UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 22-110

Caption [use short title]: In re Purdue Pharma L.P., et al.

Motion for: Leave to File Brief as Amicus Curiae

Set forth below precise, complete statement of relief sought:
Leave to Professor Adam J. Levitin to file a brief as amicus curiae in support of Appellees.

MOVING PARTY: Adam J. Levitin, amicus curiae
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY:

MOVING ATTORNEY: Daniel R. Walfish

OPPOSING ATTORNEY:

[name of attorney, with firm, address, phone number and e-mail]

Walfish & Fissell PLLC
405 Lexington Ave 8th floor, New York, NY 10174
212-672-0521 / dwalfish@walfishfissell.com

Court-Judge/Agency appealed from: Southern District of New York - Hon. Colleen McMahon

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☑ Don't Know

Parties' positions are set forth in the motion. No party has opposed. All parties have either consented, taken no position, or not responded to the request for consent.

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Daniel R. Walfish **Date:** 3/18/2022 Service by: ☑ CM/ECF ☑ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re: Purdue Pharma L.P., et al., Debtors.	22-110-bk(L) 22-113-bk(CON) 22-115-bk(CON) 22-116-bk(CON) 22-117-bk(CON) 22-119-bk(CON) 22-121-bk(CON) 22-299-bk(CON) 22-203-bk(XAP)

MOTION OF PROFESSOR ADAM J. LEVITIN
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES AND AFFIRMANCE

Professor Adam J. Levitin, through his undersigned counsel, respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of Appellees and the District Court's judgment. As grounds for leave, Professor Levitin states the following:

INTEREST OF *AMICUS CURIAE*

Adam J. Levitin is the Anne Fleming Research Professor & Professor of Law at Georgetown University Law Center, where he teaches courses in bankruptcy and financial restructuring. Professor Levitin has previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School and as the American Bankruptcy

Institute's Scholar in Residence. Professor Levitin is also an elected member of the American College of Bankruptcy. His article *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006), was cited (though misinterpreted) by the Bankruptcy Court in its plan confirmation decision as a basis for its power to confirm a plan containing nonconsensual, nondebtor releases. *In re Purdue Pharma L.P.*, 633 B.R. 53, 103 (Bankr. S.D.N.Y. 2021). His many other publications include *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. (forthcoming 2022) (discussing the coercive effect of a pre-plan settlement on creditor votes in this case), and *BUSINESS BANKRUPTCY: FINANCIAL RESTRUCTURING AND MODERN COMMERCIAL MARKETS* (2d ed. Wolters Kluwer 2018). Professor Levitin frequently testifies to Congress, including in 2021 before the House Judiciary Committee regarding the abuse of nondebtor releases in Chapter 11 cases, including in this case. "Oversight of the Bankruptcy Code, Part I: Confronting Abuses of the Chapter 11 System," Hearing Before the House Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust Law, July 28, 2021.

Professor Levitin is concerned that the nonconsensual releases of nondebtors approved by the Chapter 11 plan confirmation order, the District Court's reversal of which is being appealed, would misuse the reorganization system to exculpate nondebtors accused of materially contributing to one of the nation's deadliest public health crises and produce a moral hazard that would encourage further misconduct by the owners of insolvent companies.

RELEVANCE OF *AMICUS CURIAE* BRIEF IN THIS CASE

This appeal involves what is arguably the most significant and problematic issue in Chapter 11 bankruptcy today—the use of Chapter 11 plan confirmation orders to impose nonconsensual releases of creditors' direct claims against non-debtors.

The use of nonconsensual nondebtor releases raises not only a set of statutory interpretation issues regarding the Bankruptcy Code that are ably addressed by the parties' briefing, but also a set of underlying constitutional questions about the scope of the Bankruptcy Power and its interaction with the Fifth Amendment and the application of Article III jurisdiction to federal courts' jurisdiction over creditors' claims against nondebtors that have not yet matured into actual litigation. Professor

Levitin believes that if this Court disagrees with the district court's ruling that the releases here exceed statutory authority, then this Court of necessity must address these constitutional limits on bankruptcy law. In that regard, Professor Levitin respectfully submits that his expertise regarding the history of Anglo-American bankruptcy law will be helpful to the Court.

Additionally, *amici* for Appellants have made various policy arguments about the importance of nonconsenusal nondebtor releases for Chapter 11 practice and their supposed benefits for creditors. Professor Levitin believes it is important for the Court to hear a contrary view, namely that nonconsensual nondebtor releases create a substantial moral hazard that incentivizes bad conduct by the owners and managers of potentially insolvent companies, not least the diversion of money from the debtor's estate into the owners' pockets, exactly as happened here. Additionally, nonconsensual nondebtor releases actually result in *lower* recoveries for creditors (as this very case illustrates), relative to a regime that allows only consensual releases.

POSITION OF THE PARTIES

Professor Levitin's counsel requested of all parties to these appeals their position on this motion. No party has opposed the motion, but some have not taken a position and others have not responded to the request for consent.

Specifically, consent to the motion (including a statement that the party has no objection or does not oppose) has been given by the following:

Appellants

- Purdue Pharma L.P. and the other Debtors
- The Official Committee of Unsecured Creditors
- The Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants
- The Multistate Governmental Entities Group

Appellees

- The United States Trustee;
- The State of California
- The State of Oregon
- The State of Washington
- The State of Rhode Island
- The State of Connecticut

- The State of Delaware
- The District of Columbia
- The City of Grand Prairie, as Representative Plaintiff for a Class Consisting of All Canadian Municipalities, The Cities of Brantford, Grand Prairie, Lethbridge, and Wetaskiwin, The Peter Ballantyne Cree Nation, on behalf of All Canadian First Nations and Metis People, The Peter Ballantyne Cree Nation, on behalf itself, and The Lac La Ronge Indian Band;
- Ronald Bass
- Ellen Isaacs

The following have stated that they take no position on the motion:

<u>Appellants</u>

- The Raymond Sackler Family
- The Mortimer-Side Initial Covered Sackler Persons

<u>Appellees</u>

- The State of Vermont
- The State of Maryland

The following have not responded to the request for consent:

Appellants

- The Ad Hoc Group of Individual Victims of Purdue Pharma, L.P.

Appellees

- Maria Ecke, Andrew Ecke, and Richard Ecke

CONCLUSION

The Court should grant leave to file the annexed brief as *amicus curiae*.

Dated: New York, New York
March 18, 2022

Respectfully submitted,

WALFISH & FISSELL PLLC

By: /s/ Daniel R. Walfish

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Attorneys for Amicus Curiae
Professor Adam J. Levitin

CERTIFICATE OF SERVICE

I certify as follows:

On March 18, 2022 I filed the foregoing via the Court's CM/ECF system, which will accomplish service on all parties, except for the following, who will be served via email and first class mail:

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/s/ Daniel R. Walfish
Daniel R. Walfish

Nos. 22-110(L),

22-113, 22-115, 22-116, 22-117, 22-119, 22-121, 22-203, 22-299

United States Court Of Appeals for the Second Circuit

In Re: PURDUE PHARMA L.P., PURDUE PHARMA INC, PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMA MANUFACTURING L.P., PURDUE PHARMACEUTICALS L.P., IMBRIUM THERAPEUTICS L.P., ADLON THERAPEUTICS L.P., GREENFIELD BIOVENTURES L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE PHARMACEUTICAL PRODUCTS L.P., PURDUE NEUROSCIENCE COMPANY, NAYATT COVE LIFESCIENCE INC., BUTTON LAND L.P., RHODES ASSOCIATES L.P., PAUL LAND INC., QUIDNICK LAND L.P., RHODES PHARMACEUTICALS L.P., RHODES TECHNOLOGIES, UDF LP, SVC PHARMA LP, SVC PHARMA INC.,

Debtors.

(*Caption continued on inside cover*)

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF PROFESSOR ADAM J. LEVITIN AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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PURDUE PHARMA, L. P., PURDUE PHARMA INC, PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMA MANUFACTURING L.P., PURDUE PHARMACEUTICALS L.P., IMBRIUM THERAPEUTICS L.P., ADLON THERAPEUTICS L.P., GREENFIELD BIOVENTURES L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE PHARMACEUTICAL PRODUCTS L.P., PURDUE NEUROSCIENCE COMPANY, NAYATT COVE LIFESCIENCE INC., BUTTON LAND L.P., RHODES ASSOCIATES L.P., PAUL LAND INC., QUIDNICK LAND L.P., RHODES PHARMACEUTICALS L.P., RHODES TECHNOLOGIES, UDF LP, SVC PHARMA LP, SVC PHARMA INC.,

Debtors-Appellants-Cross-Appellees,

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PURDUE PHARMA L.P., et al., AD HOC COMMITTEE OF GOVERNMENTAL AND OTHER CONTINGENT LITIGATION CLAIMANTS, THE RAYMOND SACKLER FAMILY, AD HOC GROUP OF INDIVIDUAL VICTIMS OF PURDUE PHARMA, L.P., MULTI-STATE GOVERNMENTAL ENTITIES GROUP, MORTIMER-SIDE INITIAL COVERED SACKLER PERSONS,

Appellants-Cross-Appellees,

v.

THE CITY OF GRAND PRAIRIE, as Representative Plaintiff for a Class Consisting of All Canadian Municipalities, THE CITIES OF BRANTFORD, GRAND PRAIRIE, LETHBRIDGE, AND WETASKIWIN, THE PETER BALLANTYNE CREE NATION, on behalf of All Canadian First Nations and Metis People, The PETER BALLANTYNE CREE NATION, on behalf of itself, and The LAC LA RONGE INDIAN BAND,

Appellees-Cross-Appellants,

THE STATE OF WASHINGTON, STATE OF MARYLAND, DISTRICT OF COLUMBIA, U.S. TRUSTEE WILLIAM K. HARRINGTON, STATE OF CONNECTICUT, RONALD BASS, STATE OF CALIFORNIA, PEOPLE OF THE STATE OF CALIFORNIA, by and through ATTORNEY GENERAL ROB BONTA, STATE OF OREGON, STATE OF DELAWARE, by and through ATTORNEY GENERAL JENNINGS, STATE OF RHODE ISLAND, STATE OF VERMONT, ELLEN ISAACS, on behalf of Patrick Ryan Wroblewski, MARIA ECKE, ANDREW ECKE, RICHARD ECKE,

Appellees.

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INTEREST OF *AMICUS CURIAE*[1]

Adam J. Levitin is the Anne Fleming Research Professor & Professor of Law at Georgetown University Law Center, where he teaches courses in bankruptcy and financial restructuring. Professor Levitin has previously served as the American Bankruptcy Institute's Scholar in Residence. His article *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006), was cited (though misinterpreted) by the Bankruptcy Court in its plan confirmation decision as a basis for its power to confirm a plan containing nonconsensual nondebtor releases. *In re Purdue Pharma L.P.*, 633 B.R. 53, 103 (Bankr. S.D.N.Y. 2021). His many other publications include *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. (forthcoming 2022). Professor Levitin frequently testifies to Congress, including on July 28, 2021 before the House Judiciary Committee regarding the abuse of nondebtor releases in Chapter 11 cases.

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[1] No one other than *amicus* has authored this brief, and no one other than *amicus* or his counsel has contributed money to fund its preparation and submission. To the best of their knowledge, neither *amicus* nor his counsel has any financial interest in any aspect of the Debtors' bankruptcies.

Professor Levitin is concerned that the nonconsensual releases of nondebtors approved by the Bankruptcy Court's plan confirmation order, the District Court's reversal of which is being appealed, would misuse the reorganization system to exculpate nondebtors accused of contributing to one of the nation's deadliest public health crises and produce a moral hazard that would encourage highly undesirable conduct by the owners of potentially insolvent companies.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Bankruptcy Court entered an order (the "Plan Confirmation Order") that confirmed the Chapter 11 bankruptcy plan of Purdue Pharma L.P. and its affiliated debtors (the "Debtors" or "Purdue"). The Plan Confirmation Order included a provision for the *nonconsensual* releases of certain direct and derivative claims Purdue's creditors may have against Purdue's beneficial owners—members of the Sackler Family (the "Sacklers")—and assorted other parties (the "Other Released Parties").

The nonconsensual releases (the "Nondebtor Releases") of these claims (the "Released Claims") are anathema to the Constitution. The Nondebtor Releases are outside the scope of Congress's bankruptcy power under an original understanding of the meaning of the Constitution and also offend the Fifth Amendment's guaranty of Due Process of Law because they deprive creditors of a valuable property right without any sort of adjudication. Additionally, many of the Nondebtor Releases fall outside the statutory subject matter jurisdiction of all federal courts and the scope of the Article III "case" or "controversy" requirement because the Released Claims have not ripened into actual litigation.

The fundamental constitutionality of nondebtor releases is an issue of first impression for this Court. Only a handful of courts have addressed this issue previously.[2] *Amicus* is aware of no Circuit-level decision that addresses whether Congress has the power under the Constitution to authorize nondebtor releases, whether the Due Process Clause prohibits them absent an adjudication, and whether the federal courts in general (as opposed to the bankruptcy court in particular) have the jurisdiction to enter them.

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[2] *In re Digital Impact*, 223 B.R. 1, 16 (Bankr. N.D. Okla. 1998); *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 2022 U.S. Dist. LEXIS 7431 (E.D.Va. Jan. 13, 2022).

While this brief focuses on those issues, this Court need not resolve them if it affirms the District Court on the grounds that there is no statutory authority for the releases in the Bankruptcy Code and that the releases are outside the scope of the federal common law and equity powers of the bankruptcy court, as the Appellees and their *amici curiae* correctly observe.

If this Court concludes, however, that there is statutory authority for the Nondebtor Releases (whether express or implied), then it must consider whether Congress has the constitutional power to authorize them and whether the federal courts are constitutionally permitted to impose them. As discussed more fully below, the releases are outside the constitutional powers of Congress and the courts.

Appellants' *amici* make various policy arguments about the supposed utility of nonconsensual nondebtor releases. These policy arguments cannot transmogrify an unconstitutional restructuring practice into a legitimate one. The convenience of the deal does not determine the scope of the law.[3]

[3] As one scholar has noted, because of constitutional limitations, "though the chief liability of the bankrupt is thought to be his wife, the bankruptcy court cannot strike at the root of his financial troubles by

But it just so happens that nonconsensual nondebtor releases are also terrible policy. Permitting nonconsensual nondebtor releases creates a substantial moral hazard that incentivizes bad conduct by the owners and managers of potentially insolvent companies, not least the diversion of money from the debtors' estate into the owners' pockets–exactly as happened here. Additionally, contrary to the claims of Purdue's *amici*, nonconsensual nondebtor releases actually result in *lower* recoveries for creditors (as this very case illustrates), relative to a regime that only allows consensual releases.

ARGUMENT

I. THE NONDEBTOR RELEASES ARE UNCONSTITUTIONAL

A. The Nondebtor Releases Are Outside the Scope of the Bankruptcy Power

The sole font of authority for bankruptcy law in the United States is the Bankruptcy Clause of the Constitution. It provides that "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art.

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granting him a divorce." Alfred Hill, *The* Erie *Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1037-38 (1953).

I, § 8, cl. 4. While the Bankruptcy Clause does not spell out what the content of such uniform laws might be, when interpreting the Clause, the Supreme Court tends to focus on its original meaning. *See Allen v. Cooper*, 140 S. Ct. 994, 1002-1003 (2020) (discussing the scope of bankruptcy jurisdiction "at the Founding"); *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 362, 370 (2006) ("It is appropriate to presume that the Framers of the Constitution were familiar with the contemporary legal context when they adopted the Bankruptcy Clause").

An original understanding of the Bankruptcy Clause necessarily precludes nonconsensual nondebtor releases. Prior to the Johns-Manville Chapter 11 plan confirmation order in 1986, the idea of a nonconsensual nondebtor release was entirely unknown to the bankruptcy world. The concept would have been utterly incomprehensible to the Framers. As one scholar has noted, the "'subject of Bankruptcies' in the Bankruptcy Clause is limited to the adjustment of the relationship between an insolvent debtor and the debtor's creditors." Thomas E. Plank, *Bankruptcy & Federalism*, 71 FORDHAM L. REV. 1063, 1089 (2002).

How the Framers would have understood the Bankruptcy Clause may be gleaned from the provisions of English bankruptcy law in 1789, from Blackstone's *Commentaries*, and from the first American bankruptcy statute, the Bankruptcy Act of 1800, which was "a faithful transcript of the English statutes."[4]

What is clear from these sources is that bankruptcy law as understood in the Anglo-American world in the 18th century contained four features relevant to the instant litigation:

(1) the law applied solely to the debtor, who was required to have committed a defined act of bankruptcy;[5]

(2) *all* of the debtor's assets were required to be made available for distribution to creditors;[6]

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[4] F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 124 (1919).

[5] *See, e.g.*, 2:31 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 477-79 (1st ed. 1765-69) [hereinafter BLACKSTONE]; Bankruptcy Act of 1800, 6th Cong. Sess. I., Ch. 19 (Apr. 4, 1800) [hereinafter Bankruptcy Act of 1800], § 1. Today the filing of a voluntary bankruptcy petition functions as the "act of bankruptcy."

[6] *See, e.g.*, Bankruptcy Act of 1800 §§ 5 (entirety of assets), 13 (debts owed to the debtor), 14 (concealed property), and 17 (fraudulently conveyed assets).

(3) creditors had extraordinary rights of discovery against the debtor in order to ferret out concealed assets;[7] and

(4) the debtor—and solely the debtor—was able to obtain a discharge at the end of the process.[8]

The fourth point is the necessary implication of the first three. Bankruptcy comes with extraordinary burdens—transparency and making available all assets to creditors. Those burdens fall solely on the debtor. Accordingly, it is only the debtor that is freed from the debt upon passing through the ordeal. This is the bankruptcy bargain—discharge (and a fresh start) in exchange for full surrender of current assets.

Even from the first days of the Republic, limits of the scope of this bargain were clearly articulated. The primary form of business organization in the early Republic (beside the ubiquitous sole

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[7] *See, e.g.*, BLACKSTONE 482 ("The brankrupt [sic], upon this examination, is bound upon pain of death to make a full discovery of all his estate…."). Bankruptcy Act of 1800 §§ 18 (submission to examination by creditors), 19 (creditors' right to search all of the bankrupt's property, including breaking doors and locks), 22 (access to debtor's books and records). No spousal privilege was admitted regarding bankrupts. BLACKSTONE 481; Bankruptcy Act of 1800 § 24. The examination was so searching that American law even paid bounties to those who discovered concealed property of the debtor. Bankruptcy Act of 1800 § 26.

[8] *See, e.g.*, Bankruptcy Act of 1800 § 34; 5 Geo. 2, c. 30, § 7 (1732).

proprietorship) was the partnership. Frederick G. Kempin, Jr., *Limited Liability in Historical Perspective*, 4 AM. BUS. L. ASS'N BULL. 11, 14 (1960). This was not the statutory limited liability partnership common today, but a general partnership, in which partners were jointly liable for all the partnership debts. *See id.* at 16 n.25 (noting that the first American limited partnership act was only enacted in 1822). There is no closer sort of business relationship than this joint liability. And yet, the Bankruptcy Act of 1800 expressly provided that—contrary to the traditional common law rule[9]—if the debtor was a partner in a partnership, the discharge of the debtor would have no effect on the joint liability of the debtor's partners for partnership debts.[10] The same proviso also appears in the Bankruptcy Act of 1841.[11]

[9] Ralph Brubaker, *An Incipient Backlash Against Nondebtor Releases? (Part I): The "Necessary to Reorganization" Fallacy*, 42 BANKR. L. LETTER 1, 5 (2022).

[10] Bankruptcy Act of 1800 § 34. *See also Tucker v. Oxley*, 9 U.S. 34, 40 (1809) (discussing provision); *Sleech's Case*, 1 Mer. 539 (High Ct. of Chancery 1816) (discussing provision).

[11] Bankruptcy Act of 1841, § 4, 27th Cong. Sess. I., Ch. 9 (Aug. 19, 1841). The Bankruptcy Act of 1898 similarly provides that the discharge of a debtor did not affect the liability of a co-debtor, guarantor, or surety. Bankruptcy Act of 1898, § 16, 55th Cong. Sess. II., Ch. 541 (July 1, 1898).

In short, bankruptcy relief as understood by the Framers would have been limited solely to the debtor and would have been premised upon submission to a searching and invasive examination and the surrender of all of the debtor's assets. The Framers would not have been able to conceive of a bankruptcy resulting in the forced release of creditors' claims against nondebtors. Those nondebtors could not get a release of liability through the bankruptcy process because those nondebtors had not themselves committed acts of bankruptcy, submitted to examination, and made all of their assets available to creditors.

This original understanding of the Bankruptcy Clause indicates that Congress lacks the constitutional power to authorize nonconsensual releases of nondebtors' direct liability through the bankruptcy process.[12] Any reading of the Bankruptcy Clause that does not limit the scope of Congress' power to providing relief to the debtor risks transforming the Bankruptcy Clause from a narrow and particular power of Congress into

[12] Whether the Bankruptcy Clause authorizes Congress to permit the release of nondebtors' derivative liability—such as is provided for by 11 U.S.C. § 524(g), *see Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009) (limiting nondebtor release under section 524(g) to claims of derivative liability)—is a separate question that the Court need not decide in this case, as the Nondebtor Releases cover both direct and derivative liability.

the equivalent of a second "necessary and proper" clause that would allow Congress the free-ranging power to restructure all manner of economic and property relationships as it sees fit. Just as Congress does not hide elephants (such as nondebtor releases) in statutory mouseholes, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), so too did the Framers not hide a general power of economic regulation within the modest trappings of the Bankruptcy Clause. Accordingly, it does not matter what statutory provision is cited as a purported source of authority for nonconsensual nondebtor releases because no such provision is within the scope of Congress's constitutional power.

B. The Nondebtor Releases Violate the Fifth Amendment

The power of Congress and the courts is constrained not just by the Bankruptcy Clause but by the later-adopted Fifth Amendment's guaranty of due process of law. *See* Hill, *supra*, at 1038 ("the bankruptcy power is restricted … by other provisions in the Constitution, such as the Due Process Clause.").

1. *The Nondebtor Releases Violate Fifth Amendment Due Process Because Creditors Are Deprived of Property Without an Adjudication*

Nonconsensual nondebtor releases offend due process. At the core of due process is notice and the opportunity for an adjudication of a claim on its merits before a competent tribunal. As the Supreme Court has noted, "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See also Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (requiring notice and opportunity to be heard prior to replevin of goods); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (requiring notice and an opportunity to be heard prior to wage garnishment order).

To be sure, the particulars of the adjudication may vary based on the circumstances involved. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976). Nevertheless, "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Id.* (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring)). It is a "basic principle of justice . . . that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *City of New York v. N.Y., N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953). In essence, due process means that parties cannot be deprived of property without getting their proverbial "day in court" in some form. *See Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (noting the "deep-rooted historic tradition that everyone should have his own day in court" and that "[A] voluntary settlement … cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of [those] who do not join in the agreement.").

Creditors who have a direct claim possess a "chose in action," which is property protected by the Due Process Clause. *See, e.g.*, *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988) ("Little doubt remains that [a cause of action] is property protected by the Fourteenth Amendment."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs."); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); *Mullane*, 339 U.S. at 313 (recognizing cause of action as property interest). As this Court has recognized, "legal claims are sufficient to constitute property such that a deprivation would trigger due process scrutiny." *Elliott v. General Motors LLC* (*In re Motors Liquidation Co.*), 829 F.3d 135, 158 (2d Cir. 2016). Moreover, these "choses in action" also clearly have significant value: the Sacklers' contribution to the Plan is contingent upon their release from the Released Claims.

Under the Plan, Purdue's creditors who have Released Claims and did not vote for the Plan are forced to release the Sacklers and Other Released Parties. There is no way to reconcile this with the demands of due process. The Released Claims have never been adjudicated in any fashion by *any court*. In fact, in most cases there were not even actions on the Released Claims *pending* before the Bankruptcy Court, and the preliminary injunction entered at the beginning of Purdue's bankruptcy against litigation against the Sacklers and certain other related parties foreclosed all efforts to make a merits determination outside of bankruptcy, such as through a bellwether case. *See* Order Pursuant to 11

U.S.C. § 105(a) Granting, in Part, Motion for a Preliminary Injunction, *Purdue Pharma L.P. v. Commonwealth of Massachusetts (In re Purdue Pharma, L.P.)*, Adv. Proc. No. 19-08289 (Bankr. S.D.N.Y. Oct. 11, 2019) [ECF 82].

Nor could the Chapter 11 plan confirmation process function as an adjudication. The Bankruptcy Court's findings of fact in the Plan Confirmation Order all relate to whether the *Debtors* have met the requirements for Chapter 11 plan confirmation. The Bankruptcy Court made no findings of fact regarding the merits of the myriad individual Released Claims. *See* Brief for Appellant-Cross-Appellee The Raymond Sackler Family [ECF 324] at 37 ("The confirmation hearing—by agreement and with the Bankruptcy Court's approval—was not a hearing on the merits of the settled claims[.]").

The Debtors' Disclosure Statement made no attempt to value creditors' Released Claims and did not include them in its liquidation analysis. The Debtors noted that "[t]he Liquidation Analysis assumes that there is no settlement with the shareholders," *i.e.* the Sackler families, and that "[t]he amount of any hypothetical judgment is *unknowable*." Disclosure Statement for Fifth Amended Joint Chapter 11

Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re Purdue Pharma L.P.*, Case No. 19-23649 (Bankr. S.D.N.Y. June 3, 2021) [ECF 2983] at 5 (emphasis added). Moreover, the Bankruptcy Court held that the "best interests" test of 11 U.S.C. § 1129(a)(7) does not require consideration of creditors' rights against third parties,[13] and concluded that it was sufficient that it found the Debtors' settlement with the Sacklers and Other Released Parties to be fair with regard to creditors with Released Claims. *In re Purdue Pharma L.P.*, 633 B.R. 53, 107-10 (Bankr. S.D.N.Y. 2021). The Chapter 11 plan confirmation procedures are not any sort of due process for the Released Claims.

Likewise, Appellants may claim that the opportunity for a very small number of opioid victims to deliver impact statements—including subsequent to the entry of the Plan Confirmation Order—counts as having their "day in court." But no one should mistake an *ad hoc* process for the delivery of victim impact statements for an adjudication on the merits.

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[13] A "best interests" analysis is, in any event, an aggregate, class-wide analysis, not an adjudication of individual creditors' claims on the merits.

Accordingly, releasing the Released Claims violates the Fifth Amendment because it deprives the holders of Released Claims of property without an adjudication.

2. The Nondebtor Releases Violate Fifth Amendment Due Process Because the Nondebtor Releases Are Nonconsensual

The Nondebtor Releases also violate the Fifth Amendment's Due Process clause because they are nonconsensual.[14] The Supreme Court has made clear that in the context of a Rule 23(b)(3) monetary damages class action, due process requires, at a minimum, the opportunity to opt out of a class.[15] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process."); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999) (noting the due process problem of a mandatory class in a class action for damages). The Supreme Court has held the same in the context of a state law class action. *Phillips*

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[14] While the Plan, including the Nondebtor Releases, was supported by the majority of *voting* creditors, the Nondebtor Releases bind all of Purdue's creditors, the likely majority of whom did not cast ballots.

[15] Whether consent in these circumstances would require an opt-in rather than an opt-out is an issue that has divided lower courts but that this Court need not decide at this juncture.

Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class."). It is puzzling to think that what is forbidden to an Article III district judge in the context of a Rule 23(b)(3) class action is somehow permitted to a non-Article III bankruptcy judge whose powers derive entirely from those of the district court. *See* 28 U.S.C. § 1334. Bankruptcy is not a "backdoor" to bypass the constitutional strictures that govern class actions.

The Due Process Clause applies to bankruptcy cases just as it does to class actions, and that requires that any settlement of claims against nondebtors be consensual. The mandatory Nondebtor Releases violate the Fifth Amendment.

C. Federal Courts Lack Both Statutory Subject Matter Jurisdiction and Article III Jurisdiction Over Many of the Released Claims

1. Statutory Bankruptcy Subject Matter Jurisdiction Extends Only to Actual "Civil Proceedings"

The Bankruptcy Court lacked statutory subject matter jurisdiction over many of the Released Claims. The Bankruptcy Court held that 28 U.S.C. § 1334 confers "broad jurisdiction over matters that are related to the Debtors' property and cases." *In re Purdue Pharma L.P.*, 633 B.R. 53, 95-96 (Bankr. S.D.N.Y. 2021).

The District Court agreed that 28 U.S.C. § 1334(b) created statutory subject matter jurisdiction for the Nondebtor Releases:

> Because *the civil proceedings asserted* against the non-debtor Sackler family members *might have* a conceivable impact on the estate, the Bankruptcy Court has subject matter jurisdiction to … release the claims against the non-debtor[s].

In re Purdue Pharma, L.P., 635 B.R. 26, 78 (S.D.N.Y. 2021) (first emphasis added; second in original). In support of this holding, the District Court cited this Court's ruling that "a civil proceeding is related to a title 11 case if the action's outcome might have any conceivable effect on the bankrupt estate." *See id.* (citing ***SPV OSUS Ltd. v. UBS AG***, 882 F.3d 333, 339-40 (2d Cir. 2018) (internal quotation omitted)).

Both the Bankruptcy Court and the District Court failed to give effect to the textual limitation of 28 U.S.C. § 1334(b) to "civil ***proceedings*** arising under title 11, or arising in or related to cases under title 11."[16] In other words, even if someone's *claim* against a nondebtor is

[16] To be clear, 28 U.S.C. § 1334(a), which creates exclusive jurisdiction "of all cases under title 11," is a grant of jurisdiction over the *bankruptcy* itself, including claims filed against the debtor or scheduled by the debtor. But third-party claims against the third-party Sacklers are

"related to" the bankruptcy case, there is still no federal subject matter jurisdiction unless there is some sort of pending lawsuit—a "civil proceeding"—brought against the nondebtor. As the Supreme Court has noted, "related to" jurisdiction covers "*suits* between third parties which have an effect on the bankruptcy estate." *Celotext Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) (emphasis added).

This limitation on subject matter jurisdiction makes sense—there cannot be subject matter jurisdiction over litigation that has not yet materialized, as the court cannot know what the litigation is about and whether it actually falls into the ambit of its jurisdiction.

When this Court has previously addressed the scope of bankruptcy subject matter jurisdiction under section 1334(b), it has been in the context of *pending* civil litigation. *Celotex Corp. v. Edwards*, 514 U.S. 300, 301-302 (1995) (execution on supersedeas bond on judgment); *SPV OSUS,* 882 F.3d at 338 (suits filed); *In re Quigley Co.*, 676 F.3d 45, 47 (2d Cir. 2012) (attempt to lift injunction to bring suit); *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 576-577 (2d Cir. 2011) (suit

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not part of the bankruptcy "case"; they are at best "related to" it and in that regard would come solely within Section 1334(b), not Section 1334(a).

filed); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 111 (2d Cir. 1992) (suit filed).

This case presents a different fact pattern, namely that many, perhaps most, of the Released Claims have not ripened into actual litigation. Potential plaintiffs' *claims* against the nondebtor Sacklers might well be "related to cases under title 11." However, unless an actual lawsuit has been filed – as has happened for only a subset of Released Claims – there is no "civil proceeding," and hence no statutory subject matter jurisdiction.

2. Article III Jurisdiction Does Not Extend to Third Party Claims That Have Not Ripened into Actual Litigation

Not only is statutory subject matter jurisdiction lacking over many of the Released Claims, so too is constitutional jurisdiction. Article III extends the judicial power solely to "cases" and "controversies." U.S. Const. art. III, § 2. It is axiomatic that a "case" or "controversy" requires litigation to have actually been brought, for if litigation has not been commenced there is nothing for the court to adjudicate. Again, the requirement of actual litigation makes sense because it requires some sort of pleadings articulating the claim. Without that, the court—and the parties—could not know what was actually being adjudicated. Nor could other courts determine the preclusive effect of any judgment.

This jurisdictional limitation means that if there was no actual litigation pending on a Released Claim at the time of the Plan Confirmation Order, then there could not be Article III jurisdiction for any federal court to enter the Nondebtor Release of that claim. If a creditor or other third party merely has a *potential* claim against the Sacklers or Other Released Parties, but has not yet sued, federal courts lack Article III jurisdiction to resolve that potential claim until it ripens into actual litigation, whether through a lawsuit brought by the claimant or a declaratory judgment action brought by Sacklers or Other Released Parties.[17] Accordingly, no federal court, including the bankruptcy court in this case, has jurisdiction to enter the Nondebtor Releases.

[17] Recognizing this limitation on federal court jurisdiction does not affect the ability of bankruptcy law to address contingent and unmatured claims against the debtor because the filing of a proof of claim or scheduling of a claim by a debtor should function like a complaint for the purposes of bringing the matter within the scope of Article III.

3. Many of the Released Claims Are Neither "Civil Proceedings" nor "Cases" or "Controversies" Because They Have Not Ripened into Actual Litigation

Only some of the Released Claims involved *pending* litigation against the Sacklers or Other Released Parties. *See* Complaint for Injunctive Relief, *Purdue Pharma L.P. v. Commonwealth of Massachusetts (In re Purdue Pharma, L.P.)*, Adv. Proc. No. 19-08289 (Bankr. S.D.N.Y. Sept. 18, 2019) [ECF 1], Exhibit B (listing 560 actions pending against various related parties of the Debtors, including the Sacklers). The rest merely could *potentially* be asserted in litigation. Federal courts lack Article III and statutory subject matter jurisdiction over such unripened non-litigation.

The Bankruptcy Court had jurisdiction solely to enter the Nondebtor Releases solely for those approximately 560 cases in which Purdue's creditors had actually sued the Sacklers or Other Related Parties.[18]

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[18] Critically, this is *not* a *Stern v. Marshall* issue that can be corrected if a District Court orders the Nondebtor Releases. *See* 564 U.S. 462 (2011). Instead, it is a fundamental jurisdictional limitation on all federal courts.

II. NONCONSENSUAL NONDEBTOR RELEASES CREATE A MORAL HAZARD

For all the supposed good being done by the Plan according to the Appellants and their *amici*, the rule urged by Appellants produces a terrible moral hazard. Specifically, if nonconsensual nondebtor releases are available, then the owners of companies can, as the Sacklers did, not only engage in alleged misconduct but at the same time siphon out huge amounts of money from a company once it becomes clear that the company may be rendered insolvent. Under the rule urged by Appellants, the company's owners know that they can piggyback on the company's bankruptcy and get releases down the line that cap their own direct liability.

If the Sacklers (who have had sophisticated advice at every turn) had known *ex ante* that civil immunity would *not* be available, for one thing, they might have been more circumspect in their conduct running Purdue. They also would likely not have been so quick to take billions of dollars out of Purdue, meaning there would likely have been far more money left in the estate to fund opioid abatement and otherwise compensate creditors without the debtors now having to bargain with the Sacklers for a contribution.

That the current deal *may* be the "best" available under the circumstances is, even if true, a problem of the Sacklers' own making. Purdue's *entire bankruptcy* was in fact premised on the assumed existence of a legal regime that would allow the Sacklers to obtain civil immunity through a nondebtor release.[19] Such a regime does our society no good in the long run.

Lest the Court think that Purdue and the Sacklers are a *sui generis* situation, one has only to look to nearby Newark, New Jersey, where the bankruptcy of a subsidiary of Johnson & Johnson ("J&J") is pending. J&J, worth nearly half a trillion dollars, did an end run around a pending multi-district litigation and transferred its toxic talc liabilities to a newly created subsidiary, known as LTL Management LLC, two days before the subsidiary filed for bankruptcy.[20] J&J's entire scheme is premised on J&J being able to get a nonconsensual nondebtor release and thereby settle its talc liability more cheaply through bankruptcy than in the regular

[19] The "term sheet" that Purdue filed at the very beginning of its bankruptcy included a nonconsensual nondebtor release for the Sacklers in exchange for a $3 billion contribution. Notice of Filing of Term Sheet with *Ad Hoc Committee*, *In re Purdue Pharma L.P.*, Case No. 19-23649 (Bankr. S.D.N.Y. Oct 8, 2019) [ECF 257] at Exhibit A.

[20] *See In re LTL Mgmt. LLC,* 2021 Bankr. LEXIS 3155, *9-10 (Bankr. W.D.N.C. Nov. 16, 2021).

tort system.[21] The moral hazard of nonconsensual nondebtor releases is not just a matter of a family-owned company in the opioid space, but affects *any* company with potentially massive tort liability, including publicly traded blue chip companies.

III. NONCONSENSUAL NONDEBTOR RELEASES RESULT IN LOWER RECOVERIES FOR CREDITORS

A. Only *Nonconsensual* Releases Are at Issue in This Case

Amici for the Debtors claim that nondebtor releases result in greater recoveries for creditors.[22] They are wrong.[23] To understand why,

[21] Mike Spector & Dan Levine, *Special Report: Inside J&J's secret plan to cap litigation payouts to cancer victims*, REUTERS, Feb. 4, 2022, *at* https://reut.rs/3i5bh0r.

[22] Brief of *Amici Curiae* Law Professors in Support of Appellants [ECF 476] at 4 (nonconsensual nondebtor releases allow "creditors to obtain higher recoveries"), 22 ("The bankruptcy regime [of nonconsensual nondebtor releases] preserves far more value for the company to distribute to claimants than would be attainable through piecemeal litigation outside of the unified bankruptcy forum.").

[23] It is also important to note that maximizing dollar recoveries to creditors is not all that matters. While that might be true in the garden-variety commercial bankruptcy case, the situation is more complicated for tort victims. Some tort victims might not want to accept a deal for their own dignitary reasons. They might wish to have their day in court and risk losing on the merits, rather than accept a settlement from people they view as morally repugnant and/or become unwitting beneficial owners of an opioid company, even under new management. They might be seeking purely *symbolic* or even nominal damages (as when Taylor Swift famously sued an alleged sexual harasser for one dollar, *see* Phoebe

it is critical to distinguish between consensual and nonconsensual nondebtor releases. *Amici* for Purdue often fail to make this distinction, but this case is solely about *nonconsensual* releases. This distinction is important because the claimed benefits of nondebtor releases are not lost by prohibiting nonconsensual releases.

A consensual nondebtor release is merely another name for a settlement between a creditor and a nondebtor. There is no need to include such a settlement in a plan confirmation order if it does not involve the debtor or the property of the bankruptcy estate. Indeed, the landmark tobacco Master Settlement Agreement of 1998—which was also incredibly complex, involved a large number of parties, was designed to compensate for and abate the public health consequences of an addictive, deleterious product, and was, in dollar terms, at least an order of magnitude larger than the plan here—was negotiated outside of any one court proceeding. *See* Tobacco Control Legal Consortium, Pub.

Lett, *Taylor Swift's Priceless Dollar*, N.Y. TIMES, Aug. 16, 2017) because what some tort victims really seek is judicial vindication for themselves (or a lost loved one) through a definitive finding that the defendant committed a wrong. For these tort victims, money isn't everything and may not even be anything. For a claimant who pursues legal action for expressive or dignitary purposes, being bound to a nonconsensual release adds insult to injury.

Health L. Ctr., *The Master Settlement Agreement: An Overview* (2015), *at* https://bit.ly/3IkQDUE.

Parties are always free to enter into their own private settlements, and they are free to coordinate those settlements with a reorganization plan in the bankruptcy court. *See* Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOK. J. CORP. FIN. & COM. L. 169, 170 (2018) (explaining the use of restructuring support agreements—"contractual agreements among creditors, and sometimes the debtor, to support restructuring plans that have certain agreed-upon characteristics."). Similarly, a bankruptcy court is free to take private settlements into account and to coordinate at some level with privately negotiating parties, even if the court lacks jurisdiction to include certain nondebtor releases in a plan of reorganization.

Contrary to the arguments of Purdue's *amici,* the choice here is not between allowing nonconsensual nondebtor releases and leaving mass tort "crises to be resolved only through years-long value-destructive litigation with lower, if any victim recoveries and liquidated businesses as collateral damage."[24] That is a false dichotomy. Forbidding *nonconsensual* nondebtor releases does not preclude consensual nondebtor releases. Instead, it forces nondebtors to purchase consent. Creditors will agree to those releases only if they believe the nondebtor's settlement offer is appropriate. This might mean nondebtors like the Sacklers will have to pay more for their releases.

B. The Sacklers' March 2022 Settlement Shows That Requiring Creditor Consent Results in Greater Recoveries for Creditors

The events in this very case subsequent to the submission of the briefs of Purdue's *amici* falsifies their claims. Subsequent to the District Court's ruling prohibiting nonconsensual releases, the Sacklers went back to the negotiating table and increased their offer: on top of their original contribution of $4.3 billion, the Sacklers agreed to pay an extra $1.175 billion in guaranteed payments and up to $500 million in contingent payments in order to obtain the consent of an additional nine states to their releases.[25]

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[24] *Amicus* Brief in Support of Appellants by [certain former] Commissioners of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 [ECF 437] at 21.

[25] Motion for Entry of an Order Authorizing and Approving Settlement Term Sheet*, In re Purdue Pharma L.P.*, No. 19-23649 (RDD) (Bankr. S.D.N.Y. Mar. 3, 2022) [ECF 4410] at 2. *See also* Order

The Sacklers' actions in this case show that requiring releases to be consensual hardly results in the "lower, if any victim recoveries" predicted by Debtor's *amici*. The District Court's requirement that the nondebtor releases be consensual has actually resulted in a 27% increase in the Sacklers' monetary contribution (and thus more funding for opioid abatement), as well as certain nonmonetary concessions. The same is likely to be true once again if this Court sides with the District Court's reversal because even if the releases must be consensual, the Purdue bankruptcy still presents the Sacklers their best opportunity to settle with a large number of creditors at one time.

C. Economic Theory Indicates That Consensual Releases Will Result in Greater Recoveries for Creditors than Nonconsensual Releases

The course of this case alone is proof that if only consensual releases are allowed, creditors will do *better* than in a world of nonconsensual releases. But the idea that requiring that nondebtor releases be consensual will result in greater recoveries for creditors is also consistent with economic theory: consensual releases force "Coasean" bargaining

Authorizing and Approving Settlement Term Sheet, *In re Purdue Pharma L.P.*, No. 19-23649 (RDD) (Bankr. S.D.N.Y. Mar. 10, 2022) [ECF 4503] (approving settlement).

among the parties, whereas nonconsensual releases allow nondebtors like the Sacklers to purchase a release for a discount from the market clearing price.

To illustrate, recall that the attraction to nondebtors of obtaining releases through the bankruptcy process is the possibility of a global deal that binds all creditors. Now imagine a situation in which there are four creditors with ripened claims (so there is no jurisdictional deficiency) against a nondebtor. One creditor is demanding $1 to settle, the second demands $2, the third demands $3, and the fourth demands $4. Suppose that the bankruptcy court can approve a nonconsensual release that binds all four creditors, as long as three consent, *cf.* 11 U.S.C. § 524(g) (requiring 75% consent of a class of asbestos claims to approve a channeling injunction), and that all creditors must be paid the same price, *cf. id.* § 1123(a)(4) (requiring equal treatment within a class of claims). In such a situation, the nondebtor could settle for the "lowest winning bid" of $3/creditor or $12 total.

If, on the other hand, the bankruptcy court could bind only consenting creditors to the deal (again assume only ripened claims), then the price of a global deal that covered all four creditors would be at

$4/creditor, or $16 total, because under a consensual release regime, the nondebtor will have to pay the "highest winning bid," that is the actual market clearing price, for global peace. This illustration shows that a consensual release regime will result in greater recoveries for creditors if the nondebtor wants to achieve global peace through the bankruptcy.

To be sure, in a consensual release regime, the "highest winning bid" might be more than the nondebtor is willing to pay. Suppose, for example, that the fourth creditor demanded $4 billion, rather than $4 to settle. In that case, the nondebtor could simply choose to do a deal in the bankruptcy with the first three creditors for $3/creditor or $9 total and then worry about the fourth creditor outside of the bankruptcy plan. This is not unrealistic; it is the same thing that happens in the Rule 23(b)(3) class action context when settling defendants have to deal with the opt-outs.

The "lowest winning bid" rule of nonconsensual releases makes it easier to achieve global deals on nondebtor releases by lowering the bid-ask spread, but this also means that the creditors will not receive top dollar. In a "lowest winning bid" regime, nondebtors are able to take advantage of some creditors' desperation and liquidity needs to get a bargain vis-à-vis all creditors. A "highest winning bid" rule of consensual releases ensures that consenting creditors get the actual market clearing price and are at least as well off as under a nonconsensual release deal, and potentially better off.

D. Creditor Majorities Should Not Be Allowed To Bind Minorities Unless There Is a Limited Fund, Which Does Not Exist Regarding Nondebtors

To be sure, the "lowest winning bid" rule of nonconsensual releases mirrors the general Chapter 11 practice of allowing majorities to bind minorities. In regard to a debtor firm, this makes sense because the creditors are competing for a limited fund. If a deal made by a majority did not bind the minority, the bankruptcy would devolve into a grab race for the limited pot of assets. The same is true for Rule 23(b)(1)(B) mandatory class actions.

In contrast, nondebtor releases do not involve a true limited fund. The Sacklers' settlement offer is an artificially limited fund; the full extent of family assets is not known because they are not debtors in bankruptcy. That said, there is general consensus that the two families' wealth may be in the vicinity of $11 billion, an amount that greatly exceeds the amount of their plan contributions, particularly when the contributions, which would be paid out over a very long period of time, are discounted to present value (or when the returns on the Sacklers' vast wealth are projected into the future), as must be done for an apples-to-apples comparison. *See, e.g.*, Patrick Radden Keefe, *How Did the Sacklers Pull This Off?*, N.Y. TIMES (July 14, 2021).

If the Sacklers were to settle with a majority of creditors for $5.5 billion, the ability of non-settling creditors to pursue the Sacklers' other assets would not inherently impair the majority's deal. It would only affect the price the Sackers would be willing to pay for something less than global peace. There is no reason to think that, under the correct legal regime, the Sacklers would be unwilling to pay ratably based on the number/amount of claims settled. And, if the Sacklers' assets do truly prove to be a limited fund, a solution is readily on hand: the Sacklers can always file for bankruptcy themselves.

CONCLUSION

The District Court's reversal of the Plan Confirmation Order should be affirmed.

Dated: New York, New York
March 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1) that this brief complies with the type-volume limitation of Local Rule 29.1(c) because it contains 6,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: March 18, 2022

/s/ Daniel R. Walfish
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CERTIFICATE OF SERVICE

I certify as follows:

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