UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 09-cv-10506

In re Charter Communications, Inc., *et al.*

Debtors.

R^2 Investments, LDC

Appellant,

v.

Charter Communications, Inc., *et al.*

Appellees.

REPLY BRIEF FOR APPELLANT R^2 INVESTMENTS, LDC

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INTRODUCTION

Praising their reorganization plan as "tremendous" and "fantastic," Appellees urge this Court to leave them in peace to enjoy its benefits. Debtors Br. 7; Allen Br. 14; see also, *e.g.*, Official Committee of Unsecured Creditors ("Committee") Br. 5. But regardless of how exceptional the plan might be from *their* perspective, the Bankruptcy Code demands (among other things) that the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). While Allen has received a handsome payoff, the debtors have rid themselves of debt, and the Crossover Committee now stands to reap the profits of the reorganized enterprise, the CCI shareholders have been left out entirely, receiving neither a single dollar for the extinguishment of their interests nor an adequate justification for being left empty-handed. That result, our opening brief explained, violates not only the "fair and equitable" prescription, but also several other statutory conditions for a crammed-down bankruptcy reorganization plan.

Appellees' first-line response to our arguments is to duck them. Having run roughshod over bankruptcy law to achieve their aims, they urge this Court to rule that it is too late to do anything about it. But their claim of equitable mootness ignores our actual position in favor of attacking a strawman. We are not, as Appellees suggest, asking the Court to do the impossible and turn back the clock to a time before the plan was consummated. We are instead asking the Court—practically and permissibly—to order that value wrongly siphoned from CCI and proceeds wrongly obtained by Allen be transferred to the CCI shareholders, who received nothing at all under the plan (but should have). Such a remedy is well within the Court's powers and will not derail the reorganized enterprise. We seek, in other words, simple and readily achievable fixes; *it is not necessary to unwind the plan*.

Appellees put so many eggs in the equitable mootness basket precisely because their defense on the merits is so insubstantial. They do not even address their failure to prove the standalone value of CCI, nor can they escape their prior acknowledgements that CCI owns the Charter enterprise's tax-beneficial net operating losses (NOLs). They cannot get around the fact that, by richly compensating Allen to maintain his equity voting power in CCI, the plan rewards him "on account of" his preexisting equity position, in violation of the absolute priority rule. They cannot show that the plan-negotiating process was fair, where it steamrolled towards the predetermined result of a substantial payoff to Allen; and they cannot show that the payoff itself was fair, where there is compelling evidence (largely ignored by the bankruptcy court's opinion) that Allen would have accepted far less or nothing at all. Finally, they cannot demonstrate that the plan's expansive third-party releases are truly integral to the plan and justified by the sort of "exceptional circumstances" that Second Circuit law demands.

No matter how great the Appellees think this plan is—or, more accurately, how great the plan is *for them*—the ends do not justify the means. There is no cost-benefit exception to well-settled bankruptcy law. Instead, this Court must apply the law as it is written, which in this case requires remanding this case for further proceedings with specific directions to determine the amount of compensation owed to the CCI shareholders.

ARGUMENT

I. R^2'S APPEAL IS NOT EQUITABLY MOOT

Appellees' equitable mootness arguments rest on the premise that R^2 is seeking to "unravel" Charter's reorganization plan. Thus, for example, Appellees repeatedly claim that

R^2's appellate arguments, if accepted, would require the bankruptcy court to "strike down the Plan, and start again." Debtors Br. 20.[1] In fact, R^2 demands no such thing. Having erected this strawman, however, Appellees devote page after page to cataloguing the "innumerable steps" that have taken place since plan confirmation that make "*unwinding the entire Plan* . . . impossible and certainly inequitable." Debtors Br. 14, 21 (emphasis added). All of that is entirely beside the point: R^2 does not dispute that the plan has been substantially consummated. The question is whether the *particular remedies* that R^2 seeks will require the unwinding of the plan. As explained below, they plainly will not.

R^2 asks for three discrete remedies—none of which will "blow up" (Debtors Br. 21) Charter's reorganization plan or disrupt a highly profitable company with massive revenues and ready access to ample cash (see *infra* pages 6–7): The bankruptcy court should be directed to (1) "conduct a proper standalone valuation of CCI and direct the payment of the excess value to CCI's shareholders"; (2) "void the payment of $200 million to Allen" because it violates the absolute priority rule and the entire fairness doctrine; and (3) "strike the third-party releases" bestowed on Allen and others. R^2 Br. 40. In short, this Court is called upon to order an evidentiary hearing, direct the redistribution of $200 million paid to a single corporate insider, and strike liability releases given gratuitously to a collection of nondebtors at the uncompensated expense of third parties barred from bringing claims against them. That is not the stuff of equitable mootness.

[1] See also Debtors Br. 11 (arguing that "it is too late to try to retrace the steps of the billions of dollars that have changed hands and, thus, unscramble the egg"); *id.* at 21 (the Court cannot "blow up Charter's entire Plan of Reorganization" to start over "with a brand new plan"); *id.* at 21 ("undoing Charter's Plan is simply not feasible"); *id.* at 21 (listing the things necessary to "unwind the Plan"); *id.* at 23 (explaining debt service implications of "[u]nwinding the Plan"); *id.* at 23 (stating that transactions would have to be "unwound" in order to "undo the Plan"); Committee Br. 26 (discussing "the impossibility of undoing a plan of reorganization"); *id.* at 29 ("The Plan cannot be undone."); see also Allen Br. 17–18.

A. The Equitable Mootness Analysis Requires A Remedy-By-Remedy Examination Of Whether Relief Is Feasible

In stark contrast to the Appellee's blunderbuss "save the plan" approach, the proper way to analyze equitable mootness is remedy-by-remedy. That is because equitable mootness "bears only upon the proper remedy" to be applied to particularized violations of law. *Deutsche Bank AG* v. *Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005); see also *Bank of New York Trust Co., NA* v. *Official Unsecured Creditors' Committee (In re Pacific Lumber Co.)*, 584 F.3d 229, 241 (5th Cir. 2009) ("[E]quitable mootness applies to specific claims, not entire appeals."). Appellees have assiduously avoided undertaking such an analysis, but "[i]n exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligation to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole." *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986); see also *In re Pacific Lumber Co.*, 584 F.3d at 240 ("[A]ppellate cases generally apply equitable mootness with a scalpel rather than an axe.").

Appellees focus almost exclusively on whether the plan has been substantially consummated. But "'[s]ubstantial consummation' is not a blanket discharge of this judicial duty to examine carefully each request for relief." *In re AOV Indus., Inc.*, 792 F.2d at 1148. 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." *Frito-Lay, Inc.* v. *LTV Steel Co., Inc. (In re Chateaugay Corp.) ("Chateaugay II")*, 10 F.3d 944, 952 (2d Cir. 1993); see also *Schaefer* v. *Superior Offshore Int'l, Inc. (In re Superior Offshore Int'l, Inc.)*, 591 F.3d 350, 353–54 (5th Cir. 2009) ("Although the Appellants seek reversal of the confirmation order . . . [r]emedies can be crafted for [the plan's alleged] deficiencies.").

Appellees' refusal to imagine any remedy short of the plan's destruction does not mean that none exists. An individualized evaluation of each remedy requested in this appeal reveals that "the court can still order some effective relief," without "affect[ing] the reemergence of the debtor as a revitalized corporate entity" or "'knock[ing] the props out from under the authorization for every transaction that has taken place.'" *Chateaugay II*, 10 F.3d at 952–53.[2] Indeed, courts routinely reject the sort of sky-is-falling claims that Appellees advance here. See, *e.g.*, *Hilal* v. *Williams (In re Hilal)*, 534 F.3d 498, 500 (5th Cir. 2008) ("The Trustee's argument [that third parties would be adversely affected and the liquidation of the debtor's assets modified] reflects his erroneous premise that Hilal is appealing the entire confirmation order."); *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000) (rejecting assertion that an "appeal . . . would necessitate the reversal or unraveling of the entire plan of reorganization" where there were "intermediate options," including striking releases granted by the plan).

The debtors rely heavily on the bankruptcy court's observation that the facets of the reorganization it approved were "integral to the Plan" and "nonseverable and mutually dependent." Debtors Br. 24, 26 (quoting Plan, art. XV.K). But the court's reliance on the plan's boilerplate non-severability clause was entirely misplaced. See, *e.g.*, *Institut Pasteur* v. *Cambridge Biotech Corp.*, 104 F.3d 489, 491 (1st Cir. 1997) ("disagree[ing]" with appellee's contention that a reorganization plan's non-severability provision made "meaningful partial

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[2] Furthermore, "[a] chief consideration" in the equitable mootness calculus is whether Appellants sought a stay. *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144, n.2; see also *Chateaugay II*, 10 F.3d at 954 (seeking a stay is "significant"); *Windels Marx Lane & Mittendorf, LLP* v. *Source Enters., Inc. (In re Source Enters., Inc.)*, 392 B.R. 541, 551 (S.D.N.Y. 2008) ("Seeking a stay is of the 'utmost importance'"); *Freeman* v. *Journal Register Co.*, No. 09-cv-7296, 2010 WL 768942, at *4 (S.D.N.Y. 2010) ("[C]ourts in this Circuit have emphasized the importance of seeking a stay."). Here, R^2 diligently—albeit unsuccessfully—asked the bankruptcy court and this Court to stay the confirmation order pending appeal. See R163; CD R10. Likewise, all of the relevant parties have had—and continue to have (see *infra* pages 7–8)—notice of R^2's appeal (indeed, most of them are before the Court). See *Chateaugay II*, 10 F.3d at 953.

relief" impossible). If the debtors were correct that a non-severability clause always means that *no* change to a plan can be made (Debtors Br. 26), then the insertion of such a clause would mean that substantial consummation of a plan automatically renders moot *every* appeal that follows—a result that is plainly contrary to Second Circuit law. See *Chateaugay II*, 10 F.3d at 952. Equitable mootness is, after all, a "prudential doctrine," *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144, and the "cramdown" reorganization of one of the largest telecommunications companies in the country—over vociferous objections by creditors, shareholders, the Trustee, and the SEC—"cries out for appellate review," *In re Pacific Lumber Co.*, 584 F.3d at 244.

B. The CCI Valuation Claim Is Not Equitably Moot

Debtors do not dispute that bankruptcy law required a standalone valuation of CCI but that they failed to make such an inquiry before wiping out CCI's equityholders (other than Paul Allen). See Debtors Br. 47–48. That critical error comes with a simple fix: The bankruptcy court must hold an evidentiary hearing to determine CCI's value at confirmation (a hearing to which CCI's creditors and shareholders have *always* been entitled (see R^2 Br. 15; *infra* page 14)). If that hearing establishes that CCI had standalone value (and as explained *infra*, pages 15–19, there is already compelling evidence in the record that it was highly valuable), then CCI's stakeholders would be entitled to recover accordingly.

Ordering such relief would not require unwinding the plan. The proceeding itself—a relatively short evidentiary hearing involving no more than a handful of fact witnesses and perhaps some expert testimony—would not adversely affect Charter's reorganization or operations. And the relief that would be ordered as a result is hardly beyond the means of the reorganized Charter, which has massive cash flow and is well financed (particularly after settling the adversary proceeding brought by its senior lending syndicate, see No. 09-cv-10328-DC). Indeed, since emerging from bankruptcy, CCI boasts gross revenues of $590 million *each month*; almost $2.5 billion in 2009 adjusted EBITDA[3]; and more than $1.7 billion in shareholder equity. Charter Communications, Inc. Form 10-Q Quarterly Report 4–6 (Aug. 4, 2010) ("CCI August 2010 10-Q"); Charter Communications, Inc. Form 10-K 2009 Annual Report 33 (Feb. 26, 2010) ("CCI 2009 10-K"). The company has ready access over $840 million in cash. CCI August 2010 10-Q, at 4, 10, 43. In such circumstances, courts have not hesitated to order monetary remedies. See *LTV Corp.* v. *Aetna Casualty & Surety Co. (In re Chateaugay Corp.) ("Chateaugay III")*, 167 B.R. 776, 779 (S.D.N.Y. 1994) ("[I]it is difficult to conceive of 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."); *In re Pacific Lumber Co.*, 584 F.3d at 250 (noting that an $11 million claim "would seem not to imperil a reorganization involving hundreds of millions of dollars"). 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 money to the estate" for the benefit of CCI's former creditors and shareholders, *Spirtos* v. *Moreno (In re Spirtos)*, 992 F.2d 1004, 1007 (9th Cir. 1993). 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.

[3] EBITDA refers to a company's earnings before certain interest expenses, income taxes, depreciation and amortization, and other specialized expenses. According to CCI, this publicly-reported figure "provides 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 2009 10-K 46–47, n.3. It is likewise telling evidence that the debtors are more than able to fund proper relief for Appellants in this proceeding.

There is, in short, no shortage of ways to make Appellants whole without seriously affecting Charter's viability and operations.

Nor is it true that supposed "reliance" on "the finality of the Plan" by CCI's new debt and equity holders is a basis for holding R^2's appeal equitably moot. Committee Br. 28. No stakeholder in the reorganized enterprise could justifiably have relied on any such thing. They have *always* been on notice of potential liabilities arising out of appeals from the confirmation order. Time and again, CCI's publicly-filed annual and quarterly reports have expressly informed them of R^2's appeal, and explicitly acknowledged that the company "*cannot predict the ultimate outcome of the [confirmation] appeals.*" CCI 2009 10-K, at 29 (emphasis added); see also CCI August 2010 10-Q, at 43 (indicating that the appeals are "in the briefing phase" and a "risk factor" for CCI stakeholders to consider); Charter Communications, Inc. Form 10-Q Quarterly Report 38 (May 6, 2010) (providing notice that R^2 and Law Debenture Trust had filed their opening briefs). As the debtors admit (at 17), "[t]he public . . . relied on these financial statements in trading and holding Charter securities, conducting business with the new Charter, and in regulating the activities of new Charter." Appellees cannot claim that the public justifiably *ignored* the portions of those statements cautioning that the bankruptcy proceeding remained subject to appellate review. Cf. *In re Boston Scientific Corp. Sec. Litig.*, 490 F. Supp. 2d 142, 153–56 (D. Mass. 2007) (disclosures of pending litigation in a company's 10-K were sufficient to alert investors to the potential of a total loss), rev'd on other grounds *sub nom.*, *Miss. Public Employees' Ret. Sys.* v. *Boston Scientific Corp.*, 523 F.3d 75 (1st Cir. 2008); 17 C.F.R. § 229.103 (companies may "briefly" disclose "any material pending legal proceedings" to their investors).

In any event, Appellees' assertions that ordering a proper standalone valuation of CCI and the payment of corresponding monetary relief to CCI's stakeholders would imperil Charter's viability is premature at best. In the (almost inconceivable) event that the amount due to CCI's former creditors and shareholders would have such dire effects on an enterprise of this magnitude, the courts would be perfectly positioned to tailor relief accordingly. See *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994) (remand—not dismissal—is appropriate when the extent of a potentially moot claim is undetermined). CCI's stakeholders are entitled to whatever *partial* recovery will not moot their appeal. "Certainly, [the appellant] would accept some fractional recovery that does not impair feasibility or affect parties not before this Court, rather than suffer the mootness of its appeal as a whole. A claimant should not be out of court on grounds of mootness solely because its injury is too great for the debtor to satisfy in full." *Chateaugay II*, 10 F.3d at 954 (citation omitted); see also *In re Pacific Lumber Co.*, 584 F.3d at 244 (citing *Chateaugay II* and concluding that an appeal is not equitably moot if "some other, more limited form of relief might be afforded").

In sum, while Appellees do not dispute that they were required but failed to conduct a standalone valuation of CCI, they now insist that even asking that question is beyond the courts' reach. But there is already overwhelming evidence that the reorganized Charter could readily provide relief to CCI's stakeholders without compromising the reorganization plan. What is more, the notion that Appellees' error was simply too large—*i.e.*, that CCI stakeholders would be entitled to such a large payment as to scuttle a multi-billion-dollar enterprise like Charter—is no reason to avoid *inquiring* whether at least *some* measure of relief is warranted and feasible.

C. The Allen Payments Claim Is Not Equitably Moot

There is also no reason to believe that R^2's appeal is equitably moot with respect to Paul Allen's improper receipt of $200 million in cash and securities in violation of the absolute priority rule and Delaware law (the latter by virtue of 11 U.S.C. § 1129(a)(3)). The effective remedy is readily apparent: this Court should enter an order directing Paul Allen to return $200 million to the estate for distribution to CCI's creditors and shareholders shortchanged by the Allen deal, or, at the very least, to return some lesser amount based on the bankruptcy court's determination of what Allen would have been willing to accept had there been competing plans or a proposal that complied with the entire fairness doctrine.[4] Such a recovery from Allen would in no way undo any of the "intricate transactions" that have taken place since confirmation or impact Charter's reemergence from bankruptcy. See *Chateaugay II*, 10 F.3d at 953. Nor is it inequitable to obtain a $200 million repayment from Allen, who—the evidence shows—avoided a $1 billion tax bill by agreeing to this deal. See R^2 Br. 27–28 (citing evidence).

Where prevailing on appeal results in a "finding that [the 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," a court is "able to fashion effective relief to the extent of remanding 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." *Chateaugay II*, 10 F.3d at 953. That is precisely the

[4] The debtors (at 20) mischaracterize our supposedly "candid[]" admission that R^2 intends to *replace* Charter's plan with "competing plans." Our suggestion was *far* simpler than that. As an alternative to ordering Allen to repay all of the $200 million in value he gained from Charter's reorganization, the Court should at least remand for further proceedings in which parties could present evidence regarding what alternative, "competing" plans *could have* offered Allen for agreeing not to destroy Charter's value (along with, it would seem, his own highly favorable tax situation). See R^2 Br. 40. The bankruptcy court can then analyze, on the basis of that evidence, how much less than $200 million (plus the releases) Allen would have accepted to cooperate in the reorganization and achieve massive tax savings of approximately $1 billion.

remedy required here. Debtors cite (at 23) *Credit Alliance Corp.* v. *Dunning-Ray Ins. Agency, Inc. (In re Blumer)*, 66 B.R. 109, 113 (9th Cir. B.A.P. 1986), for the proposition that an appeal may be equitably moot if it implicates funds that have been widely disbursed to *third parties*, but they ignore the actual holding in that case: A court *can* "structure effective relief" by requiring "*a party to th[e] appeal*" to "return . . . erroneously distributed funds." *Id.* at 113 (emphasis added).

Allen is before the Court, and surely it is equitable "to address the merits of the appeal" given that Allen "knew at the time he received and spent his plan distribution that [R^2] had appealed the bankruptcy court's decision." *In re Spirtos*, 992 F.2d at 1007; see also *Salomon* v. *Logan (In re Int'l Envtl. Dynamics, Inc.)*, 718 F.2d 322, 326 (9th Cir. 1983) (it is equitable to order "a party to [the] appeal" to "return . . . erroneously disbursed funds" where the party knew that another party had "contest[ed] the bankruptcy court's order that he be paid"). Any "adverse consequences" to Allen from this appeal are both "a natural result of any ordinary appeal [because] one side goes away disappointed" and "foreseeable to [him] as a sophisticated investor[] who opted to press the limits of bankruptcy confirmation and valuation rules." *In re Pacific Lumber Co.*, 584 F.3d at 244.

This Court should, moreover, be particularly wary of Appellees' attempt to prevent appellate review of an insider deal under the guise of equitable mootness. "[E]quity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Hilal*, 534 F.3d at 500. The insider deal reached in this case—a payoff to Allen purportedly to induce him to refrain from undertaking destructive actions by virtue of his rights relating to his status as CCI's controlling shareholder—truly tests the boundaries within which a corporate insider operates when spearheading a Chapter 11 reorganization.

D. The Nondebtor Releases Claim Is Not Equitably Moot

Tellingly, the debtors' and the Committee's pleas for equitable mootness include no discussion of the nondebtor releases (Debtors Br. 13–28; Committee Br. 24–30), and even Allen mentions the word "releases" only parenthetically (Allen Br. 18). Perhaps that is because the "circuits have agreed that equitable mootness need not foreclose an appeal from aspects of Chapter 11 plan confirmation that solely concern . . . releases." *In re Hilal*, 534 F.3d at 501 (collecting cases).[5]

Moreover, the equitable mootness and merits of the nondebtor releases claim are two peas in a pod: the releases are valid only if they are truly essential and indispensable to the reorganization plan, which is essentially the same inquiry the Court would undertake when determining whether striking them would require unwinding the plan. See *In re Metromedia*, 416 F.3d at 144 ("Because equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness. Often an appraisal of the merits is necessary to the framing of an equitable remedy.") (citation omitted). Put another way, if a nondebtor release is improper because it is not "*itself*" integral to the plan (see R^2 Br. 37 (quoting *In re Metromedia*, 416 F.3d at 143); see also *infra* page 34), it follows that striking the provision cannot be beyond the court's equitable powers. If (as we contend) the confirmation order's sweeping nondebtor releases—which freed Allen, certain of his affiliates, and other nondebtors from *all* liability relating to Charter—were *not* justified by any exceptional circumstance that made the success of Charter's reorganization "manifestly impossible" without them (see R^2 Br.

[5] The Second Circuit has held that an otherwise meritorious appellate challenge to third-party releases may be equitably moot if the appellants failed even to *try* to obtain a stay pending appeal. See *In re Metromedia*, 416 F.3d at 143–45, n.5. Here, however, that consideration would not apply, because R^2 *did* seek a stay pending appeal. See *supra* note 2 (citing R163 and CD R10).

37 (quoting *Cartalemi* v. *Karta Corp. (In re Karta Corp.)*, 342 B.R. 45, 55 n.1 (S.D.N.Y. 2006)); see also *infra* pages 33–37), then surely those releases can be excised from the plan. Conversely, if the releases are essential to the plan and therefore proper on the merits, then striking them would likewise require upsetting the plan and thus (after substantial consummation) run afoul of the equitable mootness doctrine. There is simply no need to plumb the depths of equitable mootness on this issue. Cf. *Kenton County Bondholders Comm.* v. *Delta Air Lines, Inc.* (*In re Delta Air Lines, Inc.)*, 374 B.R. 516, 524 (S.D.N.Y. 2007) (holding that a claim regarding releases was equitably moot, but for a merits-based reason: "[T]he releases were a necessary part of the Settlement reached by the parties").

In any event, no matter how the issue is framed, effective relief is plainly available. Striking the nondebtor releases will have no impact on Charter's reorganization or the "intricate transactions" the company and others have engaged in since confirmation. See, *e.g.*, *In re PWS Holding*, 228 F.3d at 236–37 (reorganization plans could go forward even if releases were struck). Indeed, a challenge to nondebtor releases seeks a laser-like remedy: that the releases be voided as contrary to law while the remainder of the reorganization plan be left unimpeded. The impact of such a remedy will be felt only by Allen and the other released nondebtors—and that is no reason to deem the appeal moot. See *In re Hilal*, 534 F.3d at 500 ("[A] change in the scope of the release would affect only the Trustee and other professionals, who are no strangers to the plan and who have been on notice of this contingent exposure since early in the confirmation process."). The Fifth Circuit, for example, recently held that a challenge to nondebtor releases was "not equitably moot" because "the goal of finality sought in equitable mootness does not outweigh a court's duty to protect the integrity of the process," and there is "little equitable about protecting the released non-debtors from negligence suits arising out of the reorganization." *In* *re Pacific Lumber Co.*, 584 F.3d at 251–52. The equities in this case even more strongly favor proceeding to the merits, because the releases at issue here are so broad that they release nondebtors from *all* claims having *anything* to do with Charter, not (as in *Pacific Lumber*) just from claims arising out of the nondebtors' reorganization-related activities.

For the reasons stated above, Appellees' motions to dismiss should be denied.

II. THE PLAN PROPONENTS FAILED TO CARRY THEIR BURDEN TO PRESENT A STANDALONE VALUATION OF CCI

A. Appellees Do Not Seriously Dispute That A Standalone Valuation of CCI Was Required But Not Done

Tellingly, Appellees spend almost no time addressing the very first point raised in our brief—that the plan improperly valued CCI shares at $0 without ever even attempting to prove that those shares were, in fact, worthless. Appellees do not dispute the legal authority demonstrating that a standalone solvency analysis of CCI was required. See R^2 Br. 15–16. They do not dispute that it was their burden to provide that analysis. See *id.* at 15. And they do not dispute that they presented no such analysis to the bankruptcy court. See *id.* at 16. These concessions alone require a remand so that the bankruptcy court can hear evidence on the issue and compensate the CCI shareholders (either in cash from, or stock in, the reorganized enterprise) if the plan proponents cannot prove, through a standalone solvency analysis, that CCI was insolvent at the relevant time.

The Committee briefly argues that such a remand is unnecessary, claiming that evidence at trial was sufficient to establish CCI's insolvency. See Committee Br. 46–47. But that argument rests on the flawed premise that evidence showing the insolvency of the Charter enterprise *as a whole* necessarily demonstrates the insolvency of *CCI in particular*. As we explained in our opening brief (at 18), that is demonstrably false. CCI's value is not simply the sum total of the assets and liabilities of the various subsidiary entities, because CCI had its own highly valuable assets—most significantly, billions of dollars in NOLs. Indeed, the debtors in this very case have claimed that certain individual Charter entities were solvent even while the Charter enterprise collectively was not. See *ibid.* The same is true of CCI, which has substantial assets and few liabilities. See *ibid.*

Moreover, the only evidence the Committee can point to is an analysis of how much the various creditors of the enterprise might recover in a hypothetical *liquidation.* See Committee Br. 47 (describing what would happen "'[i]n the event of a liquidation under chapter 7'") (quoting R7 (Confirmation Op.) 65). Such a liquidation analysis does not substitute for the standalone *going-concern* valuation required to establish the value of CCI shares. See, *e.g.*, *Canadian Pacific Forest Prods. Ltd.* v. *J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1442 (6th Cir. 1995) (recognizing that creditors get a "more meager satisfaction" from liquidation than from going-concern value); see also, *e.g.*, *Assocs. Commercial Corp.* v. *Rash (In re Rash)*, 90 F.3d 1036, 1053 n.23 (5th Cir. 1996) (*en banc*) (solvency analysis requires going-concern valuation), rev'd on other grounds, 520 U.S. 953 (1997). It is that latter type of analysis that the plan proponents failed to present and should have to present on remand before wiping out CCI's shareholders.

B. By Express Agreement And By Law, CCI Owned The NOLs

The Court should instruct in its remand order that the value of CCI, for purposes of determining its solvency, includes the considerable value of the Charter enterprise's NOLs.[6] As

[6] The debtors' brief's suggestion that the burden was on the plan objectors to produce evidence regarding NOL ownership is misplaced. As cases cited by the debtors expressly acknowledge, it is the *plan proponents'* burden to establish that the plan meets the statutory requirements—including the statutory requirement that shareholders may be wiped out only if there is in fact no value available for them. See *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 656 (Bankr. D. Del. 2003) ("The proponent bears the burden of establishing the plan's compliance with each of [the] requirements."); *In re*

our opening brief established, and Appellees nowhere dispute, the debtors repeatedly have represented—to the SEC, the IRS, and to the bankruptcy court itself—that the NOLs belonged to CCI. See R^2 Br. 19 (citing R115 (2007 10-K filing); R106 (4/6/09 Ltr. to IRS); No. 09–11435, Dkt-10 at 10). Indeed, the debtors' deal with Allen, by Allen's own admission, was structured to avoid income "allocated to CCI" that "would reduce *its* NOLs." CD R95 (Allen Post-Trial Br. 15 n.9) (emphasis added); see R^2 Br. 19–20. As much as the Appellees might want to pretend that they never made these statements, such pretense cannot explain why they should be permitted to switch sides on this issue now that CCI's ownership of the NOLs no longer suits their purposes. See, *e.g.*, *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (describing the doctrine of judicial estoppel).

Even assuming that Appellees were not estopped from arguing the point, they advance no coherent reason why CCI—the corporation to which, as a legal matter, the losses flow; and the corporation that, as a factual matter, claimed those losses to the IRS—does not own the NOLs. Their arguments essentially rehash the position of the bankruptcy court, without meaningfully engaging our explanation of why the bankruptcy court got this issue wrong. See R^2 Br. 20–21. Neither of the two arguments they advance has merit.

The first argument is that the NOLs belong to the operating subsidiaries rather than to CCI. See Debtors Br. 41–43; Committee Br. 37–38. That argument fails because, for one thing, the debtors here had an *explicit agreement* that the NOLs belonged to CCI. There is no dispute that under Holdco's operating agreement, NOLs "attributable to losses at [Holdco] . . . were allocated to" CCI. R106 (4/6/09 Ltr. to IRS). That by itself is enough to resolve this issue. See

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Genesis Health Ventures, Inc., 266 B.R. 591, 599–600 (Bankr. D. Del. 2001) ("To confirm a proposed Chapter 11 plan of reorganization, the proponent bears the burden of establishing the plan's compliance with each of the thirteen elements of 11 U.S.C. § 1129(a)."); see also R^2 Br. 15–16. Moreover, the NOL-allocation issue is legal, not factual. Everyone agrees about the facts; the question is simply which entity, as a matter of law, owns the NOLs.

Official Comm. of Unsecured Creditors v. *PSS Steamship Co. (In re Prudential Lines Inc.),* 928 F.2d 565, 571 (2d Cir. 1991) ("'[W]here there is an explicit agreement, or where an agreement can fairly be implied, as a matter of state corporation law the parties are free to adjust among themselves the ultimate tax liability.'") (quoting *Western Dealer Mgmt., Inc.* v. *England (In re Bob Richards Chrysler-Plymouth Corp.),* 473 F.2d 262, 264 (9th Cir. 1973));[7] *Nisselson* v. *Drew Indus., Inc. (In re White Metal Rolling & Stamping Corp.)*, 222 B.R. 417, 424 (Bankr. S.D.N.Y. 1998) (corporate affiliates "are free to allocate the tax benefits and burdens among themselves, and the agreement will control the members' rights, *inter se*, in the absence of overreaching or breach of fiduciary duty." (citation omitted)).

Appellees' argument also fails for the independent reason that CCI would, in any event, own the NOLs as a matter of law. The Appellees embrace a statement from *In re White Metal Rolling & Stamping Corp.* that "NOL carrybacks and carryovers are property of the estate of the loss corporation that generated them." 222 B.R. at 424; see Debtors Br. 42; Committee Br. 37. What they fail to recognize is that CCI here *is* the loss corporation that generated the losses: it is the only relevant Charter entity that could ever qualify as a "loss corporation," and black-letter tax law dictates that losses by its subsidiaries are deemed to have been "generated" by it. In contrast to the cases on which Appellees rely, which involve allocation of NOLs between parents and subsidiaries that are each independent taxpaying corporations (see R^2 Br. 21), it is undisputed that the CCI subsidiaries here are either partnerships or limited liability companies that *do not* independently pay federal taxes. See 26 U.S.C. § 701 ("A partnership as such shall

[7] The debtors make a passing stab at distinguishing these cases on the ground that at least one refers to the allocation of "tax liability" rather than the ownership of NOLs. That is a distinction without a difference—allocation of NOLs *is* allocation of tax liability. Accordingly, in *In re Prudential Lines*, case concerning the precise issue here (ownership of NOLs in bankruptcy), the Second Circuit took pains to note that—in sharp contrast to this case—"[t]here was no explicit agreement" regarding the "allocation" of the NOLs at issue. See 928 F.2d at 570–71.

not be subject to the income tax imposed by this chapter); *Nero Trading, LLC* v. *IRS*, 570 F.3d 1244, 1246 (11th Cir. 2009) (observing that certain LLCs functioned "as pass-through entities with no entity-level income tax liability"); *Pierre* v. *Comm'r*, 133 T.C. 24, 30–32 (2009) (describing how by default, a sole-ownership LLC is "disregarded" for tax purposes) (citing 26 C.F.R. §§ 301.7701-1 to -3). None of these subsidiaries is a "corporation" under the relevant IRS regulations, and therefore none can be a "loss corporation." 26 C.F.R. § 301.7701-2 (defining "corporation" to exclude entities treated as partnerships or disregarded); 26 C.F.R. § 1.382-2 (defining "loss corporation" as "a corporation" that meets certain criteria). Instead, these subsidiaries simply pass their losses through to their loss-corporation parent, CCI—which, unlike its subsidiaries, *does* pay taxes—and the losses are treated as though they were generated by CCI itself. See 26 C.F.R. §§ 1.702-1(b), -2 (losses of partnership passed through to partner and treated as though incurred by the partner itself); *id.* § 301.7701-2 ("activities" of a disregarded entity such as an LLC "are treated in the same manner as a sole proprietorship, branch, or division of the owner"); see also R59 (7/21/09 IRS ruling) 4 (noting that CCI has represented that it "is a loss corporation"). Thus the very rule trumpeted by the Appellees dictates here that CCI owned the NOLs.

The Appellees' second argument is that, even if CCI did own the NOLs, those NOLs had no value to CCI because CCI did not generate any income on its own. See Debtors Br. 43–47; Committee Br. 38. To the extent that their argument relies on the fact that the NOLs have no value in a *liquidation* (see Debtors Br. 45–46; Committee Br. 38), that fact is irrelevant to the NOLs' *going-concern* value to CCI. On a going-concern basis, NOLs have monetizable value even when owned by a company that does not itself generate income, because *other* entities will pay for the right to associate with that company and use its NOLs. See, *e.g.*, *In re White Metal*

Rolling & Stamping Corp., 222 B.R. at 422 n.2 (describing agreement among corporate affiliates whereby debtor received compensation from corporate affiliates for use of its NOLs); see also *In re Coral Petroleum, Inc.*, 60 B.R. 377, 385–86 (Bankr. S.D. Tex. 1986) ("The value of the net operating losses as an asset to URC derives from URC's ability to either generate future profits or to market the net operating losses for use by another profitable company.").[8] Indeed, the value of CCI's NOLs here is conclusively established by the undisputed fact that the debtors were willing to pay Allen a considerable sum to go along with a plan that would preserve them. See R^2 Br. 9. If CCI (like Allen) had had a seat at the plan-negotiating table, and if CCI (like Allen) had threatened to take some action that would have destroyed the NOLs, CCI doubtless could have extracted a substantial payoff as well. Accordingly, the NOLs have substantial value that must be accounted for in a going-concern valuation.

III. THE ALLEN DEAL VIOLATES THE ABSOLUTE PRIORITY RULE AND THE ENTIRE FAIRNESS DOCTRINE

A. The Payment To Allen For Retaining Equity Voting Power Violates The Absolute Priority Rule

As our opening brief explained, paying off Allen to keep 35% equity voting power in the reorganized debtors violates the statutory absolute priority rule by impermissibly permitting Allen to "receive or retain . . . property," ahead of more senior claimants, "on account of" his preexisting equity interest. 11 U.S.C. § 1129(b)(2)(B)(ii). As Allen himself concedes (at 20 n.12), he is receiving compensation in order to comply with a debt covenant that specifically

[8] *Loop Corp.* v. *U.S. Trustee*, 379 F.3d 511 (8th Cir. 2004), cited by the debtors, is not to the contrary. The debtors claim that the court there "converted a case from chapter 11 to chapter 7 . . . because [the debtor's NOLs] had no value absent future income against which they could be used." Debtors Br. 47–48. In fact, however, the court of appeals held merely that the lower court had not abused its discretion, on the particular facts of that case, in concluding "that any speculative value which might be derived from the net operating losses in Chapter 11 *was outweighed* by the continuing erosion of the estate, the debtors' failure to achieve a confirmable Chapter 11 plan, and the preference of the Creditors' Committee for conversion [to a Chapter 7 proceeding]." 379 F.3d at 519 (emphasis added).

requires him to maintain his "'power, directly or indirectly, to vote or direct the voting of *Equity Interests* having more than 35% of the ordinary voting power for the management of'" Charter. R7 (Confirmation Op.) 21–22 (quoting credit agreement) (emphasis added; internal alteration omitted); see R^2 Br. 23–25. And even if the connection between Allen's equity interest and his recovery under the plan were not so explicit, Allen's deal would still offend the absolute priority rule because he is a preexisting equityholder who is providing no new value, and whose compensation has not been properly market-tested to assure that the debtors are getting an optimal deal. See R^2 Br. 25–29.

1. Try as they might, the Appellees cannot sidestep the absolute priority rule. They start by suggesting that the bankruptcy court's conclusion on this issue was entirely factual, subject only to clear error review. See Debtors Br. 37–38; Allen Br. 19. But "[w]hether a reorganization plan violates the absolute priority rule is a question of law," and is therefore reviewed *de novo*. *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 511 (3d Cir. 2005). We are not challenging a factual determination that Allen was paid to maintain his equity voting interest in CCI; our argument is that, as a matter of law, such compensation was "on account of" his preexisting equity and thus violated the absolute priority rule.

Appellees' response on this legal point amounts to nothing more than *ipse dixit*. Allen is not being compensated in his "capacity" as an equityholder, Appellees say, because paying him "to secure his continued equity and voting interests in Charter in the future" is something different from paying him "'on account of'" his preexisting equity. Debtors Br. 38; see also Allen Br. 20 (Allen is being compensated "to maintain a certain level of voting power"). But that assertion fails as a matter of both logic and law. As a matter of logic, Appellees do not and cannot deny that the only reason Allen's "equity and voting interests" can be "continued" is because *he had them in the first place*. Paying him to retain those interests therefore constitutes paying him "on account of" them. 11 U.S.C. § 1129(b)(2)(B)(ii).

As a matter of law, and as explained in our opening brief, the absolute priority rule requires examination not just of the most immediate cause, but also the contributing causes, for the Allen payment. See R^2 Br. 25. The Supreme Court has explicitly repudiated the notion that a payment violates the absolute priority rule only when it is directly "in exchange for" the preexisting equity investment. See *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 449–50 (1999). Instead, "what activates the absolute priority rule" is simply "a causal relationship between holding the prior claim or interest and receiving or retaining property." *Id.* at 451. That causal relationship need not be either direct or exclusive. "If Congress had intended to modify [the statutory language] with the addition of the words 'only,' 'solely,' or even 'primarily,' it would have done so"; as it stands, so long as "old equity's new interest under the plan results in *any significant way* from its old status, the plan may not be confirmed." *Coltex Loop Cent. Three Partners, L.P.* v. *BT/SAP Pool C Assocs., L.P. (In re Coltex Loop Cent. Three Partners, L.P.)*, 138 F.3d 39, 43 (2d Cir. 1998) (emphasis added). Here, because the payment to Allen for retaining his preexisting equity interests "results in [a] significant way" from Allen's pre-bankruptcy ownership of those interests, the plan cannot pass muster under the absolute priority rule. Appellees have no answer to any of this.

2. Appellees' responses to our alternative arguments—that the Allen settlement additionally violates the absolute priority rule because Allen provided no new value and his compensation was not market-tested—likewise fall short. To begin with, Appellees simply skip over the requirement that a preexisting equityholder must at least provide "new value" to the estate in order to merit a priority payoff in a reorganization plan. See R^2 Br. 26 (citing cases).

Nowhere do they explain how Allen has provided such "new value" in circumstances where he did not inject any new capital into the new enterprise but merely promised not to *harm* the debtors by depriving them of value (a favorable loan agreement) that they already had. If refraining from harming a reorganized company constitutes the contribution of "new value," then there is little left of the absolute priority rule. Indeed, if the bankruptcy court is correct, any company executive or board member who remains with the reorganized entity could claim that he is contributing "new value" by refusing to deprive the company of his expertise going forward. But the Supreme Court has expressly rejected that end-run around the absolute priority rule. See *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 202–05 (1988); *Case* v. *Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 121–22 (1939).

And even if Appellees could get past the new-value hurdle, the plan nevertheless fails the further legal requirement that the debtors show that they received the best price possible from Allen. Contrary to Allen's claim (at 23) that the absolute priority rule merely requires a deal to be "fair," *203 North LaSalle* expressly states that "[c]ausation between the old equity's holdings and subsequent property substantial enough to disqualify a plan would presumably occur . . . whenever old equity's later property would come at a price that failed to provide the *greatest possible addition* to the bankruptcy estate." 526 U.S. at 453 (emphasis added).[9] Here, the

[9] Appellees make a somewhat desperate attempt to limit both *203 North LaSalle* and *Coltex* to their facts. See Debtors Br. 39; Allen Br. 21–22. But there is nothing in either case that would justify constricting their legal holdings. See, *e.g.*, *203 N. LaSalle*, 526 U.S. at 453 (discussing how to interpret the statutory language). The best Appellees can do is to quote a bankruptcy judge in Delaware who has declined "'*to [] extend*'" the holding of *203 North LaSalle*. See Allen Br. 21 (quoting *In re Zenith Elecs. Corp.*, 241 B.R. 92, 106 (Bankr. D. Del. 1999) (emphasis added). A bankruptcy judge does not have the authority to limit a Supreme Court decision to its facts. And in any event, Appellees take even that quote out of context: the bankruptcy judge there declined to apply *203 North LaSalle* in circumstances where a claimant was getting a priority recovery not in its capacity as an equityholder (as was the case both in *203 North LaSalle* and here) but instead "in its capacity as a substantial secured and unsecured creditor." 241 B.R. at 106.

negotiations with the Crossover Committee—even assuming they were "fair," but see *infra* page 32—merely arrived at a price acceptable to the Crossover Committee, not the "greatest possible" price for the debtors. See R^2 Br. 29; see also, *e.g.*, FRANK L. ACUFF, HOW TO NEGOTIATE ANYTHING WITH ANYONE ANYWHERE AROUND THE WORLD 14 (2008) (discussing how negotiating parties will wind up somewhere within a range of outcomes deemed acceptable to both sides). Only by putting Allen to the test with a range of options, such as competing plans, would it have been possible to determine the minimum price Allen would have accepted. See R^2 Br. 27–29 & n.6.

Indeed, as Allen himself concedes (albeit grudgingly), there was testimony from multiple witnesses that failure of the reorganization would have left him facing approximately $1 billion in tax liability, a compelling reason why Allen might have taken much less—and perhaps nothing at all—in return for helping the reorganization to succeed. See Allen Br. 16–17; R^2 Br. 27–28. Appellees' attempts to dismiss this evidence lack merit. The debtors erroneously suggest (at 46) that the bankruptcy court made a factual finding on this issue. What the bankruptcy court actually said was that Allen could have taken actions that would have resulted in his "bearing no tax liability *for* any proposed restructuring" (R6 (Findings of Fact and Conclusions of Law ("FOF/COL")) ¶ 43) (emphasis added)[10]; it did not find that he could avoid tax liability if the restructuring were to fall through completely. Allen himself tries simply to sweep the testimony about his potential tax liability under the rug, baldly asserting that contrary testimony—which was entirely vague on how Allen might avoid tax liability—is more credible. See Allen Br. 16–

[10] Contrary to debtors' assertion that "Appellants do not cite to [the bankruptcy court's Findings of Facts and Conclusions of Law] in their briefs" (Debtors Br. 5 n.1), R^2 relies on FOF/COL ¶ 46 on page 39 of its opening brief. More importantly, there is considerable overlap between the FOF/COLs and the bankruptcy court's opinion, which we cited extensively. Compare R6 (FOF/COL) ¶¶ 30–40 with R7 (Op.) 48–57. Finally, while Appellees cleverly shorthand this document as "FOF," that document is replete with conclusions of law subject to this Court's *de novo* review. See R6 (FOF/COL) 4 n.2.

17; see also Debtors Br. 46. There is no basis for this Court, in its appellate capacity, to reach out and decide such a credibility-dependent evidentiary issue. At the very least, the bankruptcy court should have squarely confronted this pivotal issue and determined whether Allen was, in fact, sparing himself massive tax liability by doing the very thing for which Appellees insist he rightly demanded nearly $200 million in additional compensation.

Accordingly, the case should be remanded for an evidentiary hearing on the optimal price (if any) that the debtors should have had to pay for Allen's participation in the plan, and a readjustment of recoveries (from Allen to others) in accordance with that determination. See *203 N. LaSalle*, 526 U.S. at 458 (remanding case for further proceedings when price paid by old equityholder had not been adequately market-tested); cf. *Schreiber* v. *Kellogg*, 50 F.3d 264, 265–67, 278 (3d Cir. 1995) (remanding case for determination of trust assets were sold at a price that preserved or benefited the value of the trust).

B. The Charter Plan Was Proposed By Means Forbidden By Law Because Its Proposal Hinged On An Unfair Insider Deal Voidable Under Delaware's Entire Fairness Doctrine

The bankruptcy court erroneously held that Charter's reorganization plan was not "proposed . . . by any means forbidden by law" (11 U.S.C. § 1129(a)(3)) without first evaluating whether the negotiation and proposal of its "cornerstone" (R7 (Confirmation Op.) 49)—the Allen Deal—contravened Delaware's entire fairness standard. This Court reviews that conclusion of law *de novo*. Contrary to Appellees' assertions, Delaware would review the Allen Deal for entire fairness and such a review demonstrates that Allen's $200 million payoff was not entirely fair. Accordingly, this Court should order repayment of the funds that Allen wrongly siphoned out of Charter's reorganization.

1. Appellees first assert that R^2 challenges the reorganization plan's substantive provisions and not the manner of the plan's proposal. That is wrong. The entire fairness doctrine calls for evaluating the *process* that led to an insider transaction (like the Allen Deal), by asking whether "fair dealing" led to a "fair price." See *Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). For that reason, the proffered distinction between evaluating a plan's *proposal* (to which, the bankruptcy court said, Section 1129(a)(3) applies) and evaluating its *contents* (to which, it said, Section 1129(a)(3) does not apply) is of no consequence here. As explained in our opening brief, "[t]he 'proposal' of a plan that hinges on an impermissible sweetheart deal for an insider is *necessarily* improper" and "the problem in this case *is* with how the plan was proposed." R^2 Br. 31–32.

The debtors attempt to avoid that fact by simply mischaracterizing our argument. They claim (at 49) that Appellants want to apply entire fairness review to *all* of their "complaints"—including those about the plan's "treatment of different classes of claims [and] the treatment of NOLs." Not so. Indeed, the headings that introduce Appellants' respective arguments about entire fairness make it abundantly clear that the entire fairness challenge addresses the proposal of the Allen Deal as part of Charter's reorganization plan, and not the other troubling plan provisions that Appellees identify (which violate the Bankruptcy Code for other reasons). See R^2 Br. 29; LDC Br. 30.

Only by moving the goalposts could the debtors possibly take issue with the cases that support applying entire fairness review to the Allen deal under Section 1129(a)(3). For example, the debtors assert that *In re Zenith Elecs. Corp.*, 241 B.R. 92 (D. Del. 1999), *supports* the bankruptcy court's refusal to evaluate the Allen deal for entire fairness. See Debtors Br. 49. But that simply isn't so—the bankruptcy court in *Zenith* agreed with plan objectors that "the [p]lan must not only comply with the provisions of the Code, *but must meet the standards for approval of such a transaction under Delaware corporate law*." 241 B.R. at 108 (emphasis added). When the court evaluated the role that Zenith's largest creditor and shareholder (LGE) played in the reorganization, it *did not* (as the debtors claim (at 49)) limit its entire fairness review to LGE's decision "to propose a restructuring of Zenith." 241 B.R. at 108. Instead, the court also applied the entire fairness standard to evaluate each and every one of the following: whether LGE took advantage of its dominant position, failed to pursue alternatives to its plan, retained conflicted advisers, failed to obtain an outside opinion of the plan's fairness, failed to disclose relevant information, refused to negotiate with minority shareholders, and were paid too high a price. *Ibid.* The similarities to this case are hard to ignore. Allen more forthrightly admits (Allen Br. 26 n.14) that *Zenith* is a bad case for Appellees on Section 1129(a)(3), but he suggests only that this Court ignore it as an out-of-Circuit decision (despite citing no in-Circuit case rejecting entire fairness review under Section 1129(a)(3)). The Committee, for its part, fails to mention *Zenith* at all. See Committee Br. 42–46. And as to the other cases cited in Appellants' opening briefs, Appellees can say merely that they are "not . . . contrary" to the undisputed point that Section 1129(a)(3) applies to the proposal of a reorganization plan. See Debtors Br. 49.

2. Appellees' fall-back argument is that the bankruptcy court's review under Bankruptcy Rule 9019 was good enough. Wrong again. Compliance with Section 1129(a)(3) is a statutory prerequisite to confirmation of a Chapter 11 reorganization plan, and the bankruptcy court's broad discretion to approve minimally reasonable settlements under Rule 9019 is a poor stand-in for the stricter safeguards of fiduciary duty set by Delaware law. Indeed, bankruptcy courts have *rejected* the idea that Rule 9019 is a proxy for enforcing fiduciary duties. See, *e.g.*, *Olson* v. *Anderson (In re Anderson)*, 377 B.R. 865, 870–73 (6th Cir. B.A.P. 2007), abrogated on other

grounds, *Schwab* v. *Reilly*, 130 S. Ct. 2652 (2010); *Boyd* v. *Engman*, 404 B.R. 467, 474–75 (W.D. Mich. 2009).

In asserting nevertheless that the bankruptcy court sufficiently tested the Allen Deal by applying Rule 9019, Appellees obscure the critical difference between the garden-variety settlement of a discrete claim involving a debtor's estate (a matter that is left to the bankruptcy court's discretion under Rule 9019), and a so-called "[s]ettlement" among insiders that constituted the "linchpin" (R6 (FOF/COL) ¶ 45) of a cramdown reorganization plan. As the Committee recognizes (at 45), "[b]ankruptcy settlements" to which Rule 9019 applies "can be, and generally are, proposed *outside* of a plan of reorganization" (emphasis added). And yet the Committee claims to be horrified by "Appellants' contention" that "settlements incorporated in a chapter 11 plan must meet one standard of review, whereas the same settlements proposed as independent settlements outside of a chapter 11 plan would be reviewed under a different standard." *Ibid.* But that is precisely how the law works.

In *Motorola, Inc.* v. *Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452 (2d Cir. 2007), for example, the court of appeals held that the absolute priority rule (11 U.S.C. § 1129(a)(9)) applied to "a settlement presented for approval as part of a plan of reorganization, because it constitutes part of the plan," but that the same "settlement . . . presented for court approval apart from a reorganization plan" would "not necessarily implicat[e]" the requirements imposed by Section 1129. 478 F.3d at 463. So, too, here. The Allen deal was no run-of-the-mill settlement between truly opposing parties in a bankruptcy proceeding; it was an agreement among self-interested parties who monopolized the outcome of the Chapter 11 process and paid Allen $200 million as the basis for a cramdown reorganization.

As such, the Allen Deal must comply with Section 1129(a)(3) and therefore should have been negotiated and proposed in accordance with Delaware law.

3. Appellees further err in claiming that Delaware would not even require entire fairness review of the Allen Deal. Citing *Kahn* v. *Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1116–17 (Del. 1994), Allen and the debtors claim that Delaware law limits entire fairness review to "cases . . . in which the controlling shareholder will *remain* the controlling shareholder." Allen Br. 28 (emphasis added); see also Debtors Br. 51. But the holding of that case contains no such qualification: "the *exclusive standard* of judicial review in examining the propriety of an interested . . . transaction by a controlling or dominating shareholder is entire fairness." 638 A.2d at 1117 (emphasis added). And no case holds that a deal with a controlling shareholder is immune from entire fairness review simply because, after the transaction in question, he no longer occupies such a position. But see Allen Br. 28. Indeed, it would be surpassingly strange if a controlling shareholder could insulate a self-dealing transaction from entire fairness review simply by making sure that he cashed out enough of his interests to slip below that threshold.

Indeed, Allen's and the debtors' reliance on *Lynch Communication* is particularly puzzling, because that case firmly supports reviewing *all* interested transactions with a controlling shareholder for entire fairness. There, the court emphasized that "[t]he controlling stockholder relationship" to the company—unlike that of a non-controlling director or officer—"has the potential to influence, however subtly" the votes of minority stockholders or disinterested directors. 638 A.2d at 1116 (quoting *Citron* v. *E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del. Ch. 1990)). Disinterested directors might fear that a vote of "disapproval could risk retaliation of some kind by the controlling stockholder." *Ibid.* What clearly mattered to the court was the dominant shareholder's ability to influence disinterested directors' votes on the insider deal. That concern is no less pronounced when the transaction pays off a controlling shareholder for ceding control. The instant case illustrates that point all too well: Allen's representatives threatened to fire an uncooperative board during deal negotiations. See R92 & R96. And if the disinterested directors had rejected the deal, Allen would have remained at Charter's helm, well-positioned to retaliate against the disinterested directors who had moved against him. The damage done by Allen's sweetheart deal is not diminished simply because he gave up his controlling position in the process.

Debtors further mangle Delaware law by asserting—without citing any authority—that the Crossover Committee's participation in the restructuring negotiations exempts the Allen deal from entire fairness review. Debtors Br. 51. But there is no "third party in the room" exception to entire fairness. Yet again, this case illustrates precisely why that is so. The Crossover Committee's presence assured only that *its* interests would be protected from Allen's self-dealing, and it was interested first and foremost in making sure that its members exploited a valuable opportunity in the reorganized Charter enterprise.[11] Fully occupied with the task of lining its own pockets, the Crossover Committee could not be expected to do anything to protect other Charter stakeholders—like CCI's shareholders—from having the value of their interests stripped and funneled to Allen. Not surprisingly, that is precisely what happened here.

Finally, Allen—alone among Appellees—asserts (at 26–28) that the Allen Deal is anchored in Delaware's "safe harbor" for interested transactions that receive the approval of a majority of disinterested directors. See Del. Code tit. 8, § 144(a)(1). But this, too,

[11] The Crossover Committee succeeded. Its members won the right to purchase shares in reorganized CCI at a 25% discount from a $25-per-share valuation of the compnay. See R113 (Disclosure Statement) 25–26; Decl. of George L. Doody ¶ 9(a) (June 25, 2010) (Basta Decl. ex. A). Those shares—purchased for $18.75 each—began trading over the counter for $35 per share right out of the gate (and still trade for nearly as much as of early-September 2010). That 40% increase in the company's market valuation *on day one* (and 87% return for the fortunate participants in the rights offering), is further evidence that the marketplace recognized immediately that the Crossover Committee had acquired more value at CCI than the reorganization plan accounted for (including the NOLs).

mischaracterizes how Delaware treats insider deals reached *with controlling shareholders* (as opposed to similar transactions with other interested parties who wield substantially weaker influence over disinterested directors). Delaware law is crystal clear on this point: "When a controlling stockholder"—like Allen—"is on both sides of the transaction . . . *entire fairness applies regardless of approval by disinterested directors or stockholders*." 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.16 (2009) (emphasis added); see also *Lynch Commc'n*, 638 A.2d at 1117 ("[E]ven when an interested . . . transaction receives the informed approval of . . . an independent committee of disinterested directors, *an entire fairness analysis is the only proper standard of judicial review*." (emphasis added)). Allen cites *Benihana of Tokyo, Inc.* v. *Benihana, Inc.*, 906 A.2d 114, 120–21 (Del. 2006), but that case is plainly inapposite, because it did not involve a transaction with the controlling shareholder. Indeed, it involved a suit brought *by* the controlling shareholder *against* board approval of a transaction that benefited a director with a minimal ownership interest. *Id.* at 116–119.

In any event, Section 144(a)(1) cannot apply unless the disinterested directors knew *all* of the "material facts as to the [interested] director's . . . interest and as to the contract or transaction" (Del. Code tit. 8, § 144(a)(1)). Here, only Allen and his affiliated directors knew about the tax consequences that Allen faced in a disorderly dissolution of Charter, and therefore what Allen stood to gain by agreeing not to bring about such a state of affairs—even before Charter kicked in any additional "compensation."

Finally, even if Section 144(a)(1) applied to the Allen Deal, that still is not enough to insulate it from entire fairness review. Allen relies on *Nebenzahl* v. *Miller*, No. 13206, 1996 WL 494913 (Del. Ch. Aug. 26, 1996), an unreported Chancery Court case, to explain "the operation of Section 144" (Allen Br. 27), but neglects to include in his quotation that decision's conclusion that "compliance with Section 144 does not automatically remove the 'taint' of self-interest. A plaintiff who alleges and then ultimately proves a transaction to be unfair may deprive a director defendant of Section 144's statutory safe harbor and make the director's action voidable." *Nebenzahl*, 1996 WL 494913, at *4 (citation omitted). Appellants can—and have—proven the manifest unfairness of a deal in which one and only one CCI shareholder walked away from the reorganization with upwards of $200 million in compensation.

4. Appellees desperately want to avoid application of the entire fairness standard to the Allen deal because they cannot demonstrate that the transaction resulted from "fair dealing" or that Allen received a "fair price." *Weinberger*, 457 A.2d at 711. The Committee, for its part, devotes only one conclusory sentence (at 46) to the whether the Allen Deal is entirely fair. The debtors and Allen labor mightily to defend the insider-driven process resulting in the Allen deal, but to no avail:

- Allen *did* "'manipulate[] the timing of [the] transaction to benefit [himself].'" Debtors Br. 53. Indeed, Allen's representatives *admitted* that Allen threatened to exercise his exchange rights in order to put Charter's reorganization on a very short clock, and to force the Crossover Committee to agree to a substantial payment to Allen under the duress of an impending free-fall bankruptcy. See R^2 Br. 35 (citing R38 (9/2/09 Tr.) 150:22–151:2 (exchange threat was "primarily to bring the bondholders to the table"). Allen led Charter to the edge of a cliff and offered to sell the company and its creditors a parachute, while threatening to push them over the edge in short order. And there is more: Charter officials were complicit in that manipulation by allowing Allen to give just five days' notice of his threat rather than the contractually required ten. R38 (9/2/09 Tr.) 39:24–25, 151:11–17.

- Allen cannot disclaim responsibility for "initiat[ing] the transaction" (Debtors Br. 52) on the ground that Lazard—instead of Allen—put the first proposal on paper. Lazard was hired by Charter at a board meeting that *Allen* chaired while still in control of Charter. What is more, Lazard was engaged only *after* it pledged to propose that Charter pay Allen a substantial sum. See R^2 Br. 33–34. And the bankruptcy court specifically found that Allen initiated parts of the Allen Deal, such as its nondebtor releases. R7 (Confirmation Op.) 61; see also Allen Br. 15 ("Mr. Allen's advisors proposed the Third-Party Release in favor of Mr. Allen from the inception of negotiations.")

- Contrary to the debtors' assertion, we did not contend that Charter's independent directors "had no legal and financial advisors." Debtors Br. 56–57. The problem is not a lack of *some* advice, but rather the absence of *independent* advice. See R^2 Br. 33–34. It is, indeed, "undisputed" that the independent directors received some advice from Kirkland & Ellis and Lazard (Debtors Br. 57), but it is likewise undisputed that those advisers were hired by—and provided advice to—Charter's entire board (including Allen and the other interested directors) and its officers (who had their own agenda to secure compensation agreements from any reorganized Charter).

- Appellees tout the impromptu congregation of a "*de facto*" committee of disinterested directors. Debtors Br. 56. But *ad hoc* meetings are a far cry from having an authorized, empowered, and independently advised special committee calling the shots. In any event, Appellees do not dispute that even having a fully functioning special committee would only shift the burden of proof on the entire fairness question; it would not make entire fairness inapplicable. See, *e.g.*, *Lynch Commc'n*, 638 A.2d at 1117.

- The supposedly "vigorous and hard-fought three-way negotiations involving Charter, Allen, and the Crossover Committee" did not make those negotiations fair to CCI's shareholders and creditors.[12] Debtors Br. 54. There is no doubt that parties may have spirited negotiations over parts of a transaction that matter *to them*, while ignoring issues that are most important *to others*. So it was here. The process lacked the hallmarks of fair dealing because no party invited to the table advocated for the interests of CCI's creditors and shareholders, who received a mere 33 cents on the dollar and zero recovery, respectively. Appellees have no response to—and therefore do not mention—the frank (and startling) admission that Charter acted as a mere mediator, rather than true negotiator, during the deal-making process. See R^2 Br. 34 (citing R25 (7/21/09 Tr.) 72:12–73:9). And claiming that CCI's equity and bondholders deserved no say in the matter because they were "out of the money" (Debtors Br. 54) simply assumes the conclusion.

- Our opening brief did, in fact, "cite . . . evidence" (Debtors Br. 54) that Allen exerted an undue influence on Charter's board, including its independent directors. Among other things, two separate e-mails recount Allen's threat to "fire the board" if they did not cooperate with his efforts to reach a lucrative deal. R^2 Br. 34 (citing R92 & R96). Those are hardly hallmarks of an "entirely fair" deal.

[12] Debtors statement (at 54) that the negotiations "lasted more than a month" is misleading. All parties agreed at trial that there were long periods without any communication between the parties, and that the final deal was actually reached in a few quick days after Allen threatened to exchange his Holdco interest for CCI equity. Indeed, the primary purpose of Allen's threat was to force the Crossover Committee back to the negotiating table. See R38 (9/2/09 Tr.) 150:25–151:2.

Furthermore, Appellees cannot show that Allen received a "fair price." What the investors in a *reorganized* Charter gained from its restructuring is neither here nor there; what matters is what the *bankrupt* Charter *paid Paul Allen $200 million to do*. For that princely sum, Allen agreed to do two things: (1) retain an equity interest and equity voting rights in CCI, and (2) retain an ownership interest in Holdco. Once again, Debtors hide the ball by suggesting (at 56) that R^2 challenges the separate and distinct $175 million that Allen also received for "a management receivable from CCO," "an accreting note from CCHC," and "approximately $200 million face value bonds of CCH and CIH." But R^2's entire fairness challenge is directed at the $200 million Allen received as part of his agreement to retain equity voting and ownership rights.

Even under normal circumstances, it would be unfair to pay a controlling shareholder so handsomely to hold onto power and ownership in a major public company. The inequity here is particularly pronounced, however, because of evidence that Allen saved over $1 billion in taxes by taking those two steps. See R^2 Br. 27–28 (citing evidence). Neither Charter's management nor its independent directors could explain to the bankruptcy court *why* they had to pay Allen $200 million to participate in the plan, when Allen's only alternative to that participation was the "much worse" "financial consequences" that he faced if Charter plunged into a freefall bankruptcy. R36 (8/17/09 Tr.) 219:2 (Johri); see also *id.* at 219:10–11 ("net-net," freefall bankruptcy "would mean a *much* worse financial impact to him" (emphasis added)).

IV. THE NONDEBTOR RELEASES MUST BE STRUCK FROM THE PLAN

The nondebtor releases are not uniquely "important" to the success of Charter's reorganization (*In re Metromedia*, 416 F.3d at 143); they are giveaways to insiders and plan proponents in contravention of Second Circuit law. The multitude of objections to those releases—including objections by the SEC (see R23) and U.S. Trustee (R142)—should have been upheld. Appellees try to avoid that conclusion by relying on rhetorical sleight-of-hand: From the propositions that (1) Allen and his affiliates were (not surprisingly) interested in being released from any claims relating to Charter, and (2) Allen was important to Charter's reorganization, Appellees surmise that the releases must be important to Charter's reorganization. In short, their story goes, what's good for Allen is good for the plan. But that story does not explain how the releases *themselves* are important to the plan, nor does it justify their stunning breadth. Nor does it matter that the parties "elected to make [the releases] an element of [the Allen] deal" because "[i]t would set the law on its head if parties could get around it by making third party releases a *sine qua non* of their deal, to establish a foundation for an argument that the [releases are] essential to the reorganization, or even 'an important part' of the reorganization." *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 269 (S.D.N.Y. 2007).

Appellees' contentions that *Charter's reorganization* was "truly unusual" (Debtors Br. 58), and that Allen's "role in facilitating the plan" was "unique" (*id.* at 59), are beside the point. The Second Circuit had much more than that in mind when it established the "minimum require[ment]" that any nondebtor release be supported by a showing that the release "was *itself* important to the [p]lan." *In re Metromedia*, 416 F.3d at 143; see *id.* at 141, 143 (nondebtor releases may be approved only in "rare cases" in which "truly unusual circumstances render *the release terms* important to the success of the plan" (emphasis added)). It is not enough that this was a unique reorganization, or that Allen had a prominent role in it—what matters is that the release terms played no part (let alone an "important" one) in facilitating Charter's reorganization.

Appellees make much of the "substantial consideration" Allen provided during Charter's reorganization (as did the bankruptcy court (see R6 (FOF/COL) ¶ 43; R7 (Confirmation Op.) 60), but the Second Circuit has rejected the proposition that a nondebtor's "'material contribution' to the estate" is enough to get a release without evidence that such a release "was *itself* important to the [p]lan," *In re Metromedia*, 416 F.3d at 143. What is more, the bulk of the true "consideration" ran the other way. It was *Allen* who received $200 million as part of his "settlement" with the Debtors, and Appellees point to no case (and we have found none) where a nondebtor's *non-monetary* contribution to—much less the extraction of financial compensation from—the estate was rewarded with liability releases.

Debtors propose (at 59) that the releases can be sustained because Allen's "participation [in the reorganization] came at a cost to him and those around him," and that because of his wealth he "could have been expected to attract numerous lawsuits" "without the protection of a release." See also Allen Br. 40. But a release's power to ward off litigation is not self-justifying, and there is no indication in the record that Allen could have expected to attract *more* lawsuits by *participating* in the reorganization than he would have faced had he made good on his threat to force Charter into a freefall bankruptcy by exercising his exchange rights. That is, there is no reason to believe that *Charter's reorganization* increased Allen's litigation exposure at all; indeed, one would reasonably expect the opposite. But even if Allen misjudged that dynamic, there is still no reason why providing him a nondebtor release was necessary to the operation of Charter's reorganization plan—after all, the plan was already paying him $200 million plus $25 million in legal fees. And it cannot possibly be the case that a party is entitled to releases simply because he is rich and famous.

Moreover, Appellees offer no explanation at all for the releases' sweeping breadth (they cover claims having nothing to do with Charter's reorganization) or the decision to bestow them upon nondebtors other than Allen and his affiliates (including, for example, Crossover Committee members and the Debtors' officers and directors). See *In re Metromedia*, 416 F.3d at 143 (criticizing nondebtor releases approved without "any inquiry" into "whether the[ir] breadth . . . was necessary to the [p]lan"). Debtors are wrong (at 59) that the releases are limited to liability arising out of the nondebtors' "bankruptcy-related activities." In fact, even the bankruptcy court acknowledged that "[t]he releases in the Plan are *broad*" because they provide sweeping immunity from "'any and all Causes of Action . . . arising from *or related in any way to* the Debtors.'" Mem. Order 12, No. 09-11435, Dkt-1149 (Feb. 8, 2010) (quoting R6 ex. A (art. X.E) (emphasis added)). Simply put, the releases are a get-out-of-jail-free card for all things Charter, and the Second Circuit has rightly held that such "blanket immunity" "heighten[s]" the likelihood that the court's limited authority to provide nondebtor releases has been abused. *In re Metromedia*, 416 F.3d at 142. The Seventh Circuit emphasized the same point in *In re Ingersoll, Inc.*, 562 F.3d 856, 864–65 (2009), upon which the debtors rely (at 59). Discussing *In re Metromedia*, that case approved nondebtor releases only because they *did not* provide "blanket immunity" like the releases here, but rather were "narrowly tailored" to two particular claims against the nondebtors that had to be fully settled for the reorganization to succeed. 562 F.3d at 865.

As for the motley crew of nondebtors immunized by the releases, there is not a single indemnification agreement in the record supporting the bankruptcy court's assertion (see R6 (FOF/COL) ¶ 46) that Charter shared an "identity of interest" with *each* released nondebtor that covers the *full universe* of released claims. See Debtors Br. 60. And Appellees are curiously silent about the bankruptcy court's explicit conclusion that *no* such identity of interest linked the members of the Crossover Committee to the Debtors. R6 (FOF/COL) ¶46; see also R^2 Br. 39. As we demonstrated in our opening brief, without a showing that all of the enjoined claims would impact the Debtors' estates, the bankruptcy court had no jurisdiction to impose the nondebtor releases. See R^2 Br. 39 (citing *Johns-Manville Corp.* v. *Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 66 (2d Cir. 2008), rev'd on other grounds *sub nom.*, *Travelers Indem. Co.* v. *Bailey*, 129 S. Ct. 2195 (2009)). Moreover, Appellees' (and the bankruptcy court's) belief that *Allen's* supposedly "substantial contribution" to Charter's reorganization justifies the releases does nothing to explain how *his* contributions could have bought sweeping immunity *for unrelated parties* consistent with Circuit law.

This Court should strike the nondebtor releases, which were inappropriately ordered over multiple objections.

CONCLUSION

For the foregoing reasons, as well as those stated in the opening brief, this Court should reverse the bankruptcy court's confirmation order and remand with instructions to: conduct a proper standalone valuation of CCI and direct the payment of the excess value to CCI's shareholders; void the payment to Allen in violation of the absolute priority rule and entire fairness doctrine; and strike the third-party releases bestowed on Allen and other nondebtors. At a minimum, this Court should direct the bankruptcy court to conduct such further proceedings as are necessary to correct the serious errors in its confirmation analysis.

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Respectfully submitted,

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