11-1710

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE CHARTER COMMUNICATIONS, INC.,

Debtor.

R² INVESTMENTS, LDC,

Appellant,

v.

CHARTER COMMUNICATIONS, INC.; PAUL G. ALLEN; CCH I, LLC; CCH I CAPITAL CORPORATION; CCH II, LLC; CCH II CAPITAL CORPORATION; OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PAGE PROOF OPENING BRIEF FOR APPELLANT

Lawrence S. Robbins
Mark T. Stancil
Matthew M. Madden
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K St. NW, Suite 411L
Washington, DC 20006
(202) 775-4500

Attorneys for Appellant R² Investments, LDC

CORPORATE DISCLOSURE STATEMENT

R^2 Investments, LDC, is an investment fund whose investment manager is Amalgamated Gadget, L.P. No publicly held corporation owns 10% or more of the equity of either entity.

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PRELIMINARY STATEMENT

This case involves the Chapter 11 reorganization of Charter Communications Inc. ("CCI") and a set of its subsidiaries and affiliates (collectively "Charter" or "the debtors"). More particularly, the case arises from a sweetheart deal arranged by CCI's chairman and controlling shareholder, Paul Allen, and a select group of creditors in mid-level CCI subsidiaries (the "Crossover Committee"). Under their

pre-arranged bankruptcy plan, the Crossover Committee walked away with most of the company for a fraction of its actual worth. Indeed, the Crossover Committee doubled its money almost instantly when trading commenced on their new CCI shares and the market recognized the enormous value concealed in Charter's reorganization. For his part, Allen took home cash and other compensation worth $375 million *and* avoided more than $1 billion in personal taxes. By contrast, other stakeholders were forced to accept fractional recoveries, while R[2] and every other public shareholder of CCI—*except* Allen—got absolutely nothing.

As the bankruptcy court correctly recognized, that "calculated pre-bankruptcy planning" was—to say the least—an "ambitious and contentious" "gamble" that was "a test of the chapter 11 process itself." *JPMorgan Chase Bank, N.A.* v. *Charter Communications Operating, LLC (In re Charter Communications),* 419 B.R. 221, 230, 234 (Bankr. S.D.N.Y. 2009) ("Bankr.Ct.Op.") (J.A.___, ___). Indeed, the plan presented for confirmation violated the Bankruptcy Code in at least three ways:

(1) It wiped out the investments of CCI's public shareholders (except Allen) without first conducting a standalone valuation of CCI to prove that their shares were actually worthless, and in the face of powerful evidence that CCI had significant net worth (in violation of 11 U.S.C. § 1129(b)(2)(C));

(2) It gave Paul Allen illegal preferential treatment to the tune of $200 million that was awarded "on account of" his equity interest (despite leaving other shareholders out in the cold), and that award was not "entirely fair" to minority shareholders, a "means forbidden" by Delaware law (in violation of 11 U.S.C. §§ 1129(a)(3), (b)(2)(B)(ii)); and

(3) It improperly released Allen, all of his affiliates, the Crossover Committee, and all of the debtors' directors and officers from civil liability having anything to do with their involvement in Charter (in violation of, *inter alia*, *Deutsche Bank* AG v. *Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141–43 (2d Cir. 2005)), and over the express objections of the Securities and Exchange Commission and the United States Trustee.

Those sharp tactics led to "strenuous objections" by "[p]arties who were not at the table" during the pre-planning of Charter's brief trip through bankruptcy. Bankr.Ct.Op. 233–34 (J.A.___–___). Indeed, the bankruptcy court rightly called this "one of the most hotly contested confirmation battles ever conducted." *Id.* at 230 (J.A.___). And in confirming the plan, the bankruptcy court acknowledged that there were "unusually complex legal issues" that were "subject to differing interpretations." *Id.* at 231 (J.A.___).

But those complex issues have thus far eluded any appellate review. In a radical and unprecedented application of the "equitable mootness" doctrine, the district court dismissed the appeals filed by CCI's bondholders and one of its largest shareholders (Appellant R^2 Investments, LDC). The district court reasoned that the plan contained a provision declaring that every single term (including every dollar, share, right, and release it awarded or eliminated) was "nonseverable." *R^2 Investments, LDC* v. *Charter Communications, Inc. (In re Charter Communications, Inc.)*, 449 B.R. 14, 20 (S.D.N.Y. 2011) (emphasis added) ("Dist.Ct.Op.") (J.A.___). Observing that the plan had already taken effect, the district court held that "[s]ubstantial consummation of

a plan *does* moot the appeal of plan terms and provisions encompassed under a nonseverability clause because no appellant . . . can then demonstrate the availability of effective relief." *Id.* at 25 n.22 (emphasis added) (J.A.___).

That is an extraordinary departure from any legitimate reach of the "equitable mootness" doctrine. That doctrine exists to protect *innocent third-parties* who have justifiably relied on a consummated plan of reorganization and therefore should not be forced to risk the complete unwinding of the plan years later. It does not protect a hand-picked group of corporate insiders and creditors from targeted relief sought on appeal by one of the plan's numerous objecting stakeholders, simply because those proponents inserted into the plan a self-serving nonseverability provision. Boilerplate nonseverability clauses are a dime a dozen in large reorganization plans, and bestowing on them the *per se* power to moot appeals effectively means that Article III courts will never again hear plan-confirmation appeals in these important cases.

STATEMENT OF JURISDICTION

The bankruptcy court had jurisdiction to consider the debtors' joint plan of reorganization under 28 U.S.C. § 157(b)(2)(L). It entered an order confirming the plan on November 17, 2009. Dkt-921 ("Confirmation Order") (J.A.___).[1] On November 23, 2009, Appellant R² Investments, LDC, filed a timely notice of appeal to the Southern District of New York, which had jurisdiction to review the bankruptcy court's final order of confirmation under 28 U.S.C. § 158(a)(1). The district court entered a judgment dismissing R²'s appeal on March 31, 2011.

R² filed a timely notice of appeal to this Court on April 28, 2011 (No. 09-Civ.-10506 S.D.N.Y. Dkt-52), subsequently amended on May 2, 2011 (No. 09-Civ.-10506 S.D.N.Y. Dkt-53). This Court has jurisdiction under 28 U.S.C. §§ 158(d)(1) and 1291.

[1] Unless otherwise specified, references to "Dkt-#" are to docket entries in No. 09–11435 (Bankr. S.D.N.Y.). References to "LDT-#," "JPX-#," and "CX-#" refer to exhibits that are part of the record.

ISSUES PRESENTED

1. Does a "nonseverability" clause in a reorganization plan necessarily equitably moot *all* appellate review of the bankruptcy court's confirmation order once the plan has been substantially consummated?

2. Does a bankruptcy *appellant* bear the burden of overcoming a "strong presumption" that effective and equitable relief is impossible after a plan's substantial consummation?

3. Did the district court wrongly dismiss R²'s appeal by concluding that the limited remedies requested could not be severed from the rest of Charter's reorganization?

STATEMENT OF THE CASE

The debtors filed for bankruptcy on March 27, 2009. See Dkt-1. They proposed their pre-negotiated plan the same day. See Dkt-36. R² lodged an objection to the plan on July 13, 2009 (Dkt-579), as did other parties. The bankruptcy court held a bench trial to resolve those objections over 19 hearing days between July 20 and October 1, 2009. On October 15, 2009, The Honorable James M. Peck issued an oral ruling confirming the plan. See 10/15/09 Tr. A written opinion,

findings of fact, conclusions of law, and an order followed on November 17, 2009. Bankr.Ct.Op. (J.A.___); Confirmation Order (J.A.___). R² filed a timely notice of appeal to the U.S. District Court for the Southern District of New York on November 23, 2009. Dkt-952 (J.A.___).

On March 30, 2011, without oral argument, The Honorable George B. Daniels granted Appellees' motions to dismiss, and judgment was entered the next day. *R² Investments, LDC* v. *Charter Communications, Inc., et al. (In re Charter Communications, Inc.)*, 449 B.R. 14 (S.D.N.Y.). R² filed a timely notice of appeal on April 28, 2011 (No. 09-Civ.-10506 S.D.N.Y. Dkt-52), which it subsequently amended on May 2, 2011 (No. 09-Civ.-10506 S.D.N.Y. Dkt-53).

STATEMENT OF FACTS

1. The debtors in this case are a group of affiliated companies that sell a range of communications services to residential and commercial customers. See LDT-428 ("Disclosure Stmt.") 14 (J.A.___). CCI is the parent company of the group. It is the managing member of Charter Communications Holding Company, LLC ("Holdco"), which sits atop a ladder of other limited liability companies. See *id.* at 14–16 (J.A.___–

___). Towards the bottom of that ladder is Charter Communications Operating, LLC ("CCO"), which directly owns the debtors' operating subsidiaries.

Paul Allen effectively controlled the entire Charter enterprise. Dist.Ct.Op. 17 (J.A.___). He was CCI's largest shareholder, directly owning a 7% equity share, and an overwhelming 91% voting share. Disclosure Stmt. 16 (J.A.___). He was the Chairman of CCI's board of directors and had the power to appoint several of the other board members. See Dist.Ct.Op. 17; Dkt-845 (Allen Post-Trial Br.) 8. He also was (and still is) the 100% owner of Charter Investment, Inc. ("CII"), which owned 45% of Holdco. See Disclosure Stmt. 15 (J.A.___). An agreement with the debtors (the "Exchange Agreement") gave him the right to exchange that 45% interest in Holdco for a like share of CCI, which would have made CCI the sole member of Holdco and, in turn, given Allen a majority financial share in CCI. See *ibid.*

Allen was not the only party with a financial stake in the debtors. R^2 held about 4.5% of CCI's outstanding shares during the bankruptcy proceeding. Indeed, investors other than Paul Allen owned 93% of CCI's equity (to Allen's 7%), but only a 9% voting share (to his 91%).

See *id.* at 16 (J.A.___). CCI also carried a relatively small amount of debt: just under $500 million of bonds. See *id.* at 33.[2] But most of the overall enterprise's debt—over $20 billion of bonds and loans—was held by the limited liability corporations beneath CCI and Holdco in the corporate structure. See Bankr.Ct.Op. 231 (J.A.___).

2. Charter was, and remains, an "operationally sound business." *Ibid.* It earned about $6.7 billion in revenue during 2009 (the year of its bankruptcy) and $7.1 billion during 2010 (the year after). Charter Communications, Inc. 2010 Form 10-K Annual Report 34 (Mar. 1, 2011) ("CCI 2010 10-K") (J.A.___).[3] But the collapse of the credit markets—combined with the enterprise's heavy debt load—began to cause problems in late 2008. See Bankr.Ct.Op. 232 (J.A.___). The debtors first encountered difficulties in November 2008, when organizational problems left certain subsidiaries unable to access sufficient cash to

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[2] R[2] participated independently in the bankruptcy court in its capacity as a CCI shareholder, and submits this brief in that capacity. R[2]'s bond interests (see Dkt-684 (R[2]'s Stmt. of Ownership)) are represented by the Law Debenture Trust Company of New York, which has filed a separate brief in its related appeal, No. 11-1726. R[2] incorporates by reference the arguments made in that brief.

[3] This Court takes judicial notice of such public filings. See, *e.g.*, *United States* v. *Am. Soc. of Composers, Authors & Publishers*, 627 F.3d 64, 69 n.2 (2d Cir. 2010).

make interest payments on their debts. See *id.* at 234 (J.A.___). The debtors ultimately made the payments by drawing $250 million on a different line of credit and then distributing funds to the debtor subsidiaries. See *ibid.* Such a distribution is permissible only if the entity making it has a sufficient "surplus"—*i.e.*, assets in excess of its liabilities—that the distribution will not affect its ability to pay off its own creditors. See *id.* at 234–35 (J.A.___-___) Paul Allen and the rest of the debtors' board determined that such a surplus existed in November 2008 based largely on a determination that the Charter enterprise, viewed as a whole, was then worth about $21.6 billion. See *id.* at 247 (J.A.___); Dkt-848 (Debtors' Post-Trial Br. on Reinstatement) 30; LDT-80 (11/14/2008 Bd. Minutes).

Just four months later, however, Allen and the board changed their tune. Seeking to shed billions of dollars of debt, the debtors now claimed to be worth some $6 billion less (even as markets were dramatically improving), declared their *insolvency*, and announced their plan to reorganize through a "pre-arranged" bankruptcy (in which various stakeholders negotiate a reorganization plan before filing for bankruptcy protection). Unless all groups of creditors and investors

agree, however, such a plan can be confirmed only if the bankruptcy court "cram[s] down" the plan over the dissenters' objections. See 11 U.S.C. § 1129(b). And of course, as with any reorganization plan, any value beyond what is owed to creditors belongs to equityholders. See generally COLLIER BANKRUPTCY MANUAL ¶ 1.03[4] (Henry J. Somner & Lawrence P. King eds., 3d ed. rev. 2002).

Lazard Frères & Co. LLC, a longstanding advisor to Charter during Allen's tenure as chairman and controlling shareholder, set the debtors' bankruptcy strategy in motion. See Bankr.Ct.Op. 232–33 (J.A.___–___). Lazard opined that the debtors would need some of the existing creditors to agree to trade their debt for equity (*i.e.*, stock) in reorganized Charter, and to invest additional money. See *id.* at 233 (J.A.___). Lazard therefore encouraged the creditors whose participation it deemed necessary—creditors holding bonds issued by particular mid-level companies in the debtors' corporate structure—to form the Crossover Committee (whose professional fees and expenses would be paid from the bankruptcy estate). See *id.* at 233 & n.7 (J.A.___).

Lazard also determined that Allen should get paid handsomely. At Lazard's suggestion, Allen "demanded . . . the right to receive substantial compensation in exchange for his cooperation" with a reorganization. *Id.* at 231 (J.A.___). It was a condition of the debtors' primary loan agreement that Allen (or entities under his control) retain at least 35% equity voting control of CCI. See *id.* at 237–38 (J.A.___–___). For Charter to be able to "reinstat[e]" that loan on its original terms following the bankruptcy, Allen had to retain at least that much equity voting power over CCI in the reorganization. See *id.* at 238, 248 (J.A.___, ___). Without reinstatement, the debtors would have had to replace the credit facility at a higher interest rate. See *id.* at 230 (J.A.___).

Moreover, CCI had built up well over a billion dollars' worth of "net operating losses," or "NOLs," that could be used to reduce future tax liability. See *id.* at 253 (J.A.___). Because the reorganization would eliminate substantial debt, it would generate "cancellation of debt" (or "COD") income that would flow up the debtors' corporate structure to the two owners of Holdco: CII (Allen's affiliate company) and CCI. See Dkt-841 (Debtors' Post-Trial Br.) 20; Dkt-845 (Allen Post-Trial Br.) 15

n.9; Dkt-635 (Degnan Decl.). Any COD income received by CCI would reduce its NOLs. See Dkt-841 (Debtors' Post-Trial Br.) 20; Dkt-845 (Allen Post-Trial Br.) 15 n.9; Dkt-635 (Degnan Decl.). During the run-up to the bankruptcy, Allen threatened to maximize the hit that CCI's NOLs would take by getting rid of CII's investment in Holdco and forcing *all* the COD income to go straight to CCI. See LDT-128 (1/20/09 e-mail) (documenting Allen's threat to exchange his interest in Holdco for an interest in CCI); Dkt-841 (Debtors' Post-Trial Br.) 20; Dkt-845 (Allen Post-Trial Br.) 15 n.9; Dkt-635 (Degnan Decl.). That maneuver, if actually carried out, would have cost the reorganized CCI over one billion dollars. See Bankr.Ct.Op. 253–54 (J.A.___ –___).[4]

[4] Substantial evidence introduced at trial—to which neither the bankruptcy court nor the district court ever adverted–indicated that Allen's threat to scuttle the reorganization was a hollow bargaining ploy. Forcing the company into liquidation would have increased Allen's *personal* taxes by approximately $1 billion, and Allen therefore had no intention of pulling the trigger. See, *e.g.*, 8/31/09 Tr. 217:16–17 (testimony from CCI board member that "in the event of a freefall bankruptcy, [Allen] would have a large tax liability"); 9/2/09 Tr. 186:16–17 (testimony from president of Allen's investment company that "there were scenarios that had the potential to create large tax liabilities for Mr. Allen"); see also LDT-132 (1/27/09 e-mail) 1 (stating that Allen could in certain circumstances "get a tax bill for abt 1.5bb"); LDT-133 (1/28/09 e-mail) 2 (stating that "[d]oing a deal with [Charter] would enable [Allen] to avoid" "a potential $1+ billion tax liability"); LDT-169

Lazard's strategy was to get the Crossover Committee together with Allen and allow them to hammer out among themselves how much of the enterprise's value each should receive in the reorganization. The eventual "agreement among Mr. Allen and certain members of the Crossover Committee . . . bec[ame] the foundation of [the] pre-negotiated Plan" that debtors' board of directors (which included Allen himself, as well as directors he had appointed) approved. *Id.* at 233 (J.A.___). The salient features of that plan, as revised and presented to the bankruptcy court for confirmation, were as follows:

- Members of the Crossover Committee received considerable recoveries, including substantial control over the reorganized enterprise. Some committee members received stock—plus the option to purchase additional stock in a rights offering for approximately $18.75 per share.[5] Disclosure Stmt. 25–26, 44–45

(2/8/09 e-mail) 1 (stating that deal avoided approximately $1 billion liability for Allen).

[5] On November 30, 2009, CCI raised $1.663 billion through a rights offering of 88.7 million shares, or approximately $18.75 per share. Charter Communications, Inc. 2009 Form 10-K Annual Report F-13 (Feb. 26, 2010) (J.A.___); Charter Communications, Inc. S-1 Registration Statement, at item 15 (Dec. 31, 2009).

(J.A.___–___, ___–___). When trading resumed, that stock almost immediately traded at nearly twice that share price; certain committee members thus may ultimately have recovered *more* than their claims against the estate.[6] Other committee members received full value for their bonds. See *id.* at 24–25, 46–47 (J.A.___–___, ___–___). Certain committee members would get the right to appoint directors to CCI's reconstituted board. See Bankr.Ct.Op. 230 (J.A.___).

- On top of the $1 billion in taxes he avoided by participating in the plan (*supra* note 4), Allen received cash, bonds, warrants, and stock in the reorganized debtors, then valued at approximately $375 million (and worth considerably more when the company emerged from bankruptcy). See Bankr.Ct.Op. 253 (J.A.___); Disclosure Stmt. 26–27 (J.A.___–___). Roughly $175 million of that paid off a $25 million claim he had against the debtors and bought out his interest in one of the debtor subsidiaries. See Bankr.Ct.Op. 253 (J.A.___) The remaining $200 million was

[6] Between December 1 and 30, 2009, shares traded over-the-counter between $33.00 and $36.50 per share, and they traded publicly at similar prices the following year. CCI 2010 10-K at 31 (J.A.___).

payment for maintaining 35% equity voting control of CCI and a 1% share of its subsidiary, Holdco. See *id.* at 253–54 (J.A.___–___). Despite charging such a steep price to *maintain* those equity stakes, Allen no longer holds either one. CCI 2010 10-K at 24, 41 (J.A.___, ___).

- Allen, his affiliates, the debtors' directors and officers, and bondholders on the Crossover Committee were awarded prospective immunity against any potential lawsuit by a creditor or shareholder concerning their involvement with the debtors. See Dkt-921 Ex. A ("Reorganization Plan") 61 (J.A.___).
- The CCI bondholders—who were not on the Crossover Committee, and thus were not at the negotiating table—received less than a third of the value of their bonds. See Bankr.Ct.Op. 242 (J.A.___).
- CCI shareholders—other than Allen—got nothing. See Disclosure Stmt. 33 (J.A.___).

3. The plan Allen and the Crossover Committee pre-negotiated was the only reorganization option ever presented to the creditors and shareholders during the bankruptcy. Parties other than debtors generally must wait until the expiration of an exclusive 120-day debtor-

only window to offer competing proposals. See 11 U.S.C. § 1121(b). That window never expired here, because the debtors presented their pre-arranged plan on the first day of the bankruptcy and quickly put it to a vote. See *id.* § 1126.

The plan was *not* unanimously ratified. See *id.* § 1129(a)(8). CCI's bondholders (who held over 99% of the claims against CCI, which in turn held billions of dollars' worth of NOLs and other assets) voted overwhelmingly to reject the plan—fully 82.5% of the bonds that voted expressed opposition. See Dkt-621 (Sullivan Aff.) Ex. A. And CCI's equityholders (including R^2) were deemed by law to have rejected the plan because they were to receive no value whatsoever. See Reorganization Plan 25, 43 (J.A.___, ___); 11 U.S.C. § 1126(g). Twelve other classes at the various debtor entities also voted against or were deemed to have rejected the plan.

Nevertheless, the bankruptcy court ultimately permitted the debtors to cram down the plan despite the dissenters' "foreseeable strenuous objections." Bankr.Ct.Op. 234 (J.A.___); see also 11 U.S.C. § 1129(b)(1). A cramdown is permissible under the Bankruptcy Code only when a plan satisfies certain specific requirements, including that

it is "fair and equitable"; "does not discriminate unfairly"; does not pay anyone more than it is owed; and pays everyone in proper order (*i.e.*, more senior creditors first). See 11 U.S.C. § 1129(b); see generally 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4] (15th rev. ed.).

The dissenting stakeholders, including R², argued that this plan did not meet those criteria. They pointed to, among other things, problems with the debtors' assessment of their value at the time of the reorganization. Despite having valued the collective enterprise at $21.6 billion at the nadir of the credit crisis in November 2008 (*supra* pp. 10–11), four months later—in an improving market, no less—the debtors claimed that their value had *dropped* more than 25%, to just $15.4 billion. See Bankr.Ct.Op. 234 (J.A.___); see also *id.* at 235 (J.A.___) (recognizing "that conflicting indications of value were offered by Charter itself"). As a result (and as the bankruptcy court correctly observed), "[b]illions of notional dollars [had] disappeared"—*i.e.*, were unavailable for distribution to creditors and shareholders—even though "the markets h[ad] stabilized and . . . no corporate event h[ad] taken place that would explain any sharp decline in value." *Id.* at 235 (J.A.___).

More troubling still, the debtors had valued the various Charter entities only collectively, and had not analyzed the value of each debtor individually. See Disclosure Stmt. Ex. D (valuation analysis); see also Bankr.Ct.Op. 269–70 (J.A.___–___). The dissenters argued that the law required such individualized valuations, especially of an entity like CCI that had uniquely valuable assets, such as the billions in NOLs, intercompany claims and receivables, certain programming rights, real estate, and other assets. See Dkt-837 (R²'s Post-Trial Brief) 8–12, 16–22. Because the debtors had failed to conduct such an entity-by-entity valuation of CCI, the plan's choices about how much the creditors and shareholders of each particular debtor should get paid were fundamentally arbitrary. See *ibid.*

The objectors also strongly opposed Allen's deal. They argued that compensating Allen for retaining a 35% equity voting share of CCI improperly allowed him to recover hundreds of millions of dollars "on account of" his equity investment, ahead of CCI's bondholder creditors (who got less than one-third of the value of their bonds) and other shareholders (who got nothing at all). 11 U.S.C. § 1129(b)(2)(B)(ii); see Bankr.Ct.Op. 269 (J.A.___). And they argued that Allen's deal was

subject to, and could not withstand scrutiny under, the "entire fairness" standard for insider transactions under Delaware law. Consequently, the plan had been proposed by "means forbidden by law" in violation of 11 U.S.C. § 1129(a)(3). See Bankr.Ct.Op. 261 (J.A.___).

The objectors further argued that the broad releases granted to Allen, his affiliates, the debtors' directors and officers, and the Crossover Committee were improper. *Id.* at 257–59 (J.A.___–___). They were joined in that objection by the United States Trustee and the Securities and Exchange Commission. *Id.* at 257–58 n.27 (J.A.___–___); Dkt-146; Dkt-587.

4. Of critical importance to the district court's dismissal of R²'s appeal, among the plan's "miscellaneous provisions" (Article XV) was a clause (Article XV.K) governing the "Nonseverability of Plan Provisions upon Confirmation." It stated:

> If, prior to Confirmation, any term or provision of the Plan is held by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court shall have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration, or interpretation, the remainder of the terms and provisions of

> the Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is: (1) valid and enforceable pursuant to its terms; (2) integral to the Plan and may not be deleted or modified without the consent of the Debtors, the Crossover Committee, and Mr. Allen; and (3) nonseverable and mutually dependent.

Reorganization Plan 72 (J.A.___).

The bankruptcy court confirmed the plan by written order on November 17, 2009. Confirmation Order (J.A.___). In doing so, the bankruptcy court concluded that

> Each term and provision of the Plan, and the transactions related thereto as it heretofore may have been altered or interpreted by the Bankruptcy Court is: (1) valid and enforceable pursuant to its terms; (2) integral to the Plan and the transactions related thereto and may not be deleted or modified without the consent of the Debtors, the Crossover Committee, and Mr. Allen; and (3) nonseverable and mutually dependent. It is further acknowledged that the participants in the Rights Offering, among others, will be advancing substantial sums to the Reorganized Company or taking other action contemplated by the Plan in reliance upon each term and condition of the Plan and this Order, including the reinstatement of the Senior Debt, which monies or other action will enable the Reorganized Company to make the distributions and other payments contemplated by the Plan and to reorganize as contemplated by the Plan.

Id. ¶ 152 (J.A.___).

5. Just three days after confirmation, R² and others—including Law Debenture Trust Company, representing CCI's bondholders—asked the bankruptcy court to stay its confirmation of Charter's reorganization plan pending appeal, and to certify an expedited appeal to this Court. See Dkt-929 (R²'s Emergency Mot. for Stay Pending Appeal) (J.A.___); Dkt-944 (R²'s Joinder in Law Debenture Trust Co.'s Emergency Request for Certification Pursuant to 28 U.S.C. § 158(d)(2)) (J.A.___). In opposing both a stay and certification, the debtors emphasized a deadline–built into the plan by its proponents—by which the plan had to be effective or certain stakeholders could rescind their support. Although this self-imposed deadline had been amended *six times* to facilitate confirmation (*e.g.*, Dkt-972 (Sixth Amendment)), Debtors provided "no assurance" that the deadline would be extended to facilitate appellate review. Dkt-946 (Debtors' Stay Opp.) 3, 24. They also demanded that appellants post a $3.5 billion bond if a stay was granted. *Id.* at 6. On November 24, 2009, the bankruptcy court entered an order refusing to stay its confirmation order or to certify a direct appeal to this Court. Dkt-959 (J.A.___). The next day, the district court

likewise declined to stay the confirmation order pending appeal. Order, No. 09 M 47 (S.D.N.Y.) (J.A.___).

On November 23, 2009, R² and others timely appealed the bankruptcy court's confirmation order to the U.S. District Court for the Southern District of New York. See Dkt-952 (R²'s Notice of Appeal) (J.A.___). One week later—and despite those pending appeals—Debtors proceeded to make their plan "effective" (see Dkt-978 (Notice of Entry of Confirmation Order and Occurrence of Effective Date of Debtors' Joint Plan of Reorganization)), and immediately engaged in a number of the transactions directed by the plan.

6. In the district court, the debtors (now controlled by the Crossover Committee), Paul Allen, and the Official Committee of Unsecured Creditors moved to dismiss the appeal as equitably moot. No. 09-Civ.-10506 S.D.N.Y. Dkt-24, -27, -36. After briefing, but without oral argument, the district court granted the motion and dismissed the appeal (along with a related appeal by CCI's bondholders) on March 30, 2011. Dist.Ct.Op. (J.A.___). A judgment issued the next day. No. 09-Civ.-10506 S.D.N.Y. Dkt-51 (J.A.___).

The district court acknowledged that "Appellants seek relief that appears to be less in magnitude than directly unraveling the current Plan." Dist.Ct.Op. 24 (J.A.___). Nevertheless, the court added, the plan's nonseverability clause made it impossible to excise illegal provisions. *Ibid.* In the district court's view, "[s]ubstantial consummation of a plan does [equitably] moot the appeal of plan terms and provisions encompassed under a nonseverability clause because no appellant—including R2 and [Law Debenture Trust Company]—can then demonstrate the availability of effective relief." *Id.* at 25 n.22 (J.A.___). The court concluded that it was therefore powerless to "modify the Confirmation Order or the Plan to provide for the requested relief, not even to grant effective relief, without nullifying the Plan's authorization." *Id.* at 25 (J.A.___).

On that basis, the court decided that, even if it was illegal to pay Allen $200 million and to give him and others nondebtor releases, it could neither order the payment's refund (*id.* at 24–27 (J.A.___–___)) nor void the releases (*id.* at 27–28 (J.A.___–___)). Likewise, even if CCI's public shareholders were entitled to a standalone valuation of CCI and whatever value their shares held, the court believed that it

could not order such a valuation proceeding, or even a single dollar of any recovery to which the shareholders are entitled. *Id.* at 28–29 (J.A.___–___). This appeal followed.

SUMMARY OF ARGUMENT

The district court's refusal to hear R²'s appeal marked a severe departure from this Circuit's longstanding equitable-mootness doctrine.

1. The district court premised dismissal of R²'s appeal on the unprecedented and erroneous legal conclusion that a plan's nonseverability clause automatically moots *any* appeal from a confirmed reorganization plan after its substantial consummation. The only circuit to have addressed that contention took precisely the opposite view. Moreover, making nonseverability clauses dispositive elides a court's duty, under well-settled equitable-mootness jurisprudence, to examine *each* requested remedy and apply the doctrine to those remedies as narrowly as possible. Giving a boilerplate nonseverability clause sweeping effect, by contrast, represents an all-or-nothing approach to mootness. And because doing so systemically deprives dissenting parties of their right to Article III review of the bankruptcy court's order, it presents grave constitutional concerns.

2. The district court further erred by requiring R² to rebut a "strong presumption" that all plan-confirmation appeals are equitably moot after substantial consummation. It misread this Court's decisions in *Chateaugay II and III*, and inexplicably departed from the longstanding rule that parties making even *constitutional* mootness claims bear a "heavy burden" to prove that review on the merits must be avoided. The district court's contrary view is inconsistent with the approach taken by every other Circuit to have considered the question.

3. Once novel and mistaken conclusions about nonseverability clauses and strong presumptions have been dispensed with, the targeted relief available on each of R²'s appellate claims is strikingly clear. If R² prevails on the merits, such relief will not unravel Charter's reorganization or threaten innocent third parties:

a. Charter's former chairman and controlling shareholder, Paul Allen, should be ordered to disgorge the interests valued at $200 million that he received under the reorganization plan. He appears before this Court, and he was an active litigant at every turn of the proceedings below. He is no innocent third party whose reliance interests cannot equitably be upset. He is instead—like many a trial-court victor—the

recipient of significant value that may not legally be his due, fully aware from the outset that his receipt of such value has been challenged on appeal.

And if Allen's gains were indeed ill-gotten, then Allen cannot protect his spoils based on a nonseverability clause and a few unsupported suppositions that repaying those funds will unwind the reorganization. Indeed, Allen needs no "benefit" from the estate to make worthwhile his near-costless (and, indeed, quite lucrative) participation in Charter's reorganization, nor does he retain any realistic ability to plunge Charter into the abyss by "walk[ing] away" from its reorganization. In short, Allen's disgorgement of interests valued at $200 million will have no effect on Charter or a single innocent third party.

b. The plan's illegal nondebtor releases can be struck from the plan and its supporting agreements, which expressly provide for their *severability*. The district court's contrary belief is flat wrong. Moreover, the circuits share a broad consensus that inappropriate nondebtor releases are particularly remediable precisely because striking them affects only a handful of lucky recipients. Finally, the plan's nondebtor

releases are illegal under Circuit law unless they are uniquely "important" to the feasibility of Charter's reorganization plan; striking *unimportant* releases from that plan cannot possibly destroy it.

c. There is nothing inequitable about asking the bankruptcy court to determine whether CCI had standalone value at confirmation that should have gone to its public shareholders. Simply hearing evidence cannot possibly unravel the plan. Nor would any resulting recovery to CCI's former shareholders doom the thriving, reorganized Charter. But even if that were in doubt, under *Chateaugay II*, the district court must proceed to address the merits if—as here—*some* "fractional recovery" might be available that will not scuttle the reorganization.

STANDARD OF REVIEW

When a district court has acted as an appellate court in bankruptcy, including when ruling on whether the appeal is equitably moot, "[t]his Court exercises plenary review over the decisions of the district court and bankruptcy court . . . review[ing] conclusions of law *de novo* and findings of fact for clear error." *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 139; see also *Resolution Trust Corp.* v. *Best Prods. Co. (In re Best Prods. Co.)*, 68 F.3d 26, 29 (2d Cir. 1995).

ARGUMENT

The bankruptcy court correctly described this reorganization plan as an "ambitious," multi-billion-dollar "gamble" by a select group of corporate insiders and debt holders that "test[ed] the chapter 11 process itself." Bankr.Ct.Op. 230, 234 (J.A.___, ___). The district court was *wrong* in holding that those who were not invited to help devise the plan—and whose interests were extinguished or sharply diminished under it—should receive no appellate review of the plan's confirmation. The district court premised its equitable-mootness conclusion on three fundamental legal errors: (1) creating a *per se* rule that a plan's boilerplate nonseverability clause wipes out *all* appellate rights after substantial consummation of a plan; (2) imposing on R^2 the burden to defeat a "strong presumption" in favor of equitable mootness after substantial consummation; and (3) ignoring the limited scope of the relief R^2 seeks on appeal, none of which would imperil the reorganized Charter's operations or unfairly burden innocent third parties.

Equitable mootness is a limited, judge-made exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist.* v. *United*

States, 424 U.S. 800, 817 (1976). The doctrine asserts that bankruptcy appellants can be barred from receiving certain remedies where awarding particular relief would be impracticable and injurious to "faultless beneficiaries who are not parties to th[e] appeal." *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co.* v. *Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 326 (2d Cir. 1993) ("*Chateaugay I*").

That doctrine is not, however, a get-out-of-jail-free card for plan proponents. This Circuit has announced a five-factor equitable mootness inquiry for an appeal from a confirmed, substantially consummated reorganization plan. Such an appeal is *not* moot where:

> (a) the court can still order some effective relief, (b) such relief will not affect the 're-emergence of the debtor as a revitalized corporate entity,' (c) such relief will not unravel intricate transactions so as to 'knock the props out from under the authorization for every transaction that has taken place' and 'create an unmanageable, uncontrollable situation for the Bankruptcy Court,' (d) the 'parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings,' and (e) the appellant 'pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.'

Frito-Lay, Inc. v. *LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952–53 (2d Cir. 1993) *("Chateaugay II")* (citations omitted; alterations in original).

All of those factors are easily satisfied here. But before we turn to explaining why that is so—and to explaining why the district court's reasons for concluding otherwise are patently wrong—it is helpful to reiterate precisely what "effective relief" R² is seeking. The bankruptcy should: (1) require Paul Allen to return to the estate cash and other compensation valued at $200 million that he siphoned off on account of his controlling equity interest in CCI; (2) strike the plan's gratuitous nondebtor releases as unnecessary to Charter's reorganization and, therefore, illegal; and (3) order a standalone valuation of debtor CCI to determine whether R²'s equity stake was impermissibly extinguished without any compensation. All of that relief is easily effected, and awarding it would neither jeopardize the reorganized Charter enterprise (the market value of which, not surprisingly, has ranged as high as *three times* the reorganization plan's low-ball valuation of the company (see Disclosure Stmt. Ex. D (J.A.___))) nor unravel a single transaction by an innocent third party.

To be sure, granting R[2] such relief *does* mean that the plan's architects—including Paul Allen—won't get everything they hoped for. But the possibility of "adverse consequences" to those parties "is not only a natural result of any ordinary appeal—one side goes away disappointed—but adverse appellate consequences were foreseeable to them as sophisticated investors who opted to press the limits of bankruptcy confirmation and valuation rules." *Bank of New York Trust Co., NA* v. *Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 244 (5th Cir. 2009). A prudential doctrine rooted in equity cannot shield such parties' ill-gotten gains.

I. BOILERPLATE ASSERTIONS OF NONSEVERABILITY DO NOT BAR REVIEW OF A SUBSTANTIALLY CONSUMMATED PLAN'S ILLEGAL PROVISIONS

The district court adopted the unprecedented *per se* rule that "[s]ubstantial consummation of a [reorganization] plan *does* moot the appeal of plan terms and provisions encompassed under a nonseverability clause because no appellant . . . can then demonstrate the availability of effective relief." Dist.Ct.Op. 25 n.22 (J.A.___)

(emphasis added).[7] Because the plan and associated agreements declared that all of their terms were interdependent, the district court reasoned, the court could not "modify the Confirmation Order" in any respect "to provide for the requested relief, *not even to grant effective relief*, without nullifying the Plan's authorization." *Id.* at 25 (J.A.___) (emphasis added). It thus refused to review any of R[2]'s claims on the merits. See *id.* at 24–25 (J.A.___–___) (Allen Payments), 27–28 (J.A.___–___) (Nondebtor/Third-Party Releases), 28–29 (J.A.___ –___) (CCI Valuation).

The district court was wrong. A plan's drafters do not avoid appellate review simply by asserting that "we must have everything we awarded ourselves in the plan." The error of such a proposition is self-evident, and, not surprisingly, it has no basis in this Court's case law or in simple common sense.

To our knowledge, only one circuit has squarely addressed a reorganization plan's statement that its provisions are "nonseverable and mutually dependent." That Court flatly rejected the notion that

[7] The bankruptcy court's confirmation order parroted the plan's boilerplate nonseverability clause. Compare Reorganization Plan 72 (J.A.___), *supra* pp. 21–22, with Confirmation Order ¶ 152 (J.A.___), *supra* p. 22.

such a clause deprived it of the power to grant "meaningful partial relief" on appeal. See *Institut Pasteur* v. *Cambridge Biotech Corp.*, 104 F.3d 489, 491 (1st Cir. 1997). Just like this case, the reorganization plan in *Institut Pasteur* had been substantially consummated, and it contained a boilerplate statement that the "'[p]rovisions of the Confirmation Order are nonseverable and mutually dependent.'" *Ibid.* Faced with an appellate challenge that certain provisions of that plan were contrary to the Bankruptcy Code, the appellee asserted that the plan's nonseverability clause meant that "no court can now provide [the appellant] with meaningful partial relief." *Ibid.* The First Circuit "disagree[d]," holding that equitable mootness must instead be determined only "'upon close consideration of the relief sought in light of the facts of the particular case.'" *Ibid.*

As the First Circuit recognized, allowing plan proponents to manufacture mootness simply by inserting a nonseverability clause would eliminate the appellate court's obligation to "scrutinize each individual claim, testing the feasibility of granting the relief." *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986). Instead of the *appellate court* determining whether the relief requested could be

awarded without imperiling the reorganization or having other inequitable consequences, the plan's *proponents* would hold that power. That makes no sense. Plan proponents who have succeeded in confirming a reorganization plan over the objections of other stakeholders will—like any winning litigant—want to avoid appellate review. Allowing them to do so by declaring that every plan provision is integral to their plan is like giving the fox the keys to the hen house. A particular claim for relief can be equitably moot only if a *reviewing court* determines that it *actually* requires so substantial an alteration of a consummated plan that it would necessarily unravel that entire plan to the manifest detriment of innocent third parties who have relied on it. See *Chateaugay II*, 10 F.3d at 952–53. Only then could the relevant plan term be considered "nonseverable" from the rest of the plan for equitable-mootness purposes.[8]

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[8] Most of the Southern District of New York cases cited by the district court (Dist.Ct.Op. 25 (J.A.___)) refer to "nonseverability" in this sense—based on a claim-by-claim analysis of the realistic possibilities for effective relief without placing dispositive weight on a plan's *mere recitation* of nonseverability. See *Campbell* v. *Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43, 53–62 (S.D.N.Y. 2010) (relying on "statutory mootness" under 11 U.S.C. § 363(m), mentioning equitable mootness in *dicta*, and even then focusing on the need for asset sales to good-faith purchasers to be "free and clear" of existing

This is why the district court's suggestion that appellants had to disprove "factual findings" that supported the nonseverability clause, or to show that its "insert[ion]" into the plan and confirmation order was "legal error" is so befuddling. Dist.Ct.Op. 25 n.22 (J.A.___). As for the latter, the reviewing court's focus when evaluating equitable mootness isn't on whether it was legal for a plan and order *to assert* nonseverability, but rather whether that assertion is *substantively correct* as a legal matter with respect to any particular plan term. The "legal error" was the district court's—in particular, its unflinching adoption of the confirmed plan's nonseverability clause to declare all appeals to Charter's plan equitably moot.

The district court's offhand reference to "factual findings" and "clear error" review is likewise perplexing. First of all, the pertinent part of the confirmation order is entirely devoid of "factual findings" in support of *any* term's nonseverability from the overall plan—let alone

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claims if that is what those sales purported to be); *Windels Marx Lane & Mittendorf, LLP* v. *Source Enters., Inc. (In re Source Enters., Inc.)*, 392 B.R. 541 (S.D.N.Y. 2008) (never adverting to a nonseverability clause); *Kenton County Bondholders Comm.* v. *Delta Air Lines, Inc. (In re Delta Air Lines, Inc.)*, 374 B.R. 516 (S.D.N.Y. 2007) (relying on the fact that bondholders' release of their claims against the debtor could not be severed from their corresponding receipt of $65.875 million in notes and 5,848,221 shares from the reorganized enterprise).

findings to support the nonseverability of *every* plan term. The paragraph of the order containing the nonseverability clause merely lists investments in Charter under the plan. The bankruptcy court's accompanying opinion, moreover, *does not mention the nonseverability clause even once*—let alone provide a "factual" basis for it.

The district court's willingness effectively to give the plan proponents the final word on appealability also proves too much. For example, the plan language immediately preceding the nonseverability clause states that "each term and provision of the Plan . . . is . . . valid and enforceable." Reorganization Plan 72 (J.A.___). It is unimaginable, however, that a reviewing court would decline to examine whether a term of a confirmed reorganization plan *actually* is "valid and enforceable" under the Bankruptcy Code just because the confirmed plan *says* that all of its terms are valid. It is no less illogical to say that the plan's assertion of its own nonseverability makes the *actual* severability of plan provisions impervious to appellate review. Yet that is precisely what the district court concluded.

What is more, it is patently clear from surrounding plan provisions that the purpose of the nonseverability clause was primarily

to frustrate appellate review. The plan states that at any time *until* confirmation, the bankruptcy court could have determined that "*any term or provision of the Plan*" was "invalid, void, or unenforceable." *Ibid.* (emphasis added). The bankruptcy court thus explicitly "ha[d] the power to alter and interpret such term or provision to make it valid or enforceable *to the maximum extent practicable*, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision *shall then be applicable as altered or interpreted*." *Ibid.* (emphasis added). Lest there be any doubt, the plan specifies that after any such plan alteration by the bankruptcy court, "the remainder of the terms and provisions of the Plan will remain in full force and effect and will *in no way be affected, impaired, or invalidated* by such holding, alteration, or interpretation." *Ibid.* (emphasis added).

Only upon confirmation does the plan sharply change tune. There can be little doubt why the plan provides for flexibility *before* confirmation and nonseverability *after*: It allows plan proponents to use equitable mootness doctrine to protect their bankruptcy-court victories

from appellate review.[9] Indeed, the ostensible purpose of the nonseverability clause rings hollow when one realizes that, because the bankruptcy court had authority to modify the terms during the confirmation process, the plan's drafters did not even know with certainty the exact terms that would end up being deemed "nonseverable" and "mutually dependent."

For all of those reasons, the district court's treatment of such nonseverability clauses is an unsupportable departure from the equitable-mootness analysis. Nonseverability clauses are not magic wands that, waved by plan proponents and the bankruptcy court, cause confirmation appeals to vanish once the debtors have substantially consummated their reorganization. It has always been the case, in this Circuit and others, that although "[s]ubstantial consummation of a reorganization plan is a momentous event, . . . it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief." *Chateaugay II*, 10 F.3d at 952; see also *Search Market*

[9] Indeed, the debtors (including Allen-controlled CII) reserved *for themselves* the right to "initiate proceedings" "after Confirmation" to "alter, amend, or modify the Plan" subject to certain limitations (but not, apparently, subject to the plan's supposed nonseverability). Reorganization Plan 67 (J.A.___).

Direct, Inc. v. *Jubber (In re Paige)*, 584 F.3d 1327, 1342 (10th Cir. 2009) ("'Courts can and do order divestiture or damages in' situations where business deals or bankruptcy plans have been wrongly consummated."). The district court's approach makes substantial consummation not just a "momentous event," but the *dispositive* one for all appeals from a confirmation orders containing such a clause.

And it does so despite the prevalence of boilerplate nonseverability clauses in reorganization plans and the orders confirming them. Not surprisingly, plan proponents insert nonseverability clauses into reorganization plans for the bulk of the nation's sophisticated debtors. And when those clauses appear, they routinely are included in (or incorporated by) the bankruptcy court's confirmation order. For example, Charter's bankruptcy was 2009's second-largest pre-negotiated Chapter 11 filing (as measured by the value of the debtors' assets). The 2010 Bankruptcy Yearbook & Almanac 40–45 (Kerry A. Mastroianni ed., 20th ed. 2010). *Every other reorganization plan or confirmation order (and usually both) for the rest of the top ten pre-negotiated bankruptcies* ***contained a virtually identical***

nonseverability clause.[10] If this Court were to uphold the district court's decision, there is little doubt that this already pervasive practice will become an easy way to fend off appellate review under the guise of "equitable mootness."

Finally, under the district court's approach, a substantial amount of power over bankruptcy reorganization vests exclusively in Article I bankruptcy judges. Practically speaking, they can make their own confirmation decisions unreviewable. The very court whose order is subject to appellate review gets to decide, by approving a nonseverability clause, that its order will become equitably moot on appeal once the plan has been substantially consummated. And the

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[10] *In re CIT Grp. Inc.*, No. 09-16565 (Bankr. S.D.N.Y.) Dkt-193 (order) 51 and exhibit A thereto (plan) 44,48; *In re Lear Corp.*, No. 09-14326 (Bankr. S.D.N.Y.) Dkt-1070 (order) 54 and exhibit A thereto (plan) 45; *In re Premier Int'l Holdings Inc.*, No. 09-12019 (Bankr. D. Del.) Dkt-1928 (order) 52–53; *In re Masonite Corp.*, No. 09-10844 (Bankr. D. Del.) Dkt-367 (order) 45 and exhibit A thereto (plan) 40–41; *In re Source Interlink Cos., Inc.*, No. 09-11424 (Bankr. D. Del.) Dkt-237 (order) 54 and exhibit A thereto (plan) 40–41; *In re Spectrum Jungle Labs Corp.*, No. 09-50455 (Bankr. W.D. Tex.) Dkt-996 (order) 16 and Dkt- 564 (plan) 25; *In re NTK Holdings, Inc.*, No. 09-13611 (Bankr. D. Del.) Dkt-209 (order) 45 and exhibit A thereto (plan) 51; *In re BearingPoint, Inc.*, No. 09-10691 (Bankr. S.D.N.Y.) Dkt-1550 (order) 44 and exhibit A thereto (plan) 54; *In re Apex Silver Mines Ltd.*, No. 09-10182 (Bankr. S.D.N.Y.) Dkt-167 (order) 49 and Dkt-101 (plan) 49.

bankruptcy court holds considerable sway over the latter circumstance too, by deciding whether or not to stay its confirmation order pending appeal (preventing consummation in the meantime). Decisions to deny a stay are reviewable, but that review is often (as here) considerably truncated and rarely results in reversal of the bankruptcy court's decision.

There is considerable constitutional infirmity in placing that amount of power in a non-Article III court. When confronted with challenges to adjudication by non-Article III tribunals—like bankruptcy courts—the Supreme Court's approval of the practice has turned on, among other things, whether Article III courts still retain "'essential attributes of judicial power'" like the "*de novo*" review of "legal rulings." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 852–53 (1986); cf. *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592–93 (1985) (availability of some Article III review supports administrative adjudication). Commentators likewise have emphasized that "[r]eviewability may matter greatly in making decisions about the jurisdiction and authority of particular courts" and that "[t]he assignment of broad jurisdiction to the bankruptcy courts after

[*Northern Pipeline Construction Co.* v.] *Marathon* [*Pipe Line Co.*, 458 U.S. 50 (1982),] is, in part, a result of their being defined as adjuncts of the federal district courts." Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 Am. Bankr. L.J. 109, 116 (1997); see also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 939 (1988) ("Even if a case is tried in the first instance by a non-article III tribunal, a separation-of-powers interest remains in ensuring appellate review by an article III court."). The district court's decision to dismiss R²'s appeal because of the bankruptcy court's own nonseverability conclusion stymies the very appellate review that allows bankruptcy courts to constitutionally exercise judicial power in the first place.

II. R² DID NOT HAVE THE BURDEN TO DEFEAT A "STRONG PRESUMPTION" THAT ITS APPEAL WAS MOOT

The district court's decision to give preclusive effect to the plan's nonseverability clause doomed R²'s appeal. But the district court had stacked the deck in favor of equitable mootness from the very beginning by placing the burden on R² to "overcome" a "strong[] presum[ption]" that the debtors' substantial consummation of their plan equitably mooted R²'s appeal. Dist.Ct.Op. 22–23 (J.A.___–___); see also *id.* at 24

(J.A.___) ("Appellants' arguments . . . fail to satisfy *their* burden." (emphasis added)). That was wrong. The party seeking dismissal of an appeal based on equitable mootness bears the burden of proving that any relief would be inequitable; it does not enjoy the benefit of a "strong presumption."

In assigning R² the burden to prove the equity of its own appeal, the district court cited—but plainly misread—*Chateaugay II* and *III*. See Dist.Ct.Op. 22–23 (J.A.___–___). In *Chateaugay II*, this Court held that an appeal following a confirmed plan's substantial consummation is *not* constitutionally or equitably moot where certain circumstances exist—as principally relevant here, that effective relief can still be awarded that will not unravel the entire plan to the detriment of third parties who are not before the court. 10 F.3d at 952–53; *supra* p. 31 (quoting factors). This Court *never* suggested that *the appellant* bears the burden of proving that each of those circumstances exist.[11]

[11] This Circuit has arguably recognized an exception, however, where an appellant failed *even to seek* a stay of the confirmation order. See *In re Metromedia Fiber Network*, 416 F.3d at 145 ("Having sought no stay of the bankruptcy court's order . . . appellants bear the burden of [the] uncertainty [over whether partial relief was feasible]."). Here, however, R² *did* diligently seek such a stay (see *supra* p. 23), and Appellees have never argued otherwise (*e.g.*, No. 09-Civ.-10506 S.D.N.Y.

In fact, *Chateaugay II* put that burden squarely on the party that sought dismissal. In that case (like this one), the bankruptcy court had confirmed the debtors' reorganization plan and the debtors substantially consummated it despite pending appeals. *Id.* at 949. Predictably, the debtors tried to fend off a creditor's appeal on equitable mootness grounds, but this Court was "not persuaded by [the debtor's] argument that [the creditor's] appeal is mooted as a result of the bankruptcy court's order." *Id.* at 953. That is, the appeal could proceed because *the debtor* had failed to carry *its* burden to prove that the five *Chateaugay* factors permitting effective relief *were absent*. See also *Aetna Casualty & Surety Co.* v. *LTV Steel Co. (In re Chateaugay Corp.)*, No. 09 Civ. 4725 (LLS), 1995 WL 386483, at *5 (S.D.N.Y. June 28, 1995) ("[The debtor] has not shown that a cash payment . . . would affect [the debtor's] re-emergence as a revitalized corporate entity."), aff'd in pertinent part, 94 F.3d 772, 776 (2d Cir. 1996) ("*Chateaugay III*").[12]

Dkt-32 (Debtors' Br.) 19–28). What is more, by stating that appellants have to "bear the burden" when they *do not* seek a stay, *Metromedia* implies that when the appellant *has* tried to obtain a stay, the burden to show equitable mootness is on the party seeking dismissal.

[12] Although *Chateaugay III* states, in a *dictum*, that "[r]eviewing courts presume that it will be inequitable or impractical to grant relief

Burdening *appellants* to *disprove* equitable mootness is also inconsistent with the longstanding rule that *appellees* carry a "heavy" burden to demonstrate an appeal's *constitutional* mootness. See, *e.g.*, *Associated Gen. Contractors of Conn., Inc.* v. *City of New Haven*, 41 F.3d 62, 65 (2d Cir. 1994). There is no good reason to assign the burdens differently on these related inquiries. The circumstances the *Chateaugay II* court identified as allowing appeals to proceed on their merits after substantial consummation *combine* "[c]onstitutional and equitable" mootness considerations into a single analysis. 10 F.3d at 952; see also *In re Metromedia*, 416 F.3d at 143–44 (noting that *Chateaugay II* discussed those two doctrines "in the same breath"). By allocating to bankruptcy appellants the burden of demonstrating those circumstances exist, the district court either relieved appellees of their heavy burden to establish constitutional mootness, or created an unwieldy hybrid burden for the five *Chateaugay II* factors previously unknown in this Circuit's cases.

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after substantial consummation of a plan of reorganization," 94 F.3d at 776, it is clear that both *Chateaugay II*, and the district court case affirmed in pertinent part in *Chateaugay III*, placed the burden of persuasion on the party invoking equitable mootness.

The district court's decision to place the burden on R[2] is also inconsistent with numerous decisions by other courts. Most notably, the Tenth Circuit has explicitly "reject[ed] the conclusion that . . . a finding of substantial consummation will shift the burden to the party seeking to have the court reach the merits of its challenge to the plan." *In re Paige*, 584 F.3d at 1340.[13] "As with constitutional mootness," the court held, "the party seeking to prevent this court from reaching the merits of the appeal bears the burden of proving that, for pragmatic reasons, the court should abstain from reaching the merits of the case." *Id.* at 1339–40; see also *id.* at 1331, 1343–44, 1348; accord *Ala. Dep't of Econ. & Cmty. Affairs* v. *Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1226 (11th Cir. 2011) ("party asserting [equitable] mootness bears the burden of persuasion"); *Focus Media, Inc.* v. *Nat'l Broad. Co. (In re Focus Media)*, 378 F.3d 916, 923 (9th Cir. 2004) ("'[T]he party asserting mootness has a heavy burden to establish that there is no effective relief remaining for a court to provide.'"); *Gillman* v. *Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 210 (3d Cir. 2000)

[13] In doing so, the Tenth Circuit suggested—by citing *Chateaugay III*—that the Second Circuit takes the opposite view. But as discussed above (*supra* pp. 45–46 & note 12), that is based on misreading the relevant cases.

("Debtors established no record before the District Court, or before us, regarding the application of the equitable mootness doctrine to the particular facts and circumstances of Plaintiffs' appeal.").

Nor does it make practical sense to assign the *nonmovant* opposing dismissal the burden of proving the appeal is *not* equitably moot. If the district court is correct, and appellants have to *disprove* equitable mootness after substantial consummation, then a motion to dismiss in such cases need say little more than "We substantially consummated the plan. Your move." And yet information regarding the circumstances under which relief *is* available—namely what effect a remedy will have on the reorganized enterprise and its transactions with third parties—is sometimes uniquely in the reorganized debtors' and plan proponents' hands. Requiring *the movant* to demonstrate substantial consummation and why the circumstances should preclude relief is the most efficient way to evaluate the movant's assertions of equitable mootness on appeal.

III. EFFECTIVE RELIEF—THAT WILL NOT UNRAVEL THE PLAN OR HARM THIRD PARTIES—IS AVAILABLE ON EACH CLAIM

A. Ordering Allen To Refund His Ill-Gotten Payments Would Not Imperil The Debtors' Reorganization

R²'s success on its "Allen Payments Claim" has a simple remedy: an order that Paul Allen disgorge the cash, bonds, warrants, and equity (or the value thereof) that was worth some $200 million when Allen illegally procured it. No innocent third party has any interest in that payout, and requiring Allen to return it does not unravel any other aspect of Charter's reorganization—let alone the entire plan. But in addition to relying on the plan's explicit nonseverability clause, the district court asserted that Allen's payment was nonseverable from the plan *even if illegal* because it would be *inequitable* to ask him to pay it back. See Dist.Ct.Op. 24–27 (J.A.___–___). Elementary concepts of fairness say otherwise.

In sharp contrast to all of CCI's other public shareholders, who didn't receive a dime under Charter's reorganization plan, CCI's chairman and controlling shareholder, Paul Allen, walked away with interests worth $375 million at confirmation, and complete immunity from any lawsuit relating to Charter. See *supra* p. 17. First, Allen

settled various non-equity interests in, and claims against, Charter for $175 million. Had he made good on his purported threat to send Charter into a freefall bankruptcy by withholding his "cooperation" with the reorganization, his ability to recover that amount would have been compromised. Second, Allen was awarded $200 million as purported "consideration" for his agreement to (1) retain substantial influence over reorganized Charter with 35% equity voting control of CCI and the power to appoint four of its eleven directors (so that Charter could comply with a favorable loan agreement), and (2) retain a membership interest in Holdco (so that CCI could retain its valuable net operating losses—not to mention so Allen could shave $1 billion off his own tax bill). See Bankr.Ct.Op. 254 (J.A.___); *supra* note 4.

On appeal, as before the bankruptcy court, R[2] raised two separate objections to the $200 million payoff.[14] The district court concluded

[14] First, compensating Allen ahead of other shareholders and creditors of CCI violates the "absolute priority rule," which prohibits a shareholder from leveraging his equity position in the debtor to cut in line ahead of creditors and other shareholders. 11 U.S.C. § 1129(b)(2)(B)(ii). The source of Allen's voting control *before* the bankruptcy was his equity in CCI, and so compensating Allen for *retaining* a portion of that equity voting control plainly constitutes a payment "on account of" his pre-bankruptcy equity position, in violation of the absolute priority rule. See *ibid.*; see also Dkt-845 (Allen Post-

nonetheless that R² provided "no basis to find that the Settlement Parties were obligated to strike an agreement at no more than Allen's reservation or 'walk away' price." Dist.Ct.Op. 26 n.26 (J.A.___).

Not so. If R² prevails on either of its two arguments challenging the Allen payoff, the effective and targeted remedy is readily apparent: an order directing Paul Allen to disgorge the cash and other interests he received for taking actions that he would have done anyway. Partial relief is also possible: The court could order Allen to return *some* of his payout, likely based on the bankruptcy court's determination of what Allen would have been willing to accept had there been competing plans or proposals that complied with the absolute priority rule and entire fairness doctrine.

When a successful appeal will result in a "finding that [a party] was entitled to funds that . . . were wrongfully distributed to or wrongly re-vested in one or more entities that are now before this Court," then a

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Trial Br.) 62 (acknowledging that Allen is receiving compensation for "retaining an equity interest in Charter").

Second, proposal of a reorganization plan that paid the debtors' controlling shareholder $200 million to take nearly cost-free actions that also saved him $1 billion in taxes violated Delaware law's entire-fairness standard for self-dealing transactions, and therefore employed "means forbidden by law" in violation of 11 U.S.C. § 1129(a)(3). See *Kahn* v. *Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997).

court is "able to fashion effective relief." *Chateaugay II*, 10 F.3d at 953. A court need only "remand[] with instructions to the bankruptcy court to order the return to [the party] of any funds that were erroneously distributed to such parties, to the extent that can be done manageably and without imperiling [the debtor's] fresh start." *Ibid.*

The Tenth Circuit's decision in *In re Paige* is particularly instructive. The court there proceeded to the merits of the appeal challenging a confirmed and substantially consummated plan allegedly achieved by "inappropriate negotiations" between the debtor and primary plan proponent resulting in a plan filed by "'means forbidden by law'" and thus "'not in good faith.'" 584 F.3d at 1333; see also 11 U.S.C. § 1129(a)(3). The court's "foremost concern" was with whether a remedy would affect "non-party creditors," not with whether it would upset a plan proponent who played a "pivotal role in the bankruptcy proceedings" and could not be considered "an innocent third party." 584 F.3d at 1343–44. As here, the appellee complaining that relief from a plan's illegality would be inequitable was aware of the "continuing objection[s] to the consummation of the [confirmed] Plan," "intimately

involved" with the bankruptcy proceedings, and the appellant's "main antagonist" during those proceedings. *Id.* at 1343.[15]

Other circuits likewise have concluded that active combatants in the bankruptcy proceedings have an exceedingly tenuous claim to equitable mootness when defending their spoils on appeal. See, *e.g.*, *TNB Fin., Inc.* v. *James F. Parker Interests (In re Grimland, Inc.)*, 243 F.3d 228, 232 n.6 (5th Cir. 2001) ("Of course, the administrative claimants are not strangers to the bankruptcy case, and as parties intimately connected to the case administration, their expectations may not be settled, unlike purchasers at sales of estates."); *Spirtos* v. *Moreno (In re Spirtos)*, 992 F.2d 1004, 1007 (9th Cir. 1993) ("We can fashion effective relief by ordering Debtor, who is a party to this appeal, to return the money to the estate. Nor would it be inequitable to address the merits of the appeal. Debtor knew at the time he received and

[15] What is more, it was "clear" to the court in *Paige* that the plan proponent was "willing to pay far more" to ensure the reorganization's success than it initially contributed, leaving "very little risk that the court would need to unwind any of the payments that have been made to innocent third-party creditors" if it granted a remedy adverse to the proponent. 584 F.3d at 1348. So too here. Given the ease of the burden the reorganization plan placed on Allen, and his considerable tax savings, there is no reason to conclude that remedying an illegal, $200 million payment is equitably moot.

spent his plan distribution that [the appellant] had appealed the bankruptcy court's decision.").

But the district court overlooked those cases and their principles to conclude that equitable mootness shielded Allen's bankruptcy-court triumph from appellate review. In addition to the supposedly preclusive effect of the plan's nonseverability clause (Dist.Ct.Op. 24–25 & n.22 (J.A.___–___), the district court had two "problem[s]" with severing the Allen's payment from the rest of plan, even if R² was correct on the merits (*id.* at 25–26 (J.A.___–___). Each "problem," however, is based on the unfounded notion that if Allen's rewards were severed, then he would fail to "benefit[]" from the steps he took to facilitate Charter's reorganization (and his own considerable recovery and tax-liability avoidance). *Ibid.* That is preposterous. If paying Allen to take those actions was *illegal*, and unfairly siphoned Charter funds that should have gone to other creditors and shareholders, then ordering a refund cannot be called *inequitable*.

In short, the district court assumed that R² is *wrong* about the legality of the Allen payment, in order to conclude that relief cannot be granted even if R² is *right* about the Allen payment. That is, the district

court simply adhered to the bankruptcy court's flawed view that because Allen's participation in Charter's reorganization allowed CCI to extract more than $1 billion in tax write-offs, and allowed other debtors to reinstate favorable financing terms, Allen was entitled (as a matter of law) to take a $200 million cut of the upside. See *id.* at 25 n.23 (J.A.___) (Allen's payment "compensates him for his participation and cooperating in generating $3 billion in value for Charter"); *id.* at 26 (J.A.___) ("The benefits received by Charter from Allen far outweigh Allen's recovery.") But controlling shareholders aren't entitled to take a slice of a reorganization's value on account of their equity position and ahead of other creditors and shareholders. See *supra* note 14. As our appeal demonstrates on the merits, the correct analysis is to ask what Allen was asked *to do* in support of the reorganization, what costs (if any) he incurred by taking those actions, what benefits he accrued from them, and therefore what sum (if any) was necessary to compensate him fairly for his cooperation (as opposed to just slipping him a bonus along the way).

Under this appropriate analysis, Allen's payment was *not* necessary to compensate his cooperation. For one thing, all Allen was

asked to do in return was briefly to maintain 35% equity voting power in CCI and hold onto a membership interest in CCI's subsidiary, Holdco. See Bankr.Ct.Op. 254 (J.A.___). Moreover, Allen saved upwards of $1 billion in personal taxes by taking those steps and avoiding Charter's liquidation. See *supra* note 4. Even putting aside Allen's tax motivation for facilitating the reorganization, one should be so lucky to get paid $200 million for exerting considerable influence over a public company.

Without record support, the district court warned that the sky might fall if Allen were ordered to repay his $200 million payment. It speculated that Allen could—and, more important, *would*—"walk away" from Charter's reorganization if he were deprived of his payment. See Dist.Ct.Op. 27 (J.A.___). In particular, the district court worried that Allen might "relinquish[] his voting interest" in Charter and thereby "force New Charter to return to the bankruptcy court" if the payment is rescinded. See *id.* at 26 n.25 (J.A.___). *But Charter has already stripped Allen of that 35% voting interest* because, since March 2010, its financing agreements no longer require Allen's participation in firm governance. CCI 2010 10-K at 24 (J.A.___). Likewise, Allen no longer

holds the 1% interest in Holdco that once was deemed necessary to the preservation of CCI's valuable tax write-offs. *Id.* at 41 (J.A.___). It is entirely unclear what, if anything, Allen can "walk away" from that would doom Charter's reorganization.

In the end, the equities clearly favor proceeding with this aspect of R²'s appeal. Allen did not burden himself with some costly task or contribute out-of-pocket to the reorganization. Rather, his participation allowed a more lucrative approach to Charter's reorganization for him and the other interested parties who pre-negotiated the plan. And because the other parties around the table were rewarding themselves handsomely, Allen demanded a share of the action too. He cannot now plausibly claim that he stands to lose all of the considerable "benefit[s]" of his participation in the plan just because a court might order him to give back the extra compensation he claimed as icing on the cake.

B The Nondebtor Releases Are Easily Severed From The Allen Settlement And Charter's Reorganization Plan

The debtors' plan violates the Bankruptcy Code by releasing a select group of *nondebtor* insiders—including Paul Allen and his affiliates—from "any and all Causes of Action" that any Charter creditor or shareholder might bring "arising from or related in any way

to the Debtors." Reorganization Plan 60–61 (J.A.___–___). The district court should have proceeded to address the merits and struck the nondebtor releases (in whole or in part) from the plan.

Once again, however, the district court was swayed by the siren song of nonseverability. After first invoking the nonseverability clause, the district court recycled that same proposition by concluding that the nondebtor releases could not be struck from the plan because of bankruptcy court's "factual findings" that the releases were a "'required'" and "necessary" term of the Allen Settlement. Dist.Ct.Op. 27–28 & n.34 (J.A.___–___) (quoting Confirmation Order ¶¶ 34, 44). On that basis, it believed that striking the releases would require rewriting the Allen Settlement from scratch. Those "necessary modifications to the [Allen] Settlement," the court reasoned, "would nullify and unravel the Plan." *Id.* at 28 (J.A.___).

Not so. As an initial matter, the bankruptcy court's *legal conclusion* regarding the nondebtor releases simply is not a *finding of fact* reviewed only for clear error. Whether a plan's nondebtor releases are indispensible to Charter's reorganization under this Circuit's exacting standard is a legal question reviewed *de novo*.

But whatever the standard of review, the district court was dead wrong that the nondebtor releases cannot be severed from the reorganization plan. The Allen Settlement incorporated a "Term Sheet" for Charter's proposed reorganization (LDT-397 (Allen Settlement) 3 (J.A.___)), ***and that term sheet expressly rendered the nondebtor releases an expendable part of the transaction*** (CX-226 (Term Sheet) 17 (emphasis added) (J.A.___)). More particularly, the debtors agreed to "use commercially reasonable best efforts to obtain approval by the Bankruptcy Court of the 'Third Party Releases,'" but Allen and CCI further agreed that any "failure to obtain such 'Third Party Releases' *shall not constitute a breach under the Restructuring Agreement*." *Ibid.* (emphasis added). That is, if the nondebtor releases are struck from the confirmation order, no other "modification" to the Allen Settlement is "necessary." The district court's dismissal of R²'s challenge to those releases is unfounded.

Moreover, the "circuits have agreed that equitable mootness need not foreclose an appeal from aspects of Chapter 11 plan confirmation that solely concern . . . releases." *Hilal* v. *Williams* (*In re Hilal)*, 534 F.3d 498, 501 (5th Cir. 2008) (collecting cases). This case demonstrates

why: R²'s challenge to nondebtor releases seeks a laser-like remedy. R² asks only that the nondebtor releases be struck from the confirmation order—effective relief that will *not* affect any innocent third party and implicates *only* the released insiders. See *id.* at 500 ("[A] change in the scope of the release would affect only [entities] who are no strangers to the plan and who have been on notice of this contingent exposure since early in the confirmation process."); *United Artists Theatre Co.* v. *Walton (In re United Artists Theatre Co.)*, 315 F.3d 217, 228 (3d Cir. 2003) (court could "modify" the plan's "indemnity provision" and "the Plan otherwise would survive intact"); *W.R. Huff Asset Mgmt. Co.* v. *HSBC Bank USA (In re PWS Holding Corp.)*, 228 F.3d 224, 236 (3d Cir. 2000) ("The releases (or some of the releases) could be stricken from the plan without undoing other portions of it.").[16]

[16] This Circuit has carved out a limited—and inapplicable—caveat to the consensus that challenges to nondebtor releases cannot be equitably moot, covering cases in which the appellant failed even to *try* to obtain a stay of the confirmation order pending appeal. See *In re Metromedia*, 416 F.3d at 144–45. But R² *did* seek such a stay, and Appellees have never claimed otherwise. See *supra* p. 23 & note 11. In the absence of an appellant's utter failure to seek a stay, "the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the [reorganization] process," and there is "little equitable about protecting the released non-debtors from

The equities in this case strongly favor proceeding to the merits. The releases at issue here are so broad that they release nondebtors from *all* claims having *anything* to do with Charter, not just from claims arising out of the nondebtors' reorganization-related activities. This Circuit has recognized that a confirmation order's "blanket immunity" for third parties "heighten[s]" the likelihood that the bankruptcy court abused its limited authority to grant nondebtor releases. *In re Metromedia*, 416 F.3d at 142. What is more, the Supreme Court recently reaffirmed that bankruptcy courts cannot constitutionally "enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011). It follows that the bankruptcy court must also lack the power to foreclose those same kinds of claims against a nondebtor. R²'s claim "cries out for appellate review." *In re Pacific Lumber Co.*, 584 F.3d at 244.

Finally, an appellate court would be called on to strike the nondebtor releases only *after* concluding that releasing nondebtors from

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negligence suits arising out of the reorganization." *In re Pacific Lumber Co.*, 584 F.3d at 251–52.

liability for all things Charter is not "*itself* important" to the success of Charter's reorganization. See *In re Metromedia*, 416 F.3d at 143. And indeed, this case presents none of the "rare" and "unique" circumstances in which this Circuit (in conflict with other circuits[17]) has authorized bankruptcy courts to release nondebtors from liability to make a debtor's reorganization feasible. See *id.* at 141–43. In fact, the releases play *no role* in the reorganization other than as a feather in their beneficiaries' caps.[18] It is exceedingly difficult to understand how

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[17] See *In re Pacific Lumber Co.*, 584 F.3d at 251–53; *Resorts Int'l, Inc.* v. *Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995); *Landsing Diversified Props.-II* v. *First Nat'l Bank & Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600–02 (10th Cir. 1990), amended by *Abel* v. *West*, 932 F.2d 898 (10th Cir. 1991). The Bankruptcy Code does not authorize nondebtor releases, except in asbestos cases. See 11 U.S.C. § 524(e), (g).

[18] The bankruptcy court tried to justify Charter's nondebtor releases by pointing out that *some* of the released entities participated in aspects of the reorganization. Bankr.Ct.Op. 258 (J.A.___). But under *Metromedia*, the nondebtor releases themselves have to be "important" to the plan, not the *nondebtors* who walked away with them.

Likewise, despite claiming that the legality of the nondebtor releases was "wholly irrelevant" to its mootness inquiry (Dist.Ct.Op. 28 n.34 (J.A.___)), the district court based its mootness holding in part on the ground that "'many'" (but not all) of the released nondebtors, in some (but not all) of their capacities, are indemnified by the debtors (*id.* at 28 n.32 (J.A.___); see also Bankr.Ct.Op. 258 (J.A.___)). Had the district court actually reached the merits, however, it would have

striking nondebtor releases held to be *unimportant* to the plan could nonetheless "'knock the props out'" from under it. *Chateaugay II*, 10 F.3d at 953.

C. The Bankruptcy Court Can Conduct A Standalone Valuation Of CCI And Award Resulting Relief Without Scuttling Charter's Reemergence From Bankruptcy

Charter's joint reorganization plan wiped out the investment of CCI's shareholders (other than Paul Allen) without paying them a dime. It did so without a legally necessary evaluation of whether those investments had value on the ground that CCI actually had substantial net worth as an individual entity.[19] The plan's amalgamated valuation

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considered R²'s protest that no such indemnification agreement is in the record, let alone one covering *all* of the released nondebtors and the *full universe* of potential claims against them. In any event, unless the indemnified claims are so substantial—and not covered in whole or in part by Charter's Directors' and Officers' insurance (see Reorganization Plan 53 (J.A.___))—that they would doom Charter's reorganization, the mere existence of an indemnification provision does not render nondebtor releases "important" to the plan under *Metromedia*.

[19] To obtain confirmation of a reorganization plan that—as does this one—completely extinguishes equity interests, the plan's proponents must prove that the debtor is insolvent—*i.e.*, that there is no value left in the company once its creditors have been paid. See, *e.g.*, *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 441 (1968); 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4][a][ii] ("Eliminated classes may . . . insist on . . . an evidentiary showing that there is insufficient reorganization value for

of all the affiliated debtors proved nothing about the CCI's standalone solvency. Just because the debtors' *combined* liabilities may have exceeded their *combined* assets does not establish that CCI's *individual* liabilities exceeded its *individual* assets. And indeed, there is powerful evidence that CCI was solvent.[20]

This critical error has a simple fix: The bankruptcy court must hold an evidentiary hearing to determine CCI's value at confirmation. If (as we expect) that hearing establishes that CCI had standalone value, then CCI's stakeholders will be entitled to recover accordingly.

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the eliminated class after payment to the senior classes."). The *procedural* joint administration of the debtors' estates cannot trample over the separate *substantive* rights that CCI's public shareholders held in CCI alone. See *Bunker* v. *Peyton (In re Bunker)*, 312 F.3d 145, 153 (4th Cir. 2002) ("Under joint administration the estate of each debtor remains separate and distinct.").

[20] First, all but approximately $500 million of Charter's $21.7 billion debt was held by companies other than CCI. See Disclosure Stmt. 16, 18–19. Second, CCI had substantial assets to offset its small sliver of Charter's debt: it held "mirror notes" and a management agreement entitling it to pass those debts to other Charter entities. See JPX-347 (CCI 2008 10-KA) 52, 54–55; Dkt-841 (Debtors' Post-Trial Br.) 77–78 & n.115, 84. Finally, the debtors' public disclosures make clear that CCI owned valuable NOLs that, at confirmation, had a cash value of *at least* $1.14 billion. See Dkt-841 (Debtors' Post-Trial Br.) 14; LDT-444 (CCH 2007 10-K) 1, 13; LDT-249 (4/6/09 Ltr. to IRS) 3, 14.

Such a proceeding (and any total or partial recovery that results for CCI's stakeholders) is both equitable and consistent with this Circuit's cases. In *Chateaugay II*, for example, the appellant asserted it was entitled to $20 million from a reorganized debtor that had $200 million in working capital. There was no dispute that "the only way [the creditor] could win on the merits [wa]s upon a finding that [it] was entitled to funds that, at least to some extent, were wrongfully distributed to or wrongfully re-vested in one or more of the entities that are now before this Court." 10 F.3d at 953. This Court held that it could "fashion effective relief" simply by ordering the reorganized debtor to return misappropriated funds to the estate. *Ibid.* "[C]onvinced that at least *some* effective relief could be granted," the Court reached the merits. *Id.* at 954 (emphasis added).

In doing so, the Court recognized that, on remand from a successful appeal, the appellant would readily accept some fractional recovery that does not impair the overall plan's feasibility, or affect parties not before the Court, "rather than suffer the mootness of its appeal as a whole." *Ibid.* The same reasoning applies here. An order that the bankruptcy court must conduct a standalone valuation of CCI

cannot possibly unravel Charter's reorganization. The proceeding itself—a relatively short evidentiary hearing involving a handful of fact and expert witnesses—would not adversely affect Charter's reorganization or operations. And if (as we expect) that proceeding results in a finding that CCI was solvent, full or partial relief is hardly beyond the means of the reorganized Charter, which has massive cash flow and is well financed.

Indeed, since emerging from bankruptcy, CCI boasts gross annual revenues of $7.1 billion, almost $2.6 billion in annual adjusted EBITDA[21]; and more than $1.4 billion in shareholder equity. CCI 2010 10-K at 1, 35, 49, F-4 (J.A.___, ___, ___, ___). The company has ready access to over $1.3 billion in cash. Charter Communications, Inc. June 2011 Form 10-Q Quarterly Report 4, 9, 32 (Aug. 2, 2011) (J.A.___, ___, ___). In such circumstances, courts have not hesitated to order monetary remedies. See *In re Pacific Lumber Co.*, 584 F.3d at 250

[21] EBITDA refers to earnings before certain interest expenses, income taxes, depreciation and amortization, and other specialized expenses. According to CCI, this figure "provide[s] information useful to . . . assessing [the company's] performance and [its] ability to service [its] debt, fund operations, and make additional investments with internally generated funds." CCI 2010 10-K 48 (J.A.___). It is telling evidence that the debtors are more than able to fund relief to R[2].

(noting that an $11 million claim "would seem not to imperil a reorganization involving hundreds of millions of dollars"); *LTV Corp.* v. *Aetna Casualty & Surety Co. (In re Chateaugay Corp.)*, 167 B.R. 776, 779 (S.D.N.Y. 1994) ("It is difficult to conceive how a potential liability of, at most, several million dollars could unravel the Debtors' reorganization, which involved the transfer of billions of dollars, and which has resulted in the revival of Debtors into a multi-billion dollar operation with $200 million in working capital."). Moreover, Charter's financial statements have time and again put investors on notice that the outcome of this appeal is a "risk factor" that could affect the value of their shares. See, *e.g.*, CCI 2010 10-K at 29 (J.A.___).

There is accordingly no reason to doubt that effective relief can be fashioned "by ordering [the debtors], who [are] a party to this appeal, to return the money to the estate" for the benefit of CCI's former creditors and shareholders. *In re Spirtos*, 992 F.2d at 1007. In any event, the available effective remedies are not limited to immediate cash payments: Relief could take the form of cash payments over time or the issuance of new equity or debt interests in the reorganized company if necessary to preserve the continued vitality of the Charter enterprise.

There is, in short, no shortage of ways to make CCI's former shareholders whole without seriously affecting Charter's viability.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and remand this matter to the district court with instructions to address R²'s appeal on its merits and to fashion whatever effective relief is called for upon such a review.

Respectfully submitted,

/s/ Lawrence S. Robbins
Lawrence S. Robbins
Mark T. Stancil
Matthew M. Madden
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K St. NW, Suite 411L
Washington, DC 20006
(202) 775–4500

Attorneys for Appellant R² Investments, LDC

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,998 words, according to the count of Microsoft Word 2003 and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it is proportionally spaced typeface using Microsoft Word 2003 in 14-point Century Schoolbook.

/s/ Matthew M. Madden
Matthew M. Madden
Counsel for R² Investments, LDC
August 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2011, I caused copies of the foregoing brief to be filed with the Court by CM/ECF and by e-mail to briefs@ca2.uscourts.gov, and caused additional copies to be served upon the counsel for all parties by CM/ECF and by e-mail.

/s/ Matthew M. Madden
Matthew M. Madden