

**National Conference of Bankruptcy Judges  
Commercial Law League of America  
Frank G. Koger Educational Program  
Seattle, Washington  
September 19, 2024  
2:00 p.m. to 3:30 p.m.**

**“To Appeal or Not to Appeal” –  
The Jurisdiction of an Appellate  
Court to Hear a Case After *Ritzen***

***Moderator:***

**Judith Greenstone Miller  
Senior Counsel, Taft Stettinius & Hollister, LLP, Southfield, MI**

***Panelists:***

**Honorable Morgan Christen  
US Court of Appeals for the 9<sup>th</sup> Circuit, Anchorage, AK**

**Honorable Eric D. Miller  
US Court of Appeals for the 9th Circuit, Seattle, WA**

**Honorable Robert J. Faris  
US Bankruptcy Court, District of Hawaii, Honolulu, HI**

**G. Eric Brunstad, Jr.  
Dechert, LLP, Hartford, CT**

**Patricia Ann Redmond  
Stearns Weaver Miller, Miami, FL**

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**\*The Commercial Law League of America and its Bankruptcy Section and the panelists wish to thank Teresa Mkhitarian, law clerk to Judge William J. Lafferty III, United States Bankruptcy Judge for the Northern District of California, for the preparation of a Bench Brief for the judges to assist them in the preparation for this program.**

# **APPENDIX 1**

**Opening Brief of the Objectors-Appellants The Westville Ad Hoc Group; G. Eric Brunstad, Counsel for the Objectors-Appellants**

No. 24-0011

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**United States Court of Appeals for the Thirteenth  
Circuit**

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IN RE: WESTVILLE ELECTRICAL CO.

Debtor,

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WESTVILLE ELECTRICAL CO.,

Debtor and Movant-Appellee,

v.

WESTVILLE AD HOC GROUP OF BONDHOLDERS,

Objectors-Appellants,

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ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF WESTLAND  
Case. NO. 20-0000

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**OPENING BRIEF OF APPELLANTS THE WESTVILLE AD HOC GROUP**

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G. Eric Brunstad, Jr.  
DECHERT LLP  
1095 Avenue of the Americas  
New York, NY 10036  
Phone: (212) 698-3500  
eric.brunstad@dechert.com

## **RULE 26.1 DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants disclose the following: The Westville Ad Hoc Group consists of the holders of revenue bonds issued by Westville Electric Co., a privately owned corporation, located in the City of Westville in the State of Westland. None of the members of the Westville Ad Hoc Group are corporations and none are owned by publicly traded corporations.

/s/ G. Eric Brunstad, Jr.  
Attorney for Objectors-Appellants

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## **REASONS WHY ORAL ARGUMENT SHOULD BE HEARD**

Appellants respectfully request oral argument. Appellants submit that oral argument would be beneficial to the consideration and disposition of this appeal. In particular, the matter involves important issues of bankruptcy law that would benefit from both an oral presentation and the opportunity to address the questions of the Court.

## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction under 28 U.S.C. § 1334.<sup>1</sup> The district court entered its judgment on April 1, 2024. ECF 4041.<sup>2</sup> Appellants timely appealed on April 5, 2024. ECF 4042. This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine, *e.g.*, *Petralia v. AT&T Glob. Info. Sols. Co.*, 114 F.3d 352 (1st Cir. 1997).<sup>3</sup>

## **STATEMENT OF THE ISSUES**

This appeal arises out of a discrete proceeding in Appellee’s bankruptcy case—the approval of Appellee’s disclosure statement explaining the details of its Chapter 11 plan of reorganization, which plan Appellee ultimately seeks to have approved in its bankruptcy case. Under applicable law, a disclosure statement should not be approved if the plan accompanying it is patently unconfirmable.

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<sup>1</sup> Although Westville’s bankruptcy case was initially referred to the bankruptcy court, *see* 28 U.S.C. § 157(a), the district court withdrew the reference and has been presiding over the case since that time, *see id.*, § 157(d) (permitting a district court to withdraw the reference of a bankruptcy case).

<sup>2</sup> Unless otherwise stated, cites to “ECF” refer to docket entries in Case No. 20-0000 (D.West.). Cites to “Adv. No. 19-2, ECF” refer to docket entries in Adversary Proceeding 19-2—an adversary proceeding commenced within Westville’s bankruptcy case, which adversary proceeding has its own separate docket.

<sup>3</sup> Because this Court recognizes and applies the decisional law of the Court of Appeals for the First Circuit, relevant case law from the First Circuit is emphasized in this brief.

Under applicable law, a Chapter 11 plan must place the claims of creditors into distinct classes and prescribe the treatment of each class of claims. The Supreme Court has held that, in a bankruptcy case such as this one, a court may not approve a plan that provides some creditors in a class with better treatment than others. *See Am. United Mut. Life Ins. Co. v. City of Avon Park, Fla.*, 311 U.S. 138, 147-48 (1940). Likewise, § 1123(a)(4) of the Bankruptcy Code directs that a plan “shall . . . provide the same treatment for each claim . . . of a particular class, unless the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim . . . .” 11 U.S.C. § 1123(a)(4) (emphasis added). In this case, Appellee’s plan indisputably provides radically different treatment to various groups of claims in Class 3. Further, the plan does so without the agreement of those (such as Appellants) who receive the less favorable treatment in the class, rendering the plan patently unconfirmable. The issues are:

1. Whether the Court has appellate jurisdiction over this appeal?
2. Whether the district court erred in approving Appellee’s disclosure statement notwithstanding that the plan is patently unconfirmable under § 1123(a)(4) and applicable Supreme Court precedent?

### **INTRODUCTION**

This appeal arises out of the bankruptcy case of the Westville Electrical Co. (“Westville”) commenced under Chapter 11 of the Bankruptcy Code. Westville is a

provider of electric utility services and is privately owned. Westville is located in the City of Westville, a large municipality with a population of approximately 3.5 million within the State of Westland. Appellants are an ad hoc group of bondholders (the “Ad Hoc Group” or “Appellants”) holding billions of dollars in revenue bonds that Westville issued before its bankruptcy (together with all such other bonds, the “Bonds”).

Westville has filed a plan (the “Plan”) in its bankruptcy case seeking to adjust its debts. Under the Plan, the claims of the members of the Ad Hoc Group, along with the claims of many other bondholders, are classified together in Class 3. The Plan, however, does not provide the same treatment for all members of Class 3—far from it. Some members of the class, such as the members of the Ad Hoc Group, are slated to receive a paltry 3.5% of their claims—less than one year’s interest owing on their Bonds. Other bondholders are slated to receive approximately 12.5%. Still others are slated to receive considerably more.

This unequal treatment violates not only applicable Supreme Court precedent, *see Avon Park*, 311 U.S. at 147-48 (plan may not provide some creditors in a class with better treatment than others), but also § 1123(a)(4) of the Bankruptcy Code, which unmistakably directs that a plan “*shall . . . provide the same treatment for each claim . . . of a particular class, unless the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim . . .*” 11 U.S.C. § 1123(a)(4)

(emphasis added). In this case, the members of the Ad Hoc Group have not agreed to their less favorable treatment—a point Westville has conceded. Accordingly, the Plan is patently unconfirmable.

Under the Bankruptcy Code, creditors such as the bondholders in this case are entitled to vote on the debtor’s plan. In order for the creditors to exercise their vote intelligently, the Code requires that the debtor prepare a disclosure statement explaining the plan and the creditors’ treatment thereunder, which the court must approve before voting commences. To move forward with its Plan, Westville thus prepared a disclosure statement (the “Disclosure Statement”), explaining the treatment afforded to creditors under the Plan—including the unequal treatment outlined above for bondholders in Class 3. And as required by statute, Westville presented the Disclosure Statement to the district court for its approval. *See* 11 U.S.C. § 1125(b).

Although the district court acknowledged that a disclosure statement should not be approved if the plan accompanying it is patently unconfirmable, the court nonetheless approved the Disclosure Statement, overruling the Ad Hoc Group’s objection. Thus, absent this Court’s intervention, the parties must now proceed to confirmation of a Plan that legally cannot be confirmed, incurring millions of dollars in needless expense, months of wasted time and effort, and other unjustifiable

costs—all in a context in which it is abundantly clear under both applicable statutory law and binding Supreme Court precedent that the Plan cannot be confirmed.

The district court’s sole ground for overruling the Ad Hoc Group’s objection was that it was unclear to the court whether the objecting bondholders had been offered the opportunity to improve their treatment over other class members by agreeing to better treatment in exchange for committing to vote for the Plan. But the opportunity to agree to better treatment than others in the same class, even if offered, is itself plainly impermissible, and thus insufficient to justify the decision below. By its terms, § 1123(a)(4) permits unequal treatment of creditors in the same class *if and only if* the claimants receiving the *less* favorable treatment agree to the less favorable treatment. It does not permit some creditors to cut deals for treatment better than other class members in exchange for agreeing to vote for the plan. As the legislative history explains, § 1123(a)(4) means what it says: “The plan must provide the same treatment for each claim . . . unless the holder of a particular claim . . . agrees to different, *but not better*, treatment of his claim . . . .” H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 406 (1977) (emphasis added).

In *Avon Park*, the Supreme Court explained why. First, all bankruptcy plans “envisage equality of treatment of creditors” and thus may “not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others . . . .” 311 U.S. at 147. Second, providing better treatment to some claimants in a

class in exchange for their agreement to vote for the plan irredeemably contaminates the favored creditor's vote: "if a vote is influenced by the expectation of advantage . . . it cannot be considered an honest and unbiased vote." *Id.* (citation omitted). In other words, vote-buying through the offer of special inducements to some members of a class is proscribed. It does not matter, the Supreme Court explained, whether "the vast majority of security holders may have approved [the] plan" because "[that] is not the test of whether that plan satisfies the statutory standard." *Id.* at 148. On the contrary, the Court was unequivocal in condemning such an arrangement: "the imprimatur of the federal court should not have been placed on this plan." *Id.* Because the Plan in this case is patently unconfirmable—indeed, patently illegal—the district court erred in approving the Disclosure Statement.

As the Court of Appeals for the Third Circuit has explained, a plan is patently unconfirmable when "(1) confirmation 'defects [cannot] be overcome by creditor voting results' and (2) those defects 'concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.'" *In re Am. Cap. Equip., LLC*, 688 F.3d 145, 154-55 (3d Cir. 2012) (citation omitted). Both criteria are satisfied here. As the Supreme Court has held, the defect at issue in this case cannot be overcome by a favorable creditor vote. *Avon Park*, 311 U.S. at 148; *see also* 11 U.S.C. § 1129(a)(1) (a plan that does not comply with the Bankruptcy Code cannot be confirmed). Further, it is undeniable that the Plan

provides for the unequal treatment described above (in other words, it is illegal on its face), and Appellants have not agreed to their less favorable treatment. Accordingly, all material facts necessary to determine whether the Plan is patently unconfirmable are not subject to any bona fide dispute. Additionally, it is “[t]he debtor [that] has the burden of proving that . . . the plan is confirmable or that defects might be cured or involve material facts in dispute,” *In re Am. Cap. Equip., LLC*, 688 F.3d at 155, a burden Westville did not satisfy in this case.

When, as here, a plan is patently unconfirmable, there is no point in proceeding to confirmation and the supervising court should deny approval of the proposed disclosure statement. Because the Plan is patently unconfirmable, that is what the district court should have done in this instance. *Avon Park*, 311 U.S. at 146, 148 (observing the court’s “neglect” of its “duty” in approving the plan).

Although Westville will undoubtedly challenge this Court’s jurisdiction to hear this appeal, the district court’s order approving the Disclosure Statement is a final, appealable decision under the Supreme Court’s most recent bankruptcy finality analysis. *See Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 42-47 (2020); *see also In re Saco Loc. Dev. Corp.*, 711 F.2d 441, 442-48 (1st Cir. 1983). The decision is also an appealable collateral order. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-57 (1949); *Doe v. Massachusetts Inst. of Tech.*, 46 F.4th 61, 65 (1st Cir. 2022).

As the Supreme Court has directed, the court supervising a bankruptcy case has an independent duty to ensure compliance with the Code such that its “imprimatur” is not associated with impermissible schemes like this one. *Avon Park*, 311 U.S. at 146, 148; *see also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277 n.14 (2010) (mandatory provisions of the Code “require[] bankruptcy courts to address and correct a defect in a debtor’s proposed plan even if no creditor raises the issue”) (emphasis in original). For the reasons summarized above and elaborated below, this Court should reverse the decision of the district court and direct that the Disclosure Statement may not be approved.

### **STATEMENT OF THE CASE**

#### **A. The Bonds**

Appellants are the holders of approximately \$2.3 billion of Bonds. Westville issued the Bonds under a 1994 trust agreement (as amended, the “Trust Agreement” or “Agreement”), as authorized by applicable statutory law (the “Authority Act”). *See* Westville Statute § 8 (authorizing Westville to issue secured bond indebtedness). As provided in the Trust Agreement, Westville promised to repay the bondholders out of the revenues generated by its operations, and likewise pledged those revenues as security.

The Trust Agreement and the Authority Act further vest both the bondholders and American Bank, N.A. in its capacity as Westville Bond trustee (the “Trustee”)

with other enumerated rights and remedies to ensure full payment of the Bonds. Notably, these rights and remedies inure to all of the bondholders equally for their collective benefit.

## **B. Procedural History**

Westville historically failed to set rates and collect revenues sufficient to pay its debts. After that failure caught up to it in 2014, Westville began negotiating with creditors. Those negotiations resulted in a restructuring support agreement (“RSA”) with certain parties providing for a consensual restructuring.

Later, Westville refused to honor the RSA. Instead, in July of 2017 Westville filed a petition to restructure its debts under Chapter 11 of the Bankruptcy Code. ECF No. 1. As of the petition date, Westville conceded that “[a]ll the Bonds were issued under the 1994 Trust Agreement (as amended), and have the same priority, lien and collateral structure, secured by a lien on all of Westville’s revenues.” ECF No. 2 ¶ 6. Since the bankruptcy filing, Westville has not paid any principal or interest on its Bonds. ECF No. 67 ¶ 25.

Under the Bankruptcy Code, a creditor holding a claim against the debtor is entitled to file a proof of claim for the amount owed. 11 U.S.C. § 501. In accordance with this provision, the Trustee submitted a timely proof of claim on behalf of all of the bondholders, stating a secured claim for all amounts outstanding on the Bonds based on the liens Westville granted in the Trust Agreement. ECF No. 67-5, Claim

No. 12. The claim included \$8,258,614,158 in outstanding principal and \$218,542,581 in pre-bankruptcy accrued interest. *Id.* Under the Code, a timely filed claim is deemed allowed, unless a party in interest objects. 11 U.S.C. § 502; *see Travelers Cas. & Sur. Co. of AM. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449-50 (2007).

### **1. The Various Plans**

Under Chapter 11 of the Bankruptcy Code, a debtor may restructure its debts through a plan of reorganization. 11 U.S.C. §§ 1121, 1123. To facilitate the restructuring in a fair and transparent way, a proposed plan must place the claims of creditors into distinct classes and state the treatment for each class (*i.e.*, what the creditors are to receive on account of their claims). 11 U.S.C. § 1123(a)(1), (3); *see Granada Wines, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 748 F.2d 42, 46 (1st Cir. 1984) (“The general rule regarding classification is that ‘all creditors of equal rank with claims against the same property should be placed in the same class.’”).

Moreover, to ensure the fundamental bankruptcy principle of equality of treatment among creditors in the same class, *see Avon Park*, 311 U.S. at 147 (bankruptcy plans “envisage equality of treatment of creditors”), § 1123(a)(4) further directs that a plan “*shall . . . provide the same treatment for each claim . . . of a particular class, unless the holder of a particular claim . . . agrees to a less*

favorable treatment of such particular claim . . . .” 11 U.S.C. § 1123(a)(4) (emphasis added). Accordingly, a creditor in a class may be provided with treatment less favorable than other members of the class only if the creditor receiving the less favorable treatment agrees. 11 U.S.C. § 1123(a)(4); *see In re El Comandante Mgmt. Co. LLC*, No. 04-10938 (ESL), 2006 WL 3903593, at \*5 (Bankr. D.P.R. Mar. 3, 2006).

On December 16, 2022, Westville filed an initial plan of reorganization (the “Initial Plan”). ECF No. 3110. The Initial Plan offered all creditors new bonds with an aggregate value of \$5.4 billion. *See* ECF No. 3111, at 30. Of that amount, no less than \$4.3 billion was slated for bondholders, with all bondholders having the opportunity to recover no less than 50% of the face amount of their claims. *See id.* at 38.

On February 9, 2023, Westville filed an amended plan (the “First Amended Plan”). ECF No. 3200. The First Amended Plan increased the total recovery offered to creditors from \$5.4 billion to \$5.68 billion. *Id.*

On March 1, 2023, Westville filed a further modified version of its plan (the “Second Amended Plan”). ECF No. 3296. The Second Amended Plan similarly offered aggregate consideration to all creditors of \$5.68 billion.

On August 25, 2023, Westville filed yet another plan (the “Third Amended Plan”). ECF 4171. In the aggregate, the Third Amended Plan makes available to

creditors approximately \$2.38 billion, or less than half of the \$5.68 billion under the Second Amended Plan proposed less than five months earlier. *Id.* at 30.

## **2. The Third Amended Plan**

The Third Amended Plan does not treat all bondholders the same. Rather, it divides them into different classes with different treatment and, with respect to bondholders placed in Class 3, discriminates against members within the same class.

Under the Third Amended Plan, Class 1 consists of a small group of bondholders who accepted a January 27, 2023 settlement proposal from Westville (the “Initial Supporting Bondholders”). ECF No. 4171. Those Bondholders hold approximately \$75.0 million (less than 1%) in aggregate principal amount of the Bonds. *See id.* Under the Third Amended Plan, the Initial Supporting Bondholders are guaranteed to receive a distribution of no less than 50% of the face amount of their claims. *See id.*

Class 8 consists of claims on account of Bonds held by International Investments LLC (“International”). *See* ECF 4171. Under the Plan, International will receive approximately 69.08% of the face amount of its claims, plus other fees and consideration. *See id.*

Class 3 consists of the vast majority of the Bond claims. The claims within Class 3 are not treated the same. Rather, they are given different treatment

depending on how and when the claimants agree to better treatment in exchange for agreeing to vote for the Plan.

In general, Bondholders in Class 3 who agree to vote for the plan (the “Supporting Bondholders”) will receive approximately 12.5% of the face amount of their claims. *See* ECF 4171. Bondholders who do not agree to vote for the Plan—including the members of the Ad Hoc Group—will receive approximately 3.5% of the face amount of their claims—less than one year’s interest owing on their Bonds. *See id.*

In addition to this unequal treatment, certain specially preferred claimants in Class 3 who participated in negotiating the terms of the Third Amended Plan with Westville (the “Preferred Supporting Bondholders”) will receive additional fees not available to other bondholders in Class 3, as well as the exclusive right to participate in a lucrative financing offering with Westville involving the issuance of new bonds (the “Series Z Bonds”), the value of which is not fully disclosed.<sup>4</sup> The Preferred

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<sup>4</sup>The additional fees include (i) \$44.3 million in structuring fees for negotiating with Westville, and (ii) reimbursement in cash of up to \$30 million in professional fees. *See* ECF No. 25096. In conjunction with their participation in the issuance of the new Series Z Bonds, the Preferred Supporting Bondholders in Class 3 will receive yet even more value in the form of (i) a commitment fee worth approximately \$69.4 million, (ii) a structuring fee worth approximately \$49.0 million, and (iii) additional reimbursement of legal or professional fees up to \$16 million. *See* ECF 4171. Moreover, given that the Series Z Bonds have above-market economic terms (*i.e.*, they have terms that render them more valuable than the face amount owing on these bonds), *see* ECF No. 3961-13, the Preferred Supporting Bondholders will receive yet additional value under the Plan of an unknown and undisclosed amount.

Supporting Bondholders will receive no less than 44% of the face amount of their claims. *See id.*

The Third Amended Plan thus provides vastly different treatment to the holders of claims in Class 3—all of whom have identical rights under the Bonds and the Trust Agreement. Notably, the disparate treatment offered claimants in Class 3 is not based on the agreement of those receiving the less favorable treatment to accept such less favorable treatment. Rather, it is based on the agreement of certain favored creditors to receive better treatment not offered to others—*exactly* what § 1123(a)(4) prohibits.

### **3. The Disclosure Statement Hearing**

Under the Bankruptcy Code, creditors are entitled to vote on a plan that impairs their rights. 11 U.S.C. § 1126; *In re LATAM Airlines Group S.A.*, 55 F.4th 377, 383 (2d Cir. 2022), *cert. denied sub nom. TLA Claimholders Grp. v. LATAM Airlines Grp. S.A.*, 143 S. Ct. 2609 (2023). For creditors to vote intelligently, the Code requires the dissemination of a disclosure statement approved by the court that explains the plan, including what creditors are to receive under its terms. 11 U.S.C. § 1125; *In re Conco, Inc.*, 855 F.3d 703, 713-14 (6th Cir. 2017). The Code prohibits the solicitation of votes prior to court approval of the disclosure statement. 11 U.S.C. § 1125(b); *Century Glove, Inc. v. First Am. Bank of New York*, 860 F.2d 94, 96 (3d Cir. 1988).

On September 15, 2023, Westville filed its Disclosure Statement for the Third Amended Plan, ECF 4033, to which the Ad Hoc Group objected, ECF No. 4038. Among other things, the Ad Hoc Group contended that the Disclosure Statement could not be approved because the unequal treatment of claimants in Class 3 renders the Plan patently unconfirmable. *See id.* at 27-32.

On March 1, 2024, the district court held a hearing on approval of the Disclosure Statement. At the hearing, the Ad Hoc Group appeared and reiterated its objection. ECF 4040. Overruling this objection, the district court approved the Disclosure Statement, ECF 4041, and scheduled a confirmation hearing for the Third Amended Plan for December 1, 2024.

In overruling the Ad Hoc Group's objection, the district court recognized that a disclosure statement should not be approved if the plan accompanying it is patently unconfirmable. ECF 4041. The court determined, however, that it was not clear whether the Third Amended Plan was patently unconfirmable because it was unclear whether Appellants had been given the opportunity to agree to more favorable treatment in exchange for agreeing to vote in favor of the plan. *Id.* at 12 (district court stating that it could not “determine . . . whether holders of claims in Class 3 will ultimately be treated differently without equal opportunity” and “the possibility of incompatibility with section 1123(a)(4) does not render the Plan patently unconfirmable.”). This appeal followed.

## **STANDARD OF REVIEW**

This Court reviews the district court’s legal conclusions *de novo* and factual findings for clear error. *In re Fin. Oversight & Mgmt. Bd.*, 41 F.4th 29, 39 (1st Cir. 2022), *cert. denied sub nom. Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Coop. de Ahorro y Credito Abraham Rosa*, 143 S. Ct. 774 (2023). The Court will not defer to a trial court’s factual findings that are “lacking in evidential support or tainted by error of law.” *Hansen v. Sentry Ins. Co.*, 756 F.3d 53, 57 (1st Cir. 2014). Although approval of a disclosure statement is generally reviewed for abuse of discretion, *Lifemark Hosp. of Louisiana, Inc. v. Liljeberg Enters., Inc.*, No. 98-30610, 1999 WL 195247 at \*2 (5th Cir. 1999), a trial court abuses its discretion when its decision is premised on an error of law, *In re Lynch*, 795 F. App’x 57, 59 (2d Cir. 2020) (“A bankruptcy court abuses its discretion if it bases its decision on an erroneous view of the law . . .”) (citation omitted). Whether a plan is patently unconfirmable is a question of law. *See In re Am. Cap. Equip., LLC*, 688 F.3d at 153 (“review[ing] the Bankruptcy Court’s legal conclusions *de novo*” on whether the plan was patently unconfirmable) (citation omitted) (alteration in original).

## **SUMMARY OF ARGUMENT**

Applying the Supreme Court’s recent analysis in *Ritzen Grp., Inc.*, 589 U.S. at 42-47 (2020), the decision below is a “final decision,” and hence appealable, because it resolves a “discrete dispute” within Westville’s larger bankruptcy case.

The decision involves a discrete dispute because the question of the Plan’s patent unconfirmability was necessarily resolved in the context of a discrete procedural sequence involving the approval of the Disclosure Statement; the qualifications for approval of the Disclosure Statement turn on a statutory standard; the matter does not involve merely minor details; textual references support appealability; and an immediate appeal would advance the values of finality. *See also In re Saco Loc. Dev. Corp.*, 711 F.2d at 444-48.

In addition, the decision below is reviewable as an appealable collateral order. The order conclusively determines the disputed question of the Plan’s patent unconfirmability; resolves an important issue separable from the merits of the bankruptcy case as a whole (*i.e.*, whether creditors should be forced to bear the costs of a hopeless, and thus abusive, confirmation proceeding); and the harm it inflicts is effectively unreviewable (and non-remediable) on appeal from a final judgment. *See Cohen*, 337 U.S. at 546-47; *Doe*, 46 F.4th at 65.

On the merits, the Plan is patently unconfirmable (and hence the Disclosure Statement should not have been approved) because the Plan’s unequal treatment of claims in Class 3 violates § 1123(a)(4). This provision directs in plain terms that a plan “*shall . . . provide the same treatment for each claim . . . of a particular class, unless the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim . . . .*” 11 U.S.C. § 1123(a)(4) (emphasis added). Because

Appellants are clearly subjected to inferior treatment without their consent, the Plan is patently unconfirmable.

The Plan is also contrary to applicable Supreme Court precedent. As the Court explained in *Avon Park*, bankruptcy plans “envisage equality of treatment of creditors” and may “not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others . . . .” 311 U.S. at 147. Further, providing better treatment to some in exchange for their favorable vote irredeemably corrupts the franchise: “if a vote is influenced by the expectation of advantage . . . it cannot be considered an honest and unbiased vote.” *Id.* (citation omitted). The district court’s rationale for disregarding both *Avon Park* and § 1123(a)(4) is legally erroneous.

The district court determined that § 1123(a)(4) might not apply if Appellants have been presented with the opportunity to settle for better treatment. But that is not a permissible reason to ignore § 1123(a)(4) or disregard *Avon Park*. As explained succinctly in its legislative history, § 1123(a)(4) means what it says: “The plan must provide the same treatment for each claim . . . unless the holder of a particular claim . . . agrees to different, *but not better*, treatment of his claim . . . .” H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 406 (1977) (emphasis added). And as the Court held in *Avon Park*, because creditor consent does not excuse the statutory

violation, “the imprimatur of the federal court should not have been placed on this plan.” 311 U.S. at 148.

## ARGUMENT

### **I. THIS COURT HAS JURISDICTION TO DECIDE THIS APPEAL.**

#### **A. The District Court’s Determination Resolving Whether the Plan Is Patently Unconfirmable in the Context of its Approval of the Disclosure Statement Is a Final Decision.**

This Court has jurisdiction to hear appeals from all “final decisions” of the district court. 28 U.S.C. § 1291. In general, a “final decision” is one that resolves the entire case below. *Ritzen*, 589 U.S. at 38 (“[a] ‘final decision’ . . . is normally limited to an order that resolves the entire case.”). As the Supreme Court explained in *Ritzen*, however, the concept of finality in bankruptcy is different, *id.* (“The ordinary understanding of ‘final decision’ is not attuned to the distinctive character of bankruptcy litigation.”), and turns instead on whether the decision resolves a “discrete dispute[]” within the larger case, *id.* at 37-39.

Even though a bankruptcy case has not yet concluded, a court’s order disposing of a motion during the case is nonetheless a “final decision” resolving a “discrete dispute” if (1) the relevant motion “initiates a discrete procedural sequence, including notice and a hearing,” *id.* at 42-43; (2) the “qualification for relief turns on [a] statutory standard,” *id.*; and (3) the matter does not involve merely “minor details about how a bankruptcy case will unfold,” but rather those that have significant “practical consequences,” *id.* at 43-44. As the Court further explained, “[i]t does not

matter whether the court rested its decision on a determination potentially pertinent to other disputes in the bankruptcy case,” including those to be raised as part of a plan confirmation proceeding. *Id.* at 46. Rather, the standard considers “whether the order in question terminates a procedural unit separate from the remaining case, *not whether the bankruptcy court has preclusively resolved a substantive issue.*” *Id.* (emphasis added). These criteria are satisfied here.

As explained below, the district court’s order resolving whether the Third Amended Plan is patently unconfirmable was entered in the context of a discrete procedural sequence initiated by Westville’s motion for approval of the Disclosure Statement, after notice and a hearing. It applies a discrete standard governing the relief sought—whether the Disclosure Statement was properly approved under § 1125 notwithstanding that the Plan is patently unconfirmable. It does not involve merely minor details, but rather whether Westville may proceed to solicit acceptances from creditors and seek plan confirmation. As the Supreme Court explained in *Ritzen*, it does not matter that the district court’s resolution of the issue at hand is pertinent to other disputes in the case, including issues that may be litigated at confirmation. *Id.* at 46. What matters is that the order terminates a discrete dispute, which the district court’s order in this instance does—the dispute over whether the Disclosure Statement should have been approved notwithstanding the Plan’s patent unconfirmability.

## 1. *Ritzen*

The facts of *Ritzen* are illustrative. In that case, a creditor sought relief from the automatic stay, 11 U.S.C. § 362, to litigate its breach-of-contract claim against the debtor in a pending state-court proceeding. *Id.* at 39; *see also id.* at 42 (explaining the operation of the automatic stay preventing the “continuation of lawsuits to recover from the debtor,” and how a creditor may seek relief from stay to proceed with a state-court litigation). The creditor based its motion on the argument that the debtor had not filed its bankruptcy case in good faith, but rather simply to evade the state-court litigation. *See id.* at 40. The bankruptcy court denied the creditor’s motion, which meant that the creditor’s claim would be resolved in the bankruptcy court, not the state court. *Id.*

It did not matter, the Supreme Court explained, that the request for relief involved a substantive issue (the debtor’s lack of “good faith”) that might be raised again at a later point in the bankruptcy case. *See id.* at 46 (observing that the debtor’s “good faith” could be considered again as part of confirmation of the debtor’s plan, and concluding that this did not matter “so long as the order conclusively resolved the movant’s entitlement to the requested relief”—*i.e.*, relief from stay); 11 U.S.C. § 1129(a)(3) (a plan cannot be confirmed if the debtor is not proceeding in good faith). Likewise, it did not matter that the denial of the motion meant that proceedings would continue in the bankruptcy court rather than terminate. *Ritzen*,

589 U.S. at 45 (“that effect does not render a ruling nonfinal.”). What did matter, the Court observed, was that the order resolved a discrete dispute of consequence. Among other things, if an immediate appeal were not taken from the denial of relief, proceedings would continue in the bankruptcy court that later might have to be undone, which “can significantly increase creditors’ costs.” *Id.*; *see also id.* at 46-47 (criticizing an approach to finality that would postpone an appeal of a decision until after further proceedings were conducted that would have to be undone if the earlier decision were later overturned).

In conducting its analysis, the Supreme Court also examined “textual clue[s]” that shed light on whether Congress envisioned an appeal of the issue in question. *Id.* at 44. Although such clues “hardly clinc[h] the matter,” the Court reasoned that they assist in resolving it. *Id.* (alteration in original). Further, the Court considered whether immediate appealability “advances the finality principle” by avoiding needless future litigation. *Id.* at 47.

## **2. The Issue of Patent Unconfirmability Was Resolved in the Context of a Discrete Procedural Sequence.**

Section 1125(b) provides that a court may approve a disclosure statement “after notice and a hearing.” 11 U.S.C. § 1125(b). As the district court acknowledged, a disclosure statement should not be approved if the plan accompanying it is patently unconfirmable—*i.e.*, patent unconfirmability is a substantive legal question properly addressed at the disclosure statement stage. *See,*

*e.g.*, *In re Am. Cap. Equip., LLC*, 688 F.3d at 154-55 (whether a plan is “patently unconfirmable” is properly addressed at the “disclosure statement stage”). As in *Ritzen*, resolution of the issue was thus an integral part of a discrete procedural sequence initiated by motion, resulting in an order that conclusively resolved the proceeding (*i.e.*, approval of the disclosure statement).

### **3. The Qualifications for Relief Turn on a Statutory Standard.**

Under § 1125, a debtor may not proceed with soliciting approval of a plan unless the court has approved a disclosure statement. 11 U.S.C. § 1125(b). Because the issue whether a plan is patently unconfirmable properly informs the court’s exercise of its authority under the statute, it is part of the statutory approval process. *See In re Am. Cap. Equip., LLC*, 688 F.3d at 154-55 (whether a plan is patently unconfirmable properly informs whether a court should approve a disclosure statement).

### **4. The Matter Does Not Involve Merely Minor Details.**

The reason courts consider whether a plan is patently unconfirmable at the disclosure statement stage is to prevent the non-remediable waste involved in pursuing confirmation of a plan that cannot be confirmed. *See, e.g., In re E. Me. Elec. Co-op., Inc.*, 125 B.R. 329 at 333 (Bankr. D. Me. 1991) (“[U]ndertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never legally be confirmed.”); *In re Quigley*

*Co., Inc.*, 377 B.R. 110, 115-16 (Bankr. S.D.N.Y. 2007). This inquiry obviously does not involve minor details, but rather is one of significant practical consequence.

### **5. Textual Clues Support Appealability.**

Section 1125(d) of the Bankruptcy Code allows regulatory agency officials to appear and be heard as part of the disclosure statement approval process, but explicitly states that “[s]uch agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.” 11 U.S.C. § 1125(d). There would be no point to this statutory provision if appeals of orders approving disclosure statements were not authorized. *See In re Snyder*, 56 B.R. 1007, 1010 (N.D. Ind. 1986) (the implication from this provision is that “parties in interest can appeal an approval of a disclosure statement; if no one could so appeal, it makes little sense to specially point out that an agency or agency official cannot appeal.”).

Likewise, Fed. R. Bankr. P. 8002(d)(2)(E) provides that, although a court may extend the time to appeal various orders in a bankruptcy case, the court may not do so for an order that “approves a disclosure statement under § 1125 of the Code.” Fed. R. Bankr. P. 8002(d)(2)(E). Further, the Advisory Committee Note to the Rule (as amended in 1997) explains:

The subdivision is amended further to prohibit any extension of time to file a notice of appeal . . . if the order appealed from . . . approves a disclosure statement . . . . These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original appeal period under Rule 8002(a) and (b) [setting the deadline for filing a notice of appeal].

Adv. Cmm. Note, Fed. R. Bankr. P. 8002. Again, there would be no point to this rule (or the Advisory Committee explanation) if immediate appeals of decisions approving disclosure statements were not authorized.

**6. An Immediate Appeal Would Advance Finality.**

Finally, an immediate appeal of the district court’s decision resolving whether the plan is patently unconfirmability would advance the “finality principle” articulated in *Ritzen* because it would “avoid, rather than cause, ‘delays and inefficiencies.’” *Ritzen*, 589 U.S. at 46 (quoting *Bullard v. Blue Hills*, 575 U.S. 496, 504 (2015)). That is so because, once again, the whole point of the patently unconfirmable inquiry is to avoid the abusive waste associated with confirmation proceedings predicated on a plan that simply cannot be confirmed. As in *Ritzen*, delaying an appeal of the decision below raises the specter of the “untoward consequence” of requiring the “bankruptcy court to unravel later adjudications rendered in reliance on an earlier decision.” *Id.* at 39.

**7. Pre-*Ritzen* Case Law From Other Circuits Is Not Determinative.**

The appealability of a decision approving a disclosure statement resolving a dispute over whether a plan is patently unconfirmable is an issue of first impression in this Court. Prior to *Ritzen*, two circuit-court decisions indicated that the approval of a disclosure statement addressing whether the statement contains adequate information—a different issue—does not necessarily involve a final order. *See In*

*re Texas Extrusion Corp.*, 844 F.2d 1142, 1156-57 (5th Cir. 1988) (adequate information); *In re Perez*, 30 F.3d 1209, 1217 (9th Cir. 1994) (adequate information). Other courts, however, reached the opposite conclusion. See *In re Snyder*, 56 B.R. at 1009-10.

Neither *Texas Extrusion* nor *Perez* (which follows *Texas Extrusion*) decided whether an appeal from an order approving a disclosure statement is actually final. In *Texas Extrusion*, the Fifth Circuit considered an appeal from a *confirmation* order, not an order approving a disclosure statement, and specifically stated: “[w]e, of course, are not holding that a party in interest cannot appeal an order approving a disclosure statement immediately upon that order’s entry.” 844 F.2d at 1156. Rather, the court held only “that the party does not lose its right to appeal the disclosure statement if it fails to file an immediate appeal.” *Id.* In *Perez*, the Ninth Circuit likewise considered an appeal from a confirmation order. 30 F.3d at 1216-17.

More important, the Fifth Circuit’s analysis in *Texas Extrusion* differs markedly from, and is inconsistent with, the Supreme Court’s analysis in *Ritzen*, as well as the First Circuit’s analysis in *In re Saco Loc. Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983). In *Texas Extrusion*, the Fifth Circuit stated that “[t]he order sought to be appealed must ‘conclusively determine substantive rights of parties’ in order to be considered final.” 844 F.2d at 1155 (citation omitted). In other words, the Fifth

Circuit focused on the resolution of substantive issues, not procedural sequence. But in *Ritzen*, the Supreme Court held the opposite: the fact that the relevant substantive issue—the debtor’s “good faith”—was not finally resolved and could be revisited later was not dispositive—indeed, the Court held that it “does not matter.” 589 U.S. at 47. The Fifth Circuit reasoned that, in order to be final, “the order must constitute ‘a final determination of the rights of the parties to secure the relief they seek in this suit.’” *Texas Extrusion*, 844 F.2d at 1155 (citations omitted). Once again, however, that is not the test.

Notably, in conducting its analysis, the Fifth Circuit also distinguished the First Circuit’s decision in *Saco*. *Id.* *Saco* involved an appeal of an order that did not resolve the entire dispute between the debtor and a creditor over the creditor’s claim; it simply resolved the claim’s bankruptcy priority. 711 F.2d at 446 (“The present order does not settle the entire dispute between the trustee and Northwestern; it leaves open the question of how much of the claim will be entitled to the priority.”). Nonetheless, the Court determined that the order appealing the priority determination was final, recognizing “the legal and practical realities of bankruptcy proceedings.” *Id.* at 448. Just like the Supreme Court’s analysis in *Ritzen*, the Court in *Saco* focused on whether the order in question resolves a particular type of bankruptcy “proceeding,” and “conclusively determines a *separable* dispute . . . ,” *id.* at 445-46 (emphasis added)—separable in the sense of a dispute to be resolved

in *that* particular proceeding even though, as the Supreme Court emphasized in *Ritzen*, the same issue may be considered anew as part of yet another discrete proceeding (*e.g.*, confirmation of a plan).

For the purposes of the correct finality analysis under *Ritzen* and *Saco*, it is not true that the approval of the Disclosure Statement is merely part of the confirmation process, any more than the denial of the creditor's motion for relief from stay in *Ritzen* to litigate its breach-of-contract claim in state court was merely part of the process of resolving the creditor's claim. That was precisely the argument the Supreme Court *rejected*. *Ritzen*, 589 U.S. at 46. In *Ritzen*, the creditor's request for relief from stay was governed by § 362 and Fed. R. Bankr. P. 4001. *Id.* at 43-44. In contrast, resolution of the claim in the bankruptcy court was governed by § 502 and Fed. R. Bankr. P. 3001, 3002, & 3007—a different proceeding. In this case, the approval of the Disclosure Statement is governed by § 1125 and Fed. R. Bankr. P. 3016 & 3017, upon notice and a hearing. In contrast, confirmation of a plan is governed by §§ 1128 & 1129 and Fed. R. Bankr. P. 2002, upon separate notice and a hearing.

Once again, as the Supreme Court emphasized in *Ritzen*, the fact that the bankruptcy court might at the confirmation stage revisit anew an issue (*e.g.*, good faith) that it addressed previously “does not matter.” *Id.* at 46. Likewise, that the district court in this case might revisit anew at plan confirmation whether the Plan

violates § 1123(a)(4) also “does not matter.” Rather, the issue is separable because it is properly joined in separate, discrete proceedings as necessary for the resolution of *each* separate proceeding. Accordingly, the order in this case approving the disclosure statement notwithstanding the Plan’s patent unconfirmability is indeed final for the purposes of appellate review.

**B. The District Court’s Order Resolving Whether The Plan Is Patently Unconfirmable Is An Appealable Collateral Order.**

As explained by the First Circuit, “[t]he collateral order doctrine applies when three conditions are satisfied: the order must ‘conclusively determine the disputed question’; it must ‘resolve an important issue completely separate from the merits of the action’; and it must ‘be effectively unreviewable on appeal from a final judgment.’” *Doe*, 46 F.4th at 65 (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)). Each of these requirements is satisfied.

**1. The Order Conclusively Determined Whether the Plan is Patently Unconfirmable.**

The decision below resolved conclusively whether the Disclosure Statement should have been approved, notwithstanding the Plan’s patent unconfirmability. This is demonstrated by the fact that the court approved the Disclosure Statement. Absent this Court’s intervention, Westville will proceed to solicit votes and seek confirmation, and the non-remediable harm that the patent unconfirmability standard is designed to avoid will be incurred; *that* issue will not again be litigated. *See, e.g.*,

*id.* at 65-66 (order determining whether litigant may proceed with litigation using a pseudonym conclusively determined the disputed question and was an appealable collateral order). The order is thus “the final word on the subject addressed.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983).

**2. The Order Resolves an Issue Separable from the Merits of the Action as a Whole.**

The merits of the underlying bankruptcy case involve whether Westville may reorganize through confirmation of a plan of reorganization. The issue at stake here—whether the Disclosure Statement should have been approved notwithstanding the Plan’s patently unconfirmable—is separable. Once the parties arrive at confirmation, the question whether the Disclosure Statement should not have been approved because the Plan is patently unconfirmable becomes irrelevant—it is supervened by the confirmation standards set forth in § 1129. The relevant issue—whether creditors should be forced to bear the costs of Westville’s pursuit of a hopeless, and thus abusive, confirmation proceeding on a patently unconfirmable Plan—will have been resolved and not revisited. Accordingly, the order is “a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.” *Cohen*, 337 U.S. at 546-47 (1949).

In *Cohen*, the issue was whether a party could, under a state statute, be forced to post security to cover the costs of litigation ancillary to bringing a derivative

shareholder action. Like the issue here, the question in *Cohen* (*i.e.*, whether the obligation applied to a derivative action commenced in federal court) was not bound up in the merits of the action itself. Rather, it concerned whether the action could proceed absent the expenditure of the cost of the security. In other words, the question concerned whether the cost could be imposed. The Court concluded that the question was appealable. So, too, the issue in this case is about the avoidance of non-remediable cost. Likewise, the issue is important, not only to the litigants, but also systemically. *See, e.g., Doe*, 46 F.4th at 65-66 (question of whether a party may litigate using a pseudonym is sufficiently important to satisfy the standard). Accordingly, the second prong of the doctrine is satisfied.

### **3. The Order Is Effectively Unreviewable on Appeal from a Final Judgment.**

Finally, the order is effectively unreviewable on appeal from a final judgment because, as noted, once the parties have proceeded through confirmation, the patent unconfirmability standard becomes irrelevant—supervened by the confirmation standards under § 1129—and the costs incurred. The order below thus qualifies as among “the trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal.” *Richardson-Merrel Inc. v. Koller*, 472 U.S. 424, 430-31 (1985). For these reasons, the decision below is an appealable collateral order.

## II. THE PLAN IS PATENTLY UNCONFIRMABLE.

“A plan is patently unconfirmable where (1) confirmation ‘defects [cannot] be overcome by creditor voting results’ and (2) those defects ‘concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.’” *In re Am. Cap. Equip., LLC*, 688 F.3d at 154-55 (citation omitted); *see also In re E. Me. Elec. Co-op., Inc.*, 125 B.R. at 333 (noting that “undertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never legally be confirmed”). The district court has repeatedly affirmed these principles, yet failed to apply them here. *See* ECF No. 4198 (expressing its “intention . . . to take up, at the disclosure statement stage . . . structural arguments that, as a matter of law, this can’t be done, no matter how good, sincere, and economically rational the justification offered”).

### A. The Plan Patently Violates § 1123(a)(4).

The Plan indisputably violates § 1123(a)(4). In plain terms, this provision directs that a plan “*shall* . . . provide the same treatment for each claim . . . of a particular class, unless the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim . . . .” 11 U.S.C. § 1123(a)(4) (emphasis added). And “‘when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (citation omitted); *see*

*also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (“When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”) (citation omitted).

Lest there be any doubt that § 1123(a)(4) means what it says, the legislative history crystalizes Congress’s intent with precise succinctness: “The plan must provide the same treatment for each claim . . . unless the holder of a particular claim . . . agrees to different, but not better, treatment of his claim . . . .” H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 406 (1977) (emphasis added). In other words, the Bankruptcy Code imposes a “same class, same treatment” standard that may not be abridged without the express consent of the creditors receiving the less favorable treatment in the class.

Here, there is no dispute that the Plan provides wildly different recoveries to bondholders holding identical claims within Class 3. As described above, members of Class 3 are subject to the following recovery scenarios:

- 3.5% for bondholders (including Appellants) who do not agree to vote in favor of the Plan;
- 12.5% for Supporting Bondholders who accept their enhanced recovery as an inducement for their agreement to vote in favor of the Plan;
- Approximately \$208.7 million for the select group of Preferred Supporting Bondholders who negotiated the terms of the Plan, along

with additional undisclosed value represented by their exclusive right to purchase above-market Series Z Bonds not offered to other Class 3 members, yielding a recovery of not less than 44%.

These obviously divergent recoveries are stated in the Plan and Disclosure Statement, and Westville has not—and cannot—dispute them. Quite clearly, the Plan does not provide equal treatment to the members of Class 3. Further, the bondholders receiving the less favored treatment have not consented to this unequal treatment. Accordingly, the undisputed, material facts establish that the Plan violates § 1123(a)(4), rendering it patently unconfirmable.<sup>5</sup>

The relevant case law establishes that, because the Plan provides unequal treatment to members of Class 3 and does so without the consent of those treated less favorably, it violates the requirements of the statute. *See, e.g., In re AOV Indus., Inc.*, 792 F.2d 1140, 1152, 1154 (D.C. Cir. 1986) (noting “the most conspicuous inequality that § 1123(a)(4) prohibits is payment of different percentage settlements

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<sup>5</sup> Westville argued below that any Class 3 members who did not choose to settle “implicitly agreed not to receive” the \$210.0 million fee and, thus, “any violation [of § 1123(a)(4)] is cured by the consent of [those] supposedly receiving unequal treatment.” ECF No. 4091 ¶ 85. That argument, however, is absurd. Among other flaws, it would, if accepted, mean that the requirements of § 1123(a)(4) may be evaded by the simple expedient of offering creditors a settlement proposal they do not find acceptable, and then deeming them to have accepted something less by not agreeing to the proposal, all while giving better treatment to others. In *Avon Park*, the Supreme Court denounced such unequal treatment. *Avon Park*, 311 U.S. at 144-45.

to co-class members” and holding that “it is unfair to require a creditor to pay a higher price for the same benefit”); *cf. RDNJ Trowbridge v. Chesapeake Energy Corp. (In re Chesapeake Energy Corp.)*, 70 F.4th 273, 282 n.7 (5th Cir. 2023) (plan that provided some members of class with one recovery, while others received more favorable treatment by way of settlement, was “eye-popping and unsupportable”). Critically, Westville was unable below to cite a single case that supported such discriminatory treatment of creditors in the same class. That is because such discriminatory treatment is clearly impermissible.

Although Westville will undoubtedly argue that the Plan is not as discriminatory as it seems on the theory that Westville is entitled to reward those who “settle,” such arguments are illusory. Although individual creditors may settle such things as the amount and priority of their claims, individual creditors cannot “settle” discriminatory class treatment. The mandatory protection of § 1123(a)(4) exists for the benefit of both the class in general *and* non-settling creditors in particular. That is especially true in cases such as this one in which all of the creditors in Class 3 hold identical claims.

By statutory design, a plan proponent is required to propose treatment for a class as a whole, thereby enabling creditors in the class to exercise their “informed judgment” in evaluating whether they will accept that treatment. *See* 11 U.S.C. § 1125(a)(1) (directing that information must be provided to creditors in a class to

enable them to exercise their “informed judgment” as a “hypothetical investor” in evaluating the merits of their treatment under the plan); *Avon Park*, 311 U.S. at 148 (the point of the vote is to garner the creditor’s views as “an expression of an investor’s independent business judgment” rather than the plan proponent’s “influence”). Under § 1126, two-thirds of the members of the class bind the class to that treatment by voting in favor of the plan. 11 U.S.C. § 1126(c). Westville cannot pervert this structural design by offering one-off enhancements to those who agree in side-deals to vote for the plan in exchange for better treatment. If Westville desires to “settle” class treatment, § 1123(a)(4) instructs that Westville must offer the same treatment to all members of the class, negotiating collectively until it obtains the requisite two-thirds acceptance, save for those who agree to something less than what others are to receive.<sup>6</sup>

In context, and for the reasons the Supreme Court explained in *Avon Park*, Westville’s use of the term “settlement” in this instance is a euphemism for illicit vote-buying. *See Avon Park*, 311 U.S. at 147 (“[I]f a vote is influenced by the expectation of advantage . . . it cannot be considered an honest and unbiased vote.”)

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<sup>6</sup> If Westville is unable to obtain the requisite two-thirds acceptance, it might still confirm a plan under the Bankruptcy Code’s cram-down provisions (assuming Westville also satisfies, among other things, the relevant anti-discrimination standards under the cram-down criteria). *See* 11 U.S.C. § 1129(b). But what Westville may not do is pervert the process by proposing unequal treatment between members of the same class when those receiving the less favorable treatment do not so agree.

(citation omitted); *see also In re CGE Shattuck, LLC*, 254 B.R. 5, 11 (Bankr. D.N.H. 2000) (criticizing a plan proponent’s “promise of a discriminatory distribution . . . to secure votes in favor of a plan”); *In re Union Meeting Partners*, 165 B.R. 553, 566-67 (Bankr. E.D. Pa. 1994), *subsequently aff’d*, 52 F.3d 317 (3d Cir. 1995) (denying confirmation of a plan that violated § 1123(a)(4) by providing an extra 15% dividend to creditors who voted in favor of the plan and agreed to release certain non-debtors from liability). Because the Plan’s discriminatory treatment of claimants in Class 3 is unlawful, the Disclosure Statement should not have been approved. *See, e.g., In re El Comandante Mgmt. Co., LLC*, 2006 WL 3903593, at \*5 (rejecting disclosure statement where, under the plan, certain class members received a distribution and other class members did not).

**B. The Plan Is Patently Contrary to Binding Supreme Court Precedent.**

The Plan is also patently unconfirmable because it runs afoul of binding Supreme Court precedent. *Avon Park* involved a municipal bankruptcy with a single class of creditors comprised of all holders of the city’s revenue bonds. *Avon Park*, 311 U.S. at 141. Although the creditors possessed identical claims, over one third of the claims had been acquired by the city’s fiscal agent, whom the city compensated specially in exchange for the agent’s favorable vote and for the agent’s efforts to induce other creditors to vote similarly. *Id.* at 141-42, 142 n.4. The agent’s ownership and incentives were not disclosed in the plan, which 69% of bondholders

approved. *Id.* at 142. Finding that the agent’s compensation was fair and reasonable, the district court approved the plan, and the court of appeals affirmed. *Id.* at 140-43.

The Supreme Court reversed on two independent grounds. First, the Court held that, “[w]here it does not affirmatively appear that full and complete disclosure of the fiscal agent’s interests was made to the bondholders when their assents were solicited, it cannot be said that those assents were fairly obtained.” *Id.* at 144. Second, the Court addressed separately the plan’s failure to provide equal treatment, finding that a plan “would not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others.” *Id.* at 147.

The Court based its second conclusion on several considerations. To begin with, the court reasoned that, “[b]eyond [the issue of disclosure and the reasonableness of compensation], is the question of unfair discrimination . . . .” *Id.* Municipal plans of adjustment, like other forms of reorganization, “envisage equality of treatment of creditors.” *Id.* Under that principle, a plan “would not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others, whether that consideration moved from the debtor or from another.” *Id.*

Further, special inducement irredeemably taints the voting process: “‘if a vote is influenced by the expectation of advantage . . . it cannot be considered an honest

and unbiased vote.” *Id.* (citation omitted). That, too, the Court reasoned, is “but part of the general rule of ‘equality of treatment between creditors’ . . . applicable in all bankruptcy proceedings.” *Id.* (citation omitted). In other words, each creditor’s vote must be based on its evaluation of the treatment everyone is getting, not special favors. “That principle as applied to this case,” the Court stated, “necessitates a reversal.” *Id.* at 147-48.

Finally, the Court reasoned that “[i]n the absence of a finding that the aggregate emoluments receivable by the [fiscal agent’s] interests were reasonable, measured by the services rendered, it cannot be said that the consideration accruing to them, under or as a consequence of the adoption of the plan, likewise accrued to all other creditors of the same class.” *Id.* at 148. In other words, although a creditor may separately receive consideration under a plan for the reasonable value of services it provides to the debtor, that must be separately accounted for. In this case, the difference between what Appellants are receiving under the Plan as compared to the treatment the more favored creditors are receiving (nearly five times more) is because the favored creditors agreed to vote for the Plan, not the result of some supposed services the favored creditors are providing. Again, Westville cannot “settle” plan treatment with individual claimants; it must offer the same treatment to the class as a whole, which Westville has not done. Otherwise, the Supreme Court’s

analysis would amount to nothing: a debtor could *always* simply argue that the unequal treatment was the product of some individual “settlement.”

In any event, even if it could be shown that the wildly different treatment afforded claimants in Class 3 was based on some legitimate “service” the favored creditors were providing of a value equal to the better treatment they are receiving (which it cannot), the Plan still cannot be confirmed because (1) the fact that some in the class are receiving more than others irredeemably corrupts the vote, (2) the rationale cannot be used to circumvent the statutory requirements of § 1123(a)(4), and (3) the full value of what the Preferred Supporting Bondholders are receiving is not in fact disclosed. Accordingly, “the imprimatur of the federal court should not have been placed on this plan.” *Id.* at 148.

As the Supreme Court held, “[t]he fact that the vast majority of security holders may have approved a plan is not the test of whether that plan satisfies the statutory standard. The former is not a substitute for the latter. They are independent.” *Id.* Because the Plan’s ““defects [cannot] be overcome by creditor voting results,”” it is patently unconfirmable. *In re Am. Cap. Equip, LLC*, 688 F.3d at 154-55 (citation omitted).

**C. The District Court’s Reason for Approving the Disclosure Statement Notwithstanding These Flaws Is Immaterial.**

The district court’s rationale for rejecting Appellants’ argument regarding the Plan’s patent unconfirmability was that it was not clear to the court whether creditors had been offered the opportunity to settle with Westville for more favorable treatment. ECF 4041 at 12 (district court stating that it could not “determine . . . whether holders of claims in Class 3 will ultimately be treated differently without equal opportunity” and “the possibility of incompatibility with section 1123(a)(4) does not render the Plan patently unconfirmable.”). Respectfully, that rationale is immaterial and, in any event, cannot legally justify the Plan’s discriminatory treatment of claims in Class 3 in violation of § 1123(a)(4). Simply put, there is no “opportunity-to-settle” exception to plan treatment under the statute—creditors simply may not agree to one-off settlements that garner more favorable plan treatment. The statute’s only exception is for disparate treatment for those who agree to the less favorable plan treatment, which is not at issue here.

The district court’s rationale is further unsound because engrafting an “opportunity-to-settle” exception onto the text of § 1123(a)(4) would upend Congress’ carefully balanced negotiating framework. If creditors may be discriminated against because they decline to accept some meager recovery, they will understandably be reluctant to engage with the plan proponent for fear that any non-acceptance of an offer, even for perfectly valid reasons, would be used against

them. Not only is this unwise, it would subject to judicial inquiry what is generally sheltered under settlement privilege. There is no justification for such an approach. The Disclosure Statement should not have been approved.

### **CONCLUSION**

For the foregoing reasons, the Court should reverse the district court's order approving the Disclosure Statement and direct that the Disclosure Statement may not be approved.

Dated: May 5, 2024

Respectfully submitted,

G. Eric Brunstad, Jr.  
DECHERT LLP  
1095 Avenue of the Americas  
New York, NY 10036  
Phone: (212) 698-3500  
Facsimile: (212) 698-3599  
eric.brunstad@dechert.com

*Attorneys for Objectors-Appellants  
The Westville Ad Hoc Group*

## CERTIFICATION

This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 10,214 words.

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/s/G. Eric Brunstad, Jr.  
Attorney for Objectors-Appellants  
Dated: May 5, 2024

I hereby certify that on May 5, 2024, I electronically filed the foregoing document with the United States Court of Appeals for the Thirteenth Circuit by using the CM/ECF system, which will send a notice of filing to all registered users.

/s/G. Eric Brunstad, Jr.  
Attorney for Objectors-Appellants

# **APPENDIX 2**

**Responsive Brief of the Debtor and Movant-Appellee Westville  
Electrical Co., Patricia Ann Redmond, Counsel for  
the Movant-Appellee**

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**United States Court of Appeals for the Thirteenth  
Circuit**

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IN RE: WESTVILLE ELECTRICAL CO.

Debtor,

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WESTVILLE ELECTRICAL CO.,

Debtor and Movant-Appellee,

v.

WESTVILLE AD HOC GROUP OF BONDHOLDERS,

Objectors-Appellants,

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ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF WESTLAND  
Case. NO. 20-0000

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**OPENING BRIEF OF APPELLEE WESTVILLE ELECTRICAL CO.**

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Patricia A. Redmond  
Ryan M. Wolis  
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.  
150 West Flagler Street, Suite 2200  
Miami, FL 33130  
Phone: (305) 789-3200  
predmond@stearnsweaver.com  
rwolis@stearnsweaver.com  
*Attorneys for Movant-Appellee*

## **RULE 26.1 DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee discloses the following: The Westville Electrical Co. is a privately owned corporation, located in the City of Westville in the State of Westland. No publicly-owned corporation owns any of Appellee's stock.

*/s/Patricia A. Redmond*  
\_\_\_\_\_  
Attorney for Movant-Appellee

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## **REASONS WHY ORAL ARGUMENT SHOULD BE HEARD**

Appellee respectfully requests oral argument. Appellee submits that oral argument would be beneficial to the consideration and disposition of this appeal. In particular, the matter involves important issues of bankruptcy law that would benefit from both an oral presentation and the opportunity to address the questions of the Court.

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1334.<sup>1</sup> The District Court entered its judgment on April 1, 2024. ECF 4041.<sup>2</sup> Appellants appealed on April 5, 2024. ECF 4042. This Court lacks jurisdiction under either 28 U.S.C. § 1291 or the collateral order doctrine, *e.g.*, *Petralia v. AT&T Glob. Info. Sols. Co.*, 114 F.3d 352 (1st Cir. 1997).<sup>3</sup>

## STATEMENT OF THE ISSUES

Appellants raise two issues:

1. Whether this Court has appellate jurisdiction over this appeal?
2. Whether the District Court abused its discretion in approving Appellee’s disclosure statement?

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<sup>1</sup> Although Westville’s bankruptcy case was initially referred to the bankruptcy court, *see* 28 U.S.C. § 157(a), the District Court withdrew the reference and has been presiding over the case since that time, *see id.*, § 157(d) (permitting a district court to withdraw the reference of a bankruptcy case).

<sup>2</sup> Unless otherwise stated, cites to “ECF” refer to docket entries in Case No. 20-0000 (D.West.). Cites to “Adv. No. 19-2, ECF” refer to docket entries in Adversary Proceeding 19-2—an adversary proceeding commenced within Westville’s bankruptcy case, which adversary proceeding has its own separate docket.

<sup>3</sup> Because this Court recognizes and applies the decisional law of the Court of Appeals for the First Circuit, relevant case law from the First Circuit is emphasized in this brief.

## INTRODUCTION

This appeal arises out of the bankruptcy case of Appellee, the Westville Electrical Co. (“Westville” or “Appellee”) commenced under Chapter 11 of the Bankruptcy Code. Westville is a provider of electric utility services and is privately owned. Westville is located in the City of Westville. Appellants are an ad hoc group of bondholders (the “Ad Hoc Group” or “Appellants”) holding revenue bonds that Westville issued before its bankruptcy (together with all such other bonds, the “Bonds”).

As permitted under applicable law, Westville filed a plan (the “Plan”) in its bankruptcy case seeking to restructure its debts. Under the Plan, the claims of the members of the Ad Hoc Group, along with the claims of many other bondholders, are classified together in Class 3. The Plan provides different treatment for various members of Class 3 depending on the terms of various settlements reached between such creditors and Westville. All bondholders had the opportunity to settle with Westville. Appellants elected not to settle.

Under the Bankruptcy Code, creditors such as the bondholders in this case are entitled to vote on Westville’s Plan. To facilitate voting, the Code requires that the debtor prepare a disclosure statement explaining the plan and the creditors’ treatment thereunder, which the court must approve before voting commences. Westville accordingly prepared a disclosure statement (the “Disclosure Statement”),

explaining the treatment afforded to creditors under the Plan—including the treatment for bondholders in Class 3. Westville presented the Disclosure Statement to the District Court for its approval. *See* 11 U.S.C. § 1125(b).

Although the District Court acknowledged that a disclosure statement should not be approved if the plan accompanying it is patently unconfirmable, the District Court nonetheless properly exercised its discretion and approved the Disclosure Statement, overruling the Ad Hoc Group’s objection. The District Court reasoned that any objection the Ad Hoc Group had regarding the Plan’s different treatment of claims in Class 3 were preserved for the hearing on confirmation of the Plan, which is scheduled to occur in December of this year. The District Court also noted that, in order to fully consider the Ad Hoc Group’s objection, it would be helpful to develop the record regarding whether the objecting bondholders had been offered a full and fair opportunity to improve their treatment by agreeing to better treatment in exchange for committing to vote for the Plan.

### **STATEMENT OF THE CASE**

#### **A. The Bonds**

Appellants are the holders of approximately \$2.3 billion of Bonds. Westville issued the Bonds under a 1994 trust agreement (as amended, the “Trust Agreement” or “Agreement”), as authorized by applicable statutory law (the “Authority Act”). *See* Westville Statute § 8 (authorizing Westville to issue secured bond indebtedness).

In accordance with the Trust Agreement, American Bank, N.A. serves as indenture trustee for the bondholders (the “Trustee”).

## **B. Procedural History**

After Westville encountered a prolonged period of unmanageable financial difficulty, it commenced its bankruptcy case under Chapter 11 of the Bankruptcy Code in July of 2017. ECF No. 1. Under the Bankruptcy Code, creditors holding claims against the debtor are entitled to file proofs of claim for the amount owed. 11 U.S.C. § 501. In accordance with this provision, the Trustee submitted a proof of claim on behalf of all of the bondholders, stating a secured claim for all amounts outstanding on the Bonds based on the liens Westville granted in the Trust Agreement. ECF No. 67-5, Claim No. 12. The claim included \$8,258,614,158 in outstanding principal and \$218,542,581 in pre-bankruptcy accrued interest. *Id.*

### **1. The Various Plans**

Under Chapter 11 of the Bankruptcy Code, a debtor may restructure its debts through a plan of reorganization. 11 U.S.C. §§ 1121, 1123. A proposed plan must place the claims of creditors into distinct classes and state the treatment for each class (*i.e.*, what the creditors are to receive on account of their claims). 11 U.S.C. § 1123(a)(1), (3). The Code does not require, however, that all claims be placed in the same class, only that dissimilar claims may not be classified together. 11 U.S.C. § 1122.

On December 16, 2022, Westville filed an initial plan of reorganization (the “Initial Plan”). ECF No. 3110. The Initial Plan offered all creditors new bonds with an aggregate value of \$5.4 billion. *See* ECF No. 3111, at 30. Of that amount, no less than \$4.3 billion was slated for bondholders, with all bondholders having the opportunity to recover no less than 50% of the face amount of their claims. *See id.* at 38.

On February 9, 2023, Westville filed an amended plan (the “First Amended Plan”). ECF No. 3200. The First Amended Plan increased the total recovery offered to creditors from \$5.4 billion to \$5.68 billion. *Id.*

On March 1, 2023, Westville filed a further modified version of its plan (the “Second Amended Plan”). ECF No. 3296. The Second Amended Plan similarly offered aggregate consideration to all creditors of \$5.68 billion.

After Westville determined that it was not feasible for Westville to pay creditors the \$5.68 billion amount it had previously proposed, Westville filed a further modified version of its plan (the “Third Amended Plan”) on August 25, 2023. ECF 4171. In the aggregate, the Third Amended Plan makes available to creditors approximately \$2.38 billion, which is all Westville may feasibly pay. *Id.* at 30.

## **2. The Third Amended Plan**

The Third Amended Plan divides creditors into different classes with different treatment. Under the Third Amended Plan, Class 1 consists of a group of

bondholders who accepted a January 27, 2023 settlement proposal from Westville (the “Initial Supporting Bondholders”). ECF No. 4171. Those Initial Supporting Bondholders hold approximately \$75.0 million in aggregate principal amount of the Bonds. *See id.* Under the Third Amended Plan, the Initial Supporting Bondholders are guaranteed to receive a distribution of no less than 50% of the face amount of their claims. *See id.*

Class 8 consists of claims on account of Bonds held by International Investments LLC (“International”). *See* ECF 4171. Under the Plan, International will receive approximately 69.08% of the face amount of its claims, plus other fees and consideration based on its settlement with Westville. *See id.*

Class 3 consists of the majority of the Bond claims. The claims within Class 3 are given different treatment depending on if and when the claimants settled with Westville regarding their treatment.

In general, Bondholders in Class 3 who agree to vote for the plan (the “Supporting Bondholders”) will receive approximately 12.5% of the face amount of their claims. *See* ECF 4171. Bondholders who do not agree to vote for the Plan—such as the members of the Ad Hoc Group—will receive approximately 3.5% of the face amount of their claims. *See id.*

Certain claimants in Class 3 who participated in negotiating the terms of the Third Amended Plan with Westville (the “Preferred Supporting Bondholders”) will

receive additional fees, as well as the exclusive right to participate in a financing offering with Westville involving the issuance of new bonds (the “Series Z Bonds”). The Preferred Supporting Bondholders will receive no less than 44% of the face amount of their claims. *See id.*

### **3. The Disclosure Statement Hearing**

Under the Bankruptcy Code, creditors are entitled to vote on a plan that impairs their rights. 11 U.S.C. § 1126. To assist with voting, the Code requires the dissemination of a disclosure statement approved by the court that explains the plan. 11 U.S.C. § 1125; *In re Conco, Inc.*, 855 F.3d 703, 713-14 (6th Cir. 2017). The Code prohibits the solicitation of votes prior to court approval of the disclosure statement. 11 U.S.C. § 1125(b); *Century Glove, Inc. v. First Am. Bank of New York*, 860 F.2d 94, 96 (3d Cir. 1988).

On September 15, 2023, Westville filed its Disclosure Statement for the Third Amended Plan, ECF 4033, to which the Ad Hoc Group objected, ECF No. 4038. As is relevant here, the Ad Hoc Group contended that the Disclosure Statement could not be approved because claimants in Class 3 do not receive the same treatment, rendering the Plan “patently unconfirmable.” *See id.* at 27-32.

On March 1, 2024, the District Court held a hearing on approval of the Disclosure Statement. Overruling the Ad Hoc Group’s objection, the District Court

approved the Disclosure Statement, ECF 4041, and scheduled a confirmation hearing for the Third Amended Plan for December 1, 2024.

In overruling the Ad Hoc Group’s objection, the District Court recognized that a disclosure statement should not be approved if the plan accompanying it is patently unconfirmable. ECF 4041. The District Court determined, however, that it was not clear whether the Third Amended Plan was patently unconfirmable because it was unclear whether Appellants had been given the opportunity to agree to more favorable treatment in exchange for agreeing to vote in favor of the plan. *Id.* at 12 (district court stating that it could not “determine . . . whether holders of claims in Class 3 will ultimately be treated differently without equal opportunity” and “the possibility of incompatibility with section 1123(a)(4) does not render the Plan patently unconfirmable.”). In addition, the District Court observed that the Ad Hoc Group’s objection was properly preserved for the hearing on confirmation of the plan. *Id.* This appeal followed.

### **STANDARD OF REVIEW**

This Court reviews the District Court’s legal conclusions *de novo* and factual findings for clear error. *In re Fin. Oversight & Mgmt. Bd.*, 41 F.4th 29, 39 (1st Cir. 2022), *cert. denied sub nom. Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Coop. de Ahorro y Credito Abraham Rosa*, 143 S. Ct. 774 (2023). Approval of a disclosure

statement is reviewed for abuse of discretion. *See Lifemark Hosp. of Louisiana, Inc. v. Liljeberg Enters., Inc.*, No. 98-30610, 1999 WL 195247 at \*2 (5th Cir. 1999).

### **SUMMARY OF ARGUMENT**

The decision below is not a “final decision,” and hence this Court lacks jurisdiction to hear the Ad Hoc Group’s appeal. The decision below involves a dispute properly reserved for the hearing on confirmation of the Third Amended Plan—whether the plan is unconfirmable owing to its classification scheme. Although the District Court had discretion to consider the classification issue at the disclosure statement approval stage, it was not required to do so and, in fact, did not resolve it. The time for an appeal of the issue will be when and if the District Court confirms the Third Amended Plan later this year.

In addition, the decision below is not an appealable collateral order because it did not conclusively determine the disputed question of the Plan’s confirmability; it did not resolve an important issue separable from the merits of the bankruptcy case as a whole; and any hypothetical harm it inflicts is effectively reviewable on appeal from a final judgment. *See e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430–31 (1985).

On the merits, the Plan is not patently unconfirmable, and hence the Disclosure Statement was properly approved. Although § 1123(a)(4) sets a general rule that claims within a class should receive the same treatment, this general rule is

subject to exceptions. One of these is that a particular creditor may settle its entitlement, which is the relevant principle here.

The Plan is also not contrary to applicable Supreme Court precedent. The Supreme Court’s decision in *Avon Park* is primarily a disclosure case. In this instance, the different treatment afforded bondholders in Class 3 is disclosed. In cases of this kind, settlements are favored and should be encouraged, and there is nothing impermissible about the treatment of claims in Class 3.

## **ARGUMENT**

### **I. THIS COURT LACKS JURISDICTION TO DECIDE THIS APPEAL.**

#### **A. The District Court’s Approval of the Disclosure Statement Is Not a Final Decision.**

This Court has jurisdiction to hear appeals from all “final decisions” of the district court. 28 U.S.C. § 1291. In general, a “final decision” is one that resolves the entire case below. *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020) (“[a] ‘final decision’ . . . is normally limited to an order that resolves the entire case.”). As the Supreme Court explained in *Ritzen*, however, the concept of finality in bankruptcy is somewhat different, *id.* (“The ordinary understanding of ‘final decision’ is not attuned to the distinctive character of bankruptcy litigation.”), and turns instead on whether the decision resolves a “discrete dispute[]” within the larger case, *id.* at 37-39. The decision below, however, does not resolve a discrete

dispute. Rather, the dispute over whether the Third Amended Plan's classification scheme is improper will be resolved at the hearing on confirmation of the Plan.

A "discrete dispute" does "not mean merely competing contentions with respect to separable issues." *In re MSR Resort Golf Course LLC*, 14-CV-9491 JMF, 2015 WL 5172956, at \*1 (S.D.N.Y. Sept. 3, 2015). A district court must have "completely resolve[d] all of the issues pertaining to a discrete claim, including issues as to the proper relief." *Sletteland v. Orndorff*, 2 F. App'x 225, 228 (2d Cir. 2001). It is clear then that orders which do not resolve a "discrete dispute" do not fully resolve issues that are "intertwined with and directly concern" a pending plan. *See In re LATAM Airlines Group S.A.*, 2022 WL 1471125, at \*6 ("These interdependencies between the Backstop Agreements and confirmation of the Plan make plain that the Backstop Order did not resolve a 'discrete dispute[ ] within the overarching bankruptcy case.' Instead, it resolved disputes that were 'intertwined with and directly concern[ ]' confirmation of LATAM's proposed Plan, which remains pending."); *In re Energy Future Holdings Corp*, 949 F.3d 806, 819 (3d Cir. 2020) (concluding that a Confirmation Order and related Merger Order were likewise "inextricably intertwined" because the "merger agreement expressly provided that closing would take place only after entry of the Confirmation Order[.]").

As the Supreme Court explained in *Ritzen*, even though a bankruptcy case has not yet concluded, a court’s order disposing of a motion during the case is nonetheless a “final decision” resolving a “discrete dispute” if (1) the relevant motion “initiates a discrete procedural sequence, including notice and a hearing,” *id.* at 589; (2) the “qualification for relief turns on [a] statutory standard,” *id.*; and (3) the matter does not involve merely “minor details about how a bankruptcy case will unfold,” but rather those that have significant “practical consequences,” *id.* at 43-44. This standard considers “whether the order in question terminates a procedural unit separate from the remaining case . . . .” *Id.* (emphasis added). These criteria are not satisfied here.

The District Court’s order approving the Disclosure Statement (notwithstanding the Ad Hoc Group’s contention that the Third Amended Plan is patently unconfirmable) was simply a preliminary step in the confirmation process, not the resolution of a discrete procedural sequence. *See Pieterse v. Tyler Donegan Duncan Real Estate Services, Inc.*, 8:22-CV-00900-PX, 2022 WL 13937215, at \*3 (D. Md. Oct. 24, 2022) (“[J]udicial approval or denial of a disclosure statement is not a final order. Rather, the final determination on the veracity of the information included, and the rights that stem from such information, occurs when the Court decides whether to ‘confirm’ the Chapter 11 Plan.”) (citing 6 Norton Bankr. L. & Prac. 3d § 110:12 (Oct. 2022 Update)). Nor did it apply a discrete standard

governing the relief sought, for (as the District Court determined) the issue whether the Plan’s classification scheme violates the Bankruptcy Code will be resolved at the confirmation hearing. As the Supreme Court explained in *Ritzen*, what matters is that the order in question terminates a discrete dispute, which the District Court’s order in this instance does not do. Accordingly, jurisdiction is lacking.

**1. *Ritzen***

In *Ritzen*, a creditor sought relief from the automatic stay, 11 U.S.C. § 362, to litigate its breach-of-contract claim against the debtor in a pending state-court proceeding. *Id.* at 39; *see also id.* at 42 (explaining the operation of the automatic stay preventing the “continuation of lawsuits to recover from the debtor,” and how a creditor may seek relief from stay to proceed with a state-court litigation). The bankruptcy court denied the creditor’s motion, which meant that the creditor’s claim would be resolved in the bankruptcy court, not the state court. *Id.* at 40.

As the Supreme Court explained, the denial of the creditor’s motion resolved a discrete dispute of consequence that terminated a particular procedural sequence. Not so here. In this case, the approval of Westville’s Disclosure Statement is more properly viewed as part of the confirmation process, which has yet to run its course. *See Pieterse*, 2022 WL 13937215, at \*3 (“Judicial review of a disclosure statement is performed simply to ensure that the debtor has provided ‘adequate information’ regarding the proposed Chapter 11 Plan.”); *Askri v. Fitzgerald*, 612 B.R. 500, 505-

06 (E.D. Va. 2020) (“There is no doubt that a bankruptcy court order denying approval of a disclosure statement is interlocutory.”) (citing *In re Wallace & Gale*, 72 F.3d 21, 25 (4th Cir. 1995)).

In conducting its analysis, the Supreme Court also examined “textual clue[s]” that shed light on whether Congress envisioned an appeal of the issue in question. *Id.* at 44. Further, the Court considered whether immediate appealability “advances the finality principle” by avoiding needless future litigation. *Ritzen*, 589 U.S. at 47.

## **2. The Issue of Patent Unconfirmability Was Not Resolved in the Context of a Discrete Procedural Sequence.**

Section 1125(b) provides that a court may approve a disclosure statement “after notice and a hearing.” 11 U.S.C. § 1125(b). (“An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.”). Notably, the *Ritzen* Court did not suggest that all bankruptcy court orders which follow notice and a hearing must be final. *Accord In re LATAM Airlines Group S.A*, 2022 WL 1471125, at \*9. Rather, the Supreme Court noted, in that case, that a ruling on a stay-relief motion disposes of a “procedural unit anterior to, and separate from, claim-resolution proceedings.” *Ritzen*, 589 U.S. at 43.

But a disclosure statement does not exist in a vacuum—it explains and is inextricably attached to a bankruptcy plan. Logically and legally, the relevant procedural sequence is the confirmation process as a whole, not simply the approval of a disclosure statement.

**3. Although the Qualifications for Relief Turn on a Statutory Standard, that Standard Includes the Criteria Applicable to the Confirmation of Plans.**

Under § 1125, a debtor may not proceed with soliciting approval of a plan unless the court has approved a disclosure statement. 11 U.S.C. § 1125(b). On the other hand, under § 1129(a)(2), a court may not confirm a plan unless “[t]he proponent of the plan complies with the applicable provisions of [Title 11]”—including § 1125(b). *See In re Mickey’s Enterprises, Inc.*, 165 B.R. 188, 193 (Bankr. W.D. Tex. 1994) (“In order to confirm a plan the court must find that the plan and its proponent have complied with the applicable provisions of Title 11. . . . One of those applicable provisions is § 1125 which requires disclosure of “adequate information[.]”) (citing 11 U.S.C. § 1129(a)(1) and (2)).

The two statutory standards are thus intertwined.

**4. Although the Matter Does Not Involve Merely Minor Details, They Are Details That Must Be Revisited at Confirmation.**

Because confirmation of a plan requires the court to revisit whether the disclosure statement was properly approved, the details regarding approval of a disclosure statement are not finally resolved until the confirmation process has run

its course. See *In re St. Margaret's Health - Peru*, 23 B 11641, 2024 WL 2078639, at \*5 (Bankr. N.D. Ill. May 8, 2024) (“The court may revisit the question of the adequacy of disclosure at plan confirmation, if necessary.”); *In re Islet Sciences, Inc.*, 640 B.R. 425, 460 (Bankr. D. Nev. 2022) (“Reassessing the adequacy of disclosure from the vantage of the confirmation hearing is an efficient safeguard of the integrity of the reorganization process.”); *In re Renegade Holdings, Inc.*, 09-50140C-11W, 2010 WL 2772504, at \*3 (Bankr. M.D.N.C. July 13, 2010) (“Notwithstanding the earlier approval of a plan proponent's disclosure statement, the requirement of section 1129(a)(2) regarding compliance with section 1125 is that the court reassess at the confirmation hearing whether the disclosure contemplated by section 1125 has been provided.”); *In re Michelson*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) (“By the time of the confirmation hearing, the context has changed. More information is available. . . . What once appeared to be adequate information may have become plainly so inadequate and misleading as to cast doubt on the viability of the acceptance of the plan and to necessitate starting over.”). That further supports the non-finality of the order in this case. See *In re Perez*, 30 F.3d 1209, 1216-17 (9th Cir. 1994) (“As a general matter, the inadequacy of disclosure can only injure a creditor if the plan is eventually confirmed. But, just because the bankruptcy court has approved the disclosure statement doesn't mean the plan will be approved.

The creditors still have to vote, and the bankruptcy court still must determine that the plan complies with the Code.”).

#### **5. Textual Clues Support Non-Finality.**

The textual clues in this case point to non-finality. Unlike motions for relief from stay, which are designated as discrete “core” procedural units in § 157(b)(2)(G) for the purposes of establishing jurisdiction in the bankruptcy courts, no such specific designation is made for orders approving disclosure statements. 28 U.S.C. § 157(b)(2)(G). In contrast, there is a special designation for “confirmations of plans.” *See id.*, § 157(b)(2)(L). This supports the inference that it is the confirmation process that is the relevant procedural sequence, not the disclosure statement process by itself.

#### **6. An Immediate Appeal Would Not Advance Finality.**

Lastly, the finality principle would be advanced by limiting appeals to those taken at the conclusion of the confirmation process. In particular, an appeal at this stage would only serve to delay the proceeding and may ultimately be unnecessary. For example, if the plan is not confirmed, whether the disclosure statement had been properly approved would become moot.

Reviewing the disclosure statement on appeal concurrently with the Plan confirmation proceedings would likely cause the very “delays and inefficiencies” that the rule of finality was designed to prevent. *Bullard v. Blue Hills Bank*, 575 U.S.

496, 504 (2015) (“[E]ach climb up the appellate ladder and slide down the chute can take more than a year. Avoiding such delays and inefficiencies is precisely the reason for a rule of finality.”). Despite a “relaxed view of finality in the bankruptcy setting as a whole, the general antipathy toward piecemeal appeals still prevails in individual adversary actions.” *In re White Beauty View, Inc.*, 841 F.2d 524, 526 (3d Cir. 1988); *Pieterse*, 2022 WL 13937215, at \*3 (“Accordingly, the Bankruptcy Court’s admonition to characterize Defendants’ claims as ‘impaired’ in the Disclosure Statement was not final. Rather, it was a necessary procedural step to ensure that the disclosure statement includes sufficient information to proceed toward the final decision on the propriety of the Chapter 11 Plan. 11 U.S.C. § 1125(b). Thus, because court approval of the Disclosure Statement is a prerequisite for Plan confirmation, but does not fix any rights, it is not a final order and not appealable.”). Certainly, these “pragmatic considerations” further support the non-finality of the order in this case. *In re Lehman Bros. Holdings Inc.*, 697 F.3d 74, 77 (2d Cir. 2012).

#### **7. Pre-Ritzen Case Law From Other Circuits Suggests Non-Finality.**

Prior to *Ritzen*, two circuit-court decisions indicated that the approval of a disclosure statement addressing whether the statement contains adequate information—a different issue—does not necessarily involve a final order. *See In re Texas Extrusion Corp.*, 844 F.2d 1142, 1156-57 (5th Cir. 1988) (adequate

information); *In re Perez*, 30 F.3d at 1217 (adequate information). The reasoning of these cases, although not dispositive, is persuasive.

In *Texas Extrusion*, the Fifth Circuit considered an appeal from a *confirmation* order. 844 F.2d at 1156. Although the court held only “that the party does not lose its right to appeal the disclosure statement if it fails to file an immediate appeal,” *id.*, this suggests that appeals of disclosure-statement-approval issues are properly taken following confirmation. The Fifth Circuit also noted that “an order approving a disclosure statement is not a final order for purposes of appeal but instead is “an interlocutory order[:.]”

The approval of a disclosure statement is only one step in the process of the approval and confirmation of a plan of reorganization under Chapter 11 of the Bankruptcy Code. By no stretch of the imagination does the approval of a disclosure statement resolve any discrete dispute among the various parties involved within the larger bankruptcy proceeding or determine the rights of the parties to secure their requested relief.

In *Perez*, the Ninth Circuit conducted a similar analysis, *see* 30 F.3d at 1216-17. And was “not persuaded that a bankruptcy court order approving a disclosure statement is a final order for purposes of appeal.” The court held that a confirmation order, not a disclosure order, “triggers the deadline for notices of appeal on ‘adequate information’ issues under section 1125(a).” *Id.*; *compare In re MSR Resort Golf Course LLC*, 14-CV-9491 JMF, 2015 WL 5172956, at \*1 (S.D.N.Y. Sept. 3, 2015) (analyzing whether or not preclusion constitutes a “separable issue” under 28 U.S.C.

§ 158(a) and noting that the Bankruptcy Court’s “ruling here indisputably left several aspects of Conlon’s ‘claim’ to be adjudicated, as some of Conlon’s claims survived summary judgment, and others were not even addressed in the parties’ cross-motions”). The reasoning of these cases further support non-finality.

**B. The District Court’s Order Resolving Whether The Plan Is Patently Unconfirmable Is Not An Appealable Collateral Order.**

“The collateral order doctrine is a ‘narrow exception’ whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal.” *Koller*, 472 U.S. at 430–31. As explained by the First Circuit, “[t]he collateral order doctrine applies when three conditions are satisfied: the order must ‘conclusively determine the disputed question’; it must ‘resolve an important issue completely separate from the merits of the action’; and it must ‘be effectively unreviewable on appeal from a final judgment.’” *Doe v. Mass. Inst. of Tech.*, 46 F.4th 61, 75 (1st Cir. 2022) (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)); see also *Euroboor BV v. Grafova*, 23-14121, 2024 WL 2209651, at \*1 (11th Cir. May 16, 2024) (application of the collateral order doctrine depends on whether delaying review of that category of orders “would imperil a substantial public interest or some particular value of a high order”). “In making this determination,” a court does “not engage in an individualized jurisdictional inquiry.” *In re Decor Holdings, Inc.*, 86 F.4th 1021, 1026 (2d Cir. 2023). Rather, a court’s “focus is on the entire category to which a claim belongs.” *Id.* None of these requirements is satisfied.

As shown, this Court lacks jurisdiction under the collateral order doctrine to review District Court’s order approving the Disclosure Statement because it was a preliminary step in the confirmation process and did not conclusively determine the issue of patent unconfirmability. *See Copan Italia SpA v. Puritan Med. Products Co. LLC*, 101 F.4th 847, 851 (Fed. Cir. 2024) (stating that a court lacks jurisdiction to review an “order in question” if “any one of these conditions is not met”).

**1. The Order Does Not Conclusively Determine Whether the Plan is Patently Unconfirmable.**

As noted, the decision below did not resolve conclusively whether the Disclosure Statement should have been approved because these issues were properly preserved for confirmation. *Compare Good v. Voest-Alpine Indus., Inc.*, 398 F.3d 918, 925 (7th Cir. 2005) (“There is no doubt that the court’s order withdrawing the reference satisfies the first and second conditions. It conclusively determined the question whether the bankruptcy court could retain the case over Good’s objection, given the right to a jury trial, and that question was distinct from the merits of the underlying contract and fraud claims.”). The order is thus not “the final word on the subject addressed.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983); *Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351, 1358 (Fed. Cir. 2020) (“There is no question that the district court’s orders conclusively determined that Uniloc’s purportedly confidential filings should be made public; there is likewise no dispute that they present an important issue—separate from the

merits of the underlying action—because they address the scope of a court's discretion to deny, in full, a litigant's sealing motion based upon its failure to comply with procedural rules.”); *Copan Italia SpA*, 101 F.4th at 852 (“We find that the district court’s denial of Puritan's partial motion to dismiss does not conclusively determine any issue. Therefore, Puritan has not shown that the collateral order doctrine's requirements are satisfied. Accordingly, we dismiss for lack of appellate jurisdiction.”).

**2. The Order Does Not Resolve an Issue Separable from the Merits of the Action as a Whole.**

Westville agrees that the merits of the underlying bankruptcy case involve whether Westville may reorganize through confirmation of a plan of reorganization. And whether the plan will be confirmed has yet to be decided, including the classification issue raised by Appellants. The issue is thus not separable from the merits because it is not “a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.” *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *In re Energy Future Holdings Corp*, 949 F.3d at 819; *Pieterse*, 2022 WL 13937215, at \*3.

**3. The Order Is Not Effectively Unreviewable on Appeal from a Final Judgment.**

Finally, the District Court’s order is not effectively unreviewable on appeal from a final judgment because the classification issue may be litigated as part of the

confirmation process. The order below thus does not qualify as among “the trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal.” *Koller*, 472 U.S. at 430-31; *see also In re Worldcom, Inc.*, M-47 HB, 2003 WL 21498904, at \*9 (S.D.N.Y. June 30, 2003) (declining to exercise jurisdiction to review adequacy of disclosure statement because “appeal would not conclusively determine the adequacy of the disclosure statement”). For these reasons, the decision below is an appealable collateral order.

## **II. THE PLAN IS NOT PATENTLY UNCONFIRMABLE.**

Turning to the merits, it is true that “[a] plan is patently unconfirmable where (1) confirmation ‘defects [cannot] be overcome by creditor voting results’ and (2) those defects ‘concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.’” *In re Am. Cap. Equip., LLC*, 688 F.3d at 154-55 (citation omitted); *see also In re E. Maine Elec. Co-op., Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991) (noting that “undertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never legally be confirmed”).

During disclosure statement hearings, “courts should refuse to hear issues that are confirmation rather than disclosure issues, such as classification of claims, feasibility, whether the plan has been proposed in good faith, or whether a plan is

fair and equitable.” *In re Foxwood Hills Prop. Owners Ass’n, Inc.*, CV 20-02092-HB, 2021 WL 3059716, at \*5 (Bankr. D.S.C. June 1, 2021).

At the very least, however, Appellants cannot meet the second prong of this analysis. That is so because, as the District Court determined, whether the classification scheme violates the Bankruptcy Code requires a more fully developed record.

**A. The Plan Does Not Violate § 1123(a)(4).**

It is true that, under § 1123(a)(4), a plan is generally required to “provide the same treatment for each claim . . . of a particular class . . . .” 11 U.S.C. § 1123(a)(4) (emphasis added). But the statute itself admits of at least one exception, specifically in cases in which “the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim . . . .” *Id.* A logical inference of this is that individual holders are free to negotiate different treatment for their claims. *See In re Quigley Co., Inc.*, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) (“Section 1123(a)(4) does not require precise equality, only approximate equality.”); *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013) (“[C]ourts have interpreted the ‘same treatment’ requirement [of section 1123(a)(4)] to mean that all claimants in a class must have ‘the same opportunity’ for recovery.”); *In re Dana Corp.*, 412 B.R. 53, 62 (S.D.N.Y. 2008) (“The key inquiry under § 1123(a)(4) is not whether all of the claimants in a class obtain the same thing, but whether they have the same

opportunity.”); *In re Mesa Air Group, Inc.*, 10-10018 MG, 2011 WL 320466, at \*7 (Bankr. S.D.N.Y. Jan. 20, 2011) (“Without question, the ‘same treatment’ standard of section 1123(a)(4) does not require that all claimants within a class receive the same amount of money.”). The Court, however, need not address this issue as doing so in this case would be premature.

As the District Court determined, it was not clear to the court whether creditors had been offered the opportunity to settle with Westville for more favorable treatment. ECF 4041 at 12 (District Court stating that it could not “determine . . . whether holders of claims in Class 3 will ultimately be treated differently without equal opportunity” and “the possibility of incompatibility with section 1123(a)(4) does not render the Plan patently unconfirmable.”). Given that the record is not complete with respect to this issue, the District Court was correct in determining that the Disclosure Statement was not patently unconfirmable.

**B. The District Court’s Reason for Approving the Disclosure Statement Notwithstanding Appellants’ Arguments Is Material.**

It bears emphasis that, under the “patent unconfirmability” standard that Appellants recite, the relevant issues must “concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.” *In re Am. Cap. Equip., LLC*, 688 F.3d at 154-55 (citation omitted); see e.g., *In re Hyatt*, 509 B.R. 707, 714 (Bankr. D.N.M. 2014) (analyzing whether a plan is patently unconfirmable and relying upon “uncontroverted facts” to which the

parties “have consented on the record to the Court determining these issues on the record now before it”). That is simply not the case here, as the District Court properly determined.

Accordingly, whether the District Court properly approved the Disclosure Statement should await the outcome of confirmation hearing and the full development of the relevant material facts.

### CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal for lack of jurisdiction or, alternatively, affirm the decision below.

Dated: June 11, 2024

Respectfully submitted,

Patricia A. Redmond  
Ryan M. Wolis  
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.  
150 West Flagler Street, Suite 2200  
Miami, FL 33130  
Phone: (305) 789-3200  
predmond@stearnsweaver.com  
rwolis@stearnsweaver.com  
*Attorneys for Movant-Appellee*

## CERTIFICATION

This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,176 words.

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/s/Patricia A. Redmond  
Attorney for Movant-Appellee

I hereby certify that on June 11, 2024, I electronically filed the foregoing document with the United States Court of Appeals for the Thirteenth Circuit by using the CM/ECF system, which will send a notice of filing to all registered users.

/s/Patricia A. Redmond  
Attorney for Movant-Appellee

# **APPENDIX 3**

**Reply Brief of the Objectors-Appellants The Westville Ad Hoc Group; G. Eric Brunstad, Counsel for the Objectors-Appellants**

No. 24-0011

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**United States Court of Appeals for the Thirteenth  
Circuit**

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IN RE: WESTVILLE ELECTRICAL CO.

Debtor,

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WESTVILLE ELECTRICAL CO.,

Debtor and Movant-Appellee,

v.

WESTVILLE AD HOC GROUP OF BONDHOLDERS,

Objectors-Appellants,

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ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF WESTLAND  
Case. NO. 20-0000

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**REPLY BRIEF OF APPELLANTS THE WESTVILLE AD HOC GROUP**

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G. Eric Brunstad, Jr.  
DECHERT LLP  
1095 Avenue of the Americas  
New York, NY 10036  
Phone: (212) 698-3500  
eric.brunstad@dechert.com

## **RULE 26.1 DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants disclose the following: The Westville Ad Hoc Group consists of the holders of revenue bonds issued by Westville Electric Co., a privately owned corporation, located in the City of Westville in the State of Westland. None of the members of the Westville Ad Hoc Group are corporations and none are owned by publicly traded corporations.

/s/ G. Eric Brunstad, Jr.  
Attorney for Objectors-Appellants

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## **REASONS WHY ORAL ARGUMENT SHOULD BE HEARD**

The parties agree that oral argument would be beneficial to the consideration and disposition of this appeal because the matter involves important issues of bankruptcy law that would benefit from both an oral presentation and the opportunity to address the questions of the Court.

## SUMMARY OF REPLY

Contrary to Westville’s argument, this appeal does indeed arise out of a discrete proceeding within Westville’s bankruptcy case—the approval of Westville’s Disclosure Statement.<sup>1</sup> It likewise involves the resolution of a discrete legal dispute within that discrete proceeding—whether approval of the Disclosure Statement should have been denied because Westville’s Plan is “patently unconfirmable.” Westville’s theory is that the district court’s resolution of the “patent unconfirmability” issue at the disclosure-statement stage does not qualify as a “final order” because whether the Plan may be confirmed must be revisited at the plan-confirmation stage. *See, e.g.*, Appellee.Br. at 9. But that is exactly the kind of argument the Supreme Court rejected in *Ritzen* as a basis for denying finality.

As the Supreme Court explained, “[i]t does not matter whether the court rested its decision on a determination potentially pertinent to other disputes in the bankruptcy case,” including those to be raised as part of a plan confirmation proceeding. *Ritzen Grp., Inc. v. Jackson Masonry, LLC.*, 589 U.S. 35, 46 (2020). Rather, the standard considers “whether the order in question terminates a procedural unit separate from the remaining case, *not whether the bankruptcy court has preclusively resolved a substantive issue.*” *Id.* (emphasis added).

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<sup>1</sup> Capitalized terms not defined herein have the meaning set forth in the Appellants’ opening brief.

Further, the whole point of the “patently unconfirmable” standard is to superintend the approval of disclosure statements to *avoid* lengthy and expensive confirmation proceedings on a plan that, as a matter of law, simply cannot be confirmed. *See In re Am. Cap. Equip., LLC*, 688 F.3d 145, 155 (3d Cir. 2012); *In re Quigley Co., Inc.*, 377 B.R. 110, 115-16 (Bankr. S.D.N.Y. 2007) (“If the plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied, as solicitation of the vote would be futile.”); *In re E. Me. Elec. Co-op., Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991) (“[U]ndertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never legally be confirmed.”); *In re Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) (“If, on the face of the plan, the plan could not be confirmed, then the Court will not subject the estate to the expense of soliciting votes and seeking confirmation.”); *In re Valrico Square Ltd. P’ship*, 113 B.R. 794, 796 (Bankr. S.D. Fla. 1990) (“Soliciting votes and seeking court approval on a clearly fruitless venture is a waste of the time of the Court and the parties.”). Under the Supreme Court’s finality analysis in *Ritzen*, an appeal of the resolution of this discrete dispute is proper at this juncture, not later after the harm has been incurred and become non-remediable.

Applying the criteria outlined in *Ritzen*, the decision below resolves a “discrete dispute” within Westville’s larger bankruptcy case because the question of

the Plan’s patent unconfirmability was necessarily resolved in the context of a discrete procedural sequence involving the approval of the Disclosure Statement; the qualifications for approval of the Disclosure Statement turn on a statutory standard; the matter does not involve merely minor details; textual references support appealability; and an immediate appeal would advance the values of finality. *See also In re Saco Loc. Dev. Corp.*, 711 F.2d 441, 444-48 (1st Cir. 1983) (Breyer, J.).

Notably, the two out-of-circuit cases on which Westville principally relies—*In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988) and *In re Perez*, 30 F.3d 1209 (9th Cir. 1994)—do not involve direct appeals of orders approving disclosure statements. *See Appellee.Br.* at 18-20 (citing these cases). Rather, they involve appeals from orders confirming plans of reorganization. And neither case involves the issue presented here (and properly addressed at the disclosure statement hearing): whether the Disclosure Statement should not have been approved because the Plan accompanying it is *patently* unconfirmable.

In *Texas Extrusion*, the Fifth Circuit expressly stated that “[w]e, of course, *are not holding* that a party in interest cannot appeal an order approving a disclosure statement immediately upon that order’s entry.” *Texas Extrusion*, 844 F.2d at 1156 (emphasis added). Rather, the court determined only “that the party does not lose its right to appeal the disclosure statement if it fails to file an immediate appeal.” *Id.*

In *Perez*, the Ninth Circuit followed *Texas Extrusion* and likewise considered an appeal from a confirmation order. *Perez*, 30 F.3d at 1216.

Further, neither *Texas Extrusion* nor *Perez* apply the more recent (and binding) appealability analysis adopted by the Supreme Court in *Ritzen*. In addition, *Texas Extrusion* distinguishes the First Circuit's decision in *Saco*, which likewise applied a different analysis than the one the Fifth Circuit adopted. *See Texas Extrusion*, 844 F.2d at 1155. Westville also ignores decisions of other courts concluding that orders approving disclosure statements are immediately appealable. *See In re Snyder*, 56 B.R. 1007, 1009-10 (N.D. Ind. 1986). Under *Ritzen* and *Saco*, the decision below is properly final.

Alternatively, the decision below is reviewable as an appealable collateral order. The order conclusively determines the disputed question of the Plan's patent unconfirmability; resolves an important issue separable from the merits of the bankruptcy case as a whole (*i.e.*, whether creditors should be forced to bear the costs of a hopeless, and thus abusive, confirmation proceeding); and the harm it inflicts is effectively unreviewable (and non-remediable) on appeal from a final judgment. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-57 (1949); *Doe v. Massachusetts Inst. of Tech.*, 46 F.4th 61, 65 (1st Cir. 2022).

On the merits, the Plan is patently unconfirmable (and hence the Disclosure Statement should not have been approved) because the Plan's unequal treatment of

claims in Class 3 violates § 1123(a)(4). This provision directs in plain terms that a plan “*shall . . . provide the same treatment for each claim . . . of a particular class, unless the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim . . .*” 11 U.S.C. § 1123(a)(4) (emphasis added). Because Appellants are clearly subjected to inferior treatment without their consent, the Plan is patently unconfirmable.

The Plan is also contrary to applicable Supreme Court precedent. As the Court explained in *Avon Park*, bankruptcy plans “envisage equality of treatment of creditors” and may “not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others . . . .” *Am. United Mut. Life Ins. Co. v. City of Avon Park, Fla.*, 311 U.S. 138, 147 (1940). Further, providing better treatment to some in exchange for their favorable vote irredeemably corrupts the franchise: “if a vote is influenced by the expectation of advantage . . . it cannot be considered an honest and unbiased vote.” *Id.* (citation omitted). The district court’s rationale for disregarding both *Avon Park* and § 1123(a)(4) is legally erroneous.

The district court determined that § 1123(a)(4) might not apply if Appellants have been presented with the opportunity to settle for better treatment. But that is not a permissible reason to ignore § 1123(a)(4) or disregard *Avon Park*. As explained succinctly in its legislative history, § 1123(a)(4) means what it says: “The plan must provide the same treatment for each claim . . . unless the holder of a

particular claim . . . agrees to different, *but not better*, treatment of his claim . . . .” H.R. Rep. No. 95-595, 95th Cong. 1st Sess., 406 (1977) (emphasis added). And as the Court held in *Avon Park*, because creditor consent does not excuse the statutory violation, “the imprimatur of the federal court should not have been placed on this plan.” 311 U.S. at 148.

## ARGUMENT

### **I. THIS COURT HAS JURISDICTION TO DECIDE THIS APPEAL.**

#### **A. The District Court’s Determination Is a Final Decision.**

Westville concedes that the finality (and hence appealability) of the decision below is properly determined through application of the Supreme Court’s analysis articulated in *Ritzen*. See, e.g., Appellee.Br. at 12. Nonetheless, citing precedents that do not involve the approval of a disclosure statement (and two of which predate *Ritzen*), Westville contends that the decision below is not final on the theory that the district court did not conclusively resolve the substantive legal issue at stake: whether approval of the Disclosure Statement should have been denied because the Plan is unconfirmable. See *id.*, at 11.<sup>2</sup> Rather, Westville contends that this issue was

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<sup>2</sup> The Third Circuit’s decision in *In re Energy Future Holdings Corp.*, 949 F.3d 806 (3d Cir. 2020) applied *Ritzen*, but did not involve the approval of a disclosure statement—it involved the finality of an order setting a deadline to file claims. Similarly, *In re LATAM Airlines Grp. S.A.*, No. 22-CV-2556 (JMF), 2022 WL 1471125 (S.D.N.Y. May 10, 2022) applied *Ritzen*, but did not involve the approval of a disclosure statement—it involved an order approving a settlement regarding plan financing. The other two decisions, in *In re MSR Resort Golf Course LLC*, No. 14-CV-9491 (JMF), 2015 WL 5172956 (S.D.N.Y. Sept. 3, 2015) and *Sletteland v.*

not conclusively decided because it is also ripe for reconsideration at the plan-confirmation stage. But that fundamentally misapprehends the relevant finality analysis.

To begin with, the legal standards are not exactly the same. Although a court considering whether to confirm a plan must consider whether the plan is, in fact, confirmable, the “patent unconfirmability” standard is narrower. It considers whether the plan is so clearly flawed as a matter of law that there is no point in approving the disclosure statement. But in any event, even if the legal standards were identical, that is beside the point under *Ritzen*.

What matters is that, in approving the Disclosure Statement, the district court concluded a discrete proceeding initiated by motion separate from any subsequent proceeding on a motion to confirm a plan. In doing so here, it is true that the district court concluded that the Plan is not patently unconfirmable. And it is true that, at the plan-confirmation stage, the district court may again revisit whether the Plan is fatally defective because it violates the Bankruptcy Code and applicable Supreme Court precedent. But as the Court explained in *Ritzen*, the fact that a substantive legal issue may recur across different proceedings is *irrelevant* to the analysis: “*It does not matter* whether the court rested its decision on a determination potentially

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*Orndorff*, 2 F. App’x 225 (2d Cir. 2001), predate *Ritzen* and likewise do not involve the approval of disclosure statements.

pertinent to other disputes in the bankruptcy case,” including those to be raised as part of a plan confirmation proceeding. 589 U.S. at 46 (emphasis added). Rather, the standard considers “whether the order in question terminates a procedural unit separate from the remaining case, *not whether the bankruptcy court has preclusively resolved a substantive issue.*” *Id.* (emphasis added).

Contrary to Westville’s approach, the approval of a disclosure statement is not simply a preliminary step in the confirmation process—it is a discrete proceeding in its own right under the factors the Supreme Court identified in *Ritzen* as the relevant criteria. Critically, the case Westville cites in support of its theory that, for finality purposes, the approval of a disclosure statement is just a preliminary step in the confirmation process, *see* Appellee.Br. at 12 (citing *Pieterse v. Tyler Donegan Duncan Real Est. Servs., Inc.*, No. 8:22-CV-00900-PX, 2022 WL 13937215 (D. Md. Oct. 24, 2022)), simply repeats the analytical mistake outlined immediately above. In *Pieterse*, the court reasoned that the approval of a disclosure statement is not a final order because the court might revisit whether the disclosure statement was defective at a later hearing on plan confirmation. But, once again, the fact that a substantive legal issue may be addressed repeatedly across different proceedings is irrelevant. And what *does* matter under *Ritzen* is something quite different.

Under *Ritzen*, even though a bankruptcy case has not yet concluded, a court’s order disposing of a motion during the case is nonetheless a “final decision”

resolving a “discrete dispute” if (1) the relevant motion “initiates a discrete procedural sequence, including notice and a hearing,” 589 U.S. at 42; (2) the “qualification for relief turns on [a] statutory standard,” *id.* at 43; and (3) the matter does not involve merely “minor details about how a bankruptcy case will unfold,” but rather those that have significant “practical consequences,” *id.* at 44. These criteria are satisfied here.

As explained below, the district court’s order resolving whether the Plan is patently unconfirmable was entered in the context of a discrete procedural sequence initiated by Westville’s motion for approval of the Disclosure Statement, after notice and a hearing. It applies a discrete standard governing the relief sought—whether the Disclosure Statement was properly approved under § 1125 notwithstanding that the Plan is patently unconfirmable. It does not involve merely minor details, but rather whether Westville may proceed to solicit acceptances from creditors and seek plan confirmation. What matters is that the order terminates a discrete dispute within a discrete proceeding, which the district court’s order in this instance does—the legal dispute over whether the Disclosure Statement should have been approved notwithstanding the Plan’s patent unconfirmability.

**1. The Issue of Patent Unconfirmability Was Resolved in the Context of a Discrete Procedural Sequence.**

Westville concedes that the approval of a disclosure statement is governed by a particular statutory provision with its own particular procedural requirement—

namely, § 1125(b), which directs that a court may approve a disclosure statement that complies with the statutory standard “after notice and a hearing.” 11 U.S.C. § 1125(b); *see* Appellee.Br. at 14 (citing § 1125(b)). Likewise, Westville does not deny that a request for approval of a disclosure statement is made by a discrete motion distinct from a request for confirmation of a plan. Specifically, a request for approval of a disclosure statement is made by motion under Fed. R. Bankr. P. 3016 & 3017. In contrast, confirmation of a plan is governed by §§ 1128 & 1129 and Fed. R. Bankr. P. 2002, upon separate notice and a hearing. These distinct statutory and procedural requirements underscore the procedural distinctness of the disclosure-statement-approval process in precisely the manner the Supreme Court recognized as illustrating when and how a particular proceeding in bankruptcy is distinct.

Rather than acknowledge these procedural differences (as well as their import), Westville contends that “a disclosure statement does not exist in a vacuum” and is “[l]ogically and legally” part of the “confirmation process as a whole . . . .” Appellee.Br. at 15. But the same could be said of the motion for relief from stay addressed in *Ritzen*. Yet the Supreme Court concluded that the denial of the motion, which simply permitted the litigation to proceed in the bankruptcy court, was a final disposition.

Moreover, the link Westville relies on it making its point that the two proceedings (disclosure statement approval and confirmation) are connected is none

other than its contention that there is an overlap of dispositive substantive issues. But once again, that is exactly the kind of argument the Supreme court rejected in *Ritzen*. The relevant point is that the *process* for the approval of a disclosure statement and the *process* for the confirmation of a plan are distinct statutorily and procedurally. Although not dispositive by itself, this points to the finality of orders approving disclosure statements.

## **2. The Qualifications for Relief Turn on a Statutory Standard.**

Once again, Westville concedes that the approval of a disclosure statement turns on a distinct statutory standard. *See Appellee.Br.* at 15. It contends, however, that the statutory standard for the approval of a disclosure statement is “intertwined” with the statutory standard for the confirmation of a plan because, in order to confirm a plan, the court may revisit whether the disclosure statement was properly approved. *See id.* But the same was also true in *Ritzen*.

In *Ritzen*, the substantive legal issue to be resolved in the context of the creditor’s motion for relief from stay was the debtor’s good faith. As the Supreme Court acknowledged, the same issue would be properly raised and addressed anew at other points in the proceeding, including at confirmation of any plan. Yet that did not make the order denying relief from stay non-final. On the contrary, the Court concluded that this consideration was (once again) irrelevant to the analysis. The

same applies here. Because the qualifications for relief indisputably turn on a statutory standard, this consideration also points to finality.

### **3. The Matter Does Not Involve Merely Minor Details.**

Westville concedes that the matter does not involve merely minor details. *See* Appellee.Br. at 15-17. But once again, Westville contends that an order approving a disclosure statement is not final because “the details” may be revisited at confirmation. *See id.* (citing cases for the proposition the court may revisit the adequacy of a disclosure statement at plan confirmation). As reiterated above, whether a substantive legal issue may be revisited at confirmation is immaterial. That fact that the matter indisputably involves more than minor details further supports the finality of the order in question.

### **4. Textual Clues Support Appealability.**

Westville does not dispute that § 1125(d) allows regulatory agency officials to appear and be heard as part of the disclosure statement approval process, but explicitly states that “[s]uch agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.” 11 U.S.C. § 1125(d). Westville likewise does not dispute that there would be no point to this statutory provision if appeals of orders approving disclosure statements were not authorized. *See In re Snyder*, 56 B.R. 1007, 1010 (N.D. Ind. 1986) (the implication from this provision is that “parties in interest can appeal an approval of a disclosure statement;

if no one could so appeal, it makes little sense to specially point out that an agency or agency official cannot appeal.”).

Likewise, Westville does not deny that Fed. R. Bankr. P. 8002(d)(2)(E) provides that, although a court may extend the time to appeal various orders in a bankruptcy case, the court may not do so for an order that “approves a disclosure statement under § 1125 of the Code.” Fed. R. Bankr. P. 8002(d)(2)(E). Further, Westville does not dispute the explanation for this provision as set forth in the Advisory Committee Note to the Rule (as amended in 1997):

The subdivision is amended further to prohibit any extension of time to file a notice of appeal . . . if the order appealed from . . . approves a disclosure statement . . . . These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original appeal period under Rule 8002(a) and (b) [setting the deadline for filing a notice of appeal].

Adv. Comm. Note, Fed. R. Bankr. P. 8002. Nor does Westville contest that there would be no point to this rule (or the Advisory Committee explanation) if immediate appeals of decisions approving disclosure statements were not authorized.

Instead, Westville makes a different point: unlike motions for relief from stay, “which are designated as ‘core’ procedural units in § 157(b)(2)(G) for the purposes of establishing jurisdiction in the bankruptcy courts, no such specific designation is made for orders approving disclosure statements.” Appellee.Br. at 17 (citing 28 U.S.C. § 157(b)(2)(G)). In contrast, Westville observes that “there is a special designation for ‘confirmations of plans’” as a distinct category of core proceeding.

*Id.* (citing 28 U.S.C. § 157(b)(2)(L)). Westville contends that the statutory designation of plan confirmation as a core proceeding supports the inference that the approval of disclosure statements is part of the confirmation process. *Id.*

But no such inference is warranted. Westville’s theory might have some currency if § 157(b)(2)(L) lumped together in one discrete category “approvals of disclosure statements and confirmations of a plans,” but § 157(b)(2)(L) mentions only “confirmations of plans.” A separate provision, § 157(b)(2)(A), designates as core proceedings “matters concerning the administration of the estate,” which easily includes the approval of disclosure statements. 28 U.S.C. § 157(b)(2)(A). Thus, the jurisdictional provision actually supports the opposite inference—that approvals of disclosure statements and confirmations of plan are distinct. In sum, textual clues properly point to the finality of the order below.

### **5. An Immediate Appeal Would Advance Finality.**

Finally, an immediate appeal of the district court’s decision resolving whether the plan is patently unconfirmability would advance the “finality principle” articulated in *Ritzen* because it would “avoid, rather than cause, ‘delays and inefficiencies.’” *Ritzen*, 589 U.S. at 46 (quoting *Bullard v. Blue Hills*, 575 U.S. 496, 504 (2015)). That is so because, as noted, the whole point of the patently unconfirmable inquiry is to avoid the abusive waste associated with confirmation proceedings predicated on a plan that simply cannot be confirmed.

Westville does not dispute this point. Rather, it contends that the better course is to wait until the conclusion of the confirmation process because an immediate appeal might “delay the proceeding and may ultimately be unnecessary,” for example, if the court ultimately denies confirmation of the plan. Appellee.Br. at 17. But that is exactly the argument the Supreme Court rejected in *Ritzen*. As in *Ritzen*, delaying an appeal of the decision below raises the specter of the “untoward consequence” of requiring the “bankruptcy court to unravel later adjudications rendered in reliance on an earlier decision.” 589 U.S. at 39. Collectively, each of the factors the Supreme Court relied upon in conducting its analysis in *Ritzen* point decisively toward finality in this case.

**6. Pre-*Ritzen* Case Law From Other Circuits Is Not Determinative.**

Equally inapposite, the two out-of-circuit appellate cases on which Westville principally relies—*Texas Extrusion*, 844 F.2d 1142 and *Perez*, 30 F.3d 1209—do not involve direct appeals of orders approving disclosure statements. They involve appeals from orders confirming plans of reorganization. Moreover, in *Texas Extrusion*, the Fifth Circuit expressly stated that “[w]e, of course, *are not holding* that a party in interest cannot appeal an order approving a disclosure statement immediately upon that order’s entry. . . .” *Texas Extrusion*, 844 F.2d at 1156 (emphasis added). Rather, the court concluded only “that the party does not lose its right to appeal the disclosure statement if it fails to file an immediate appeal.” *Id.*

This hardly supports Westville’s conclusion that the decision below cannot be appealed.

Likewise, Westville ignores the fact that the Fifth Circuit’s analysis in *Texas Extrusion* differs markedly from, and is inconsistent with, the Supreme Court’s analysis in *Ritzen*, as well as the First Circuit’s analysis in *In re Saco Loc. Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983). In *Texas Extrusion*, the Fifth Circuit stated that “[t]he order sought to be appealed must ‘conclusively determine substantive rights of parties’ in order to be considered final.” 844 F.2d at 1155 (citation omitted). In other words, the Fifth Circuit focused on the resolution of substantive issues, not procedural sequence. But in *Ritzen*, the Supreme Court held the opposite: the fact that the relevant substantive issue—the debtor’s “good faith”—was not finally resolved and could be revisited later was not dispositive—indeed, the Court held that it “does not matter.” 589 U.S. at 46. The Fifth Circuit reasoned that, in order to be final, “the order must constitute ‘a final determination of the rights of the parties to secure the relief they seek in this suit.’” *Texas Extrusion*, 844 F.2d at 1155 (citations omitted). But that is not the test.

Just like the Supreme Court’s analysis in *Ritzen*, the First Circuit in *Saco* focused on whether the order in question resolves a particular type of bankruptcy “proceeding,” and “conclusively determines a *separable* dispute . . . .” 711 F.2d at 445-46 (emphasis added)—separable in the sense of a dispute to be resolved in *that*

particular proceeding even though, as the Supreme Court emphasized in *Ritzen*, the same issue may be considered anew as part of yet another discrete proceeding (*e.g.*, confirmation of a plan). That is exactly the situation here. And for the same reasons, the decision below is properly final.

**B. The District Court’s Order Resolving Whether The Plan Is Patently Unconfirmable Is An Appealable Collateral Order.**

Westville’s evaluation of the collateral order doctrine is likewise fundamentally flawed. Westville first contends that the decision below does not satisfy the first requirement of the doctrine—that the order must conclusively determine the disputed question—because the district court’s “order” is “not ‘the final word on the subject addressed.’” Appellee.Br. at 21 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983)). But that is incorrect.

The relevant issue is whether approval of the Disclosure Statement should have been denied because the Plan is patently unconfirmable. This is important because, if the Plan is patently unconfirmable, the Plan should not proceed to confirmation. That is so because proceeding to confirmation on a patently unconfirmable plan is a form of abuse of process.

Quite clearly the order in this case *did* resolve the disputed question—whether the Disclosure Statement should not have been approved because of the Plan’s patent

unconfirmability. After all, the Disclosure Statement was approved. The order was thus the final word on precisely what matters: that the parties were required to proceed to confirmation of a doomed plan, with all the wasteful expense that such entails.

Regarding the second prong of the analysis—whether the order resolved an issue separable from the merits—Westville contends that this requirement is not satisfied because “whether the plan will be confirmed has yet to be decided,” including whether confirmation should be denied owing to the issues the Ad Hoc Group has raised that preclude its confirmation. Appellee.Br. at 22. But Westville’s argument again misidentifies the relevant issue. The relevant issue involves whether confirmation may be avoided altogether because, under the circumstances, proceeding to confirmation amounts to an abuse of process, implicating unjustifiable and non-remediable costs (all at the expense of Westville’s creditors). *That* issue is properly separable.

As demonstrated in Appellants’ brief, it is akin to the question addressed in *Cohen*, 337 U.S. 541, from which the collateral order doctrine derives. *See* Appellants.Br. at 30-31. In a nutshell, *Cohen* held that an order requiring a party to bear the costs of proceeding with litigation qualified as a collateral order. So, too, in this instance. Moreover, the issue here is no less important than the question addressed in *Cohen*, or whether a litigant may proceed using a pseudonym, as

addressed in *Doe*. *See Doe*, 46 F.4th at 65-66 (order determining whether litigant may proceed with litigation using a pseudonym conclusively determined the disputed question and was an appealable collateral order).

Westville next contends that the doctrine does not apply because the issue is effectively reviewable following completion of the confirmation process. Appellee.Br. at 22-23. But that misses the point by ignoring the harm associated with proceeding with what amounts to an abuse of process. This cannot be undone at a later date in any satisfactory way, let alone in the way that avoids the very harm the patent unconfirmability standard was specifically designed to prevent in the first place.

Westville is also being a bit disingenuous here. If the Plan is confirmed, Westville undoubtedly will move to implement the Plan as quickly as possible to foreclose any additional appellate review owing to the invocation of the doctrine of “equitable mootness.” *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 987 F.3d 173 (1st Cir. 2021) (denying appeal of confirmed plan on grounds of equitable mootness). This also should be borne in mind.

The material facts necessary to resolve this appeal are undisputed and self-evident. The Plan discriminates against the Ad Hoc Group by providing them, without their consent, less favorable treatment than other claimants in Class 3. *See Appellants.Br.* at 33-34. That is all the factual basis necessary to resolve the appeal.

As more particularly addressed in the Ad Hoc Groups' brief, the decision below qualifies as a collateral order. *See* Appellants.Br. at 29-31. Accordingly, this Court has jurisdiction to hear this appeal.

## **II. THE PLAN IS PATENTLY UNCONFIRMABLE.**

Westville concedes that “[a] plan is patently unconfirmable where (1) confirmation ‘defects [cannot] be overcome by creditor voting results’ and (2) those defects ‘concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.’” Appellee.Br at 23 (quoting *In re Am. Cap. Equip., LLC*, 688 F.3d 145, 154-55 (3d Cir. 2012) (citation omitted)); *see also In re E. Me. Elec. Co-op., Inc.*, 125 B.R. at 333 (noting that “undertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never legally be confirmed.”). As explained in the Ad Hoc Group’s opening brief, these criteria are satisfied here. *See* Appellants.Br. at 32-40.

Westville contends nonetheless that the Ad Hoc Group cannot meet the second prong of the analysis on the theory that, “as the District Court determined, whether the classification scheme violates the Bankruptcy Code requires a more fully developed factual record.” Appellee.Br. at 24. But this ignores the fact that the only reason behind the need for “a more developed factual record” was to support a legally erroneous proposition—that the discrimination at issue is permissible if the

non-settling creditors had been given the *opportunity* to settle for more favorable treatment. *See* ECF 4041 at 12 (district court stating that it could not “determine . . . whether holders of claims in Class 3 will ultimately be treated differently without equal opportunity” and “the possibility of incompatibility with section 1123(a)(4) does not render the Plan patently unconfirmable.”).

As explained in the Ad Hoc Group’s opening brief, there is no such thing as an “opportunity to settle” defense to the kinds of defects that plague the Plan in this case. *See* Appellants.Br. at 32-42. That is so because, as the Supreme Court has explained and the relevant provisions of the Bankruptcy Code direct, a creditor cannot agree to settle for *better* treatment than others in the creditors’ class. Rather, all creditors in the class must receive equal treatment, except for those who expressly agree to *less* favorable treatment. Because there is no such thing as an “opportunity to settle” defense to the kind of discriminatory treatment at issue here, Westville’s argument is simply irrelevant.

### **CONCLUSION**

For the foregoing reasons, as well as those set forth in Appellants’ opening brief, the Court should reverse the district court’s order approving the Disclosure Statement and direct that the Disclosure Statement may not be approved.

Dated: June 21, 2024

Respectfully submitted,

G. Eric Brunstad, Jr.  
DECHERT LLP  
1095 Avenue of the Americas  
New York, NY 10036  
Phone: (212) 698-3500  
Facsimile: (212) 698-3599  
eric.brunstad@dechert.com

*Attorneys for Objectors-Appellants  
The Westville Ad Hoc Group*

## CERTIFICATION

This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,089 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word, typeface Times New Roman, 14-point type.

/s/G. Eric Brunstad, Jr.  
Attorney for Objectors-Appellants  
Dated: June 21, 2024

I hereby certify that on June 21, 2024, I electronically filed the foregoing document with the United States Court of Appeals for the Thirteenth Circuit by using the CM/ECF system, which will send a notice of filing to all registered users.

/s/G. Eric Brunstad, Jr.  
Attorney for Objectors-Appellants

# **APPENDIX 4**

**The Art of Litigating Bankruptcy Appeals: Outline of Practice Points, G. Eric Brunstad, Jr., Yale Law School and Dechert LLP**

**THE ART OF LITIGATING BANKRUPTCY APPEALS:  
OUTLINE OF PRACTICE POINTS**

**G. Eric Brunstad, Jr.  
Yale Law School  
Dechert LLP**

This outline consists of three parts. The first contrasts some of the major differences between litigating cases in the bankruptcy courts and prosecuting bankruptcy appeals. The second part offers some commentary on how to structure an effective appellate argument and draft an effective appellate brief. The third part outlines the functions, challenges, and pitfalls of appellate oral advocacy.

I. Context is King: Understanding the Roles and Functions of the Appellate Courts

A. Understand your audience. The bankruptcy courts are specialized courts. In contrast, the district and circuit courts, as well as the U.S. Supreme Court, are all courts of general jurisdiction, and this difference has significant ramifications for the prosecution of bankruptcy appeals.

First, appellate judges are not often immersed in the substance and practice of bankruptcy law, and often express frustration in resolving bankruptcy issues. As one circuit judge has remarked: “These bankruptcy cases give us a great deal of difficulty. They are prosecuted by expert lawyers before expert judges, and then appealed to us novices.” Appellate judges often perceive bankruptcy issues as fundamentally arcane. In preparing for any bankruptcy appeal, counsel should bear this in mind, and think carefully about how best to present and explain the relevant issues so as not to add to the frustration.

Of particular importance is the need to pay careful attention to the idiom of bankruptcy law and its relative inaccessibility to most appellate judges and their law clerks. Before writing the briefs and preparing for argument, it is critical to spend some time thinking about how best to explain concepts like “adequate protection” and “indubitable equivalent” if these are relevant to the appeal. It is also helpful to think about how much of the bankruptcy process should be explained by way of background. It is easy for bankruptcy lawyers to take for granted that the audience understands what “property of the estate” is, or how the “automatic stay” functions. This can be a mistake. Try the following approach:

Werner Heisenberg was comfortable explaining complex principles of theoretical physics, like his uncertainty principle, using short-hand mathematical and scientific concepts. His mentor, Niels Bohr, however, insisted that he be able to explain things in terms that a non physicist could understand. The same concept applies in preparing a bankruptcy appeal.

Second, the appellate courts have “daily diets” that are quite different from those of the bankruptcy courts. A bankruptcy judge’s typical “diet” consists of a steady stream of financial woe in which success is often measured in terms of jobs saved, debtors reorganized, discharges granted,

and value preserved. On the other hand, the “daily diet” of the average appellate judge (which may include a heavy docket of criminal matters) is quite different, and the judge’s general perspective on how to address cases and controversies is shaped accordingly.

For example, bankruptcy judges are often concerned with advancing the policies of the Bankruptcy Code as they perceive them. In contrast, many appellate judges never acquire much of a sense of comfort that they actually understand the policies of the Bankruptcy Code, let alone how they relate to the particular case before them.

Similarly, bankruptcy judges often perceive their role as essentially equitable in nature. In contrast, equity is not particularly in vogue in the federal courts generally, and most appellate judges are far more cautious about invoking equity as an overt basis of decision-making—at least the kind of equity that typically animates proceedings in the bankruptcy courts.

Not surprisingly, appellate judges are more likely to emphasize different doctrinal tools in interpreting the Bankruptcy Code. This helps explain an increase in “plain meaning” interpretations as cases move up the appellate ladder. The upshot is that the particular equitable, policy, or practice-based argument that may find such currency in the bankruptcy court may be a much harder sell on appeal.

Third, the institutional focus of the appellate courts, particularly the courts of appeals, is quite different from that of the bankruptcy courts. The bankruptcy judge has to decide cases, and often must do so quickly—on occasion more quickly than he or she would like. In addition, the bankruptcy judge also understands that if he or she makes a mistake, there is a higher court that can fix things. The judges of the courts of appeals, on the other hand, are often the end of the line. Not only do few cases go any farther, but the decisions of the circuit courts have precedential effect over all the lower courts within their respective jurisdictions. Accordingly, the circuit judges often place a greater emphasis on understanding how a particular result will add or detract from the larger jurisprudence, and appellate presentations should be tailored accordingly.

B. Understand the relevant standards of appellate review. In general, appellate courts review factual determinations under the clearly erroneous standard. In contrast, questions of law are subject to de novo review. In addition, decisions to grant discretionary relief based on the particular facts is subject to review for abuse of discretion. With regard to issues of law, the question becomes: did the court below apply the correct legal standard, which is freely reviewable. With regard to factual findings, the question often becomes: are they supported in the record. If so, they are not likely to be disturbed on appeal unless the bankruptcy judge clearly missed the boat. Assuming that the bankruptcy court applied the correct legal standard to the relevant facts, and the relevant legal standard permits some leeway in applying the law to those facts (e.g., in considering whether to grant a request to extend plan exclusivity), the question becomes: did the court abuse its discretion in making its decision. This standard is highly deferential, and is not likely to be overturned on appeal unless the appellate court is convinced that the bankruptcy court made an obviously incorrect choice.

A common pitfall for trial lawyers who both prosecute a matter in the bankruptcy court and then prosecute the same matter on appeal is the tendency to focus on the details of the lower court proceedings at the expense of the legal issues that are more likely to attract the attention of the appellate judges. In most instances, the bankruptcy court's factual findings are a non-issue, and the real focus should be on analysis of the legal principles at stake in the case.

## II. Structuring the Arguments and Writing the Briefs

A. Pay attention to the story. In writing the briefs and preparing for argument, remember that the task is essentially that of crafting a story that is being told at two critical levels. First, there is the story of the particular case before the court—the human drama that is the foundation of the controversy. Second, there is the story of the law—the story behind the legal principle that the court is being asked to resolve. To be effective, both must be presented in an interesting and compelling way.

B. Think Hemingway, not Faulkner. Simply your points, and strip down your prose. Distill the most important facets of the story, and avoid layering the presentation with too many issues, too many arguments, and too many adjectives. Every practitioner has seen briefs that take the “kitchen sink” approach by presenting every argument that the lawyer could think of. This approach only demonstrates a lack of focus and direction, and inevitably undermines the lawyer's credibility.

C. Organize the materials from the court's perspective. A good organization anticipates the questions that the reader will have, and anticipates what the reader really wants to know. It has a good logical and narrative flow.

D. Structure the decision-making process. Judges like to pull away the different strands of the argument to see what your position is really based upon. Make it easy and logical for the judge to do this in a way that allows your main points to shine through.

E. Define the issues narrowly. Avoid asking the court to overturn an entire area of law. Judges have a natural reluctance to take large leaps. Identify issues that the court need not, decide if the court rules in your favor on preliminary matters.

F. Prioritize. Focus on the three or four most critical points and build your main arguments around them.

G. Pay careful attention to analogies. Lawyers tend to argue by analogy. Pure logic and statistics tend to leave a colder impression than a powerful analogy or anecdote. Certainly logical reasoning is a critical part of sound lawyering, but it is the story and the analogy that really make the point. Good analogies can be enormously powerful. Bad ones, however, leave the argument open to attack.

H. Explain why the court should rule in favor of your client. Do not simply recite what the cases or statutes say, and leave it to the court to “do justice” in a vacuum. Many briefs lack analysis, and this can be fatal.

I. Test your arguments from different perspectives. Have others review your arguments for weaknesses and potential improvements. Consider running things by a nonlawyer, which can help sharpen the “justice” aspect of your presentation.

Harold Koh: “The case, in the end, must have a common-sense point, a justice-based appeal. My mother, who is a sociologist, once said to me: ‘These judges have never met you. Why don’t you tell me what you’re going to argue, because if I’m not persuaded, then why should they be?’ (Unfortunately, after I laid out my position, she still wasn’t persuaded!).”

J. Avoid excessive citations and quotations. Some briefs contain “wall-to-wall” quotations, followed by long string cites. This style is not very effective. Be judicious in selecting quotes and citing authority.

K. Avoid vicious hyperbole. Just because one side says the other side’s argument is “outrageous” does not make it so. More important, by saying so, the lawyer insults the reader’s intelligence. If the other side’s argument is really outrageous, the reader will be able to figure that out.

L. Avoid sarcasm and ad hominem remarks. Attack the issues, not the other lawyers, or the judge below.

M. Avoid pandering. Phrases such as “learned counsel” or “the esteemed, honorable court below” sound phony and detract from the presentation.

N. Avoid legalese. Phrases such as “beyond peradventure” and “sine qua non” are tiring and obscure. Similarly, terms such as “obligor” and “obligee” detract from the story by depersonalizing the parties. Refer instead to the actual people or institutions involved. In addition, avoid phrases like “clearly wrong” or “clearly right.” A lawyer once remarked at argument in the Supreme Court that the resolution of the case was perfectly clear, prompting the Chief Justice to interrupt with the comment that, if the resolution were so obvious, then why were they all there.

O. Front-load the argument. The judges should be able to understand what the issues are from the outset of the presentation. It is important to get to the point early, preferably within the first few pages. This is the best opportunity to hook the court on your position. Burying the essential points somewhere in the brief is far less effective.

P. Do not misquote authority, or miscite the record. This only damages your credibility.

Q. Take care in assembling the appendix of the record. Include in the appendix critical excerpts from the record that the court should have handy in resolving your case. If possible, avoid the multiple “phone book” approach, which insists on including every document from the record.

### III. Oral Argument.

A. Oral argument is important. Indeed, it can be a critical part of the process. In general, it is a chance to answer questions and either cement the court’s views, or cast doubt on any tentative conclusions.

Justice O’Connor: “The lawyer can strengthen a point beyond that which was evident from the brief and give us a lot more confidence in our tentative opinion... [or] a lawyer can shake [the justice’s] confidence. It doesn’t happen in a majority of cases, but often enough that it would encourage a lawyer to think, ‘Yes, oral argument is important.’”

Justice Scalia: “I use [oral argument] to give counsel his or her best shot at meeting my major difficulty with that side of the case. ‘Here’s what’s preventing me from going along with you. If you can show why that’s wrong, you have me.’”

B. Preparation is critical to a successful argument. Know the case thoroughly: the facts, the record, the parties, the proceedings, the briefs, the important cases, the statutes, and the arguments on all sides. If a judge asks a question about the record, be prepared to answer and avoid responding: “I was not the lawyer who tried this case.”

C. Make wise use of your time. Avoid attempting to uncover and memorize every detail about even the most trivial precedent cited in your brief. Target the most important cases and principles, and focus on understanding and organizing them to make the most persuasive presentation.

D. Develop a theme for the argument. Tighten your focus and be able to explain your key points in three or four short sentences. It is often not possible to make more than a few good legal points in the limited time available for oral argument. Develop your theme and, if possible, make use of it in answering questions.

E. Practice with several moot court sessions. The conventional wisdom is that, in preparing for argument, counsel should do what feels comfortable. But forget the conventional advice if following it means you would avoid doing moot court sessions. You must practice with moot courts. If possible, videotape the sessions (if you can bear watching yourself argue). In practicing your argument, pay particular attention to the following:

1. Try to eliminate distracting ways of arguing or answering questions, such as distracting hand motions;

2. Focus on which questions are the most frequent, and which responses are working or not working;
3. Consider whether is it taking you too long to get to your point.

In addition, consider different panels of moot judges:

1. Those who know your case. They can help you get the details right.
2. Those who know nothing about your case, but who are good lawyers. They can help you get the big picture right.
3. Other bankruptcy lawyers. They can help you hone your bankruptcy arguments.
4. Generalists. They can help ensure that you explain the concepts adequately.
5. Your mother. At the very least, she will be flattered that you asked.

F. Anticipate the questions. Understand the strengths and weaknesses of your arguments and prepare to address the weaknesses, not simply hammer away at strengths. At the very least, you should be able to answer the following questions with short, common-sense responses:

1. What is the case about?
2. How would the legal rule that you advocate work in practice?
3. How would the particular result that you seek affect future cases?
4. Does the court have the authority to grant the requested relief?
5. Why should the court grant the requested relief?

G. Focus on your opening. This may be only chance that you have to get in one or two uninterrupted lines. Use the opportunity to highlight the most important points. Hook the judges from the beginning and explain why you should win.

H. Avoid obscure reasoning. Avoid presenting elaborate, multi-step proofs to support your position. For example, other bankruptcy lawyers may well appreciate an elaborate argument drawn from the interplay between a section of the Bankruptcy Code and various provisions of the procedural rules. Oral argument, however, is not often the place for obscure complexity.

I. Prepare to concede points that are indefensible. If pressed, make concessions that should be made. Sticking to an indefensible position only undermines your credibility. If you

must make a concession, however, explain why the concession does not mean you lose. Do not concede a point unless you agree that it should be conceded.

J. Be respectful yet conversational. As one commentator has explained: “Use the tone that you would use when you’re initiating conversation with an elderly relative from whom you seek a large bequest.” Be informal and conversational without being familiar. Treat the argument like a seminar, not a lecture.

Justice Rhenquist: “[The ‘All American oral advocate’] will recognize that there is an element of drama in oral argument. . . . But she also realizes that her spoken lines must have substantive legal meaning. . . She has a theme and a plan for her oral argument but is quite willing to pause and listen carefully to questions. . . . She avoids table pounding and other frustrating mannerisms, but she realizes equally well that an oral argument on behalf of one’s client requires controlled enthusiasm and an impression of *fin de siecle* ennui.”

K. Answer the questions. Listen carefully and do not be evasive. The judges’ questions present an opportunity to understand what it is that the judges care about and what it is that is bothering them. Make sure you understand the question before giving an answer, and try to answer the question by first stating “Yes,” or “No,” or “I do not know,” or “It depends.” If a judge asks a question, avoid saying things like “I’ll get to that later,” or “that’s irrelevant.” Do not try to bluff your way through an answer. Lawyers often do not like to admit that they do not know an answer. But it is better to respond that you do not know the answer than to fake a response.

Justice White: “All of us on the bench [are] working on the case, trying to decide it . . . [The lawyers] think we are there just to learn about the case. Well, we are learning, but we are trying to decide it, too. [I]t is then that all of us . . . are working on the case together, having read the briefs and anticipating that [we] will have to vote very soon and attempting to clarify [our] own thinking and perhaps that of [our] colleagues. Consequently, we treat lawyers as a resource rather than as orators who should be heard out according to their own desires.”

L. Answer hypothetical questions carefully. Listen carefully, and respond succinctly and directly. If the hypothetical question is not your case, answer it anyway, and then explain why the hypothetical is distinguishable. Avoid answering with responses like “but that’s not our case” or “that’s not the facts here.”

M. Return to your theme. Use your key points in responding to questions and redirect the argument wherever possible. For example, if the case involves the applicability of a particular section of the Bankruptcy Code, you might develop the theme that “there are three circumstances that must be present, A, B, and C, for the statute to apply.” In responding to a hypothetical question, you might explain that “although the answer to your question is yes, the hypothetical omits one of the key circumstances, C, so in that case the statute would not apply.”

N. Listen to the judges' comments and concerns and be flexible. Prepare your argument in interchangeable parts. If the court wishes to proceed down a particular path, be prepared to go down that path, even though you would prefer to address that topic later. If a judge begins by making it clear that one of your arguments is dead wrong, and you have another good argument that gets you to the same point, consider focusing on the alternative argument rather than battling with the judge and wasting your time

O. Be familiar with the court environment. Unless you appear regularly in the particular court, view some arguments there in advance and get a sense of the lay of the land.

P. Know something about the judges. Before argument, try to get a sense of what the particular judges are like during argument. Review relevant opinions and speak to others who have experience with the judges assigned to your case. You may also consult various on-line resources, such as the almanac of the federal judiciary.

Q. Pay attention to organizational mechanics. Try the Winston Churchill approach. During the war, Churchill required reports to be distilled to a single page. Similarly, outline your argument on a single sheet of paper (making sure that you can read the type). Underneath this single sheet you may have your entire argument written out on several pages for reference in case you get lost at some point. **BUT DO NOT READ YOUR ARGUMENT.** Tab your copy of the appendix and briefs, so that you can go directly to particular references if necessary.

Harold Koh: "The night before I argued my first case at the Supreme Court, the phone rang at my hotel. The voice said 'Harold, this is Larry Tribe. I just wanted to tell you that the podium at the Supreme Court is exactly thirteen inches by twenty inches. This means that you can't put a notebook there, because if you turn the page, it will hit the microphone. The best way to deal with it is to prepare your outline on two sheets of paper, cut to the exact size, and lay them flat. Now, first of all, this showed me that Larry Tribe is quite a perfectionist. But second, it showed me that at oral argument, it's imperative that you not leave anything to chance. You must think in advance about all of these mechanical things; so-that you don't get into mistakes or fumble around in those precious moments that you're actually standing up at the podium."

R. Let yourself relax. While standing at the podium, allow yourself to relax and be drawn into the conversation with the judges. For the time that you are there, assume that the court is truly interested in what you have to say (which is most often the case).

S. Be enthusiastic about your case. If you have no passion for your case, it is unlikely that the court will either. Avoid presenting your position in a monotone. Be sincerely enthusiastic, but do not go overboard.

T. Get plenty of sleep. The night before the argument is not the time to stay up and cram until the wee hours of the morning. Arrive at the court refreshed and focused.

U. Avoid humor. Some folks have a rare gift for humor and can inject it naturally and effectively into their presentations. Most, however, are not comedians, and attempts at humor for those without the natural gift often fall flat. Avoid needless embarrassment and do not try to inject contrived humor into the proceedings.

V. Avoid speaking too quickly. Some lawyers tend to speak quickly, particularly when they fear that they will not have enough time to make all their points. This is often counterproductive. It is better to speak slowly and have your points understood than speak too quickly and leave the judges behind.

W. Maintain eye contact. Look directly at the judge to whom you are speaking. Staring up at the ceiling, out the window, or at the clock over the bench is distracting and undermines the effectiveness of the presentation.

X. Avoid filling up time just to fill up time. If you have made your points and the court has no further questions, do not keep talking simply to talk. Apart from annoying the judges, you run the risk of stumbling into an issue that suddenly careens out of control and undermines your case. It is best to avoid snatching defeat from the jaws of victory.

Y. Have the court read along with you. If your argument centers on a particular statutory text, have the judges read it along with you if that helps your argument. This can provide a useful way to focus the court's attention. The same applies to other critical references in the record.

Z. Be aware of how much time is left. Be sensitive to when you are nearing the end of your allotted time. If you have not yet made your "must make" points, make them now.

AA. Reiterate your key points in closing. Use your closing to reiterate your key points. You should be able to state them succinctly in a few short sentences.

BB. Listen carefully to the previous argument. If you are counsel for the appellee, listen to the points that opposing counsel is making and whether he or she is making any headway. Also pay attention to the judges' reactions and what seems persuasive. Note the points that require a response and be prepared to address those points. The same applies to the appellant's rebuttal argument.

CC. Be flexible in responding to the previous argument. If you are counsel for the appellee, you should prepare your points in advance based on how you believe the argument will proceed. But you should also be prepared to ditch your prepared remarks and proceed right to the heart of the controversy and address what interests the judges. If the judges seem focused on a particular issue that you may turn to your advantage, you should consider leading with that issue. Take your cue from the judges. If your opponent has been evasive in answering a particular question, you may wish to answer the question directly if doing so assists your position.

DD. Expect to be limited to the time that you are allotted. Some courts (e.g., the Supreme Court), are very strict about enforcing time limits. Other courts, however, will permit counsel to exceed the limit if the argument is going somewhere. Courts impose time limits to force counsel to think about what is really important in the case, and get to the point quickly. Do not assume that the court will allow extra time.

# **APPENDIX 5**

## **Biographies of the Moderator and the Panelists**

# **National Conference of Bankruptcy Judges**

## **CLLA Frank Koger Memorial Education Program**

Thursday September 19, 2024  
Seattle, Washington

### **“To Appeal or Not to Appeal” – The Jurisdiction of an Appellate Court to Hear a Case After *Ritzen***

#### **BIOGRAPHIES**

##### **Moderator:**

##### **Judith Greenstone Miller, Senior Counsel, Taft Stettinius & Hollister, LLP, Southfield, MI**

Judith Greenstone Miller’s practice at Taft focuses on bankruptcy, insolvency, creditors’ rights and commercial litigation. Her practice involves representing debtors, secured and unsecured creditors, creditors’ committees, and trustees in bankruptcy proceedings, primarily involving Chapter 11 reorganizations. Judy also represents parties in litigation in complex commercial disputes.

Judy is a member of the American Bar Association (Co-Chair, Professional Ethics Subcommittee of the Business Bankruptcy Committee of the Business Law Section), the American Bankruptcy Institute, the Commercial Law League of America (NCBJ Committee), the Federal Bar Association for the Eastern District of Michigan (Bankruptcy Court Advisory Committee and the Mediation Panel for the United States Bankruptcy Court for the Eastern District of Michigan), and the State Bar of Michigan (Co-Chair, Debtor Creditor Rights Committee of the Business Law Section; Member; Receivership Committee, Receivership Rules Committee and the Michigan Assignment of Rents Committee).

Judy has testified numerous times on pending bankruptcy legislation before the National Bankruptcy Review Commission, the Judiciary Committees of the United States House of Representatives, and the United States Senate. Judy is a frequent lecturer nationally and has authored and co-authored many articles on bankruptcy law and procedure, revised Article 9 of the Uniform Commercial Code, and state law creditor rights issues, including receiverships and domestic asset protection trusts.

Ms. Miller has been recognized by (i) The Michigan Consumer Bankruptcy Association in December (2000) as a local practitioner that is a nationally recognized bankruptcy leader; (ii) Michigan Super Lawyer from 2006 through 2023 as an honoree; (iii) Top Rated Lawyer in Commercial Litigation, American Lawyer Media and Martindale-Hubbell (2013); (iv) *Best Lawyers in America* (2020-2023) as an honoree; and (v) Top Women Attorneys in Michigan, *HOOR Detroit* Magazine (2015) as one of the Top Women Attorneys in Michigan.

## **Panelists:**

### **Honorable Morgan Christen, US Court of Appeals for the 9<sup>th</sup> Circuit, Anchorage, AK**

Judge Morgan Christen was appointed to serve on the United States Court of Appeals for the Ninth Circuit in January of 2012. She currently serves on the Ninth Circuit's Judicial Council, the Ninth Circuit's Executive Committee, and the Pacific Island Committee. She chairs the Court-Council Committee on Bankruptcy Appointments, as well as the Cameras in the Courtroom Committee. In October 2019, Judge Christen began a three-year term on the Judicial Conference Committee on Federal-State Jurisdiction. Judge Christen currently serves on the Ninth Judicial Circuit Historical Society Advisory Board. She chaired the Rhodes Scholarship Selection Committee for District 14 from 2017 to 2020.

Prior to her appointment to the Ninth Circuit, Judge Christen served as a justice on the Alaska Supreme Court. Judge Christen was born and raised in Washington, and attended college in England, Switzerland, and the People's Republic of China. She earned a B.A. degree from the University of Washington in International Studies and a J.D. degree from Golden Gate University School of Law. After law school, Judge Christen joined Preston Gates & Ellis (now K&L Gates) where she practiced civil litigation. Judge Christen was appointed to the Alaska Superior Court in 2001 and served as Presiding Judge of Alaska's Third Judicial District from 2005-2009.

### **Honorable Eric D. Miller, US Court of Appeals for the 9<sup>th</sup> Circuit, Seattle, WA**

Judge Miller is a United States Circuit Judge for the Ninth Circuit. He was appointed on March 4, 2019. His chambers are in Seattle, Washington. Prior to his appointment, Judge Miller was in private practice in Seattle, where he also served as a part-time lecturer at the University of Washington School of Law. He previously served as an Assistant to the Solicitor General of the United States, as Deputy General Counsel of the Federal Communications Commission, as an attorney on the Appellate Staff of the Civil Division of the U.S. Department of Justice, and as an attorney-adviser in the Office of Legal Counsel of the U.S. Department of Justice.

Judge Miller received his A.B. from Harvard University and his J.D. from the University of Chicago Law School. Following law school, he served as a law clerk to the Honorable Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and the Honorable Clarence Thomas of the Supreme Court of the United States.

### **Honorable Robert J. Faris, US Bankruptcy Court, District of Hawaii, Honolulu, HI**

Judge Faris is the U.S. Bankruptcy Judge for the District of Hawaii. He received a B.A. from Reed College in 1980 and his J.D. from the Boalt Hall School of Law, University of California, Berkeley, in 1983. From 1983 until 2002, he practiced with a Honolulu law firm. His practice emphasized business restructuring, insolvency, and commercial litigation. He became a bankruptcy judge in February 2002 and was appointed to the Bankruptcy Appellate Panel of the Ninth Circuit in August 2015. He is a member of the American Bankruptcy Institute, the National Conference of Bankruptcy Judges, and the American College of Bankruptcy.

## **G. Eric Brunstad, Jr., Dechert, LLP, Hartford, CT**

Eric is a partner at Dechert, LLP. He has argued 11 cases in the U.S. Supreme Court, including matters involving bankruptcy, the First Amendment, fee-shifting, taxation, the Commerce Clause, statutory interpretation, jurisdiction, and arbitration. His most recent argument was on behalf of the respondent in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, Case No. 21-1270 (2023). In addition to the cases he has argued, Eric has worked on over 70 other matters in the Supreme Court. He has also argued and briefed numerous cases in most of the federal courts of appeals, and has argued two *en banc* matters in the Third and Eighth Circuits. In addition to his practice, he is a Visiting Lecturer in Law at the Yale Law School, a Professor (Adjunct) of Law at New York University School of Law, and an Adjunct Professor at Boston College Law School, teaching courses on secured transactions, bankruptcy, advanced business reorganizations, argument and reason, federal jurisdiction, poetic and legal interpretation, commercial transactions, and international insolvency law. He began teaching at Yale in 1990 and has also taught at the Harvard Law School and Georgetown University Law Center. He is a 2021 recipient of a Yale Law School Teacher of the Year award. He is also the 2019 recipient of the American Bar Association Business Law Section National Public Service Award for his pro bono work, and the 2019 recipient of the Commercial Law League's Lawrence P. King award for excellence.

### Education

Yale Law School, J.S.D., 2014; LL.M., 2011

University of Michigan Law School, J.D., 1986; Associate Editor and Contributing Editor of the *Michigan Law Review*

Connecticut College, BA, *magna cum laude*, 1983

### Judicial Clerkship

Hon. T. Emmet Clarie, U.S. District Court, D. Conn., 1986-87

### Publications and Lectures

Eric is a contributing author for the Collier treatise on bankruptcy law, has published a number of scholarly articles, and has lectured widely on a broad range of subjects. He has also published two textbooks: "Secured Transactions, Teaching Materials," with his co-authors, Professors Jim White and Heather Hughes; and "Bankruptcy, Cases and Materials," with his co-author, Professor Margaret Howard.

## **Patricia Ann Redmond, Stearns Weaver Miller, Miami, FL**

Patricia "Trish" Redmond, Bankruptcy & Creditors' Rights Shareholder was elected Chair of the American College of Bankruptcy Board of Regents. Trish is the first woman in the College's history to hold this position. The Board of Regents is responsible for the nomination and selection of qualified candidates to fellowship in the College. Fellows are invited to join based on a proven record of the highest standards of expertise, leadership, integrity, professionalism, scholarship and service to the bankruptcy and insolvency practice and to their communities.

Trish was inducted as a XV Class Fellow in 2003 and has served as a Regent for the 11th Circuit for the past (3) years. She has also served as Chair of the College's Distinguished Law Student Committee and as a member of the College's Foundation Board of Directors from 2005-2011, including as Secretary for a 3-year term.

Trish has a long history of being actively involved in numerous professional industry organizations. For decades, she has served on the Board of Directors and held various leadership roles for the American Bankruptcy Institute (“ABI”), the American Bar Association (“ABA”), the Bankruptcy Bar Association for the Southern District of Florida (“BBASDFL”) and the Dade County Bar Association (“DCBA”).

In addition to her steadfast commitment to professional associations, Trish has devoted countless hours throughout her career to providing pro bono legal services to thousands of underprivileged and low-income individuals, children and families. She founded the Bankruptcy Assistance Clinic both at St. Thomas University School of Law as well as the University of Miami. Trish is also an adjunct professor of law and a frequent presenter, both locally and nationally, on topics related to bankruptcy law. In recognition of her significant contributions to the community and the legal profession, she has been the recipient of several prestigious accolades including the ABA Business Law Section’s Jean Allard Glass Cutter Award and The Florida Bar’s Tobias Simon Bro Bono Service Award.

Trish focuses her practice on bankruptcy and creditors' rights. She has extensive experience representing creditors’ committees, secured creditors and debtors in Chapter 11 cases. Trish is routinely recognized by leading peer and client legal ranking publications including being recognized with the highest ranking (Band 1) in Chambers USA, as a “Top 100”, “Top 50 Women” and “Top 100 Miami” Florida Super Lawyers, and as a “Lawyer of the Year” multiple times in The Best Lawyers in America.