reasons, we affirm the district court's judgment.

AFFIRMED

FILED: July 25, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1608
(1:12-cv-01 329-AJT-JFA)
(09-10525-BFK)
(09-01342-SSM)

NATIONAL HERITAGE FOUNDATION, INCORPORATED

Plaintiff-Appellant

v.

HIGHBOURNE FOUNDATION; JOHN R. BEHRMANN; NANCY BEHRMANN

Defendants-Appellees

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

PUBLISHED

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Plaintiff-Appellant,

v.

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Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:12-cv-01329-AJT-JFA; 09-10525-BFK; 09-01342-SSM).

Argued: May 14, 2014 Decided: June 27, 2014

Before WILKINSON, AGEE, and DIAZ, Circuit Judges.

Affirmed by published opinion. Judge Diaz wrote the opinion, in which Judge Wilkinson and Judge Agee joined.

ARGUED: David B. Goroff, FOLEY & LARDNER LLP, Chicago, Illinois, for Appellant. Glenn W. Merrick, G.W. MERRICK & ASSOCIATES, LLC, Centennial, Colorado, for Appellees. **ON BRIEF**: Erika L. Morabito, Rory E. Adams, FOLEY & LARDNER LLP, Washington, D.C., for Appellant. Daniel J. Schendzielos, COLORADO TRIAL LAWYERS & LEGAL SERVICES, LLC, Greenwood Village, Colorado, for Appellees.

DIAZ, Circuit Judge:

On remand following an earlier appeal in this case, a bankruptcy court ruled that the non-debtor release provision in National Heritage Foundation's Chapter 11 reorganization plan was unenforceable. The district court affirmed. On appeal to this court, NHF argues that the courts below erred, claiming that the facts and circumstances surrounding its bankruptcy are sufficiently unique to justify the release. Finding insufficient evidence to support NHF's contentions, we affirm.

I.

A detailed recitation of the facts underlying this case is contained in our previous opinion, *Behrmann v. National Heritage Foundation, Inc.*, 663 F.3d 704 (4th Cir. 2011) (*NHF I*). We recite only those facts relevant to this appeal.

NHF is a non-profit public charity[1] that administers and maintains Donor-Advised Funds. These are funds in which donors relinquish all right and interest in the assets they donate. The sponsoring charitable organization – in this case, NHF – owns and controls all of the donated assets, although donors retain the right to make non-binding recommendations regarding the use of the assets.

In 2009, NHF filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code after a state court entered a multimillion dollar judgment against it. After multiple revisions, the bankruptcy court approved NHF's Fourth Amended and Restated Plan of Reorganization (the "Plan"). The Plan contained a Non-Debtor Release Provision covering NHF; the Official Committee of Unsecured Creditors (the "Committee") and its members; any designated representatives of the Committee; and any officers, directors, or employees of NHF, the Committee, or their successors and assigns (collectively, the "Released Parties"). The Release Provision provided that the Released Parties

> shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to any party in interest who has filed a claim or who was given notice of the Debtor's Bankruptcy Case (the "Releasing Parties") for any act or omission

[1] In November 2011, the IRS revoked NHF's status as a section 501(c) public charity.

> before or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the operation of the Debtor's business, except to the extent relating to the Debtor's failure to comply with its obligations under the Plan.

J.A. 1059.[2]

Certain NHF donors – the appellees in this case – challenged the Plan's confirmation on the ground that the Release Provision was invalid. The district court affirmed the bankruptcy court's confirmation of the Plan.

On the first appeal, we vacated that portion of the district court's judgment affirming the Release Provision, holding that the bankruptcy court failed to make sufficient factual findings to support its conclusion that the Release Provision was essential. *See NHF I,* 663 F.3d at 712-13. Although we reiterated this circuit's longstanding rule that non-debtor releases may be enforced in appropriate circumstances,

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[2] The Plan also contained an Exculpation Provision, barring suits against the Released Parties for any acts or omissions in connection with the bankruptcy, and an Injunction Provision, enjoining suits in violation of either the Release or Exculpation Provision. The bankruptcy court upheld the Exculpation Provision, *see In re Nat'l Heritage Found., Inc.,* 478 B.R. 216, 234 (Bankr. E.D. Va. 2012), a decision that neither party challenged. It also approved the Injunction Provision, but only to the extent that it enforced the Exculpation Provision and not the Release Provision. *See id.* Based on our holding that the Release Provision is unenforceable, we find no error in that judgment.

we cautioned that they should only be approved "cautiously and infrequently." *Id.* at 712. To determine whether such circumstances exist, we directed the bankruptcy court to consider the six substantive factors enumerated in *Class Five Nevada Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648 (6th Cir. 2002). These include whether:

> (1) There is an identity of interests between the debtor and the third party . . . ; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization . . . ; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; [and] (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full.

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A different bankruptcy court judge considered the case on remand. That court gave the parties the option of reopening the record to present more evidence, but they declined to do so. Reviewing the then-existing record, the bankruptcy court made factual findings with respect to each of the *Dow Corning* factors. It concluded that only one factor – an identity

of interests between NHF and the Released Parties – clearly weighed in favor of NHF, and it declared the Release Provision unenforceable. *See In re Nat'l Heritage Found., Inc.*, 478 B.R. 216, 232 (Bankr. E.D. Va. 2012). The district court affirmed the bankruptcy court's ruling. *See Nat'l Heritage Found., Inc. v. Behrmann,* No. 1:12-cv-1329, 2013 WL 1390822, at *9 (E.D. Va. Apr. 3, 2013). NHF timely appealed.

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[3] Relying on *Henry A. Knott, Co. v. Chesapeake & Potomac Telephone Co. of West Virginia,* 772 F.2d 78 (4th Cir. 1985), NHF argues that the district court should have reviewed the bankruptcy court's factual findings on remand de novo. In *Henry A. Knott,* we held that a de novo hearing may be required before a successor judge "if the case requires the trier of fact to make credibility determinations concerning the testimony of witnesses." *Id.* at 85. Here, however, there was only one witness, Janet Ridgely, and her credibility was not in dispute. Rather, both courts simply found her testimony insufficient to support the Release Provision even if fully credited. Given this, we see no reason why the district court was required to depart from the general rule that the bankruptcy court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." Fed. R. Bankr. P. 8013.

A.

Based on the record before us, we conclude that NHF has failed to carry its burden of proving that the facts and circumstances of this case justify the Release Provision. Like the courts below, we consider the evidence with respect to each *Dow Corning* factor in turn.

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is not essential. That clause provides that the Plan would remain in effect "[s]hould *any* provision in this Plan be determined to be unenforceable." J.A. 643 (emphasis added). As we have already concluded, such language "suggests that the plan would remain viable absent the Release Provision[ ]." *NHF I,* 663 F.3d at 714.

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To satisfy the fourth *Dow Corning* factor, NHF was required to prove that the class or classes affected by the Release Provision overwhelmingly voted in favor of the Plan.[6] *Id*. at 712.

In this case, the Release Provision most directly impacted the class of individuals who made donations to NHF's Donor-Advised Funds (the "donor class"). Under applicable bankruptcy rules, the donor class's support for the Plan was presumed without a formal vote because, under its terms, donor claims were eligible for full payment with interest. NHF maintains

[6] Appellees argue that NHF has waived argument with respect to the last three *Dow Corning* factors because it did not address them below. As NHF would not prevail on the merits anyway, we need not resolve this question.

that the donor class's presumed support for the plan weighs in favor of the Release Provision, and that, regardless, the class's support for the Plan is irrelevant because its donors are not actually creditors.

We recognize that there is some uncertainty regarding whether an unimpaired class's presumed support for a reorganization plan is sufficient to satisfy this *Dow Corning* factor. As a legal matter, the bankruptcy court was entitled to presume the donor class's support because their claims were unimpaired. *See* 11 U.S.C. § 1126(f) ("[A] class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class . . . is not required."). But the power to authorize non-debtor releases is rooted in a bankruptcy court's equitable authority. *See Menard-Sanford v. Mabey* (*In re A.H. Robins Co.*), 880 F.2d 694, 701 (4th Cir. 1989). Here, the equities weigh against NHF, as the class most affected by the Release Provision was not given the opportunity to accept or reject the plan. *Cf. In re Specialty Equip. Cos.,* 3 F.3d 1043, 1047 (7th Cir. 1993) (finding releases consensual and valid when "each creditor could choose to grant, or not to grant, the release irrespective of the vote of the class of creditors or interest holders of which he or she is a member," meaning that "a creditor who . . . abstains from voting may still pursue any claims against third-party nondebtors").

In any event, we need not resolve this question today. Even if NHF is correct, this factor only marginally weighs in its favor, and it would not alter our ultimate conclusion that NHF has failed to demonstrate that the circumstances warrant the Release Provision. Creditor support does not make up for the fact that most of the other *Dow Corning* factors weigh against enforcing the Release Provision.

5.

Under the fifth *Dow Corning* factor, we consider whether the debtor's reorganization plan provides a mechanism to consider and pay all or substantially all of the class or classes affected by the non-debtor release. *See NHF I,* 663 F.3d at 712. As the district court noted, "[t]his consideration has typically been used to justify release provisions where the reorganization plan includes a mechanism such as a dedicated settlement fund to pay the claims . . . of those affected by an injunction." *Behrmann,* 2013 WL 1390822, at *8; *see also In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) ("Courts have approved nondebtor releases when . . . the enjoined claims were 'channeled' to a settlement fund rather than extinguished. . . .").

For example, we have upheld a release provision in a reorganization plan when the debtor created a separate fund to settle, among other things, untimely claims or those that otherwise failed to comply with applicable procedures. *See A.H. Robins Co.,* 880 F.2d

at 700-02. Although there is no per se requirement that a debtor "channel" claims, the absence of such a mechanism can weigh against the validity of a non-debtor release, especially when the result is that the impacted class's claims are extinguished entirely.

The absence of such a mechanism here weighs against the Release Provision. Any donor claims not filed or allowed during the bankruptcy proceedings have simply been extinguished. Thus, NHF's plan lacks an important element of the plan endorsed in *A.H. Robins* – "a second chance for even late claimants to recover." *Id.* at 702.

To be sure, NHF provided notice and opportunity for donors to file claims against it during the bankruptcy proceedings. But NHF has provided no evidence – in the form of expert testimony or otherwise – that this process adequately protected the donors' interests. NHF certainly did not encourage donors to participate in the bankruptcy process. *See, e.g.,* J.A. 503 (informing donors in the disclosure statement that NHF would object to any donor-filed claims and that "Donors are not creditors of the Debtor and will have no rights to vote or reject the Debtor's Plan or receive Distributions under the Plan"). This hardly strikes us as a bona fide effort to ensure the consideration of nearly all of the donor class's claims, and we agree with the district court's conclusion that this factor weighs against the Release Provision.

6.

The final substantive *Dow Corning* factor is whether the plan provides an opportunity for those who chose not to settle to recover in full. *NHF I,* 663 F.3d at 712.

Our analysis of this factor largely overlaps with the preceding factor. To that effect, we reiterate the import of NHF's failure to provide any mechanism to pay donor claims outside of the bankruptcy proceedings. As the bankruptcy court found, "the very purpose of the Release Provision[ ] is to . . . preclud[e] any recovery from third party sources outside of the Plan." *In re Nat'l Heritage Found.,* 478 B.R. at 232.

B.

Our review of the record shows that one factor – the possibility that NHF will have to indemnify its officers and directors for litigation expenses – weighs clearly in favor of the Release Provision. But NHF has failed to provide sufficient evidence that it faces a strong possibility of suits that would trigger its indemnity obligation, much less that such suits would threaten its reorganization. And an indemnity obligation is not, by itself, sufficient to justify a non-debtor release. If it were, "third party releases would be the norm, not the exception, in Chapter 11 cases." *Id.* at 232. Given the extraordinary breadth of this particular release, we are also troubled by NHF's failure to provide a mechanism outside of the bankruptcy process to satisfy donor claims.

In sum, we agree with the district court that NHF has failed to demonstrate that it faces exceptional circumstances justifying the enforcement of the Release Provision in its Reorganization Plan.

We emphasize that our decision is ultimately rooted in NHF's failure of proof rather than circumstance alone. A debtor need not demonstrate that every *Dow Corning* factor weighs in its favor to obtain approval of a non-debtor release. But, as we noted in *NHF I,* a debtor must provide adequate factual support to show that the circumstances warrant such exceptional relief, and NHF has failed to do so here.

We also note that NHF is not without options should circumstances change – in particular, if damaging donor suits do materialize. For example, NHF can petition the bankruptcy court to reopen the case. *See* 11 U.S.C. § 350(b); Fed. R. Bankr. P. 5010; *see also Goodman v. Phillip R. Curtis Enters., Inc*., 809 F.2d 228, 232 (4th Cir. 1987) (noting that bankruptcy court jurisdiction "is specifically retained to modify a previously confirmed plan"). It can also file another petition for reorganization under Chapter 11.

At this point, however, NHF has not made the necessary showing to support the risk of donor litigation, nor has it carried its broader burden of justifying the non-debtor release in its Reorganization Plan.

III.

For these reasons, we affirm the district court's judgment.

AFFIRMED

FILED: June 27, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1608
(1:12-cv-01329-AJT-JFA)
(09-10525-BFK)
(09-01342-SSM)

NATIONAL HERITAGE FOUNDATION, INCORPORATED

Plaintiff-Appellant

v.

HIGHBOURNE FOUNDATION; JOHN R. BEHRMANN; NANCY BEHRMANN

Defendants-Appellees

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONAL HERITAGE FOUNDATION INC., Appellant, v. JOHN BEHRMANN, *et. al* Appellees.	No. 1:12-cv-1329 (AJT/JFA)

MEMORANDUM OPINION

National Heritage Foundation, Inc. (hereinafter "NHF" or "appellant") appeals the August 27, 2012, decision of the United States Bankruptcy Court for the Eastern District of Virginia [Doc. No. 1]. In that decision the Bankruptcy Court held that certain non-debtor release provisions of NHF's Fourth Amended Plan of Reorganization (the "Reorganization Plan" or the "Plan") were not warranted and severed those provisions from the Reorganization Plan. On appeal, NHF raises three issues:

> 1. Whether, on remand, the Bankruptcy Court overstepped the Fourth Circuit's mandate;
>
> 2. Whether the Bankruptcy Court erroneously concluded that the rejected releases were not essential to NFH's [sic] reorganizations, and

> 3. Whether the Bankruptcy Court otherwise "misconstrued undisputed record evidence and otherwise misapplied the law in rejecting the Releases. . . ."

See Appellant Br. at 1.

After reviewing the record, the Court finds and concludes that (1) the Bankruptcy Court did not exceed the mandate on remand; (2) the findings of fact that formed the factual basis for its decision were not clearly erroneous and are, in fact, fully supported by the record; and (3) applying the applicable law *de novo* to the factual findings of the Bankruptcy Court, the Release Provisions were not warranted as part of the Reorganization Plan.[1] The decision of the Bankruptcy Court is therefore AFFIRMED.

I. BACKGROUND

NHF is a Georgia non-profit public charity, exempt from taxation under Internal Revenue Code § 501(c)(3). Third Am. Disc. St. at 5. Members of the Houk family control all of NHF's officer positions and all but one of its board seats. Confirmation Hr'g Tr. I at 42. NHF's bylaws provide for indemnification of its directors and officers to the extent permitted by

[1] The Court also concludes that the Bankruptcy Court correctly stated the applicable law and that its decision to exclude the Release Provisions based on the application of that law to the facts, as it determined them, was not an abuse of discretion. *See* n.4 *infra* as to the standard of review applied to this appeal.

the Georgia Non-Profit Corporation Code. Before its bankruptcy filing, NHF managed net assets with a book value of $152 million and had 17 full-time employees. *Id.* at 46, 54; Third Am. Discl. St. at 5. Relevant to this appeal, NHF administered and maintained what are called, under the applicable tax laws, Donor Advised Funds ("DAFs"). Third Am. Discl. St. at 5. DAFs are funds owned and controlled by a sponsoring charitable organization, in this case NHF, for the purpose of receiving charitable contributions from a particular donor or group of donors. *See* 26 U.S.C. § 4966(d)(2). When a donor contributes to a particular DAF, the donor must relinquish all right, title, and interest in the assets, in exchange for a 100% dollar for dollar tax deduction at the time the donation is made. *Id.* The donor, however, may make non-binding recommendations with respect to the distribution or investment of the amounts held in the DAF. *Id.* Prior to its Chapter 11 filing, NHF sponsored and maintained DAFs from more than 9,000 donors (collectively "the Donors"). Confirmation Hr'g Tr. I. at 96. NHF also entered into approximately 114 charitable gift annuity contracts totaling approximately $12 to $15 million in total annuity obligations and, at the time of the Chapter 11 filing, owed approximately $1.64 million in annual annuity payments to the annuitants and their spouses (collectively the "Annuitants"). *In re Nat'l Heritage Found., Inc.,* 478 B.R. 216, 219-20 (Bankr. E.D. Va. 2012).

On January 24, 2009, NHF filed for Chapter 11 Bankruptcy after experiencing difficulties in posting

an appeal bond to prevent execution upon a $6 million Texas state court judgment (the "Mancillas Judgment"). *Id.* at 220. Hundreds of claims were filed, nearly all of which were either claims by Donors or claims by Annuitants.[2] Among the claimants were the appellees John R. and Nancy Behrman [sic] and their affiliated foundation, The Highbourne Foundation and Dolores Anderson and her foundation, The Dodie Anderson Foundation (collectively "the appellees"). *Id.* at 220-21.[3]

On October 13, 2009, NHF filed the Reorganization Plan, which included certain nondebtor release provisions and injunction provisions (collectively the "Release Provisions"), as well as exculpation provisions. *See Behrmann v. Nat'l Heritage Found.,* 663 F.3d 704, 707 (4th Cir. 2011). In essence, the Release Provisions prevent claimants from asserting any

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[2] Overall, 343 Proofs of Claim were filed, totaling approximately $51.5 million, which included one secured bank claim in the amount of approximately $7.5 million, the Mancillas' judgment claim in the amount of approximately $6 million, claims filed by Donors and claims filed by Annuitants. *See In re Nat'l Heritage Found., Inc.,* 478 B.R. at 219-20.

[3] NFH [sic] objected to all of the Donor Claims on the grounds that the Donors were not creditors; and the Bankruptcy Court sustained some but not all of NFH's [sic] objections to the Donor Claims. NHF entered into a settlement with the Behrmanns before an adjudication of NHF's objections to their claim and the Bankruptcy Court disallowed Anderson's claim as untimely. *Id.* at 219-220. The Court was advised during oral argument that all of the other Donors' claims filed in the Bankruptcy Court and objected to by NHF were settled. Bankr. Appeal Hr'g Tr. at 86.

claims, other than those relating to the administration of the Reorganization Plan, against NHF, the Official Committee of Unsecured Creditors, and certain other persons closely connected with NHF or the Committee, such as NHF's officers and directors. *Id.* at 707.

The Bankruptcy Court conducted a confirmation hearing with respect to the Reorganization Plan on October 15, 2009. The only witness at the confirmation hearing was Janet Ridgely, a member of the Houk family. She testified that the Release Provisions were essential to a successful reorganization. Specifically, Ridgley asserted that (1) the Reorganization Plan and NHF's bylaws required the debtor to indemnify the officers and directors for liabilities arising out of lawsuits filed against them related to acts taken in their official capacities; (2) the officers and directors were concerned about the possibility of litigation against them related to such acts; (3) NHF's officers and directors might be unwilling to continue to serve after confirmation of NHF's proposed plan of reorganization absent the Release Provisions; and (4) retaining the officers and directors was essential to NHF's success as a reorganized debtor. Confirmation Hr'g Tr. I at 60-64; *see also Behrmann,* 663 F.3d at 707-08; *In re Nat'l Heritage Found.,* 478 B.R. at 222-23. Ridgely also testified that none of the officers had come forward to say that they would not serve absent the Release Provisions. Confirmation Hr'g Tr. I at 63.

Over the appellees' objections, the Bankruptcy Court entered a Confirmation Order on October 16,

2009, that approved and adopted, in large measure, the proposed Release Provisions as part of the Reorganization Plan. The Confirmation Order provides, in pertinent part:

> *Releases and Discharges.* The releases, exculpation, and injunction provisions described in Section 7.10, 7.20, and 7.21 of the Plan are essential to the Debtor's reorganization efforts and appropriate given the Debtor's unique circumstances. Each of the discharge, release, indemnification and exculpation provisions set forth in the Plan: (i) is within the jurisdiction of the Court under 18 U.S.C. §§ 1334(a), (b), and (d); (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 transactions incorporated into the Plan; (iv) confers material benefit on, and is in the best interest of, the Debtor, its Estates and their creditors; (v) is important to the overall objectives of the Plan to finally resolve all claims among or against the parties-in-interest in Debtor's case with respect to Debtor's organization, capitalization, operation and reorganization; and (vi) is consistent with sections 105, 1123, 1129 and other applicable provisions of the Bankruptcy Code.

Reorganization Plan at 15-16.[4]

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[4] The Release, Injunction, and Exculpation Provisions were amended in accordance with the Bankruptcy Court's rulings at the confirmation hearing and provide as follows:

(Continued on following page)

7.19 Release. On the Effective Date, the Debtor, Reorganized Debtor, the Committee, the members of the Committee and their designated representatives in their capacity as such, any such parties' respective current (i.e., as of the Confirmation Date) officers, directors or employees, and any of such parties' successors and assigns (the "Released Parties") shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to any party in interest who has filed a claim or who was given notice of the Debtor's Bankruptcy Case (the "Releasing Parties") for any act or omission before or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the operation of the Debtor's business, except to the extent relating to the Debtor's failure to comply with its obligations under the Plan. Notwithstanding the foregoing, nothing contained herein shall be deemed to be a release by the Debtor or Reorganized Debtor of any of the Causes of Action retained by the Debtor pursuant to the Plan, including, without limitation, the Causes of Action described on Exhibit C to the Disclosure Statement.

7.20 Injunction. The satisfaction, releases, and discharge pursuant to Article VII of this Plan shall also act as an injunction against any Person commencing or continuing any action, employment of process, or act to collect, offset, or recover any claim or cause of action satisfied, released or discharged under this Plan to the fullest extent authorized or provided by the Bankruptcy Code, including, without limitation, to the extent provided for or authorized by sections 524 and 1141 thereof.

Except as provided in this Plan or as expressly approved by the Reorganized Debtor, the Releasing Parties (as defined in Section 7.19) shall be precluded and enjoined from asserting against the Reorganized Debtor, the Estate or the Reorganized Debtor's Assets,

(Continued on following page)

Several donors appealed the Confirmation Order to this Court, which affirmed the Order of the Bankruptcy Court. *Behrmann v. Nat'l Heritage Foundation,* 1:10-cv-40 (E.D. Va. Aug. 17, 2010). Those donors then appealed to the Fourth Circuit, which vacated the judgment and remanded the case to the Bankruptcy Court for further proceedings, holding that the Bankruptcy Court's factual findings were insufficient to determine on appeal whether the

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> any other or further Claim based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date.
>
> 7.21 Exculpation. The Released Parties shall have no liability to any of the Releasing Parties (as defined in Section 7.19) for any act taken or omission made in connection with, or arising out of, the Bankruptcy Case, the Disclosure Statement, this Plan or the formulation, negotiation, preparation, dissemination, implementation or the administration of this Plan, any instrument or agreement created or entered into in connection with this Plan, any other act taken or omitted to be taken in connection with, or in contemplation of, any of the restructuring or other transactions contemplated by this Plan, and the property to be distributed or otherwise transferred under this Plan; unless such person obtains the prior approval of the Bankruptcy Court to bring such a claim. Nothing in this Section 7.21 or elsewhere in this Plan shall release, discharge or exculpate any non-Debtor party from (a) any claim owed to the United States government or its agencies, including any liability arising under the Internal Revenue Code or criminal laws of the United States, or (b) any claim of any Claimant except as expressly set forth herein.

Id. at 27-28.

Release Provisions should have been approved. *See Behrmann,* 663 F.3d at 713. Specifically, the Fourth Circuit ruled as follows:

> Because the record does not allow us to assess – under any standard of review – whether NHF's circumstances entitle it to the benefit of the Release Provisions, we must vacate the district court's judgment and remand the case to allow the bankruptcy court – *if the record permits it* – to set forth specific factual findings supporting its conclusions."

Id. (emphasis added). More specifically, the Fourth Circuit "commended" to the Bankruptcy Court the factors outlined in *Class Five Nev. Claimants v. Dow Corning* (*Dow Corning*), 280 F.3d 658 (6th Cir. 2002) and *In re Railworks Corp.,* 345 B.R. 529, 536 (Bankr. D. Md. 2006) when considering whether to approve the nondebtor releases as part of the final plan of reorganization. *Behrmann,* 663 F.3d at 712 ("We find the *Dow Corning* and *In re Railworks Corp.* factors instructive and so commend them to the bankruptcy court when considering whether to approve nondebtor releases as part of a final plan of reorganization.").

Following remand, the Bankruptcy Court held a status conference on March 6, 2012, at which time it gave the parties the option of introducing new evidence at a supplemental confirmation hearing. The parties stipulated, however, that the Bankruptcy Court could, and should, make its findings of fact and conclusions of law based on the existing record as it

stood at the conclusion of the confirmation hearing held on October 15, 2009. *See* Hr'g Tr. March 6, 2012 at 3-7. Following a thorough and reasoned analysis of the *Dow Corning* and *In re Railworks* factors, the Bankruptcy Court determined that the record did not support including in the Reorganization Plan the nondebtor release provisions in Section 7.19 and the corresponding injunction provision in Section 7.20. *In re Nat'l Heritage Found,* 478 B.R. at 232.[5] It did,

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[5] *Dow Corning* identified the following seven factors to be considered when analyzing non debtor release provisions:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

280 F.3d at 658 (citations omitted). *In re Railworks* looked at the following factors

> (1) overwhelming approval for the plan; (2) a close connection between the causes of action against the third party and the causes of action against the debtor; (3) that the injunction is essential to the reorganization;

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however, uphold the exculpation provisions in Section 7.21 and the corresponding injunction provision in Section 7.20. *Id.* at 234.

II. STANDARD OF REVIEW

On appeal, the district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings." Fed. R. Bankr. P. 8013. This Court "review[s] the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error." *In re Hartford Sands Inc.,* 372 F.3d 637, 639 (4th Cir. 2004); *see also* Fed. R. Bankr. P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous."). "In cases where the issues present mixed questions of law and fact, the Court will apply the clearly erroneous standard to the factual portion of the inquiry and *de novo* review to the legal conclusions derived from those facts." *In re Phinney,* 405 B.R. 170, 175 (E.D.

> and (4) that the plan of reorganization provides for payment of substantially all of the claims affected by the injunction.

345 B.R. at 536. The parties agree with the Bankruptcy Court's conclusion that "[t]he four-factor test employed in *Railworks* . . . is basically a shortened version of the seven-factor test in *Dow Corning*. *In re Nat'l Heritage Found.,* 478 B.R. at 227.

Va. 2009) (citing *Gilbane Bldg. Co. v. Fed. Reserve Bank,* 80 F.3d 895, 905 (4th Cir. 1996)).[6]

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[6] There are two issues with respect to the applicable standard of review, one raised by NHF and one raised by the Fourth Circuit. First, NHF contends that because now retired Judge Mitchell, not Judge Kenny who issued the decision under review, presided over the original confirmation hearing, and Judge Kenny on remand acted solely on the basis of the written record pertaining to the original confirmation hearing, his factual findings are entitled to no deference and must be reviewed *de novo.* The Court concludes that the appropriate standard of review is the clearly erroneous standard as to factual findings. Nevertheless the Court has reviewed the record in detail and affirms the Bankruptcy Court's findings of fact under either standard.

Second, the Fourth Circuit left open whether a bankruptcy court's decision to approve or reject the Release Provisions should be viewed under a *de novo* standard, as the appellees argued before the Fourth Circuit (viewing as a legal issue whether the Reorganization Plan as approved satisfies the requirements of the Bankruptcy Code), or under an abuse of discretion standard generally applicable to the equitable powers the Bankruptcy Court was exercising, as NHF argued before the Fourth Circuit. *See Behrmann,* 663 F.3d at 708-09. The parties have not raised or briefed this issue in connection with this appeal from the Bankruptcy Court's decision on remand. Nevertheless, the Court has considered *de novo* whether the Bankruptcy Plan, as approved, satisfies the requirements of the Bankruptcy Code and affirms the decision of the Bankruptcy Court based on that *de novo* review, including the application of law to the factual findings of the Bankruptcy Court. This affirmance under that standard of review would, perforce, require affirmance under an abuse of discretion standard.

III. ANALYSIS

A. The Bankruptcy Court Properly Discharged its Obligations under the Fourth Circuit's Mandate

NHF first argues that the Bankruptcy Court exceeded its mandate because "[t]he Fourth Circuit did not ask the [Bankruptcy Court] to revisit the law that the Original Bankruptcy Court applied. . . ." Rather, according to NHF, the Fourth Circuit's mandate was limited to making "sufficient findings of fact that support the Releases, if the record permits[,]" and the Bankruptcy Court violated that mandate when it concluded, contrary to its original decision, that the Releases were not warranted. Appellant Br. at 15. The Court has reviewed *de novo* whether the Bankruptcy Court exceeded the Fourth Circuit's mandate and concludes that NHF's position is without merit.

In deciding to remand the case to the Bankruptcy Court, the Fourth Circuit recognized that the Bankruptcy Court, without explicitly saying so, based its decision on the *Dow Corning* factors. *Behrmann,* 663 F.3d at 712 ("It [the Bankruptcy Court] clearly considered the case in deciding whether to approve the Release Provisions."). The Fourth Circuit concluded, however, that " . . . the bankruptcy court's ultimate decision to grant equitable relief lacks adequate factual support." *Id.* It continued:

> Put simply, to conclude, as the bankruptcy court did, that the Release Provisions (1) were

> "essential" to NHF's reorganization and appropriate given NHF's "unique circumstances;" (2) were an "essential means" of implementing the confirmed plan; (3) were an "integral element" of the transactions contemplated in the Confirmed Plan; (4) conferred a "material benefit" on NHF, its bankruptcy estate and its creditors; (5) were "important" to the plan's overall objections; and (6) were "consistent" with applicable provisions of the Bankruptcy Code, is meaningless in the absence of specific factual findings explaining why this is so. Indeed, without more, the court's conclusions could apply just as well to any number of reorganizing debtors. Because the present record does not allow us to assess – under any standard of review – whether NHF's circumstances entitle it to the benefit of the Release Provisions, we must vacate the district court's judgment and remand the case to allow the bankruptcy court – *if the record permits it* – to set forth specific factual findings supporting its conclusions.

Behrmann, 663 F.3d at 712-13 (emphasis added). Thus, on remand, the Bankruptcy Court was charged with determining whether the record permitted specific findings of fact sufficient to include the third party releases and exculpations in the Reorganization Plan. In other words, the Bankruptcy Court was obligated to review the record and articulate, if it could, why the extraordinary and "dramatic measure" of nondebtor release provisions was warranted based on this record. *See Dow Corning,* 280 F.3d at 658. The

Bankruptcy Court, after giving the parties an opportunity to supplement the record, examined the record and concluded that it could not make factual findings sufficient to warrant the inclusion of such provisions. It then acted in the only way it could, consistent with that determination – it disallowed those provisions and severed them from the Reorganization Plan. Accordingly, the Court finds and concludes that the Bankruptcy Court complied with the Fourth's Circuit's mandate on remand.[7]

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[7] The logic of NHF's argument that the Bankruptcy Court exceeded its mandate is less than clear. On the one hand, NHF concedes that the Fourth Circuit "left open the possibility that the record might not support the Releases." Appellant Reply Br. at 4. On the other hand, it appears to argue that the Bankruptcy Court was restricted to finding only those facts that supported the original decision approving the Release Provisions. *See* Appellant Br. at 24-26. Left unexplained is how the Bankruptcy Court's inability to find facts sufficient to support the Release Provisions would not necessarily result in the Bankruptcy Court's refusal to include those provisions in the Reorganization Plan. In any event, the Court agrees with the Bankruptcy Court that "[t]he phrase 'if the record permits' [in the Fourth Circuit's opinion]. . . . surely implied some discretion on the part of this Court[ ]" and that "[t]he [Bankruptcy] Court was not asked to blindly approve the release and exculpation provisions." Order Granting Stay, Doc. No. 1039 at 2. The Court has no doubt that the Fourth Circuit was remanding the case for more fact finding and that the Bankruptcy Court had discretion to approve or invalidate the releases after completing its duties. *See Behrmann,* 663 F.3d at 7113 (remanding "to allow the bankruptcy court – if the record permits it – to set forth specific factual findings supporting its conclusions.").

B. The Bankruptcy Court Did Not Err in Concluding that the Release Provisions Were Not Essential to the Reorganization Plan

NHF argues that the Bankruptcy Court erred in concluding that the Release Provisions were not essential to the Reorganization Plan. NHF's position is based on two contentions: (1) absent the Release Provisions, NHF's indemnification obligations, found in its bylaws, would cause a reorganized NHF to fail; and (2) the directors and officers would refuse to serve if the Release Provisions were severed from the Reorganization Plan.[8] In support of these contentions, NHF argues that the Bankruptcy Court "acknowledged record facts that established this factor [that the Releases were essential], but improperly disregarded such facts in favor of speculation made by a law student in a 20-year old note and its own unfounded assumptions."[9] Appellant Br. at 15. NHF

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[8] The Reorganization Plan can survive the invalidation of the Release Provisions. Section 12.2 provides:

> *Severability.* Should any provision of this Plan be determined to be unenforceable, that determination shall in no way limit or affect the enforceability and operative effect of any other provision of this Plan. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of this Plan, as it may be altered or impaired in accordance with the foregoing, is valid and enforceable pursuant to its terms.

Reorganization Plan at 23.

[9] Elsewhere, in connection with its third grounds for appeal based on the *Dow Corning* factors, NFH [sic] argues that

(Continued on following page)

claims that these "record facts" include (1) that absent the releases, NHF's 9000 donors "are likely to bring multiple suits against the Directors and Officers;" and (2) that because of NHF's indemnification obligations, these claims could "easily jeopardize NHF's continued operation." Appellant Br. at 15. NFH [sic] contends that these facts alone "should have shown that the 'essential' prong had been satisfied." *Id.* NHF claims that the Bankruptcy Court

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because of NHF's indemnification obligations, there is an "identity of interests" between NHF and the persons released under the Release Provisions and that this identity of interests, "standing alone," demonstrates the necessity of the Release Provisions. Appellant Br. at 26. This position is substantially identical to NHF's position that because of its indemnification obligations, the Release Provisions are "essential" to the Reorganization Plan; and the Court rejects its "identity of interests" position for the same reasons it rejects its claim that the Release Provisions are "essential." The Court notes in this regard that the Bankruptcy Court recognized such an identity of interests arising out of NHF's indemnity and advancement obligations to its officers and directors but also correctly concluded that this identity of interest was not sufficient in and of itself to justify those Release Provisions. *See In re Nat'l Heritage,* 478 B.R. at 227. As the Fourth Circuit made clear, identity of interests is only one factor under *Dow Corning,* and is not dispositive in this case. *See Behrmann,* 663 F.3d at 712 ("[W]e are satisfied to leave to a bankruptcy court the determination of which factors may be relevant in a specific case. . . ."). Again, this record does not place NHF in a position relative to its officers and directors any different from any corporation with a duty to indemnify its officers and directors. NHF has clearly failed to demonstrate any "unusual circumstances" that would justify the Release Provisions. *See In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 143 (2d Cir. 2005).

erred when it ignored these "facts" and instead concluded that NHF's officers and directors would continue to serve, even without the Releases, based, not on the record, but on opinions contained in a law review note and its own unsupported speculation concerning the effect of the Houk family ties shared among the officers and directors. *Id.* at 15-16. The Court finds these contentions without merit.[10]

First, NFH [sic] overstates the record evidence as to the likelihood of lawsuits and the effects of such lawsuits on NFH [sic]. In this regard, there is no evidence in the record that NHF's officers and directors are facing or would, in fact, face claims that would trigger indemnification obligations on the part of NHF so onerous as to threaten the prospects of a successful reorganization. For example, there is nothing in the record concerning how many claimants, if any, have threatened litigation, what those potential claims might be and the financial magnitude of any such claims, to what extent any claims would be time barred, the litigation costs associated with such claims, the insurance coverage available for such claims, or how any such claims might impact continued operations. Moreover, NHF's unsupported contention that its reorganization would fail without

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[10] NHF also contends that the Bankruptcy Court improperly considered evidence that undercuts its position. In essence, this is a variation of its position on the scope of the mandate and the Court rejects it for the same reasons that it rejects NHF's position in that regard.

the Release Provisions is effectively foreclosed by the Fourth Circuit's opinion:

> NHF has also failed to demonstrate how the relief requested by [NHF] would jeopardize the success of the Confirmed Plan. On this point, NHF argues that it could incur substantial litigation costs in defending its directors and officers against claims brought by dissatisfied donors that would threaten its ability to continue operations. However, here NHF merely parrots certain conclusions of the bankruptcy court, for example, that the Release Provisions are "important to the overall objectives of the Plan," and we have already noted that such conclusions lack adequate factual support. We also note that the Confirmed Plan expressly provides that any clause may be severed should it be determined to be unenforceable, which suggests that the plan would remain viable absent the Release provisions.

Behrmann, 636 [sic] F.3d at 713-14. Despite this glaring defect that the Fourth Circuit identified in the factual record, and its obvious centrality to the appropriateness *vel non* of the Release Provisions, NHF failed to offer on remand any additional evidentiary support for its position. Rather, NHF relies exclusively, as it did on appeal to the Fourth Circuit, on the argument that the Release Provisions are warranted based on the sheer number of donors who theoretically might bring claims. However, the Court finds and concludes that, without more information

on the actual amount and nature of potential claims, the number of donors alone provides insufficient factual support for the Court to conclude the Release Provisions are "essential." *See Behrmann,* 663 F.3d at 713. There is simply nothing in the record that would distinguish NHF's concerns over its indemnification obligations to its officers and directors from those of any company in bankruptcy. *See In re SL Liquidating, Inc.,* 428 B.R. 799, 803 (Bankr. S.D. Ohio 2010) (finding insufficient support for releases, where the proffered justification "could apply just as well to any number of reorganizing debtors" and that "it is not unusual for there to exist a claim against a corporation's directors and officers, when the corporation has filed for bankruptcy. Were we to adopt the Debtor's position, requests for non-consensual third party releases may become the norm.").

Nor is there sufficient factual support for the claim that without the Releases, the corporate officers and directors would be unwilling to serve. There was no evidence at the confirmation hearing that any officer or director had made the decision not to serve without the Release Provisions. The only evidence concerning the officers and directors' actual intentions was the testimony of one of the Houk family members, Janet Ridgely, that the officers and directors were concerned about the possibility of litigation against them and that they *might* be unwilling to serve absent the Release Provisions. However, she also testified that no officers or directors, almost all of whom are members of the Houk family, stated an

intention to leave. Nor was any evidence presented supporting NHF's assertion that the officers and directors "plainly have other options" for employment, or to explain how resignation would somehow shield them from liability already incurred.[11] NFH's [sic] contention is also at odds with NFH's [sic] approval of the Reorganization Plan, which continues even were the Release Provisions severed, *see* Reorganization Plan at 23; and also NFH's [sic] position that the officers and directors have contributed substantial assets because they intend to continue providing services. *See* Appellant Br. at 39. As with its other contentions, the record does not establish that NHF's exposure with respect to potential claims is "unique," and its concerns over the retention of its officers and directors "could apply just as well to any number of reorganizing debtors." *Behrmann,* 663 F.3d at 713. For all of these reasons, the record is insufficient to demonstrate that the Release Provisions were essential to NHF's efforts to reorganize.[12]

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[11] NHF contends that "[t]he remand court relied on opinions in a law review note to trump undisputed record facts." Appellant Br. at 35. In reality, the Bankruptcy Court merely referenced that article as characterizing a position such as that taken by NHF as the "throw in the towel" theory. *See* Peter M. Boyle, *Non Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy,* 61 Fordham L. Rev. 421, 447 (1992). It is clear from the record that the Bankruptcy Court drew its own conclusions based on the evidence before it.

[12] Given the Court's conclusion with respect to the scope of the Fourth Circuit mandate, the Court also concludes that the Bankruptcy Court did not improperly consider evidence outside

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C. The Bankruptcy Court Did Not Err as to the Remaining *Dow Corning* Factors

NFH [sic] finally contends that in addition to its conclusion that the Release Provisions were not essential to the Reorganization Plan, the Bankruptcy Court erred in applying the *Dow Corning* factors. With respect to those factors, the Bankruptcy Court summarized as follows its detailed findings of fact pertaining to the appropriateness of including the Release Provisions in the Reorganization Plan:

> We are, then faced with the situation where (and the Court so finds): (a) the officers and directors are potentially exposed to substantial liabilities, for which they will be entitled to assert claims for indemnification against the Debtor for any damages that might be awarded to the donors, and the advancement of fees, thereby putting the feasibility of the reorganization potentially at risk; (b) it is unlikely that the officers and directors will leave *en masse,* solely because of the assertion of Donor claims; (c) the officers and directors are not contributing anything financially toward the reorganization; (d) there is no support from the affected Donor class of disallowed claims; (e) there is no mechanism within the Plan for Donors to be paid anything; and (f) there is no ability for the Donors to recover anything outside of the Plan

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of the Fourth Circuit's mandate when it determined that the Release Provisions were not essential to reorganization.

> if the Plan Release Provisions remain in place.

Id. at 232. Based on these findings, the Bankruptcy Court then concluded:

> The single factor in favor of the Release Provisions – the potential for an obligation to indemnify the officers and directors – cannot by itself justify the Release Provisions. If it did, then third-party releases would be the norm, not the exception. This would contravene the now universally accepted proposition that third party releases are to be granted only in exceptional cases. The Court concludes on balance, the Release Provisions are not justified under the circumstances of this case.

Id. (internal citations omitted). NFH [sic] claims that these findings and conclusions "misconstrued both the record facts and the applicable law, leading to an erroneous result." Appellant Br. at 16. More specifically, NHF claims that these findings and conclusions run afoul of the *Dow Corning* factors on which they are based.[13]

The Court has reviewed the mixed issues of fact and law presented by these remaining challenges and

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[13] The Court has previously discussed the record as it pertains to whether the indemnification obligations make the Release Provisions essential, including the impact on the Reorganization Plan and the willingness of the officers and directors to continue to serve without the Release Provisions.

finds that the Bankruptcy Court's findings of fact are not clearly erroneous; indeed, those findings are fully supported by the record. The Court also concludes that after applying *de novo* the applicable law to the facts, as found by the Bankruptcy Court, the Bankruptcy Court's decision was correct.

i. Whether the Nondebtors have Contributed Substantial Assets to the Reorganization by their Willingness to Serve.[14]

NHF argues that the Release Provisions are warranted in this case because the officers and directors have contributed substantial assets to the reorganization in the form of their agreement to continue serving in their positions. Appellant Br. at 39. The Bankruptcy Court correctly held that such a contribution was inadequate to warrant the Release Provisions.

In this case, unlike cases cited by NHF,[15] the nondebtors to be released have given only an unenforceable

[14] The factual findings reflected in sub-paragraphs (a) and (b) of the Bankruptcy Court's summary quoted above have been discussed previously.

[15] For example, in *Dow Corning,* the nondebtors contributed over $2 billion in equity in exchange for an injunction. In contrast, the nondebtors in this case have not contributed any "substantial asset," only an unenforceable pledge to continue services. Similarly, in *In re Mercedes Homes,* 431 B.R. 869, 881 (Bankr. S.D. Fla. 2009), also heavily relied upon by NHF, the directors and officers to be released, in addition to their continuing

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promise for future services and there is nothing in this record that allowed the Bankruptcy Court to find, as required, exceptional circumstances based on "facts that support a conclusion that the released parties will make significant contributions to the reorganization pursuant to the Plan." *Dow Corning,* 280 F.3d at 659; *see also Gillman,* 203 F.3d at 212-13. The Bankruptcy Court's conclusion that this factor weighs against approval of the Release Provisions is further supported by *Norwest Bank Worthington v. Ahlers,* 458 U.S. 197 (1988), where the Supreme Court held that the promise of future labor did not constitute a monetary contribution to a reorganization.[16] *Id.* at 202-04 (the "promise of future service is intangible, inalienable, and in all likelihood, unenforceable. It has no place in the asset column of the balance sheet of the new entity.") (citations and internal quotation marks omitted). Other courts have also concluded that merely continuing to perform duties for pay does not constitute a contribution under the *Dow Corning* factors. *See In re SL Liquidating,* 428 B.R. at 804 (Bankr. S.D. Ohio 2010); *In re Exide Techs.,* 303 B.R. 48, 74 (Bankr. D. Del. 2003) (holding that even "meaningful" work contribution is not justification for a release).

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services, had waived certain of their claims, which allowed a $6 million distribution to unsecured creditors. *Id.* at 881.

[16] The Supreme Court considered "sweat equity" contributions for bankruptcy purposes other than as justification for non-debtor release provisions specifically. Nevertheless, the Court finds the Supreme Court's reasoning and conclusions persuasive with respect to the justifications for release provisions.

ii. Whether the Impacted Class Voted Overwhelmingly to Accept the Reorganization Plan

One consideration under *Dow Corning* is whether "[t]he impacted class, or classes, has overwhelmingly voted to accept the plan." *Dow Corning,* 280 F.3d at 658. NFH [sic] contends that the Bankruptcy Court failed to correctly apply this factor to the record in this case since all but one of the Annuitants, the only "impaired" class, voted to approve the Reorganization Plan. The Bankruptcy Court correctly concluded that this approval by the Annuitants did not favor the Release Provisions in light of the absence of any actual vote on the Reorganization Plan by the donors, which was an "impacted," although not an "impaired" class. The Court concludes, as did the Bankruptcy Court, that the term "impacted" is not limited to "impaired" classes under 11 U.S.C. § 1122 and that the donors, as Class III(C) claimants, were "impacted" claimants, who did not, in fact, affirmatively approve the Reorganization Plan; and this factor weighs against approving the Release Provisions.[17]

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[17] Class III creditors consisted of the following three subclasses: (a) the claim of the Mancillas family, who had obtained the $6 million Texas state court judgment that precipitated the bankruptcy (Class III(A)); (b) the unsecured claims of the Annuitants, which under the Plan were to be paid 85% of the pre- and post-petition amounts due (Class III(B)); and (c) the general unsecured claims of the Donors whose claims, to the extent allowed by the Bankruptcy Court, would be paid in full with 4% interest (Class III(C)). By statute, a Donor, by virtue of his

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iii. Whether the Plan Provides a Mechanism to Pay for All, or Substantially All of the Class or Classes Affected by the Injunction

Another factor under *Dow Corning* is whether "[t]he plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction." *Dow Corning,* 280 F.3d at 658. This consideration has typically been used to justify release provisions where the reorganization plan includes a mechanism such as a dedicated settlement fund to pay the claims, even precluded claims, of those affected by an injunction. *See id.*; *see also In re A.H. Robins Co.,* 880 F.2d 694 at 700-01 (4th Cir. 1989) (upholding a reorganization plan that provided for payment of claims adversely impacted by the release, even if those claims had not been timely filed). NHF argues that this factor weighs in favor of the Release Provisions because the Reorganization Plan established sufficient means to pay all of the *allowed* claims in full; and for that reason, there is no need to

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"unimpaired" status, was deemed conclusively to have accepted the Plan without any opportunity or right to vote on it. *See* 11 U.S.C. § 1126(f). Nevertheless, the Bankruptcy Court held that Donors were actually *impacted* by the Release Provisions since the proposed Release Provisions affected their ability to pursue claims against the released parties, even claims that were ultimately disallowed; and a Donor's claim would not be paid under the Plan unless that Donor prevailed in further Proof of Claims hearings over NHF's objections. *In re Nat'l Heritage,* 478 B.R. at 230-31; *see also Dow Corning,* 280 F.3d at 658 (defining "impacted" as those "classes affected by the injunction.")

preserve the claims of donors against non-debtors to be released under the Release Provisions. Appellant Br. at 41-42. The Bankruptcy Court correctly concluded, however, that this factor did not weigh in favor of the Release Provisions because "[t]he Plan does not provide any mechanism for the payment of the claims affected by the Release Provisions, specifically the Donor claims." *In re Nat'l Heritage,* 748 B.R. at 232. The Court likewise concludes *de novo* that without such a mechanism, this factor does not weigh in favor of the Release Provisions. *See In re Metromedia Fiber Network, Inc.* 416 F.3d at 142 ("Courts have approved nondebtor releases when . . . the enjoined claims were 'channeled' to a settlement fund rather than extinguished.") (citing *In re A.H. Robins, Co.,* 800 F.2d at 701).

iv. Whether the Plan Provides an Opportunity for those Claimants who Choose not to Settle to Recover in Full

The sixth *Dow Corning* factor is whether "[t]he plan provides an opportunity for those claimants who choose not to settle to recover in full." *Dow Corning,* 280 F.3d at 658. NHF argues that this factor weighs in favor of the Release Provisions because had the Donors timely filed claims against NHF and overcome NHF's objections to all such claims, the Reorganization Plan provided the donors with a sufficient opportunity for payment in full. Appellant Br. at 42-43. The Bankruptcy Court essentially concluded, as it did with respect to the *Dow Corning* factor based on a

settlement fund, that the Reorganization Plan's structure made this factor irrelevant. In this regard, the Bankruptcy Court found and concluded that the Reorganization Plan "does not provide any opportunity for the [non-settling] Donors to recover. In fact, the very purpose of the Release Provisions is to protect the Released Parties from any claims by the Donors, thereby precluding any recovery from third party sources outside of the Plan." *In re Nat'l Heritage,* 748 B.R. at 232. There is nothing in this Plan comparable to the plan in *A.H. Robbins* [sic] where claimants who opted out of a settlement funded by the debtor's insurer were barred from pursuing claims against the debtor's directors and officers, but retained their rights to recover outside of the reorganization plan by pursuing suits against the insurer. 880 F.2d at 700-01. In contrast, this Reorganization Plan is not funded by an insurer or any other third party and the donors are not offered any source of payment outside of the Reorganization Plan. In other words, there is no means to recover outside of the Plan. The Bankruptcy Court was correct in concluding that this factor weighed against approval of the Release Provisions.

IV. CONCLUSION

For the above reasons, the Bankruptcy Court's findings of fact are not clearly erroneous and upon *de novo* review of its decision based on those facts, the Court concludes that the Release Provisions are not warranted as part of the Reorganization Plan. For

these reasons, the decision of the Bankruptcy Court rejecting the Release Provisions as part of the Reorganization Plan is AFFIRMED.

An appropriate order will issue.

/s/ [Illegible]
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
April 3, 2013

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
NATIONAL HERITAGE FOUNDATION, INC.	)	**Case No. 09-10525-BFK**
	)	**Chapter 11**
Debtor	)	

MEMORANDUM OPINION

On remand from the Fourth Circuit Court of Appeals, this Court is called upon to set forth specific findings of fact – if the record so permits – in support of the Release, Exculpation and Injunction Provisions set forth in the Debtor's Fourth Amended and Restated Plan of Reorganization. The Court sets forth its specific findings of fact herein, and concludes that these findings do not support the Release Provisions in this case. The Court further concludes that the findings do support the Exculpation Provisions of the Plan. The Court's Findings of Fact and Conclusions of Law are set forth below.

Findings of Fact

The Court makes the following findings of fact:

A. The Debtor's Corporate Structure.

1. The Debtor was incorporated in the State of Georgia in 1994. Third Amended Disclosure Statement

at 5.[1] It is a non-profit, public charity, exempt from taxation under Internal Revenue Code § 501(c)(3). *Id.*

2. As of the confirmation hearing (discussed below), the Debtor's Board of Directors consisted of: Dr. Marion Houk, John T. Houk, III, Julie Ann Houk, and Dana Fenton. Confirmation Hr'g, Tr. I, p. 42.[2]

3. As of the confirmation hearing, the officers of the Debtor were: Dr. J.T. ("Doc") Houk, II(CEO), Dr. Marion M. Houk (Chief Operations Officer), John T. ("Tick") Houk, III (President), and Jan Ridgely (Vice President). Tr. I, p. 44.

4. Marion Houk is the mother of Tick Houk; Tick Houk is married to Julie Houk. *Id.* at 65. Marion Houk is the wife of Doc Houk, the CEO. *Id.* at 65-66. Jan Ridgely is the daughter of Doc and Marion; Tick is her brother, also the son of Doc and Marion Houk. *Id.* at 66.

5. In all, the Houk family controlled three out of four board seats, and all of the officer positions of the Debtor. *Id.*

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[1] The Third Amended Disclosure Statement (hereinafter, "Third Am. Discl. St.") is found at Docket No. 578. It was conditionally approved by this Court as having adequate information on September 11, 2009. Docket No. 602. The Court's Findings of Fact based on the Third Am. Disc. St. are not contested.

[2] The transcripts of the confirmation hearing, held on October 15 and 16, 2009, are referred to herein as Tr. I and Tr. II, respectively.

6. Dana Fenton is the sole director who is not related to the Houk family.

7. Within the year preceding the confirmation hearing, the Debtor had 17 full-time employees. As of the confirmation hearing, the Debtor had 10 full-time employees. Tr. I, p. 46.

8. Prior to its bankruptcy filing, the Debtor received on average approximately $11,000,000 to $12,000,000 per year in donor contributions. *Id.* at 54. The Debtor expected to receive approximately $6,000,000 in a combination of gifts and income for the year 2010. *Id.* at 55.

9. As of December 31, 2008, the Debtor managed net assets with a book value of $152,000,000, which was allocated to 6,014 donor advised funds. Third Am. Discl. St. at 5.

10. In the late 1990's and early 2000's, the Debtor entered into 114 charitable gift annuity ("CGA") contracts. *Id.* at 6.

11. In the case of each CGA, there is one Annuitant (in the case of a one-life CGA) or two Annuitants (in the case of a two-life CGA), consisting of the Annuitant and the Annuitant's spouse. *Id.* The Annuitants are creditors of the Debtor.

12. As of the filing of the Debtor's petition, the Debtor owed approximately $1.64 million in annual payment obligations to the Annuitants and their spouses, out of approximately $12 million to $15 million in total annuity obligations. *Id.*

B. The Events Leading to the Debtor's Chapter 11 Filing.

13. In the late 1990's the Debtor accepted charitable contributions involving "split dollar" life insurance policies. Third Am. Discl. St. at 7. In 1999, Congress enacted I.R.C. Section 170(f)(10), which precluded split dollar life insurance policies for purposes of charitable giving. *Id.*

14. Two individuals who had made split dollar life insurance charitable contributions to the Debtor, Dr. Juan and Silva Mancillas, sued the Debtor in State Court in Texas. *Id.* at 7. The State Court awarded damages to Dr. and Mrs. Mancillas, in an amount in excess of $6 million. *Id.* at 8.

15. Unable to obtain an appeal bond in order to stay enforcement of the Judgment, the Debtor filed its voluntary petition in bankruptcy in this Court on January 24, 2009. *Id.*

C. The Debtor's Objections to Claims.

16. This Court set a Bar Date for the filing of Proofs of Claim of June 3, 2009. Docket No. 32.

17. In all, 343 Proofs of Claim were filed in the case. In total, the claims amounted to $51,512,086.79. This amount includes a secured claim filed on behalf of Virginia Heritage Bank (Claim No. 45-1), in the amount of $7,530,588.86.

1. The Annuitants' Claims.

18. Pursuant to two Orders, entered on April 28, 2009 (Docket No. 165), and August 31, 2009 (Docket No. 556), the Court authorized the Debtor to pay 85% of the outstanding amounts due, both pre-petition and post-petition, to the Annuitants.

19. On September 8, 2009, the Debtor filed a Motion to Establish Procedures for the estimation of the Annuitants' claims. Docket No. 590.

20. On September 25, 2009, the Court entered an Order establishing procedures for the estimation of the Annuitants' Claims, and establishing the amounts of the Annuitants' claims at the present value of the payments that each Annuitant would receive for the remainder of the Annuitants' lives. Docket No. 639.

2. The Donor Claims.

21. Beginning on August 1, 2009, the Debtor filed a series of Objections to Proofs of Claim filed by the Donors (the "Donor Claim Objections"). The basis for these Objections was that the Donors had parted with legal title to the donated funds, and therefore, the Donors were not creditors of the Debtor. *See, e.g.,* Docket No. 273.[3]

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[3] Under the Bankruptcy Code, a "creditor" is defined, *inter alia,* as an "entity that has a claim against the debtor." 11 U.S.C. § 101(10)(A). A "claim" is defined as either a "right to payment,"

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22. On September 28, 2009, the Court entered an Order sustaining the Debtor's Objections to the Donor Claims. Docket No. 641. That Order was later amended, for purposes of clarifying precisely which claims were disallowed. Docket No. 652 (the "Clarifying Order").

23. Specifically, the Clarifying Order provided that certain Donor Claims – those identified as Claim Nos. 54, 68, 86, 142, 226, 240, 242, 251 and 276, were not disallowed claims. Docket No. 652. The Highbourne Foundation Claim (Claim No. 142) and the Townsley Claim (Claim No. 240) were among the claims disallowed originally in the Order of September 28, 2009, but were removed from the list of disallowed claims, with the entry of the Clarifying Order. *Id.*

24. For purposes of the Debtor's Fourth Amended Plan, these specific claims (Nos. 54, 68, etc.) were identified as the "Pending Donor Claims," and were treated as allowed claims under Class III(C) (Other General Unsecured Claims). *See* Fourth Am. Plan at 8.

3. The Highbourne Foundation Claim.

25. On May 26, 2009, the Highbourne Foundation filed Proof of Claim No. 142-1, in the amount of

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or a "right to an equitable remedy for breach or performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5).

$626,332.50, as a Donor claim. The Proof of Claim stated: "custodial account held by NHF." The claim was filed under the name of the Highbourne Foundation; no separate claim appears to have been filed by John and Nancy Behrmann.

26. The Debtor objected to this claim, as a Donor Claim Objection, on August 2, 2009. Docket No. 341.

27. The Highbourne Foundation amended this claim on September 5, 2009, as Claim No. 142-2. The Amended Claim amended the amount slightly, to $643,396.05, and stated as the basis of the claim: "Rescission of Donations."

28. The Debtor objected to the Amended Claim on December 22, 2009. Docket No. 811.

29. On June 29, 2010, John and Nancy Behrmann filed a pleading withdrawing Claim No. 142. Docket No. 948.

4. The Townsley Family Foundation Claim.

30. On June 2, 2009, Maurice Townsley and the Townsley Family Foundation filed Proof of Claim No. 240, in the amount of $1,200,000. The basis of the claim was stated to be: "Donor Directed Townsley Foundation Cash."

31. On August 2, 2009, the Debtor filed an Objection to Claim No. 240, as one of the Donor Claim Objections. Docket No. 409.

32. The Debtor filed a Motion to disallow this claim on December 22, 2009. Docket No. 809.

33. On January 29, 2010, Maurice Townsley, Theresa Townsley, and the Townsley Family Foundation filed a pleading withdrawing their claim. Docket No. 853.

5. The Dodie Anderson Foundation Claim.

34. On October 6, 2009, Dolores F. Anderson, aka Dodie Anderson, and the Dodie Anderson Foundation, filed Proof of Claim No. 341-1, in the amount of $1,010,796. The asserted basis for the claim was "Rescission of contribution."

35. On the same day, Ms. Anderson filed a Motion for leave to file the claim as a late claim. Docket No. 645.

36. On October 15, 2009, the Debtor filed an Objection to the Anderson Claim. Docket No. 675. The Objection asserted that: (a) the claim was not timely filed; and (b) the claim, as a Donor claim, should be disallowed for the same reason as the other Donor claims, i.e., the Donor had parted with legal title to the funds, and the Debtor therefore was not indebted to the claimant. *Id.*

37. On November 19, 2009, the Court entered an Order disallowing the Dodie Anderson Foundation Claim as having been untimely filed. Docket No. 744.

D. Confirmation of the Debtor's Chapter 11 Plan.

38. On September 11, 2009, the Court conditionally approved the Debtor's Third Amended Disclosure Statement. Docket No. 602.

39. The Plan was supported by the affirmative vote of its only impaired class, that of Class III(B). Debtor's Summary of Ballots, Docket No. 670. Class III(B) consisted of the claims of the Annuitants.

40. Of the 85 Ballots returned in Class III(B), 82 voted in favor of the Plan, 1 voted against, and 2 were unmarked. *Id.* Of the $12,651,909 in dollar amount in Class III(B), $12,334,531, or 97.5%, voted in favor of the Plan. *Id.*

41. The Donor Claims (other than the Pending Donor Claims), having been disallowed by the Court (Docket Nos. 641 and 652), were not counted for purposes of confirmation of the Debtor's Fourth Amended Plan. Specifically, all Donor Claims other than Claim Nos. 54, 68, 86, 142, 226, 240, 242, 251 and 276, were not allowed to vote under the Plan. Debtor's Fourth Am. Plan, § 6.1 ("The Donors are not creditors of the Debtor.").

42. The Pending Donor Claims (Claim Nos. 54, 68, etc.) were considered to be a part of Class III(C). *Id.* Class III(C) was unimpaired under the Plan. The

Pending Donor Claims, therefore, were not entitled to vote, as well.[4]

43. The Fourth Amended Plan contained certain Release, Injunction and Exculpation Provisions, at Sections 7.19, 7.20 and 7.21.

44. Section 7.22 of the Plan also provides:

> *Indemnification.* The Debtor and the Reorganized Debtor shall indemnify and hold harmless all members, officers, directors, advisors, attorneys, affiliates, representatives, agents, financial advisors or employees to the fullest extent available under applicable law or the Debtor or Reorganized Debtors [sic] organizational documents.

45. The Highbourne Foundation, the Anderson Foundation and the Townsley Foundation all objected to the Release, Injunction and Exculpation Provisions of the Plan, and argued against approval of the Release, Injunction and Exculpation Provisions at the confirmation hearing.[5]

46. Jan Ridgely testified as the Debtor's representative at the confirmation hearing. She testified

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[4] Under Bankruptcy Code Section 1126(f), classes of claims that are unimpaired are conclusively deemed to have accepted the Plan, and hence, are not entitled to vote.

[5] As noted above, the Debtor objected to the Highbourne, Townsley, and Anderson claims after the Plan was confirmed. The Court sustained the Debtor's Objections to the Anderson claim; the Highbourne and Townsley claims were withdrawn.

that she believed that the Release, Injunction and Exculpation Provisions were "necessary." Tr. I, p. 60. She testified that there was "concern" among the officers and directors that they could be sued, and that no one wanted the threat of litigation hanging over them moving forward. *Id.* She further testified that, in her view, the Release, Injunction and Exculpation Provisions were "essential to the success of the reorganized debtor," and that the failure to include the Release, Injunction and Exculpation Provisions could render the officers and directors of the Debtor unwilling to serve. *Id.* at 61. She testified that she was very concerned that other Donors "may come forward after the bankruptcy" in order to bring suit against the officers and directors. *Id.* at 62.

47. On the other hand, Ms. Ridgely testified that none of the officers and directors actually had come forward to say that they would not serve if they did not have the benefit of the Release, Injunction and Exculpation Provisions. *Id.* at 63.

48. The Debtor's Bylaws provide for the indemnification of its officers and directors, to the fullest extent of the Georgia Non-Profit Corporation Code. *See* Tr. I, pp. 91-92.

49. After hearing argument on the matter, the Court ruled that the Release, Injunction and Exculpation Provisions would be approved, though in a form that reduced the scope of the Release, Injunction and Exculpation Provisions. Tr. I, p. 141; Tr. II, pp. 4-15.

50. On October 16, 2009, after a contested confirmation hearing, the Court entered an Order confirming the Debtor's Fourth Amended Plan. *See* Docket No. 687. The Confirmation Order provides:

> *Releases and Discharges.* The releases, exculpation, and injunction provisions described in Sections 7.19, 7.20, and 7.21 of the Plan are essential to the Debtor's reorganization efforts and appropriate given the Debtor's unique circumstances. Each of the discharge, release, indemnification and exculpation provisions set forth in the Plan: (i) is within the jurisdiction of the Court under 28 U.S.C. §§ 1334(a), (b), and (d); (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 transactions incorporated into the Plan; (iv) confers material benefit on, and is in the best interest of, the Debtor, its Estates and their creditors; (v) is important to the overall objectives of the Plan to finally resolve all Claims among or against the parties-in-interest in Debtor's case with respect to the Debtor's organization, capitalization, operation and reorganization; and (vi) is consistent with sections 105, 1123, 1129 and other applicable provisions of the Bankruptcy Code.

Docket No. 687, pp. 15-16.

51. The Release, Injunction and Exculpation Provisions were amended, in accordance with the

Court's ruling at the confirmation hearing, to provide as follows:

> **7.19 Release. On the Effective Date, the Debtor, Reorganized Debtor, the Committee, the members of the Committee and their designated representatives in their capacity as such, any of such parties' respective current (i.e., as of the Confirmation Date) officers, directors or employees, and any of such parties' successors and assigns (the "Released Parties") shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to any party in interest who has filed a claim or who was given notice of the Debtor's Bankruptcy Case (the "Releasing Parties") for any act or omission before or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the operation of the Debtor's business, except to the extent relating to the Debtor's failure to comply with its obligations under the Plan. Notwithstanding the foregoing, nothing contained herein shall be deemed to be a release by the Debtor or Reorganized Debtor of any of the Causes of Action retained by the Debtor pursuant to the Plan including, without limitation, the Causes of Action described on Exhibit C to the Disclosure Statement.**

7.20 Injunction. The satisfaction, releases, and discharge pursuant to Article VII of this Plan shall also act as an injunction against any Person commencing or continuing any action, employment of process, or act to collect, offset, or recover any claim or cause of action satisfied, released, or discharged under this Plan to the fullest extent authorized or provided by the Bankruptcy Code, including, without limitation, to the extent provided for or authorized by sections 524 and 1141 thereof.

Except as provided in this Plan or as expressly approved by the Reorganized Debtor, the Releasing Parties (as defined in Section 7.19) shall be precluded and enjoined from asserting against the Reorganized Debtor, the Estate or the Reorganized Debtor's Assets, any other or further Claim based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date.

7.21 Exculpation. The Released Parties shall have no liability to any of the Releasing Parties (as defined in Section 7.19) for any act taken or omission made in connection with, or arising out of, the Bankruptcy Case, the Disclosure Statement, this Plan or the formulation, negotiation, preparation, dissemination, implementation or the administration of this Plan, any instrument or agreement

> **created or entered into in connection with this Plan, any other act taken or omitted to be taken in connection with, or in contemplation of, any of the restructuring or other transactions contemplated by this Plan, and the property to be distributed or otherwise transferred under this Plan; unless such person obtains the prior approval of the Bankruptcy Court to bring such a claim. Nothing in this Section 7.21 or elsewhere in this Plan shall release, discharge or exculpate any non-Debtor party from (a) any claim owed to the United States government or its agencies, including any liability arising under the Internal Revenue Code or criminal laws of the United States, or (b) any claim of any Claimant except as expressly set forth herein.**

Docket No. 687, pp. 27-28.[6]

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[6] Oddly, the following sentence, initially included in Section 7.19 of the Plan, was deleted from the language approved in the Confirmation Order: "Notwithstanding the foregoing, nothing contained herein shall release any claim for contribution or indemnification by a Released Party against a Released Party." Plan at 19, § 7.19. Thus, absent Section 7.22 of the Plan, an argument could be made that the officers' and directors' claims for indemnification were released by the very Release Provision on which they rely. However, the inclusion of Section 7.22 in the Plan makes it plain that the Debtor has continuing indemnity obligations to its officers and directors.

52. The Plan called for the payment in full of all of the Annuitant Claims. *See* Fourth Am. Plan at 11-12. The Plan does not provide for the payment of any of the Donor Claims, other than the Pending Donor Claims. *Id.* at 12-14.

53. The confirmed Plan also contains a Severability provision, Section 12.2, which states as follows:

> *Severability.* Should any provision in this Plan be determined to be unenforceable, that determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of this Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.

Id. at 23.

E. The Appeal and the Remand from the Fourth Circuit.

54. The Highbourne Foundation, the Anderson Foundation and the Townsley Foundation noticed an appeal of the Confirmation Order on October 23, 2009. Docket No. 709.

55. The United States District Court for the Eastern District of Virginia affirmed the Confirmation Order on August 17, 2010. Docket No. 956.

56. On December 9, 2011, the Fourth Circuit reversed and remanded the case to the District Court, holding that the record was insufficient to determine on appeal whether the Release, Injunction and Exculpation Provisions should, or should not, have been approved. Docket No. 986. The District Court, in turn, remanded the case to this Court on January 31, 2012. Docket No. 989.

57. At a status conference before this Court on March 6, 2012, the parties agreed that the Court did not need to reopen the record for additional evidence. The parties stipulated that the Court could, and should, make its findings of fact and conclusions of law based on the record as it stood at the conclusion of the confirmation hearing. The Court accepted their stipulation that the record is sufficient.[7]

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[7] There is one other set of facts worth noting here, but that, in the end, is not determinative of any of the issues before the Court. In Schedule B to the Debtor's Third Amended Disclosure Statement, the Debtor listed a policy of directors and officers liability insurance listed as an executory contract, issued by Philadelphia Indemnity Insurance Co. (the Debtor's "D&O Policy"), which was assumed by the Debtor as a part of the confirmation process. *See* Docket No. 577, Ex. B, p. 7. On April 23, 2012, the Reorganized Debtor filed a Complaint for a determination of coverage with the U.S. District Court for the Eastern District of Virginia against Philadelphia Indemnity Insurance Company. *See Nat'l Heritage Found., Inc. v. Philadelphia Indem. Ins. Co.,* Civil No. 1:12cv00447. In the Complaint, the Reorganized Debtor alleges that: (a) the Amended Highbourne Claim filed in the bankruptcy case is a Claim under the Policy as a D&O Wrongful Act (Complaint, ¶ 53); (b) the Townsley Claim is a Claim under the Policy as a D&O Wrongful

(Continued on following page)

Conclusions of Law

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Order of Reference of the United States District Court for the Eastern District of Virginia of August 15, 1984. This is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(L) ("confirmation of plans").

The Court will first address the Release Provisions of Section 7.19, and then the Exculpation Provisions of Section 7.22. The Injunction Provisions of Section 7.21 are discussed last.

I. The Release Provisions (Section 7.19).

In its Opinion remanding the case to this Court, the Fourth Circuit noted that non-debtor releases, while allowable, should be granted "cautiously and infrequently." *Behrmann v. Nat'l Heritage Found., Inc.,* 663 F.3d 704, 712 (4th Cir. Va. 2011) (citing

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Act (Complaint, ¶ 78); and (c) the Anderson Claim is a Claim under the Policy as a D&O Wrongful Act (Complaint, ¶ 125). The Complaint also alleges that the Reorganized Debtor settled the Highbourne Claim for $590,000, and the Townsley claim for $929,491. Complaint, ¶¶ 60, 77. It is unclear whether these amounts have been paid. The Complaint alleges that the Reorganized Debtor "proceeded to resolve" the Amended Highbourne Claim. *Id.* at ¶ 63. The Complaint alleges that the Townsley claim was settled, *id.* at ¶ 77, but does not state whether the settlement amount has been paid. The Anderson claim is not alleged to have been settled. Philadelphia Indemnity, for its part, has denied liability to NHF, and claims that any further liability with respect to these claims was released in connection with a previous settlement with NHF.

Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005) ("No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique."); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.),* 280 F.3d 648, 658 (6th Cir. 2002) ("[S]uch an injunction is a dramatic measure to be used cautiously."); *Gillman v. Cont'l Airlines (In re Cont'l Airlines),* 203 F.3d 203, 212-13 (3d Cir. 2000) (non-debtor releases have been approved only in "extraordinary cases")).

In discussing the propriety of third party releases, the Second Circuit stated that:

> Courts have approved nondebtor releases when: the estate received substantial consideration, *e.g.*, *Drexel Burnham*, 960 F.2d at 293; the enjoined claims were "channeled" to a settlement fund rather than extinguished, *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.),* 837 F.2d 89, 93-94 (2d Cir. 1988); *Menard-Sanford v. Mabey (In re A.H. Robins Co.),* 880 F.2d 694, 701 (4th Cir. 1989); the enjoined claims would indirectly impact the debtor's reorganization "by way of indemnity or contribution," *id.*; and the plan otherwise provided for the full payment of the enjoined claims, *id.* Nondebtor releases may also be tolerated if the affected creditors consent. *See In re Specialty Equip. Cos.,* 3 F.3d 1043, 1047 (7th Cir. 1993).

In re Metromedia Fiber Network, Inc., 416 F.3d at 142.

The Fourth Circuit further found the factors in *Dow Corning* and *In re Railworks* to be instructive, and commended these cases to this Court for consideration. *Nat'l Heritage Found., Inc.,* 663 F.3d at 712 (referencing the factors laid out in *Dow Corning,* 280 F.3d at 658, and *Hoge v. Moore (In re Railworks Corp.),* 345 B.R. 529, 536 (Bankr. D. Md. 2006)). In *Dow Corning,* the Sixth Circuit identified the following seven factors:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

280 F.3d at 658.

The Fourth Circuit, citing to the Appellee's (the Debtor's) Brief, described the factors in *Railworks* as follows:

> (1) [O]verwhelming approval for the plan; (2) a close connection between the causes of action against the third party and the causes of action against the debtor; (3) that the injunction is essential to the reorganization; and (4) that the plan of reorganization provides for payment of substantially all of the claims affected by the injunction.

Nat'l Heritage Found., Inc., 663 F.3d at 712 (citing Appellee's Brief at 25-26).

The *Railworks* decision involved the application of release provisions in an already-confirmed Plan. It is, in essence, a decision about permissive abstention. 345 B.R. 529. In *Railworks,* the Bankruptcy Court had already confirmed the Debtor's plan, which included release provisions. *Id.* at 535. The officers of the company were guarantors on certain surety bonds issued by Liberty Mutual. *Id.* at 534. They were sued in the State courts of California. *Id.* at 533. They removed the case to the Bankruptcy Court, which then transferred it to the Bankruptcy Court in Maryland, where the Debtor's plan of reorganization was confirmed. *Id.* at 533-34. Ultimately, the Bankruptcy Court enjoined the prosecution of certain claims, which is to say, it enforced the already-approved release provisions in the Debtor's plan. *In re Railworks,* 345 B.R. at 537-38. It remanded a number of other claims to the State court, because those

claims were not barred by the release language in the plan (the release provided an exception for any "acts or omissions to act involving willful misconduct, recklessness or gross negligence"). *Id.* at 536. The four-factor test employed in *Railworks,* cited above, is basically a shortened version of the seven-factor test in *Dow Corning,* to which the Court will now turn.

Putting aside the last factor in *Dow Corning* (the specific findings of fact in support of the non-debtor releases, which this Court will now endeavor to provide), the Court looks to the remaining six factors.

1. Whether there is an Identity of Interests Between the Debtor and the Third Parties.

The Court finds that there is an identity of interests between the Debtor and its officers and directors, which arises out of the indemnity and advancement obligations of the corporation to its officers and directors. This, along with the overwhelming creditor support and the availability of a recovery from other sources, was an important factor in *A.H. Robins.* In affirming the grant of a preliminary injunction against the officers and directors in *A.H. Robins,* the Fourth Circuit held:

> [T]here are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants but, . . . in order for relief for such non-bankrupt defendants to be available under

> (a)(1), there must be "unusual circumstances" and certainly "'[s]omething more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties.'" This "unusual situation," it would seem, arises when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case. To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute.

788 F.2d 994, 999 (4th Cir. 1986) (quoting *GAF Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.),* 26 B.R. 405, 410 (Bankr. S.D.N.Y. 1983)).[8]

The Debtor has indemnity obligations to the officers and directors, by virtue of its Bylaws, to the fullest extent of the Georgia Non-profit Corporation

[8] The Court makes no findings of the merits, or lack thereof, of any of the Donor claims against the Released Parties, nor with respect to any defenses the Released Parties might assert in defense of such claims (other than, as stated in this Opinion, with respect to the Release, Exculpation and Injunction Provisions).

Code. These indemnity obligations were assumed in Section 7.22 of the Plan. Under Georgia law, a non-profit corporation may provide for the indemnity of its officers and directors to the fullest extent of the law. Ga. Code § 14-3-858(a) ("A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or members, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification or advance funds to pay for or reimburse expenses consistent with this part."); Ga. Code § 14-3-856(a)(2) (Officers are entitled to indemnification and advancement of expenses to the same extent as a director, and if he or she is not a director, "to such further extent as may be provided by the articles of incorporation, the bylaws, [or] a resolution of the board of directors.").

As in other States, the right to indemnity is circumscribed by the Georgia Non-Profit Corporation Code. Specifically, directors are not entitled to indemnity unless: (1) he or she "conducted himself or herself in good faith;" and (2) he or she reasonably believed, "[i]n the case of conduct in his or her official capacity, that his or her conduct was in the best interests of the corporation," and in all other cases, "that his or her conduct was at least not opposed to the best interests of the corporation." Ga. Code § 14-3-851(a)(1)-(2). Similarly, officers of the corporation are entitled to indemnity, unless their acts or omissions "involve intentional misconduct or a knowing violation of the law." Ga. Code § 14-3-856(a)(2)(B).

Of course, the corporation cannot know, when presented with a demand for indemnity, whether its directors' or officers' conduct comports with the above statutory standards. The Non-Profit Corporation Code, therefore, provides for the advancement of legal fees and expenses. To obtain an advancement, the director or officer must provide: (1) a written affirmation of his or her good faith belief that he or she has met the statutory standards; and (2) his or her "written undertaking to repay the funds advanced," in the event that it is ultimately determined that he or she "is not entitled to indemnification." Ga. Code § 14-3-853(a)(1)-(2). Importantly, the undertaking described here "need not be secured and may be accepted without reference to the financial ability of the director to make repayment." Ga. Code § 14-3-853(b).[9]

Should the Release Provisions be excised from the Plan, there is a very real possibility that the officers and directors will be sued by the Donors, whose numbers run into the thousands. The officers and directors would then look to the Debtor for indemnification, which would include, among other things, an advancement of legal fees to pay their expenses in defending the Donor claims. While the officers and directors would have to (a) certify that their actions were taken in good faith and in accordance with the statutory standards; and (b) undertake

[9] Ga. Code § 14-3-853 applies, by its terms, to directors. Ga. Code § 14-3-856(a)(1) provides that a corporation may indemnify and advance expense to an officer "to the same extent as a director."

to repay the expenses if it were found that their actions did not comport with their duties to the corporation, any promise to repay would be unsecured. Further, the statute provides that the decision to advance expenses may be made without reference to their financial ability to repay. Ga. Code § 14-3-853(b). Thus, the officers and directors would be entitled to the advancement of their legal fees and expenses, all without any security, and without any reference to their ability to repay such amounts.

The real possibility – indeed, the near certainty – of multiple Donor lawsuits, coupled with the officers' and directors' rights to indemnification and the advancement of legal expenses, could have a materially negative impact on the Debtor's ability to successfully complete its reorganization. This factor weighs in favor of approval of the Release Provisions.

2. Whether the Non-debtors Have Contributed Substantial Assets to the Reorganization.

In this case, the officers and directors have not contributed any assets to the reorganization. The Debtor suggests that the officers and directors contributed by performing their duties in the reorganization effort. The Court finds that the officers and directors, all of whom are insiders, performed their duties either because they were paid to do so (in the case of the officers), or because they had a fiduciary obligation to do so (in the case of the directors). *See In re SL Liquidating, Inc.,* 428 B.R. 799, 804 (Bankr.

S.D. Ohio 2010) ("[T]he described efforts of the directors and officers is consistent with their preexisting fiduciary duties and job responsibilities.").

In an analogous context, the Supreme Court held that so-called "sweat equity" is not sufficient to establish a new value contribution for the purpose of plan confirmation. *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 203, 108 S.Ct. 963, 967, 99 L.Ed.2d 169, 177 (1988). Accordingly, the Court finds that the officers and directors have not made any financial contribution in this case. This factor weighs against approval of the Release Provisions.

3. Whether the Injunction is Essential to Reorganization.

Here, the Debtor claims that the officers and directors might leave the company if they are not protected by the Release Provisions. NHF's Brief at 8 ("NHF's officers and directors might be unwilling to continue to serve . . . "). One commentator has referred to this theory – where the non-debtor parties threaten to leave if they are not afforded releases – as the "throw in the towel" theory. Peter M. Boyle, *Non-Debtor Liability In Chapter 11: Validity of Third-Party Discharge In Bankruptcy,* 61 Fordham L.Rev. 421, 447 (1992). This commentator contended that

> [t]here is little reason, however, to succumb to such threats. When the debtor is the officer's best employment opportunity, the officer will stay regardless of whether the

> discharge is granted. In the event that the officer leaves to work elsewhere, the officer's liability will be unaffected by his or her departure from the debtor, and may even grow.

Id.

None of the officers said that they would in fact leave. Tr. I, p. 63. Further, three out of the four directors, and all of the officers, are members of the Houk family. It is unlikely, in the Court's view, that the members of the Houk family will abandon ship, owing solely to the assertion of any claims by the Donors.

Moreover, the officers and directors – because of the claims that arose before bankruptcy – have *already* been exposed to whatever potential liability they might have to the Donors. Even if the officers and directors left, they would still be exposed to the same potential liabilities, and they would have the same indemnification and advancement rights against the Debtor. Only if the officers and directors perceived themselves to be *increasing* their risks by continued employment with the Debtor would they choose to leave (unless, for reasons unrelated to the indemnification issue, another opportunity presented itself that was more attractive than continued employment with the Debtor). It is possible that, in staying put, the officers and directors might in fact perceive their risks to be increasing by virtue of the way that the Debtor conducts its business on a post-confirmation basis. But, if that is the case, there is nothing this Court can, or should, do to help them.

In fairness, it is possible that the Debtor might have difficulty attracting new officers and directors if its current officers and directors face substantial liabilities arising out of their employment with the company. No evidence was presented at the confirmation hearing, however, of the Debtor's need to attract new officers and directors, and how the inclusion or exclusion of the Release Provisions might affect that need.

The Court concludes that the Release Provisions are not essential to the Debtor's efforts to retain its officers and directors. This factor, likewise, weighs against approval of the Release Provisions.

4. *Whether the Impacted Class Voted Overwhelmingly to Accept the Plan.*

In the Court's view, this factor has always been something of a red herring in this case. The Debtor's Memorandum of Law in support of confirmation identified one factor as being: "whether the plan provides for the payment of substantially all the claims affected by the release," and then stated in support of this factor: "the Debtor's Plan proposes to fully satisfy the claims of all of its outstanding creditors." Docket No. 666, pp. 18-19. *See also* Tr. I, p. 111 ("[W]e have a plan that is overwhelmingly approved by the creditors."). Presently, the Debtor makes the same argument: "NHF's creditors overwhelmingly voted in support of the Plan." NHF's Brief in Support of Issuance of Supplemental Findings at 18 (Apr. 10,

2012). In making this assertion, though, the Debtor is referring to the allowed Annuitant claims under Class III(B), and not to any of the disallowed Donor claims. *Id.* at 20.

It is clear that in *Dow Corning,* the Sixth Circuit (and the Fourth Circuit, by reference to *Dow Corning* in this case) was referring to acceptance *by the impacted class.* 280 F.3d at 658. In the recently decided case of *In re Lower Bucks Hospital,* the Bankruptcy Court stated:

> A critical factor in assessing the confirmability of a plan that includes a third-party release is whether the adversely affected class of creditors have manifested their strong support for the plan through the plan voting process. In this respect, the chapter 11 process provides the opportunity for the adversely affected constituency (here, the Bondholders) to make a threshold decision whether they believe the plan is in their best interests, *i.e.,* to decide whether the benefits of the proposed plan outweigh the drawbacks of the third-party release and to bind a minority of holders within the class who disagree.

In re Lower Bucks Hosp., ___ B.R. ___, No. 10-10239-ELF, 2012 WL 1655596, at *29 (Bankr. E.D. Pa. May 10, 2012) (citations omitted). *See also In re Tribune Co.,* 464 B.R. 126, 186 (Bankr. D. Del. 2011) (Consent requires "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.") (emphasis added); Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy,* 83 Am. Bankr. L.J. 663, 727 (2009) ("In light of § 524(e), historical understandings and practices with regard to proper scope of third-party releases, and more general policy considerations, it is difficult to justify extending the cram down power to encompass discharge of claims against third parties over the objections of an entire dissenting class."). Here, the class impacted by the Release Provisions (the Donors) did not vote to accept the Plan; rather, the class that was to be paid in full under the Plan (the Annuitants) voted to accept the Plan.

The matter can further be illustrated by reference to *A.H. Robins.* In *A.H. Robins,* the Fourth Circuit approved the inclusion of a permanent injunction provision in the Plan. *In re A.H. Robins Co.,* 880 F.2d 694. The Plan was approved by 94% of the 139,605 personal injury claimants. *Id.* at 698. The Fourth Circuit found that where, among other factors, there was overwhelming creditor support by the class of claims affected by the permanent injunction, the injunction was proper. *Id.* at 702 ("In this situation where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain other parties, and where the entire reorganization hinges on the debtor being free from indirect

claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits."). By contrast, in this case, there was no acceptance of the Plan by the impacted class, the class of Donor claims.[10] Accordingly, the Court cannot find that this factor weighs in favor of approving the Release Provisions.

5. *Whether the Plan Provides a Mechanism to Pay for All, or Substantially All, of the Class or Classes Affected by the Injunction.*

This factor, again, was important in *A.H. Robins.* There, the Fourth Circuit approved a settlement known as the *Breland* settlement. *In re A.H. Robins Co.,* 880 F.2d at 700. Under the settlement, there were two classes of claims – the mandatory, non-opt out class of claims, known as Class A (which were timely filed claims), and the Class B claims, which were non-timely filed claims, and which were allowed

[10] The Debtor might contend that disallowed claimants are, as a matter of law, not entitled to vote, and therefore, the Donors could not possibly have accepted the Plan as a class. 11 U.S.C. § 1126(a) ("The holder of a claim or interest allowed under Section 502 of this title may accept or reject a plan"). The issue, however, is not whether the Donor claims were entitled to vote; in fact, they were not. If one factor to be considered here was whether the impacted class accepted the Plan and voted in favor of the Release Provisions, the plain answer would be no.

to opt-out of the Plan. *Id.* Of the approximately 110,000 Class B claims, only 2,960 (less than 3%) opted out. *Id.* at 701 n.7. Importantly, even for the opt-out class of claims, the injunction that was approved by the Fourth Circuit allowed the opt-out Class B claims to pursue their claims under two Outlier policies totaling $100,000,000, which were acknowledged to be sufficient to pay the Class B claims, as well as to pursue claims against medical providers for medical malpractice. *Id.* at 701 ("The injunction under sections 1.85 and 8.04 of the Plan prevents these claimants from suing all third parties *other than* 'insurer[s]' (which includes Aetna) and claims based exclusively on medical malpractice."). *Id.* (emphasis added).[11]

In this case, in the words of the Second Circuit, the Donor claims have not been "channeled" anywhere; they have simply been disallowed. *In re Metromedia Fiber Network, Inc.,* 416 F.3d at 142. The Plan does not provide any mechanism for the payment of the claims affected by the Release Provisions,

[11] At the confirmation hearing in this case, the Debtor relied on a statement in *A.H. Robins,* to the effect that the Donors should not be allowed to "sit on the sidelines," and then seek recovery from the officers and directors. Tr. I, p. 110. But in *A.H. Robins,* the release provisions were approved precisely because the opt-out claimants had alternative means of recovering in full on their claims. 880 F.2d at 701 ("And, in all events, provision for payment in full of all class B claimants has been made").

specifically, the Donor claims. This factor weighs heavily against approval of the Release Provisions.

6. *Whether the Plan Provides an Opportunity for Those Claimants who Choose not to Settle to Recover in Full.*

Finally, the Plan does not provide any opportunity for the Donors to recover. *See supra* Part I(5). In fact, the very purpose of the Release Provisions is to protect the Released Parties from any claims by the Donors, thereby precluding any recovery from third party sources outside of the Plan. This factor, too, weighs against approval of the Release Provisions.

7. *A Synthesis of the Foregoing Factors.*

We are, then, faced with the situation where (and the Court so finds): (a) the officers and directors are potentially exposed to substantial liabilities, for which they will be entitled to assert claims for indemnification against the Debtor for any damages that might be awarded to the Donors, and the advancement of legal fees, thereby putting the feasibility of the reorganization potentially at risk; (b) it is unlikely that the officers and directors will leave *en masse,* solely because of the assertion of Donor claims; (c) the officers and directors are not contributing anything financially toward the reorganization; (d) there is no support from the affected Donor class of disallowed claims; (e) there is no mechanism within the Plan for the Donors to be paid anything; and (f)

there is no ability for the Donors to recover anything outside of the Plan if the Plan Release Provisions remain in place. The single factor in favor of the Release provisions – the potential for an obligation to indemnify the officers and directors – cannot by itself justify the Release Provisions. If it did, then third party releases would be the norm, not the exception, in Chapter 11 cases. This would contravene the now-universally accepted proposition that third party releases are to be granted only in exceptional cases. *See In re Wash. Mut., Inc.,* 442 B.R. 314, 349 (Bankr. D. Del. 2011) (holding that an identity of interests arising out of indemnity obligations "alone is insufficient to justify the releases. To hold otherwise would eliminate the other four factors and would justify releases of directors and officers in every bankruptcy case. That is not the law.").

The Court concludes that, on balance, the Release Provisions are not justified under the circumstances of this case.

II. The Exculpation Provisions (Section 7.21).

Section 7.21 provides for exculpation for the Released Parties (defined in Section 7.19) for any acts or omissions in connection with the bankruptcy case, the Disclosure Statement, or the Plan of Reorganization. This provision is less offensive than the Release Provisions of Section 7.19 of the Plan. Judge Mitchell approved the Exculpation Provisions at the confirmation hearing, stating:

> I don't think the exculpation provision goes really beyond the protection that a Chapter 7 trustee or Chapter 11 trustee would have. Under the *Barton* Rule [*Barton v. Barbour,* 104 U.S. 126, 26 L.Ed. 672 (1881)], you can't bring a suit against a trustee for matters connected with the administration of the estate without getting the permission of the court that appointed the trustee. . . . So, I don't believe it is at all unreasonable to effectively make this court the gatekeeper as to whether suits can be brought against parties for carrying out the duties that would be imposed on a trustee had a trustee been appointed in this case.

Tr. II, pp. 14-15.[12]

The Fourth Circuit recently re-visited the *Barton* doctrine in *McDaniel v. Blust,* 668 F.3d 153(4th Cir. 2012). In *McDaniel,* the Court affirmed the dismissal of claims against a Chapter 7 trustee's counsel under the *Barton* doctrine, which requires leave of court before a receiver or a bankruptcy trustee (and now, it is clear, his or her professionals) can be sued. *Id.* The Court affirmed the dismissal of claims against the trustee's counsel, holding that the allegations made by the plaintiffs "can be considered by the bankruptcy court . . . in its role as gatekeeper." *Id.* at 157. *McDaniel,* while not directly on point here, lends support to

[12] The Behrmanns have already sued Committee Counsel in federal court. *Behrmann v. McGuire Woods,* Case No. 1:11cv419 (E.D. Va. 2011).

Judge Mitchell's approval of the Exculpation Provisions from the standpoint of the Bankruptcy Court as gatekeeper. *See also In re Vistacare Group, LLC,* 678 F.3d 218 (3d Cir. 2012) (confirming the continued validity of the *Barton* doctrine).

Exculpation provisions of this kind find their genesis in Section 1103(c) of the Bankruptcy Code, at least insofar as Committee members are concerned. They generally are permissible, so long as they are properly limited and not overly broad. *In re PWS Holding Corp.,* 228 F.3d 224, 246 (3d Cir. 2000) (finding exculpation provisions to be consistent with Bankruptcy Code Section 1103(c), for Committee members); *In re South Edge LLC,* No. 2:11-CV-01963-PMP-PAL, 2012 WL 3262880, at *10 (D. Nev. Aug. 8, 2012) ("[T]he exculpation provision in section 8.10 when properly interpreted is within the bankruptcy court's power because the bankruptcy court has exclusive jurisdiction over the parties and their conduct in the bankruptcy proceedings. Section 8.10 sets a standard of care to be applied in the bankruptcy proceeding – a matter which lies within the bankruptcy court's exclusive jurisdiction – and reiterates federal preemption principles."); *In re Wash. Mut., Inc.,* 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) (holding that "[t]he exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers"); *In re Quincy Med. Ctr., Inc.,* No. 11-16394-MSH, 2011 WL 5592907 (Bankr. D.

Mass. Nov. 16, 2011); *In re Yellowstone Mt. Club, LLC,* 460 B.R. 254 (Bankr. D. Mont. 2011); *In re Winn-Dixie Stores, Inc.,* 356 B.R. 239, 261 (Bankr. M.D. Fla. 2006); *In re WCI Cable, Inc.,* 282 B.R. 457 (Bankr. D. Or. 2002).

In this case, the Exculpation Provision prevents suits against the Released Parties, who are defined in Section 7.19 as "the Debtor, Reorganized Debtor, the Committee, the members of the Committee and their designated representatives in their capacity as such, any of such parties' respective current (i.e., as of the Confirmation Date) officers, directors or employees, and any of such parties' successors and assigns." Debtor's Fourth Am. Plan, §§ 7.19, 7.21. The class of Released Parties, as approved by the Court, was considerably narrowed from the definition of Released Parties originally set forth in Section 7.19 of the Debtor's Fourth Amended Plan. Notably, the estate's professionals were removed from the definition of Released Parties in response to the United States Trustee's Objections. *See* Tr. I, p. 108 (Mr. LeForce: "[W]e are willing to remove the professionals").[13]

[13] The Released Parties originally were defined as follows: "the Debtor, Reorganized Debtor, the Committee, the members of the Committee in their capacity as such, any of such parties' respective current (i.e., as of the Confirmation Date) members, officers, directors, advisors, attorneys, affiliates, representatives, agents, financial advisors, employees or investment bankers, and any of such parties' successors and assigns." Fourth Am. Plan, § 7.19. The Confirmation Order, in narrowing the scope of the Release, Exculpation and Injunction Provisions, *deleted* the

(Continued on following page)

The Exculpation Provision is limited to acts or omissions taken in connection [sic] the bankruptcy case itself. It does not purport to release any pre-petition claims against the officers or directors. Further, as Judge Mitchell noted, there is a "gate-keeper" function built into Section 7.21, in that Section 7.21 expressly allows for suits against the Released Parties if the claimant "obtains the prior approval of the Bankruptcy Court to bring such a claim." Order Confirming Fourth Am. Plan of Reorganization, Docket No. 687, p.28.

The Court finds that the Exculpation Provision of Section 7.21: (a) is narrowly tailored to meet the needs of the bankruptcy estate; (b) is limited to parties who have performed necessary and valuable duties in connection with the case (excluding estate professionals); (c) is limited to acts and omissions taken in connection with the bankruptcy case; (d) does not purport to release any pre-petition claims; and (e) contains a gatekeeper function by which the Court may, in its discretion, permit an action to go forward against the exculpated parties. The Court will not disturb the Exculpation Provisions of Section 7.21.

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following parties from the definition of Released Parties: "*advisors, attorneys, affiliates, representatives, agents, financial advisors . . . or investment bankers.*" (Emphasis added). The Confirmation Order *added* the words "*and their designated representatives,*" after the words "the members of the Committee." Docket No. 687, p. 27 (emphasis added).

III. The Injunction Provisions (Section 7.20).

The Injunction Provisions of Section 7.20 give effect to both the Release Provisions of Section 7.19 and the Exculpation Provisions of Section 7.21. For the reasons stated in Parts I and II above, the Court will approve the Injunction Provisions insofar as they enforce the Section 7.21 Exculpation Provisions. The Court will not enforce the Injunction Provisions to the extent that they give effect to the Release Provisions of Section 7.19 of the Plan.

Conclusion

The Court finds that the record in this case does not support the Release Provisions of Section 7.19. The Court finds that the record in the case does support the Exculpation Provisions of Section 7.21. Finally, the Court finds that the record supports the Injunction Provisions of Section 7.20, insofar as they purport to enforce the Exculpation Provisions of Section 7.21, but not as they relate to the Release Provisions of Section 7.19. An appropriate Order will issue.

Date: Aug 24 2012 /s/ Brian F. Kenney
Brian F. Kenney
United States Bankruptcy Judge

Entered on Docket: August 27, 2012

[List Of Attorneys Receiving
Copies Omitted In Printing]

JOHN R. BEHRMANN; NANCY BEHRMANN; HIGHBOURNE FOUNDATION; MAURICE TOWNSLEY; THERESA TOWNSLEY; TOWNSLEY FAMILY FOUNDATION, THE; DOLORES F. ANDERSON, a/k/a Dodie Anderson; DODIE ANDERSON FOUNDATION, Plaintiffs-Appellants, v. NATIONAL HERITAGE FOUNDATION, INCORPORATED; OFFICIAL COMMITTEE OF UNSECURED CREDITORS, Defendants-Appellees.

No. 10-2015

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

663 F.3d 704*; *2011 U.S. App. LEXIS 24454*; *Bankr. L. Rep. (CCH) P82,124*; *66 Collier Bankr. Cas. 2d (MB) 1282*; *55 Bankr. Ct. Dec. 221

September 20, 2011, Argued
December 9, 2011, Decided

COUNSEL: ARGUED: Glenn W. Merrick, G.W. MERRICK & ASSOCIATES, LLC, Greenwood Village, Colorado, for Appellants.

Erika Lynn Morabito, PATTON BOGGS, LLP, Washington, D.C., for Appellees.

ON BRIEF: Gregory H. Counts, TYLER, BARTL, RAMSDELL & COUNTS, PLC, Alexandria, Virginia, for Appellants.

JUDGES: Before TRAXLER, Chief Judge, and AGEE and DIAZ, Circuit Judges. Judge Diaz wrote the opinion, in which Chief Judge Traxler and Judge Agee joined.

OPINION BY: DIAZ

OPINION

DIAZ, Circuit Judge:

We consider in this case the circumstances under which a bankruptcy court may approve nondebtor release, injunction, and exculpation provisions as part of a final plan of reorganization under Chapter 11 of the Bankruptcy Code.

We hold that equitable relief provisions of the type approved in this case are permissible in certain circumstances. A bankruptcy court must, however, find facts sufficient to support its legal conclusion that a particular debtor's circumstances entitle it to such relief. Because the bankruptcy court in this case failed to make such findings, the district court erred in affirming the bankruptcy court's confirmation order. Accordingly, we vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

I.

Appellee National Heritage Foundation ("NHF") is a non-profit public charity that administers and

maintains Donor-Advised Funds ("DAFs").[1] Appellants John R. Behrmann, Nancy Behrmann, the Highbourne Foundation, Dolores F. Anderson, and the Dodie Anderson Foundation are among the more than 9000 donors that established DAFs to be administered by NHF.

Following a state court judgment of over six million dollars entered against NHF in Texas, NHF filed a voluntary petition in the U.S. Bankruptcy Court for the Eastern District of Virginia, seeking to reorganize under Chapter 11 of the Bankruptcy Code. NHF notified its donors and other parties in interest, including Appellants, of the deadline for filing proofs of claim in its bankruptcy proceeding.

As part of its reorganization plan, NHF proposed three categories of unsecured claims: Class III(A), consisting of a claim by the Mancillas family, the holder of the Texas state court judgment; Class III(B), consisting of claims held by NHF's charitable gift annuitants; and Class III(C), consisting of all other general unsecured claims. Although NHF contended that its donors were not creditors, it provided that a

[1] DAFs are funds that are owned and controlled by a sponsoring charitable organization that separately identifies contributions made by donors. 26 U.S.C. § 4966(d)(2). Donors may make non-binding recommendations regarding how their donations are invested or distributed, but otherwise relinquish all right and interest in the donated assets.

donor's claim would be treated as an unsecured Class III(C) claim provided that the claim was allowed.[2]

NHF's proposed plan of reorganization also included certain release, injunction, and exculpation provisions (collectively, the "Release Provisions") that prevented potential claimants from asserting claims against NHF, the Official Committee of Unsecured Creditors (the "Committee"), and other parties closely connected with NHF or the Committee, such as NHF's officers and directors, that accrued on or before the effective date of the reorganization plan. At a hearing before the bankruptcy court, NHF representative Janet Ridgely testified that the Release Provisions were essential to NHF's successful reorganization as a going concern. Specifically, Ridgely asserted that (1) NHF's proposed plan of reorganization and bylaws required NHF to indemnify its officers and directors for costs, expenses, and liabilities arising out of lawsuits filed against them relating to acts taken in their official capacities; (2) NHF's officers and directors were concerned about the possibility of

[2] The bankruptcy court ultimately dismissed the claims of Appellants Dolores F. Anderson and the Dodie Anderson Foundation as untimely. The district court affirmed and the dismissal has likewise been affirmed by this court. *Anderson v. Nat'l Heritage Found., Inc.,* No. 10-2186, 439 Fed. Appx. 238, 2011 U.S. App. LEXIS 14360, 2011 WL 2745764 (4th Cir. July 13, 2011). The bankruptcy court overruled NHF's objection to the Behrmann claims, determining that the Behrmanns may have stated claims for rescission under 11 U.S.C. § 101(5). The Behrmanns, however, subsequently withdrew their claims.

protracted litigation against them relating to acts predating NHF's petition for bankruptcy, and in particular litigation initiated by donors; (3) NHF's officers and directors might be unwilling to continue to serve after confirmation of NHF's proposed plan of reorganization if third parties could sue them for their pre-petition conduct; and (4) retaining NHF's officers and directors was essential to NHF's success as a reorganized debtor. The bankruptcy court, however, declined to approve the Release Provisions, concluding that they were overly broad.

NHF's counsel subsequently filed revisions to the Release Provisions that (1) narrowed the definition of "Released Parties" to include only NHF, the Committee, any designated representatives of the Committee, and any officers, directors, or employees of NHF, the Committee, or their successors and assigns (the "Released Parties"); (2) exculpated the Released Parties only with respect to claims brought by parties in interest that had filed a proof of claim or were given notice of NHF's bankruptcy proceeding, and then only for acts or omissions arising out of the operation of NHF's business through the effective date of the reorganization plan; and (3) explicitly provided that no parties would be released from liability stemming from NHF's failure to comply with its obligations under the reorganization plan. Following argument, the bankruptcy court approved the Release Provisions as amended and confirmed NHF's plan of reorganization (hereafter, the "Confirmed Plan").

In its written order, the bankruptcy court found that the Release Provisions were (1) "essential" to NHF's reorganization and appropriate given NHF's "unique circumstances"; (2) an "essential means" of implementing the Confirmed Plan; (3) an "integral element" of the transactions contemplated in the Confirmed Plan; (4) a "material benefit" for NHF, its bankruptcy estate, and its creditors; (5) "important" to the Confirmed Plan's overall objectives; and (6) consistent with applicable provisions of the Bankruptcy Code. J.A. 886-87.

The bankruptcy court's order also adopted all oral findings of fact made on the record during the two days of confirmation hearings. These findings included that (1) NHF's bankruptcy was "quite a unique case," *id.* 1375; (2) there were "legitimate interests" for approving the Release Provisions in the reorganization plan, *id.* 1382; (3) the "potential for mischief" was "very, very high" for a dissatisfied party whose claim was disallowed in the bankruptcy proceeding to sue NHF's officers and directors "seriatim," *id.* 1383-84; (4) NHF's obligations to indemnify its officers and directors could cause it to incur substantial legal costs in defending such claims; and (5) the Release Provisions served the purpose of "preventing an end-run around the plan" by not allowing dissatisfied claimants to attempt "second and third bites at the apple in another forum," *id.* 1416.

Appellants thereafter appealed to the district court and also moved for a stay of enforcement of the Release Provisions, which the bankruptcy court

granted through the pendency of the first level of review before the district court. The district court affirmed the confirmation order. Appellants timely appealed to this court, and moved before the bankruptcy court for a limited stay pending appeal, which the court denied because it no longer had jurisdiction. Appellants then moved before the district court for a stay, which the district court also denied.

II.

The parties articulate differing standards of review. Appellants claim that whether the Confirmed Plan satisfies the requirements of the Bankruptcy Code (to include whether the plan was proposed in good faith) and whether the Release Provisions are permissible present questions of law that are reviewed de novo. NHF responds that, however framed by Appellants, the ultimate issue in this case is the propriety of the bankruptcy court's approval of the Release Provisions. NHF argues that such a decision implicates a bankruptcy court's equitable powers, and that it is well established that a court's grant or denial of equitable relief is reviewed for abuse of discretion.

As to Appellants' claim that the Confirmed Plan was not proposed in good faith, and thereby fails to satisfy the requirements of the Bankruptcy Code, the standard of review is well settled: a court's finding with respect to the good faith requirement imposed under 11 U.S.C. § 1129(a)(3) is reviewed for clear

error. *In re PWS Holding Corp.,* 228 F.3d 224, 242 (3d Cir. 2000); *accord Schwarzmann v. First Union Nat'l Bank* (*In re Schwarzmann*), No. 95-2512, 1996 U.S. App. LEXIS 31262, 1996 WL 698072, at *4 (4th Cir. Dec. 6, 1996) (stating that the factual findings of the bankruptcy court, including a finding of good faith under § 1129(a)(3), are subject to a "clearly erroneous" standard of review).

We need not resolve the separate question of which standard of review governs the bankruptcy court's approval of the Release Provisions. Instead, we conclude that a remand is necessary because the bankruptcy court's failure to make sufficient factual findings in support of its legal conclusions does not allow for meaningful appellate review under any standard.

III.

A.

Before we address the deficiencies in the bankruptcy court's confirmation order, we first consider (and reject) Appellants' broadside contention that the Confirmed Plan fails to satisfy the requirements of the Bankruptcy Code.

Confirmation of a Chapter 11 plan of reorganization requires that the plan satisfy all of the confirmation criteria set forth in 11 U.S.C. § 1129(a). *In re Byrd Foods, Inc.,* 253 B.R. 196, 199 (Bankr. E.D. Va. 2000). Appellants argue that the Confirmed Plan fails

this basic requirement because (1) the Plan was not proposed in good faith, in contravention of 11 U.S.C. § 1129(a)(3), and (2) 11 U.S.C. § 524(e) – providing in pertinent part that "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt" – forecloses approval of the Release Provisions.

On the question of NHF's good faith in proposing the Confirmed Plan, Appellants essentially contend that the Chapter 11 filing was a sham perpetrated by NHF's officers and directors to secure immunity for their fraudulent and misleading conduct in soliciting donations for DAFs and in administering those funds. Appellants claim that the Confirmed Plan "evidences a concentrated effort by the Houk family [whose members largely comprise NHF's officers and directors] to extend to itself comprehensive clemency . . . in respect of reprehensible and tortious practices." Appellants' Br. 16.

Here, however, the bankruptcy court specifically examined the totality of the circumstances surrounding the formulation of the plan and NHF's negotiations with the Committee and holders of claims against NHF, all objections filed and responses thereto, and all other evidence presented during the two days of confirmation hearings. The bankruptcy court concluded specifically that NHF was a "debtor" as that term is defined under the Code and that it "filed its case and proposed its Plan with the legitimate and honest purpose of reorganizing and maximizing both the value of [NHF's] Estate and the recovery to

Claimants." J.A. 881. Because Appellants have not shown that the bankruptcy court clearly erred with respect to this finding, we reject their contention that the Confirmed Plan fails to satisfy the good faith requirement.

As to Appellants' second broad challenge to the Confirmed Plan, we have rejected the notion that 11 U.S.C. § 524(e) forecloses bankruptcy courts from releasing and enjoining causes of action against non-debtors. *See Menard-Sanford v. Mabey* (*In re A.H. Robins Co.*), 880 F.2d 694 (4th Cir. 1989) [hereinafter *A.H. Robins*]. *A.H. Robins* involved a reorganization necessitated by a mass tort suit arising from the use of the Dalkon Shield intrauterine device. In that case, the appellants sought to sue the debtor's directors and attorneys as joint tortfeasors, but we permitted the bankruptcy court to enjoin these suits on grounds of equity. We noted, "11 U.S.C. § 105(a) gives a bankruptcy court the power to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title, and confers equitable powers upon the bankruptcy courts." *Id.* at 701 (internal quotations omitted).

We declined to retreat from this holding in *Stuart v. First Mount Vernon Indus. Loan Ass'n,* 3 F. App'x 38 (4th Cir. 2001), stating as follows:

> In *A. H. Robins,* we determined that section 524(e) does not deny the bankruptcy court the power to release liabilities of a non-debtor under the terms of a Chapter 11 plan when the creditors of the non-debtor

> approved of and accepted the terms of the plan. We recognize that there are decisions to the contrary in other circuits, but we reject First Mount Vernon's implication that we should abandon our precedent.

Id. at 42 (citations and internal quotations omitted); *accord In re Drexel Burnham Lambert Grp.,* 960 F.2d 285, 293 (2d Cir. 1992) (upholding an injunction against creditors from suing a third party, given that the injunction played an important part in the debtor's reorganization); *In re Railworks Corp.,* 345 B.R. 529, 536 (Bankr. D. Md. 2006) (holding that a release provision enjoining the commencement of actions against nondebtors was enforceable even though "broad in nature"). Thus, Appellants' blanket assertion that equitable relief in the form of nondebtor releases is never permissible under the Bankruptcy Code is also without merit.

B.

Next, we address whether – on this record – the bankruptcy court erred in entering an order approving the Release Provisions as part of the Confirmed Plan, and the district court erred in affirming that order insofar as it included the Release Provisions. Appellants contend that the Release Provisions far exceed the narrow limits that courts have drawn in this area. In support of that contention, Appellants direct us first to our decision in *A.H. Robins,* where we approved a bankruptcy court's decision to enjoin third party suits in favor of a "channeling" injunction

that required claimants to assert their tort claims against a $350 million trust res established by the debtor's insurers, 880 F.2d at 701.

According to Appellants, however, we did so only after finding that (1) the parties who benefited from the injunction (the debtor's insurers) had all contributed funds sufficient to fully satisfy all claims asserted against the debtor; (2) the reorganization plan afforded all parties, including those with late-filed claims, a chance to be paid in full from the trust res; (3) the injunction was necessary to prevent suits against parties whose contribution rights against the debtor would defeat the prospects of a successful reorganization; and (4) the affected class of claimants voted overwhelmingly in favor of the proposed reorganization plan.

In contrast, Appellants contend that (1) the beneficiaries of the Release Provisions, NHF's officers and directors, have not contributed any funds to NHF's reorganization; (2) the plan does not afford recovery for late-filed claims, as evidenced by NHF's objection to the claim asserted by Appellant Anderson on the ground that it was filed four months after the bar date; (3) the Release Provisions do not promote the purpose of a successful reorganization because continuation of NHF's operations is not necessary for a successful reorganization, especially because there is no evidence that the service of NHF's present officers and directors is necessary to NHF's continued operations; and (4) the affected class of claimants did not overwhelmingly favor the Confirmed Plan, as

Appellants – and all other potential Class III(C) creditors – were barred from voting on the plan because they were classified as "unimpaired."

In our view, however, a bankruptcy court need not find a precise fit between the circumstances found in *A.H. Robins* and the case before it as a precondition to granting equitable relief. Rather, whether a court should lend its aid in equity to a Chapter 11 debtor will turn on the particular facts and circumstances of the case, and our decision in *A.H. Robins* is not to the contrary.

Appellants also look to decisions from other circuits holding that nondebtor releases are appropriate only in very limited circumstances. First, Appellants note the Second Circuit's observations that the only authority in the Bankruptcy Code for nondebtor releases is 11 U.S.C. § 524(g), which is limited to channeling injunctions in asbestos cases, and that nondebtor releases pose a "potential for abuse" that "is heightened when releases afford blanket immunity," *Deutsche Bank AG v. Metromedia Fiber Network, Inc.* (*In re Metromedia Fiber Network, Inc.*), 416 F.3d 136, 142 (2d Cir. 2005). The Appellants also cite *Airadigm Communs., Inc. v. FCC* (*In re Airadigm Communs., Inc.*), 519 F.3d 640, 657 (7th Cir. 2008), in which the Seventh Circuit denounced nondebtor releases that provided "blanket immunity" for pre- and post-petition conduct and omissions. Finally, Appellants cite various other circuit and bankruptcy court cases for the proposition that only unique or unusual circumstances can justify approval of nondebtor

releases. Appellants' Br. 20 (collecting cases). We have reviewed these cases and find nothing therein inconsistent with our conclusion that a bankruptcy court is authorized to approve equitable relief in the form of the Release Provisions where circumstances warrant.

Appellants next direct our attention to the seven-factor test found in *Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648 (6th Cir. 2002), arguing that bankruptcy courts frequently employ it to determine if nondebtor releases are necessary and fair. In pertinent part, the opinion states as follows:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The

> plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Id. at 658 (citing, inter alia, *A.H. Robins,* 880 F.2d at 701-02). Appellants argue that the Release Provisions fail every prong of this test and vastly exceed the scope of releases that have been permitted in prior cases.

NHF responds that a party need not satisfy a specific test or present evidence in support of specific findings for such provisions to be upheld. Alternatively, NHF contends that the following, narrower set of factors provides the proper framework for a bankruptcy court to consider in deciding whether to approve nondebtor releases: (1) overwhelming approval for the plan; (2) a close connection between the causes of action against the third party and the causes of action against the debtor; (3) that the injunction is essential to the reorganization; and (4) that the plan of reorganization provides for payment of substantially all of the claims affected by the injunction. Appellee's Br. 25-26 (citing *In re Railworks Corp.,* 345 B.R. at 536). NHF claims that the Release Provisions satisfy each of these factors.

C.

We find the *Dow Corning* and *In re Railworks Corp*. factors instructive and so commend them to a

bankruptcy court when considering whether to approve nondebtor releases as part of a final plan of reorganization. That said, we agree with Appellants that approval of nondebtor releases in this context should be granted cautiously and infrequently. *See Deutsche Bank AG,* 416 F.3d at 142 ("No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique."); *Dow Corning,* 280 F.3d at 657-58 ("[S]uch an injunction is a dramatic measure to be used cautiously. . . ."); *Gillman v. Cont'l Airlines* (*In re Cont'l Airlines*), 203 F.3d 203, 212-213 (3d Cir. 2000) (recognizing that nondebtor releases have been approved only in "extraordinary cases"). Thus, while we are satisfied to leave to a bankruptcy court the determination of which factors may be relevant in a specific case, the meaningful exercise of appellate review at a minimum requires that the court make specific factual findings in support of its decision to grant equitable relief.

In this case, although the bankruptcy court did not explicitly state that it was applying the *Dow Corning* factors, it clearly considered the case in deciding whether to approve the Release Provisions. We find, however, that the bankruptcy court's ultimate decision to grant equitable relief lacks adequate factual support. Put simply, to conclude, as the bankruptcy court did, that the Release Provisions (1) were "essential" to NHF's reorganization and appropriate given NHF's "unique circumstances"; (2) were an "essential means" of implementing the confirmed plan;

(3) were an "integral element" of the transactions contemplated in the Confirmed Plan; (4) conferred a "material benefit" on NHF, its bankruptcy estate and its creditors; (5) were "important" to the plan's overall objectives; and (6) were "consistent" with applicable provisions of the Bankruptcy Code, is meaningless in the absence of specific factual findings explaining why this is so. Indeed, without more, the court's conclusions could apply just as well to any number of reorganizing debtors. Because the present record does not allow us to assess – under any standard of review – whether NHF's circumstances entitle it to the benefit of the Release Provisions, we must vacate the district court's judgment and remand the case to allow the bankruptcy court – if the record permits it – to set forth specific factual findings supporting its conclusions.

IV.

We turn next to NHF's contention that the appeal should be dismissed as equitably moot.[3] Specifically, NHF argues that it has substantially consummated the Confirmed Plan and relied on its finality and that Appellants should be foreclosed from

[3] Ordinarily, we would address this procedural question before turning to the merits. In this case, however, "[b]ecause equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness." *Deutsche Bank AG,* 416 F.3d at 144.

relief because they failed to stay the distributions under the Confirmed Plan. We have recognized that "[t]he doctrine of equitable mootness represents a pragmatic recognition by courts that reviewing a judgment may, after time has passed and the judgment has been implemented, prove 'impractical, imprudent, and therefore inequitable.'" *Retired Pilots Ass'n of U.S. Airways, Inc. v. U.S. Airways Grp., Inc.* (*In re U.S. Airways Grp., Inc.*), 369 F.3d 806, 809 (4th Cir. 2004) (quoting *MAC Panel Co. v. Va. Panel Corp.,* 283 F.3d 622, 625 (4th Cir. 2002)). In the bankruptcy context, a court "may dismiss an appeal as equitably moot 'when it becomes impractical and imprudent to upset the plan of reorganization at [a] late date.'" *Id.* (quoting *MAC Panel Co.,* 283 F.3d at 625).

We look to the following factors to determine whether an appeal should be dismissed because it is equitably moot:

> (1) whether the appellant sought and obtained a stay; (2) whether the reorganization plan or other equitable relief ordered has been substantially consummated; (3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and (4) the extent to which the relief requested on appeal would affect the interests of third parties.

Id. Here, NHF contends that all of the factors favor dismissal of the appeal.

Appellants do not contest that NHF substantially consummated the Confirmed Plan by distributing approximately $20 million of estate assets to holders of allowed claims on November 12, 2009, more than a month before Appellants docketed their appeal to the district court, and almost a year before they docketed their appeal to this court. Instead, they argue that substantial consummation alone is insufficient to moot an appeal from an order of confirmation.

Without endorsing Appellants' contention that substantial consummation is alone insufficient, we find that the balance of factors does not support dismissal of the appeal. First, Appellants sought and obtained a stay, although limited in scope, and then were rebuffed in their efforts to obtain a further stay pending appeal.

NHF has also failed to demonstrate how the relief requested by Appellants would jeopardize the success of the Confirmed Plan. On this point, NHF argues that it could incur substantial litigation costs in defending its directors and officers against claims brought by dissatisfied donors that would threaten its ability to continue operations. However, here NHF merely parrots certain conclusions of the bankruptcy court, for example, that the Release Provisions are "important to the overall objectives of the Plan," J.A. 887, and we have already noted that such conclusions lack adequate factual support. We also note that the Confirmed Plan expressly provides that any clause may be severed should it be determined to be

unenforceable, which suggests that the plan would remain viable absent the Release Provisions.

Finally, NHF never explains how third-party interests would be affected by the relief sought, merely articulating potential harm that the organization itself might incur. By contrast, in *Retired Pilots Ass'n of U.S. Airways,* the reorganized debtor had entered into countless transactions with third parties, including the securing of loans from lenders. There we found that if a central provision of the reorganization plan was unwound, such action would likely effect a great harm on these third parties. 369 F.3d at 810. On this record, we are unable to find that the interests of third parties would be affected by the relief requested by Appellants.

In sum, we decline to exercise our discretion to dismiss this appeal as equitably moot.

V.

For the foregoing reasons, we vacate the judgment of the district court and remand this case with instructions to the district court to remand it to the bankruptcy court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

In re National Heritage Foundation, Inc.	)	
JOHN BEHRMANN, *et al.*,	)	
Appellants,	)	Civil Action No. 01:10-cv-40
v.	)	
NATIONAL HERITAGE FOUNDATION, INC.,	)	
Appellee.	)	

ORDER

This matter comes before the Court on Appeal of the Bankruptcy Court's Order of October 16, 2009 confirming the Chapter 11 Plan in Bankruptcy Case No. 09-10525-SSM. After considering the record and oral argument, it appears to the Court that the Bankruptcy Court's opinion is not clearly erroneous nor contrary to law and it is hereby

ORDERED that the October 16, 2009 Order of the Bankruptcy Court is AFFIRMED on the sound reasoning of the Bankruptcy Court.

/s/
Claude M. Hilton
United States District Judge

Alexandria, Virginia
August 17, 2010

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE:	§	
National Heritage Foundation, Inc.,	§ § §	Case No. 09-10525 (SSM)
DEBTOR	§ §	Chapter 11

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER UNDER 11 U.S.C. §§ 1129(a) AND FED. R. BANKR. P. 3020 CONFIRMING THE FOURTH AMENDED AND RESTATED PLAN OF REORGANIZATION OF THE DEBTOR

(Filed Oct. 16, 2009)

The above-captioned debtor (the "*Debtor*") having commenced its chapter 11 case on January 24, 2009 (the "*Petition Date*") by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "*Bankruptcy Code*"), and upon:

- The Debtor operating and managing its charitable mission as a debtor in possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

- The filing, on June 26, 2009 of its *Plan of Reorganization of the Debtor* (the "*Original Plan*," Docket No. 249), which plan and related documents were amended several times;

- The filing, on July 20, of its *Motion for (A) Conditional Approval of Disclosure Statement, (B) Approval of Joint Hearing on Disclosure Statement and Plan of Reorganization, (C) Approval of Certain Notice Procedures for the Disclosure Statement, Plan of Reorganization, and Joint Confirmation for the Debtor's Plan and Disclosure Statement, (D) Approval of Notice Procedures for the Assumption of Executory Contracts, and (E) Extending the Debtor's Plan Exclusivity Period Until the Conclusion of the Contemplated Plan Confirmation Process* (Docket No. 264);

- The filing, on July 20, 2009, of its *First Amended and Restated Plan of Reorganization of the Debtor* (the "*First Amended Plan*," Docket No. 266) and its *Disclosure Statement with Respect to First Amended and Restated Plan of Reorganization of the Debtor* (the "*Original Disclosure Statement*," Docket No. 263);

- The filing, on August 3, 2009, of its *Second Amended and Restated Plan of Reorganization of the Debtor* (the "*Second Amended Plan*," Docket No. 474) and *First Amended and Restated Plan of Reorganization with Respect to Second Amended and Restated Plan of Reorganization of the Debtor* (the "*First Amended Disclosure Statement*," Docket No. 475);

- The filing, on August 5, 2009, of its *Second Amended and Restated Disclosure Statement with Respect to Second Amended and Restated Plan of Reorganization of the Debtor* (the "*Second Amended Disclosure Statement*," Docket No. 485);

- The Court's entry on August 6, 2009 of the *Order Granting Motion for (A) Conditional Approval of Disclosure Statement, (B) Approval of Joint Hearing on Disclosure Statement and Plan of Reorganization, (C) Approval of Certain Notice Procedures for the Disclosure Statement, Plan of Reorganization, and Joint Confirmation Hearing for the Debtor's Plan and Disclosure Statement, (D) Approval of Notice Procedures for the Assumption of Executory Contracts, and (E) Extending the Debtor's Plan Exclusivity Period Until the Conclusion of the Contemplated Plan Confirmation Process* (the "*Original Solicitation Order*," Docket No. 490), which, among other things, conditionally approved the Debtor's Second Disclosure Statement for solicitation;

- The filing, on September 4, 2009 of the *Third Amended and Restated Plan of Reorganization of the Debtor* (the "*Third Amended Plan*," Docket No. 577) and the *Third Amended and Restated Disclosure Statement with Respect to Third Amended and Restated Plan of Reorganization of the Debtor* (the "*Disclosure Statement*," Docket No. 578);

- The filing, on September 8, 2009 of the *Debtor's Motion to Estimate Claims Filed by Annuitants* (the "*Estimation Motion*," Docket No. 590);

- The Court's entry of the *Amended Order (A) Conditionally Approving Disclosure Statement, (B) Approving Joint Hearing on Disclosure Statement and Plan of Reorganization, (C) Approving Certain Notice Procedures for the Disclosure Statement, Plan*

of Reorganization, Ballot, and Joint Confirmation Hearing for the Debtor's Plan and Disclosure Statement (the "*Solicitation Order*," Docket No. 602);

• The filing, on September 14, 2009, of the *Notice of Joint Hearing Regarding Confirmation of Debtor's Plan of Reorganization and Approval of Disclosure Statement* (the "*Confirmation Hearing Notice*," Docket No. 615);

• The Court's entry on September 23, 2009 of the *Order Granting the Debtor's Motion to Estimate Claims Filed by Annuitants* (the "*Estimation Order*," Docket No. 639);

• The filing, on October 13, 2009 of the *Fourth Amended and Restated Plan of Reorganization of the Debtor* (along with its predecessor Original Plan, First Amended Plan, Second Amended Plan, and Third Amended Plan, the "Plan," Docket No. 665);

IN ADDITION TO THE COURT'S FINDINGS AND CONCLUSIONS AS ANNOUNCED ON THE RECORD AT THE CONFIRMATION HEARING, WHICH ARE FULLY INCORPORATED HEREIN, THE COURT FINDS AND CONCLUDES THAT:

A. *Filing of Plan*. On June 26, 2009, the Debtor filed the Original Plan[1], which was amended and

[1] Unless otherwise indicated, all capitalized terms shall have the meaning assigned to them in the Plan. Any term used in the Plan or this Order (the "*Confirmation Order*") that is not defined in the Plan, but is used in the Bankruptcy Code or the

(Continued on following page)

supplemented by the terms of the First Amended Plan on July 20, 2009, the Second Amended Plan on August 3, 2009, the Third Amended Plan on September 4, 2009 and the Plan on October 13, 2009. The Debtor filed its Original Disclosure Statement on July 20, 2009, which was amended and supplemented by the First Amended Disclosure Statement on August 3, 2009, the Second Amended Disclosure Statement on August 5, 2009, and the Disclosure Statement on September 4, 2009.

B. *Solicitation Order*. On August 6, 2009, the Court entered the Original Solicitation Order which, among other things, (i) conditionally approved the Second Amended Disclosure Statement and authorized the Debtor to solicit acceptances for its plan based on the conditionally approved Second Amended Disclosure Statement, (ii) fixed September 17, 2009, as the date for the commencement of the joint hearing to consider confirmation of the Second Amended Plan and approve the Second Amended Disclosure Statement (the "*Original Confirmation Hearing*"), (iii) approved the form and method of notice of the Original Confirmation Hearing (the "*Original Confirmation Hearing Notice*"), (iv) approved the form of notice to be provided to the counterparties of executory contracts that the Debtor proposed to assume in connection with the Second Amended Plan and (v)

Federal Rules of Bankruptcy Procedure shall have the meaning ascribed to that term in the Bankruptcy Code or Bankruptcy Rules.

established certain procedures for soliciting votes with respect to the Second Amended Plan. As a result of certain plan amendments proposed by the Debtor in connection with the preparation of its Third Amended Plan, the Court entered the Solicitation Order, which (i) conditionally approved the Debtor's Third Amended Disclosure Statement for use in soliciting acceptances of the Debtor's Plan, (ii) established a joint hearing to confirm the Debtor's Third Amended Plan and Disclosure Statement on October 15, 2009 at 9:30 a.m. (the "*Confirmation Hearing*"), and (iii) established modified deadlines for Class III(B) members and trust beneficiaries to submit Objections to the Debtor's Third Amended Plan or Disclosure Statement, and (iv) established procedures for soliciting acceptance of the Debtor's Third Amended Plan from Class III(B) members.

C. *Transmittal of Original Solicitation Package*. In accordance with the terms of the Original Solicitation Order, the Debtor transmitted copies of the Debtor's Second Amended Plan, Second Amended Disclosure Statement, the Confirmation Hearing Notice, and Original Solicitation Order to: (1) all charitable annuitants, (2) all creditors whose claims were listed on the Debtor's schedules of assets and liabilities as undisputed, excluding any donors, and (3) all parties that had timely filed a proof of Claim in the Debtor's Case (the "*Full Mailing Parties*"). In addition to the materials listed above, the Debtor also transmitted copies of the Notice of Assumption of Executory Contracts and Unexpired Leases, attached

as *Exhibit B* to the Original Solicitation Order, to each of the 42 executory contract counterparties listed on *Exhibit B* to the Disclosure Statement. In accordance with the Original Solicitation Order, the Debtor also mailed a copy of the Original Confirmation Hearing Notice to each of the Debtor's more than 9,000 donors at their last known address.

D. In accordance with the terms of the Solicitation Order, the Debtor transmitted copies of the Third Amended Plan, the Third Amended Disclosure Statement, the Solicitation Order, and the Confirmation Hearing Notice to all members of Class III(B), all Charitable Remainder Trust Beneficiaries, all parties on the Rule 2002 Service List, and any other creditor or party interest that had filed a timely objection to the Debtor's Plan or Disclosure Statement. The Debtor also transmitted a copy of a ballot in the form attached as *Exhibit B* to the Solicitation Order (each a "*Ballot*" and collectively, the "*Ballots*") and a letter from the Committee, dated September 11, 2009, urging acceptance of the Debtor's Third Amended Plan, to all members of Class III(B).

E. *Publication of Confirmation Hearing Notice*. The Debtor published a notice of its Second Amended Plan and Second Amended Disclosure statement in USA Today on August 18, 2009, as evidenced by the Certificates of Publication made by Antoinette Chase of USA Today (Docket No. 673).

F. *Voting Report*. On October 14, 2009, the Debtor filed a Summary of Balloting Results for

Solicitation of Class III(B) Creditors (the "*Voting Report*," Docket No. 670), outlining the results of the voting for the Debtor's solicitation of its only impaired class of Creditors, Class III(B).

G. *Estimation of Annuitant Claims*. Prior to the Confirmation Hearing, the Debtor filed the Estimation Motion, in order to estimate the claims held by all members of Class III(B) for all purposes in the Debtor's bankruptcy. The Court, through entry of the Annuity Order, estimated the value of the Claim of each member of Class III(B) for all purposes in the Debtor's case, including voting and distribution.

H. *Exclusive Jurisdiction; Venue; Core Proceeding (28 U.S.C. §§157(b)(2) and 1334(a))*. The Court has jurisdiction over the Debtor's chapter 11 case 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 under 28 U.S.C. §157(b)(2), and the Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed, including, without limitation, in resolving any jurisdictional issues raised in objections to confirmation of the Plan that have been properly filed in the Debtor's chapter 11 case.

I. *Judicial Notice*. The Court takes judicial notice of the docket maintained by the Clerk of the Court and/or its duly-appointed agent, including, without limitation, all pleadings and other documents filed, all orders entered, and all evidence and arguments

made, proffered or adduced at, the hearings held before the Court during the pendency of the Debtor's chapter 11 case.

J. *Transmittal and Mailing of Materials; Notice*. Due, adequate and sufficient notice of the Disclosure Statement and Plan and of the Confirmation Hearing, along with all deadlines for voting on or filing objections to the Plan, has been given to all known holders of Claims and parties in interest in accordance with the procedures set forth in the Solicitation Order. The Disclosure Statement (including the appendices thereto), Plan, Ballots, Solicitation Order, Confirmation Hearing Notice and the Committee's solicitation statement with respect to the Plan were transmitted and served in substantial compliance with the Solicitation Order and the Bankruptcy Rules, and such transmittal and service were adequate and sufficient. Adequate and sufficient notice of the Confirmation Hearing and the other bar dates and hearings described in the Solicitation Order was given in compliance with the Bankruptcy Rules and the Solicitation Order, and no other or further notice is or shall be required.

K. *Solicitation*. Votes for acceptance or rejection of the Plan were solicited in good faith and complied with sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, the Disclosure Statement, the Solicitation Order, all other applicable provisions of the Bankruptcy Code, and all other rules, laws, and regulations.

L. *Ballots*. All procedures used to distribute solicitation materials to the applicable holders of Claims to tabulate the Ballots were fair and conducted in accordance with the Solicitation Order, the Bankruptcy Code, the Bankruptcy Rules, the local rules of the Bankruptcy Court for the Eastern District of Virginia and all other applicable rules, laws, and regulations.

M. *Impaired Classes that Have Voted to Accept the Plan*. As evidenced by the Voting Report, Class III(B) has accepted the Plan pursuant to the requirements of sections 1124 and 1126 of the Bankruptcy Code and Class III(A) has accepted the impairment and modification of Class III(A) noted on the record at the confirmation hearing by its sole creditor.. Thus, at least one impaired class of Claims, determined without including any acceptance by an insider of the Debtor, has voted to accept the Debtor's Plan.

N. *Burden of Proof*. The Debtor, as proponent of the Plan, has met its burden of proving the elements of section 1129(a) of the Bankruptcy Code, by a preponderance of evidence, which is the applicable evidentiary standard in this Court. The Court also finds that the Debtor has satisfied the elements of section 1129(a) of the Bankruptcy Code under the clear and convincing standard of proof.

O. *Plan Compliance with Bankruptcy Code (11 U.S.C. §1129(a)(1))*. The Plan complies with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

P. *Proper Classification (11 U.S.C. §§1122, 1123(a)(1))*. In addition to Administrative Claims and Priority Tax Claims (which are not required to be classified), Article III of the Plan designates between three Classes of Claims, Class I, Class II, and Class III, and divides Class III into three separate subclasses of Claims, Class III(A), III(B), and III(C). The Claims placed in each Class are substantially similar to other Claims in each such Class. Valid business, factual and legal reasons exist for separately classifying the various Classes of Claims under the Plan, and such Classes do not unfairly discriminate between holders of Claims. Thus, the Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

Q. *Specification of Unimpaired Classes (11 U.S.C. §1123(a)(2))*. Article V of the Plan specifies the Classes of Claims that are Unimpaired. Thus, the Plan satisfies section 1123(a)(2) of the Bankruptcy Code.

R. *Specification of Treatment of Impaired Classes (11 U.S.C. §1123(a)(3))*. Section 5.3(B) of the Plan identifies the only Class of Claims that is impaired under the Debtor's Plan, Class III(B), and specifies the treatment of Claims in all Class III(B). Thus, the Plan satisfies section 1123(a)(3) of the Bankruptcy Code. Class III(A) was impaired on the record at the confirmation hearing by the agreement of the only creditor in the Class.

S. *No Discrimination (11 U.S.C. §1123(a)(4))*. The Plan provides for the same treatment for each

Claim in each respective Class unless the holder of a particular Claim has agreed to less favorable treatment with respect to such Claim. Thus, the Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

T. *Implementation of Plan (11 U.S.C. §1123(a)(5))*. The Plan provides adequate and proper means for implementation of the Plan, including, without limitation, (a) the continued corporate existence of the Debtor; (b) the retention of the Debtor's experienced management team upon its emergence from bankruptcy; (c) including release, exculpation, and injunction provisions contained in Article VII of the Plan, as amended herein, that will apply to the Released Parties, and (d) the liquidation of assets in connection with funding the Debtor's obligations under the Plan. Thus, the Plan satisfies section 1123(a)(5) of the Bankruptcy Code.

U. *Selection of Officers, Directors and the Trustee (11 U.S.C. §1123(a)(7))*. In the Plan, as identified in the Disclosure Statement or as publicly disclosed prior to the Confirmation Hearing, or as otherwise announced at the Confirmation Hearing, the Debtor has properly and adequately disclosed or otherwise identified the procedures for determining the identity and affiliations of all individuals or entities proposed to serve on or after the Effective Date as officers or directors of the Reorganized Debtor. The appointment or employment of such individuals or entities and the proposed compensation and indemnification arrangements for officers and directors are consistent with the interests of Claimants and with public

policy. Thus, section 1123(a)(7) of the Bankruptcy Code is satisfied.

V. *Additional Plan Provisions (11 U.S.C. §1123(b))*. The Plan's provisions are appropriate and consistent with the applicable provisions of the Bankruptcy Code, including, without limitation, provisions for (a) distributions to holders of Claims, (b) the disposition of executory contracts and unexpired leases, (c) the retention of, and right to enforce, sue on, settle or compromise (or refuse to do any of the foregoing with respect to) certain claims or causes of action against third parties, to the extent not waived and released under the Plan, (d) resolution of disputed Claims, (e) allowance or disallowance of certain Claims, (f) indemnification obligations, and (g) the release and exculpation of, and injunction of claims against, the Debtor and the Released Parties.

W. *Fed. R. Bankr. P. 3016(a)*. The Plan is dated and identifies the entities submitting it, thereby satisfying Fed. R. Bankr. P. 3016(a).

X. *Debtor's Compliance with Bankruptcy Code (11 U.S.C. §1129(a)(2))*. The Debtor has complied with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(2) of the Bankruptcy Code. Specifically, the Debtor is a proper debtor under section 109 of the Bankruptcy Code and proper proponent of the Plan under section 1121(a) of the Bankruptcy Code. The Debtor has complied with the applicable provisions of the Bankruptcy Code, including, without limitation, section 541(f), as provided or

permitted by orders of the Court. The Debtor has complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Solicitation Order in transmitting the Plan, the Disclosure Statement, the Ballots and related documents and notices, and in soliciting and tabulating votes on the Plan.

Y. *Plan Proposed In Good Faith (11 U.S.C. §1129(a)(3))*. The Debtor has proposed the Plan in good faith 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 Debtor's chapter 11 case, the formulation of the Plan and the Debtor's negotiations with the Committee and holders of Claims against the Debtor, all objections filed in the Debtor's case, and all evidence presented at the Confirmation Hearing. The Debtor filed its case and proposed its Plan with the legitimate and honest purpose of reorganizing and maximizing both the value of the Debtor's Estate and the recovery to Claimants.

Z. *Payments for Services or Costs and Expenses (11 U.S.C. §1129(a)(4))*. Any payment made or to be made by the Debtor for services or for costs and expenses in connection with its case, including all administrative expense and substantial contribution claims under sections 503 and 507 of the Bankruptcy Code, or in connection with the Plan and incident to its chapter 11 case, has been approved by, or is

subject to the approval of, the Court as reasonable, thereby satisfying section 1129(a)(4) of the Bankruptcy Code.

AA. *Directors and Officers (11 U.S.C. §1129(a)(5)(A))*. The Debtor has complied with section 1129(a)(5)(A) of the Bankruptcy Code and has disclosed the proposed initial officers of the Reorganized Debtor. The Debtor has disclosed in the Plan and Disclosure Statement the manner for selection of the Reorganized Debtor's officers and directors. The identities of the Debtor's officers and directors were disclosed in the Plan and Disclosure Statement. Upon review of the information provided by the Debtor pursuant to the Plan, Disclosure Statement and Exhibits to the Plan and the evidence presented at or prior to the Confirmation Hearing regarding the composition of the board of directors of the Reorganized Debtor and selection and appointment of the Reorganized Debtor's officers and directors is consistent with the interests of creditors and with public policy.

BB. *Insiders (11 U.S.C. §1129(a)(5)(B))*. The Plan discloses the identity of, and compensation received by each of the Debtor's officers and directors. Accordingly, because the Debtor has disclosed the nature of compensation to be paid to its insider officers and directors, the requirements of section 1129(a)(5)(B) of the Bankruptcy Code have been met.

CC. *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.

DD. *Best Interests Test (11 U.S.C. §1129(a)(7))*. The Plan satisfies section 1129(a)(7) of the Bankruptcy Code. The liquidation analysis in Article X of the Disclosure Statement and evidence adduced at the Confirmation Hearing (i) are persuasive, credible and accurate as of the dates such evidence was prepared, presented, or proffered, (ii) either have not been controverted by other persuasive evidence or have not been challenged, (iii) are based upon reasonable and sound assumptions, (iv) provide a reasonable estimate of the liquidation values of the Debtor upon conversion to a case under chapter 7 of the Bankruptcy Code, and (v) establish that each holder of a Claim in an impaired Class that has not accepted the Plan will receive or retain under the Plan, on account of such Claim, property of a value, as of the Effective Date of the Plan, that is not less than the amount that it would receive if the Debtor were liquidated under chapter 7 of the Bankruptcy Code on such date. Additionally, the liquidation analysis has shown that under the "best interests" test of section 1129(a)(7) of the Bankruptcy Code, none of the Debtor's Donors would be entitled to receive any distribution from the Debtor's Estate with respect to their donation if the Debtor were liquidated under chapter 7 of the Bankruptcy Code on the Effective Date. Consequently, because the Donors would not be entitled to receive a distribution with respect to their

donation in a chapter 7 proceeding, the "best interests" test has been satisfied with respect to each of the Debtor's Donors.

EE. *Acceptance (11 U.S.C. §1129(a)(8))*. The Debtor's only impaired Classes of Claims, Class III(A) and Class III(B), have each voted to accept the Debtor's Plan. The Debtor's remaining Classes of Claims are unimpaired and deemed to have accepted the Plan. Accordingly, the Plan satisfies the requirements imposed by section 1129(a)(8) of the Bankruptcy Code.

FF. *Treatment of Administrative and Priority Tax Claims and Other Priority 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 as provided in Article III of the Plan.

GG. *Acceptance by Impaired Class (11 U.S.C. §1129(a)(10))*. The Debtor's two impaired class of claims, Class III(A) and III(B) have accepted the Plan. Thus, section 1129(a)(10) of the Bankruptcy Code is satisfied.

HH. *Feasibility (11 U.S.C. §1129(a)(11))*. The Plan satisfies section 1129(a)(11) of the Bankruptcy Code. The feasibility analysis contained in Article X of the Disclosure Statement and evidence proffered or adduced at the Confirmation Hearing (i) are

persuasive and credible, (ii) have not been controverted by other evidence or 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 or the need for further financial reorganization of the Debtor or the Reorganized Debtor.

II. *Payment of Fees (11 U.S.C. §1129(a)(12))*. The Debtor has paid or, pursuant to Section 12.5 of 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.

JJ. *Continuation of Retiree Benefits (11 U.S.C. §1129(a)(13))*. Because the Debtor does not have any obligations on account of retiree benefits, section 1129(a)(13) of the Bankruptcy Code is inapplicable to the Debtor or its Plan.

KK. *Plan's Transfers Comply with Nonbankruptcy Law (11 U.S.C. § 1129(a)(16))*. The Debtor is a corporation, other than a moneyed, business, or commercial corporation. All transfers of property contemplated in the Plan are in compliance with applicable nonbankruptcy law, including, but not limited to, federal tax law and the laws governing Georgia not-for-profit corporations, thereby satisfying section 1129(a)(16) of the Bankruptcy Code.

LL. *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).

MM. *Modifications to the Plan*. The modifications to the Third Amended Plan described and/or set forth in the Plan or in paragraph 29 hereof constitute technical changes and/or changes with respect to particular Claims by agreement with holders of such Claims, and do not materially affect or change the treatment of any Claims. Accordingly, pursuant to Bankruptcy Rule 3019, these modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or re-solicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that holders of Claims be afforded an opportunity to change previously cast acceptances or rejections of the Third Amended Plan.

NN. *Good Faith Solicitation (11 U.S.C. §1125(e))*. The Debtor and its agents, representatives, attorneys, and advisors have solicited votes on the Plan in good faith and in compliance with the applicable provisions of the Bankruptcy Code and the Solicitation Order and are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and the release, exculpation, and injunction provisions set forth in Article VII of the Plan.

OO. *The Reorganized Debtor Will Not Be Insolvent Nor Left with Unreasonably Small Capital*. As of the occurrence of the Effective Date and after taking into account the transactions contemplated by the Plan, (i) the value of the Reorganized Debtor's Assets

will be not less than the amount that will be required to pay the probable liabilities on the Reorganized Debtor's then existing debts as they become absolute and matured and (ii) the Reorganized Debtor's capital is not unreasonably small in relation to their business or any contemplated or undertaken transaction. As of the Effective Date, the Reorganized Debtor shall be conclusively determined to be solvent for all purposes.

PP. *Executory Contracts*. The Debtor has exercised reasonable business judgment in determining whether to assume or reject each of its executory contracts and unexpired leases as set forth in Article VIII of the Plan. Each pre- or post-Confirmation assumption or rejection of an executory contract or unexpired lease pursuant to Article VIII of the Plan and the related Exhibits to the Plan and Disclosure Statement shall be legal, valid and binding upon the Debtor or Reorganized Debtor and all non-Debtor parties to such executory contract or unexpired lease, all to the same extent as if such assumption or rejection had been effectuated pursuant to an appropriate authorizing order of the Court entered before the Confirmation Date under section 365 of the Bankruptcy Code.

QQ. *Adequate Assurance*. No non-Debtor party to any executory contract or unexpired lease to be assumed pursuant to Article VIII of the Plan has objected to assumption of its contract or lease pursuant to the Plan. The Debtor has cured, or provided adequate assurance that the Reorganized Debtor will cure, defaults (if any) under or relating to each of the

executory contracts and unexpired leases which are being assumed by the Debtor on the Effective Date pursuant to the Plan.

RR. *Cure*. Any Cure Costs associated with the assumption of an executory contract or unexpired lease shall be as ordered by the Court prior to the Effective Date, or as set forth on *Exhibit B* to the Disclosure Statement.

SS. *Releases and Discharges*. The releases, exculpation, and injunction provisions described in Sections 7.19, 7.20, and 7.21 of the Plan are essential to the Debtor's reorganization efforts and appropriate given the Debtor's unique circumstances. Each of the discharge, release, indemnification and exculpation provisions set forth in the Plan: (i) is within the jurisdiction of the Court under 28 U.S.C. §§1334(a), (b), and (d); (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 transactions incorporated into the Plan; (iv) confers material benefit on, and is in the best interest of, the Debtor, its Estates and their creditors; (v) is important to the overall objectives of the Plan to finally resolve all Claims among or against the parties-in-interest in Debtor's case with respect to the Debtor's organization, capitalization, operation and reorganization; and (vi) is consistent with sections 105, 1123, 1129 and other applicable provisions of the Bankruptcy Code.

TT. *Retention of Jurisdiction*. The Court properly may retain jurisdiction over the matters set forth in Article X of the Plan and in paragraph 29 below.

UU. *Preservation of Causes of Action*. It is in the best interests of creditors that the causes of action that are not expressly released under the Plan be retained by the Reorganized Debtor pursuant to Section 7.9 of the Plan in order to maximize the value of the Debtor's Estate.

ACCORDINGLY, THE COURT HEREBY ORDERS THAT:

1. *Confirmation*. The Plan, which incorporates the modifications set forth in paragraph 29 below, which are hereby incorporated into and constitute a part thereof, is approved and confirmed under section 1129 of the Bankruptcy Code. The terms of the Plan and the exhibits thereto (in the final form thereof to be filed on or before the Effective Date) are incorporated by reference into and are an integral part of the Plan and this Confirmation Order.

2. *Objections*. All Objections to confirmation of the Plan or approval of the Disclosure Statement that have not been withdrawn, waived, or settled, including, without limitation, those filed by the Mancillas (Docket No. 270 and 472), the U.S. Trustee (Docket No. 548), Larry Renick (Docket No. 562), the Highbourne Foundation (including John Behrmann and Nancy Behrmann, Docket No. 584 and 584)), the Townsley Family Foundation (including Maurice Townsley and Theresa Townsley, Docket No. 650 and

651), Dolores F. "Dodie" Anderson (including the Dodie Anderson Foundation, Docket No. 648 and 649), John Goodson (Docket No. 608), and Scott Simpson and Deanna Nord Nogel (Docket No. 596), and all reservations of rights included therein, are overruled on the merits.

3. *Plan Classification Controlling*. The classification of Claims for purposes of the distributions to be made under the Plan shall be governed solely by the terms of the Plan. The classifications set forth on the Ballots tendered to or returned by the Debtor's creditors in connection with voting on the Plan (a) were set forth on the Ballots solely for purposes of voting to accept or reject the Plan, (b) do not necessarily represent, and in no event shall be deemed to modify or otherwise affect, the actual classification of such Claims under the Plan for distribution purposes, (c) may not be relied upon by any creditor or interest holder as representing the actual classification of such Claims under the Plan for distributions purposes, and (d) shall not be binding on the Debtor or its Estate.

4. *Continued Corporate Existence; Vesting of Assets*. Except as otherwise provided in the Plan, the Reorganized Debtor shall continue to exist after the Effective Date as a separate corporate entity, with all the powers of a corporation under applicable law in the jurisdiction in which the Debtor is incorporated and pursuant to the respective Articles of Incorporation and Bylaws in effect prior to the Effective Date, except to the extent such Articles of Incorporation

and Bylaws are amended by the Plan. Except as otherwise explicitly provided in the Plan or in this Confirmation Order, including, without limitation, Section 7.4 of the Plan and the Plan Modifications set forth herein, on the Effective Date all property comprising the Debtor's Estate (including causes of action preserved under section 7.9 of the Plan, but excluding property that has been abandoned pursuant to the Plan or an order of the Court) shall revest in the Reorganized Debtor, free and clear of all Claims, liens, charges, encumbrances, rights and interests of creditors. As of the Effective Date, the Reorganized Debtor may use, acquire, and dispose of property and settle and compromise Claims without supervision of the Court, free of any restriction 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 Debtor is authorized to resume its charitable activities, including, but not limited to, donating to worthy charitable causes, after all Allowed Claims are paid in full or reserved for in accordance with the terms of the Plan.

5. *Release of Liens*. Except as otherwise provided in the Plan (including in any Exhibit thereto) or this Confirmation Order, or in any contract, instrument, release or other agreement or document entered into or delivered in connection with the Plan or pursuant to an order of the Bankruptcy Court during the Debtor's chapter 11 case, on the Effective Date and/or concurrently with the applicable distributions

made pursuant to the Plan, all mortgages, deeds of trust, liens or other security interests against the property of Debtor's Estate are fully released and discharged (except to the extent reinstated on or after the Effective Date under the Plan), and all right, title and interest of any holder of such mortgages, deeds of trust, liens or other security interests, including any rights to any collateral thereunder, shall revert to the Reorganized Debtor and its successors and assigns.

6. *Retained Assets*. To the extent the succession to assets of the Debtor by the Reorganized Debtor pursuant to the Plan is deemed to constitute a "transfer" of property, such transfers of property to the Reorganized Debtor (a) are or shall be a legal, valid, and effective transfer of property, (b) vest or shall vest the Reorganized Debtor, with good title to such property, free and clear of all liens, charges, Claims, encumbrances, or interests, except as expressly provided in the Plan or this Confirmation Order, (c) do not and shall not constitute avoidable transfers under the Bankruptcy Code or under applicable nonbankruptcy law, (d) are permissible under applicable nonbankruptcy law, and (e) do not and shall not subject the Reorganized Debtor to any liability or claim by reason of such transfer under the Bankruptcy Code or under applicable nonbankruptcy law, including, without limitation, any laws affecting successor or transferee liability.

7. *Discharge*. The discharge of the Debtor and any of its assets or properties provided in Section 7.18

of the Plan is deemed incorporated in this Confirmation Order as if set forth herein and hereby approved in its entirety.

8. *Releases, Injunction, Limitations of Liability and Indemnification*. The release set forth in Section 7.19 of the Plan, the injunction provision set forth in Section 7.20 of the Plan and the exculpation and limitation of liability provision set forth in Section 7.21 of the Plan, each as amended to the extent set forth in paragraph 29 below, are deemed incorporated in this Confirmation Order as if set forth in full herein and are hereby approved in their entirety.

9. *Matters Relating to Implementation of the Plan; General Authorizations*. 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 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. In addition to the authority to execute and deliver, adopt, assign, or amend, as the case may be, the contracts, leases, instruments, releases and other agreements specifically granted in this Confirmation Order, the Debtor and the Reorganized Debtor are authorized and empowered, without action of their board of directors, to take any and all such actions as any of their officers may determine are necessary or appropriate to implement, effectuate and consummate any and all documents or

transactions contemplated by the Plan or this Confirmation Order. Pursuant to section 1142 of the Bankruptcy Code, no action of the board of directors of the Debtor or the Reorganized Debtor shall be required for the Debtor or the Reorganized Debtor to: (a) enter into, execute and deliver, adopt or amend, as the case may be, any of the contracts, leases, instruments, releases and other agreements or documents and plans to be entered into, executed and delivered, adopted or amended in connection with the Plan, and, following the Effective Date, each of such contracts, leases, instruments, releases and other agreements shall be a legal, valid and binding obligation of the Reorganized Debtor and enforceable against such Reorganized Debtor in accordance with its terms; or (b) authorize the Reorganized Debtor to engage in any of the activities set forth in this paragraph or otherwise contemplated by the Plan. Each of the Debtor's officers, or their respective designees, is authorized to execute, deliver, file, or record such contracts, instruments, releases, indentures, and other agreements or documents, and take such actions as may be necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan, this Confirmation Order and any and all documents or transactions contemplated by the Plan or this Confirmation Order, all without further application to or order of the Court and whether or not such actions or documents are specifically referred to in the Plan, the Disclosure Statement, the Solicitation Order, this Confirmation Order or the exhibits or appendices to any of the foregoing, and the signature

of such officer on a document shall be conclusive evidence of the officer's determination that such document and any related actions are necessary and appropriate to effectuate or further evidence the terms and conditions of the Plan, this Confirmation Order or other documents or transactions contemplated by the Plan or this Confirmation Order. The secretary or any assistant secretary of the Debtor or Reorganized Debtor is authorized to certify or attest to any of the foregoing actions. Pursuant to section 1142 of the Bankruptcy Code, to the extent that, under applicable nonbankruptcy law, any of the foregoing actions otherwise would require the consent or approval of the boards of directors of the Debtor or Reorganized Debtor, this Confirmation Order shall constitute such consent or approval, and such actions are deemed to have been taken by unanimous action of the stockholders and directors of the appropriate Debtor or Reorganized Debtor.

10. *Directors and Officers of Reorganized Debtor*. The Court approves the appointment of the Debtor's existing officers and directors as officers and directors of the Reorganized Debtor. The appointment of such officers and directors is in the best interest of the Debtor and its creditors, and public policy. On the Effective Date, the existing officers and directors of the Debtor shall be deemed to be the directors and officers of the Reorganized Debtor, in accordance with the terms of section 7.6 of the Plan.

11. *Exemption from Certain Taxes and Recording Fees*. Pursuant to section 1146(a) of the Bankruptcy

Code, the issuance, transfer or exchange of any security, or the making, delivery, filing or recording of any instrument of transfer under, or in connection with, the Plan shall not be taxed under any law imposing a recording tax, stamp tax, transfer tax or similar tax. All filing or recording officers (or any other person with authority over any of the foregoing), wherever located and by whomever appointed, shall comply with the requirements of section 1146(a) of the Bankruptcy Code, shall forego the collection of 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. The Court shall retain specific jurisdiction with respect to these matters.

12. *Assumptions and Rejections*. The provisions of Article VIII of the Plan, including but not limited to, provisions relating to the assumption of executory contracts set forth on *Exhibit B* to the Disclosure Statement, and provisions governing the procedure for filing claims for damages relating to the rejection of an executory contract, are hereby approved in their entirety.

13. *Payment of Cure and Resolution of Disputes*. The provisions of Article VIII of the Plan relating to Cure Costs for any executory contracts or unexpired leases, are hereby approved. For the avoidance of doubt, there shall be no Cure Costs for any executory contract listed on *Exhibit B* to the Disclosure Statement.

14. *Professional Claims And Final Fee Applications*. All final requests for payment of Professional Fees must be filed no later than thirty (30) days after the Effective Date. After notice and a hearing in accordance with the procedures established by the Bankruptcy Code and prior orders of this Court, the final allowed amounts of such Professional Fees shall be determined by the Court. The Debtor or Reorganized Debtor shall pay all amounts owing to Professionals for all outstanding amounts payable relating to prior periods through the Effective Date either (a) as soon as is reasonably practicable following the later to occur of (i) the Effective Date, or (ii) the first Business Day after entry of an order of the Bankruptcy Court allowing such Claim for Professional Fees becomes a Final Order, or (b) upon such other terms as may be mutually agreed upon by the Holder of a Claim and the Debtor. Upon the Effective Date, any requirement that Professionals comply with sections 327 through 331 of the Bankruptcy Code in seeking retention or compensation for such services rendered after such date will terminate, and the Reorganized Debtor will employ and pay Professionals in the ordinary course of business.

15. *Administrative Claims*. All requests for payment of an Administrative Claim (other than as set forth in paragraph 15 herein, and in the final sentence of this paragraph) must be filed, and except as set forth in any order of this Court, served on counsel for the Debtor, the Committee, the United States Trustee, and as may otherwise be required by

the Bankruptcy Court or the Bankruptcy Code or the Bankruptcy Rules not later than thirty (30) days after the Effective Date. The Reorganized Debtor may settle an Administrative Claim without further Court approval. Unless the Debtor or the Reorganized Debtor objects to an Administrative Claim by the Claims Objection Deadline, such Administrative Claim shall be deemed allowed in the amount requested. The Debtor shall have thirty (30) days from the date of filing (or such longer period as may be allowed by order of the Bankruptcy Court) to review and object to any Administrative Claims. In the event that the Debtor or the Reorganized Debtor objects to an Administrative Claim, the Court shall determine if such Claim constitutes an Administrative Claim eligible for priority treatment and the allowed amount of such Administrative Claim. Notwithstanding the foregoing, no request for payment of an Administrative Claim need be filed with respect to liabilities incurred by the debtor in the ordinary course of business during the Bankruptcy Case, which liabilities shall be paid in the ordinary course of business in accordance with the terms and conditions of any agreements relating thereto.

16. *Bar Date for Rejection Damage Claims and Related Procedures*. Any Claim arising from rejection of any executory contract or unexpired lease by virtue of entry of the Confirmation Order shall be forever barred unless a proof of claim for damages arising from rejection is filed with the Bankruptcy Court within thirty (30) days of the Effective Date. Any

Claim from rejection of any executory contract or unexpired lease arising thereafter shall be forever barred unless a proof of claim for damages arising from rejection is filed with the Bankruptcy Court within thirty (30) days of the entry of a Final Order approving the rejection of the executory contract or unexpired lease. Any Allowed Claim arising from the rejection of an executory contract or unexpired lease shall be treated as a Class III(C) General Unsecured Claim.

17. *Resolution of Claims and Interests*. The Debtor or Reorganized Debtor, as the case may be, may (a) until 180 days after the Effective Date (unless any prior order entered by the Court provides for a later date, or as extended by order of the Court with or without further notice to creditors and parties-in-interest) file objections in the Court to the allowance of any Claim (whether or not a proof of Claim has been filed) (except for Claims already Allowed by Court order, including but not limited to, the Estimation Order) and/or (b) amend its schedules at any time before its chapter 11 case is closed.

18. *Payment of Fees*. All fees payable by the Debtor under 28 U.S.C. §1930 shall be paid on or before the Effective Date, and the Reorganized Debtor shall thereafter pay any statutory fees that come due until the case is closed, converted or dismissed.

19. *Authorization to Consummate Plan*. The Court authorizes the Debtor to consummate the Plan after entry of this Confirmation Order. The Debtor is

authorized to execute, acknowledge, and deliver such deeds, assignments, conveyances, and other assurances, documents, instruments of transfer, uniform commercial code financial statements, trust agreements, mortgages, indentures, security agreements, and bills of sale and to take such other actions as may be reasonably necessary to perform the terms and provisions of the Plan, all transactions contemplated by the Plan, and all other agreements related thereto.

20. *Failure to Consummate Plan and Substantial Consummation*. If the Plan is not substantially consummated, nothing contained in the Plan or this Confirmation Order, and no acts taken in preparation for consummation of the Plan, shall (a) constitute a waiver or release of any Claims by or against the Debtor or any other person, (b) prejudice in any manner the rights of the Debtor or any person in any further proceedings involving the Debtor, (c) constitute an admission of any sort by the Debtor or any other person, or (d) be construed as a finding of fact or conclusion of law with respect thereto. Upon the payment of claims that are Allowed Claims as of the Confirmation Date, the Plan shall be deemed substantially consummated by the Debtor.

21. *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, the Court shall retain exclusive or concurrent jurisdiction as provided in Article X of the Plan; *provided, however,* that nothing in this Confirmation Order or the Plan

shall constitute a waiver by the United States of its rights to assert that any statute or regulation precludes judicial review of the validity or amount of any Administrative Claim filed by the United States.

22. *Dissolution of the Committee*. The Committee shall disband and be dissolved as of the date after Class III Claims, which are Allowed as of the Confirmation Date, are paid in accordance with the Plan. However, Committee Counsel shall have the right to perform any services relating to the implementation and consummation of the Plan.

23. *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. 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 if there is determined to be any inconsistency between any Plan provision 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.

24. *Filing and Recording*. This Confirmation Order (a) is and shall be effective as a determination

that, on the Effective Date, all Claims existing prior to such date have been unconditionally released, discharged and terminated, and (b) is and shall be binding upon and shall govern the acts of all entities including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state and local officials, and all other persons and entities who may be required, by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any document or instruments. Each and every federal, state and local government agency is hereby directed to accept any and all documents and instruments necessary, useful or appropriate (including Uniform Commercial Code financing statements) to effectuate, implement and consummate the transactions contemplated by the Plan and this Confirmation Order without payment of any recording tax, stamp tax, transfer tax or similar tax imposed by state or local law.

25. *Notice of Confirmation Order and Occurrence of Effective Date*. On or before the fifth business day following the occurrence of the Effective Date, the Debtor shall serve notice of this Confirmation Order and occurrence of the Effective Date pursuant to Bankruptcy Rules 2002(f)(7), 2002(k), and 3020(c), on all Claimants, the United States Trustee and other parties in interest, by causing a notice of this Confirmation Order and the occurrence of the Effective

Date in substantially the form of the notice annexed hereto as *Exhibit A*, which form is hereby approved (the "*Notice of Effective Date*"), to be delivered to such parties by first class mail, postage prepaid. The notice described herein is adequate under the particular circumstances of the Chapter 11 Cases, and no other or further notice is necessary.

26. *Exhibits to the Plan Will Operate as Controlling Documents*. In the event of an inconsistency between the Plan and the Exhibits to the Plan (as may be modified), the Exhibits to the Plan will control.

27. *28 U.S.C. §157(d)*. Nothing in this Confirmation Order or the Plan is intended to modify or violate 28 U.S.C. §157(d).

28. *Exhibits and Corporate Matters*.

(a) All Exhibits to the Plan and documents and agreements introduced into evidence by the Debtor at the Confirmation Hearing (including all exhibits and attachments thereto) and the execution, delivery and performance of such exhibits, documents, and agreements in substantially the form submitted at the Confirmation Hearing by the Debtor in accordance with their respective terms are approved.

(b) All documents, agreements, instruments and actions reasonably necessary to effectuate the consummation and implementation of the Plan are authorized and approved by this Court and shall

be deemed effective without further corporate act or action under applicable federal and state law and without any requirement of further action by the Debtor's directors.

29. *Modifications to the Original Plan*. At the request of the Debtor, Sections 7.19, 7.20 and 7.21 of the Plan are hereby amended as follows:

> **7.19 *Release*. On the Effective Date, the Debtor, Reorganized Debtor, the Committee, the members of the Committee and their designated representatives in their capacity as such, any of such parties' respective current (i.e., as of the Confirmation Date) officers, directors or employees, and any of such parties' successors and assigns (the "*Released Parties*") shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to any party in interest who has filed a claim or who was given notice of the Debtor's Bankruptcy Case (the "*Releasing Parties*") for any act or omission before or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the operation of the Debtor's business, except to the extent relating to the Debtor's failure to comply with its obligations under the Plan.**
>
> **Notwithstanding the foregoing, nothing contained herein shall be deemed to be a release by the Debtor or Reorganized Debtor of any of the Causes of Action retained by the Debtor pursuant to the Plan including,**

without limitation, the Causes of Action described on Exhibit C to the Disclosure Statement.

7.20 *Injunction*. The satisfaction, releases, and discharge pursuant to Article VII of this Plan shall also act as an injunction against any Person commencing or continuing any action, employment of process, or act to collect, offset, or recover any claim or cause of action satisfied, released, or discharged under this Plan to the fullest extent authorized or provided by the Bankruptcy Code, including, without limitation, to the extent provided for or authorized by sections 524 and 1141 thereof.

Except as provided in this Plan or as expressly approved by the Reorganized Debtor, the Releasing Parties (as defined in Section 7.19) shall be precluded and enjoined from asserting against the Reorganized Debtor, the Estate or the Reorganized Debtor's Assets, any other or further Claim based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date.

7.21 *Exculpation*. The Released Parties shall have no liability to any of the Releasing Parties (as defined in Section 7.19) for any act taken or omission made in connection with, or arising out of, the Bankruptcy Case, the Disclosure Statement, this Plan or the formulation, negotiation, preparation,

dissemination, implementation or the administration of this Plan, any instrument or agreement created or entered into in connection with this Plan, any other act taken or omitted to be taken in connection with, or in contemplation of, any of the restructuring or other transactions contemplated by this Plan, and the property to be distributed or otherwise transferred under this Plan; unless such person obtains the prior approval of the Bankruptcy Court to bring such a claim. Nothing in this Section 7.21 or elsewhere in this Plan shall release, discharge or exculpate any non-Debtor party from (a) any claim owed to the United States government or its agencies, including any liability arising under the Internal Revenue Code or criminal laws of the United States, or (b) any claim of any Claimant except as expressly set forth herein.

All references to Sections 7.19, 7.20 and 7.21 of the Plan shall be deemed to be references to those sections, as amended herein.

Dated: _____

Oct 16 2009 **/s/ Stephen S. Mitchell**
Honorable Stephen S. Mitchell
United States Bankruptcy Judge

FILED: July 25, 2014

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1608
(1:12-cv-01329-AJT-JFA)
(09-10525-BFK)
(09-01342-SSM)

NATIONAL HERITAGE FOUNDATION, INCORPORATED

Plaintiff-Appellant

v.

HIGHBOURNE FOUNDATION; JOHN R. BEHRMANN; NANCY BEHRMANN

Defendants-Appellees

ORDER

The court grants the petition for panel rehearing for the purpose of amending its opinion by deleting lines 15-23 on page 17 and lines 1-4 on page 18. The

opinion, as amended, is filed as the court's opinion on rehearing.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: July 25, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1608
(1:12-cv-01329-AJT-JFA)
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(09-01342-SSM)

NATIONAL HERITAGE FOUNDATION, INCORPORATED

Plaintiff-Appellant

v.

HIGHBOURNE FOUNDATION; JOHN R. BEHRMANN; NANCY BEHRMANN

Defendants-Appellees

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The petition for rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor, Clerk

11 U.S.C. § 101. Definitions

In this title the following definitions shall apply:

(5) The term "claim" means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

* * *

(10) The term "creditor" means –

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

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11 U.S.C. § 105. Power of court

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

or implement court orders or rules, or to prevent an abuse of process.

---

11 U.S.C. § 524. Effect of discharge

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

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11 U.S.C. § 1123. Contents of plan

(b) Subject to subsection (a) of this section, a plan may –

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

---

11 U.S.C. § 1126. Acceptance of plan

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

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26 U.S.C. § 4966. Taxes on taxable distributions

(d) Definitions

For purposes of this subchapter –

(2) Donor advised fund

(A) In general

Except as provided in subparagraph (B) or (C), the term "donor advised fund" means a fund or account –

(i) which is separately identified by reference to contributions of a donor or donors,

(ii) which is owned and controlled by a sponsoring organization, and

(iii) with respect to which a donor (or any person appointed or designated by such donor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In re: NATIONAL HERITAGE FOUNDATION, INC. Debtor.	Case No. 09-10525 (SSM) Chapter 11

FOURTH AMENDED AND RESTATED PLAN OF REORGANIZATION OF THE DEBTOR

(Filed Oct. 13, 2009)

National Heritage Foundation, Inc., the debtor and debtor-in-possession (the "***Debtor***"), hereby proposes the following Fourth Amended and Restated Plan of Reorganization (the "***Plan***") to its creditors pursuant to the provisions of Section 1121(a) of Title 11, United States Code (the "***Bankruptcy Code***").

* * *

ARTICLE VI
DONORS

6.1. ***Donors.*** The Donors are not creditors of the Debtor. The agreement signed by each Donor at the time its Donor Advised Fund was established clearly provides that all ownership and custody in the donated funds are relinquished to the Debtor. Moreover, pursuant to applicable provisions of the Internal Revenue Code, the Donors took or were entitled to claim a tax deduction for the full amount of the contribution

at the time the charitable gift was made to the Debtor, confirming that the Donor transferred to the Debtor full control over all interests in and rights to the property. The agreement signed by the Donors granted the Donors a nonbinding right to make recommendations regarding investment and possible disbursement of the funds. Mere "advisory" rights would not preclude the Donors from claiming a charitable contribution deduction in accordance with internal Revenue Code Section 170. This treatment of the contribution by the Donors is consistent with the Donors relinquishing all interests in and rights to the property to the Debtor and accordingly, the Donors are not Claimants and have no rights to vote to accept or reject this Plan or receive Distributions under this Plan. Moreover, any rights that the Donors have with respect to Donor Advised Funds are merely "advisory." As such, the Donors are hereby advised that any advice or recommendations made by the Donors (in the past or in the future) to the Debtor or the Reorganized Debtor with respect to such Donor's Donor Advised Funds may not be followed and are not binding upon the Debtor or the Reorganized Debtor.

On September 28, 2009, the Bankruptcy Court entered an Order Sustaining the Debtor's Objections to Claims filed by the Donors (Docket No. 641), as amended by that certain Amended Order Sustaining the Debtor's Objections to claims filed by Donors (Docket No. 652), pursuant to which the Court disallowed all claims filed by the Donors (except for Proof of Claim Numbers 54, 68, 86, 142, 240, 226,

242, 251 and 276 (each, a "***Pending Donor Claim***"). To the extent any Pending Donor Claim is determined to be an Allowed Claim, such Allowed Claim shall be treated as a Class III(C) Allowed Claim or as otherwise ordered by the Bankruptcy Court or agreed to by the Debtor and such Donor.

Notwithstanding this, the Reorganized Debtor will continue to develop capacities to carry out its diverse Internal Revenue Code Section 501(c)(3) purposes in a manner commensurate with its available means and resources. This may require that the Reorganized Debtor use its Assets (which include Assets originating from a Donor's Donor Advised Fund) for its reasonable and necessary operational and overhead costs and expenses (including establishing sufficient reserves for future operations as it determines in its discretion); provided, however, that to the extent the Reorganized Debtor has sufficient funds to cover its operations, it intends to hold any remaining Assets including without limitation Donor Advised Funds for use for charitable purposes. Any rights that the Donors have with respect to Donor Advised Funds shall continue to be "advisory" only, and any advice or recommendations made by the Donors to the Debtor or the Reorganized Debtor with respect to such Donor's Donor Advised Funds shall not be binding on the Debtor or Reorganized Debtor, and may or may not be followed at the Reorganized Debtor's discretion.

The Reorganized Debtor does not intend to impose any restrictions or limitations on its ability to

manage and make distributions from any account containing Donor Advised Funds, which are donated or established after the Effective Date, and all such post-confirmation Donor Advised Funds (and any accounts within which such funds are maintained) will be administered by the Reorganized Debtor in the manner as agreed to between the Reorganized Debtor and the post-Effective Date Donor and in accordance with the Internal Revenue Code.

* * *

7.6. ***Board of Directors of the Reorganized Debtor.*** On the Effective Date, the existing directors and officers of the Debtor shall be deemed to be the directors and officers of the Reorganized Debtor, in their same capacity and office.

Specifically, the directors of the Reorganized Debtor will be: Dr. Marian M. Houk, Chairman; John T. ("Tick") Houk; Julie L. Houk and Dana Fenton. The Reorganized Debtor will pay its directors a stipend of $300 per meeting to attend quarterly board meetings.

The officers of the Reorganized Debtor, and the corresponding annual salary to be paid to each officer, are as follows:

Dr. John, T. ("Dock") Houk, CEO	$15,000
Dr. Marian M. Houk, COO	$90,000
John T. ("Tick") Houk, President	$110,000
Janet Ridgely, Vice President	$95,000

In addition to the annual salary, the Reorganized Debtor will pay 90% of the health insurance premiums for each of its officers.

* * *

7.19. ***Release.*** **On the Effective Date, the Debtor, Reorganized Debtor, the Committee, the members of the Committee in their capacity as such, any of such parties' respective current (i.e., as of the Confirmation Date) members, officers, directors, advisors, attorneys, affiliates, representatives, agents, financial advisors, employees or investment bankers, and any of such parties' successors and assigns (the "*Released Parties*") shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to one another, to any other party in interest, or to any of their respective agents, employees, representatives, financial advisors, attorneys, or affiliates, or to any of their successors or assigns, for any act or omission before or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the operation of the Debtor's business (other than liabilities incurred in the ordinary course of the Debtor's business), this chapter 11 case, the filing of this case, the formulation, preparation, dissemination, approval, confirmation, administration, implementation or consummation of this Plan, the Disclosure Statement, or the property to be distributed under this Plan.**

Notwithstanding any other provision of this Plan, no other party in interest, none of their respective agents, employees, representatives, financial advisors, attorneys, or affiliates, and no successors or assigns of the foregoing, shall have any right of action against the Released Parties for any act or omission before or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the operation of the Debtor's business (other than liabilities incurred in the ordinary course of the Debtor's business), this chapter case, the filing of this case, the formulation, preparation, dissemination, approval, confirmation, administration, implementation or consummation of this Plan or the Disclosure Statement, (and after the Effective Date with respect to any claims relating to the implementation or consummation of this Plan).

Notwithstanding the foregoing, nothing contained herein shall release any claim for contribution or indemnification by a Released Party against a Released Party.

7.20. ***Injunction.*** **The satisfaction, releases, and discharge pursuant to Article VII of this Plan shall also act as an injunction against any Person commencing or continuing any action, employment of process, or act to collect, offset, or recover any claim or cause of action satisfied, released, or discharged under this Plan to the fullest extent authorized or provided by the**

Bankruptcy Code, including, without limitation, to the extent provided for or authorized by sections 524 and 1141 thereof.

From and after the Confirmation Date, as provided for by the Confirmation Order and except as provided by any Final Order, there shall be in place with regard to the Assets and any Claims, an injunction to the same extent and with the same effect as the stay imposed by Section 362 of the Bankruptcy Code and such injunction will remain in effect until the final Distribution is made by the Debtor. Except as provided in this Plan or as expressly approved by the Reorganized Debtor, all Holders of Claims shall be precluded and enjoined from asserting against the Reorganized Debtor, the Estate or the Reorganized Debtor's Assets, any other or further Claim based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date, whether or not the Holder filed a proof of claim.

Any Person who, after the Effective Date, initiates any judicial proceeding to assert or prosecute any claim that is released and enjoined under this Plan shall post a bond in an amount to be determined by the Bankruptcy Court to cover the legal fees and expenses of the person(s) against whom such claims are asserted. Such bond must be issued by a bonding company acceptable to the Person(s) against whom

such claims are asserted or shall be established through an escrow account at a federally insured banking institution.

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12.2. ***Severability.*** Should any provision in this Plan be determined to be unenforceable, that determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of this Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.